Case No. 692

Case Concerning the Gabcikovo-Nagymaros Project: Hungary v. Slovakia (1997)

Applicant: The Republic of Hungary

Respondent: Slovak Federal Republic

Case No. 692 is a closed case. The enclosed record contains the only references permissible to bring forth before the United Nations International Court of Justice. Citation of references outside this record constitute grounds for dismissal.

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Case Summary

Citation. 1997 I.C.J. 7, reprinted in 37 I.L.M. 162 (1998)

Brief Fact Summary. Hungary (P) claimed that Czechoslovakia (D) violated the provisions of a treaty when it appropriated the waters of the Danube River to construct a dam.

Synopsis of Rule of Law. Watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.

Facts. In 1977, Hungary (P) and Czechoslovakia (D) signed a Treaty for the construction of dams and other projects along the Danube River that bordered both nations. Czechoslovakia (D) began work on damming the river in its territory when Hungary (P) stopped working on the project and negotiation could not resolve the matter which led Hungary (P) to terminate the Treaty. Hungary (P) based its action on the fact that the damming of the river had been agreed to only on the ground of a joint operation and sharing of benefits associated with the project, to which Czechoslovakia (D) had unlawfully unilaterally assumed control of a shared resource.

Issue. Shall watercourse states participate in the use, development and protection of an international watercourse in an equitable and reasonable manner?

Held. Yes. Watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Hungary (P) was deprived of its rights to an equitable and reasonable share of the natural resources of the Danube by Czechoslovakia (D) and also failed to respect the proportionality that is required by international law. Cooperative administration must be reestablished by the parties of what remains of the project.

Discussion. The Court's decision was that the joint regime must be restored. In order to achieve most of the Treaty's objectives, common utilization of shared

water resources was necessary. Hence, the defendant was not authorized to proceed without the plaintiff's consent.

CaseBriefs

Introduction

AGAINST: President Schwebel; Judges Herczegh, Fleischhauer, Rezek;

(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. *Finds*, by twelve votes to three, that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer, Rezek;

B. *Finds*, by thirteen votes to two, that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer;

C. *Finds*, by thirteen votes to two, that, unless the Parties otherwise agree, a joint operational regime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer;

D. *Finds*, by twelve votes to three, that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Oda, Koroma, Vereshchetin;

E. *Finds*, by thirteen votes to two, that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and C of the present operative paragraph.

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer."

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President Shwebel and Judge Rezek appended declarations to the Judgment of the Court. Vice-President Weeramantry, Judges Bedjaoui and Koroma appended separate opinions. Judges Oda, Ranjeva, Herczegh, Fleichhauer, Vereshchetin and Parra-Aranguren, and Judge ad hoc Skubiszewski appended dissenting opinions.

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Review of the proceedings and statement of claims
(paras. 1-14)

The Court begins by recalling that proceedings had been instituted on 2 July 1993 by a joint notification, by Hungary and Slovakia, of a Special Agreement, signed at Brussels on 7 April 1993. After setting out the text of the Agreement, the Court recites the successive stages of the proceedings, referring, among other things, to its visit, on the invitation of the parties, to the area, from 1 to 4 April 1997. It further sets out the submissions of the Parties.

History of the dispute
(paras. 15-25)

The Court recalls that the present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabcíkovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years; they are referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978. It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the system was designed to attain "the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties". The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

The sector of the Danube river with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. Cunovo and, further downstream, Gabcíkovo, are situated in this sector of the river on Slovak territory, Cunovo on the right bank and Gabcíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (*see sketch-map No. 1*).

The 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabcíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (*see sketch-map No. 2*). The Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976. It also provided for the construction, financing and management of the works on a joint basis in which the Parties participated in equal measure.

The Joint Contractual Plan, set forth, on a large number of points, both the objectives of the system and the characteristics of the works. It also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system."

The Court observes that the Project was thus to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabcíkovo.

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The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at the same time as the Treaty itself. The Agreement made some adjustments to the allocation of the works between the parties as laid down by the Treaty. Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 to accelerate the Project.

As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

During this period, negotiations took place between the parties. Czechoslovakia also started investigating alternative solutions. One of them, an alternative solution subsequently known as "Variant C", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (*see sketch-map No. 3*). In its final stage, Variant C included the construction at Cunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. Provision was made for ancillary works.

On 23 July 1991, the Slovak Government decided "to begin, in September 1991, construction to put the Gabcíkovo Project into operation by the provisional solution". Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

The Court finally takes note of the fact that on 1 January 1993 Slovakia became an independent State; that in the Special Agreement thereafter concluded between Hungary and Slovakia the Parties agreed to establish and implement a temporary water management regime for the Danube; and that finally they concluded an Agreement in respect of it on 19 April 1995, which would come to an end 14 days after the Judgment of the Court. The Court also observes that not only the 1977 Treaty, but also the "related instruments" are covered in the preamble to the Special Agreement and that the Parties, when concentrating their reasoning on the 1977 Treaty, appear to have extended their arguments to the "related instruments".

Suspension and abandonment by Hungary, in 1989, of works on the Project
(paras. 27-59)

In terms of Article 2, paragraph 1 (a), of the Special Agreement, the Court is requested to decide first

> "whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the

Gabcíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary".

The Court observes that it has no need to dwell upon the question of the applicability or non-applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties, as argued by the Parties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62. Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabcíkovo-Nagymaros Project.

Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".

The Court then considers the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

The Court observes, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It considers moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The following basic conditions set forth in Article 33 of the Draft Article on the International Responsibility of States by the International Law Commission are relevant in the present case: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcíkovo-Nagymaros Project related to an "essential interest" of that State.

It is of the view, however, that, with respect to both Nagymaros and Gabcíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time limits, without there being need to abandon it.

The Court further notes that Hungary when it decided to conclude the 1977 Treaty, was presumably aware of the situation as then known; and that the need to ensure the protection of the environment had not escaped the parties. Neither can it fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. Slowly, speeded up. The Court infers that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

In the light of the conclusions reached above, the Court finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

Czechoslovakia's proceeding, in November 1991, to "Variant C" and putting into operation, from October 1992, this Variant
(paras. 60-88)

By the terms of Article 2, paragraph 1 (b), of the Special Agreement, the Court is asked in the second place to decide

> "(*b*) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system".

Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

The Court observes that it is not necessary to determine whether there is a principle of international law or a general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabcíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabcíkovo-Nagymaros project and for the operation of this joint property as a coordinated single unit. By definition all this could not be carried out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics. The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied. Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act".

Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained." But the Court observes that, while this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act. The Court further considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

In the light of the conclusions reached above, the Court finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C insofar as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments
(paras. 89-115)

By the terms of Article 2, paragraph 1 (c), of the Special Agreement, the Court is asked, thirdly, to determine

> "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

State of necessity

The Court observes that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty.

Impossibility of performance

The Court finds that it is not necessary to determine whether the term "object" in Article 61 of the Vienna Convention of 1969 on the Law of Treaties (which speaks of "permanent disappearance or destruction of an object indispensable for the execution of the treaty" as a ground for terminating or withdrawing from it) can also be understood to embrace a legal regime as in any event, even if that were the case, it would have to conclude that in this instance that regime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to

proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives.

Fundamental change of circumstances

In the Court's view, the prevalent political conditions were not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Nor does the Court consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20 is designed to accommodate change. The changed circumstances advanced by Hungary are thus, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project.

Material breach of the Treaty

Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. The Court pointed out that it had already found that Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully. In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

Development of new norms of international environmental law

The Court notes that neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty; and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties (which treats of the voidance and termination of a treaty because of the emergence of a new peremptory norm of general international law (*jus cogens*)). On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan. The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

Finally, the Court is of the view that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination.

In the light of the conclusions it has reached above, the Court finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

Dissolution of Czechoslovakia
(paras. 117-124)

The Court then turns to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Vienna Convention on Succession of States in respect of treaties (in which a rule of automatic succession to all treaties is provided for) reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational regime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created

a situation in which the interests of other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.

The Court then refers to Article 12 of the 1978 Vienna Convention on Succession of States in respect of Treaties, which reflects the principle that treaties of a territorial character have been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States. The Court considers that Article 12 reflects a rule of customary international law; and notes that neither of the Parties disputed this. It concludes that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial regime within the meaning of Article 12 of 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself could not be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

Legal consequences of the Judgment
(paras. 125-154)

The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the past conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty. Now the Court has, on the basis of the foregoing findings, to determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*. The Court observes that it cannot, however, disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties. What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose insofar as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

The Court points out that the 1977 Treaty is not only a joint investment project for the production of energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature. The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. New norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty. Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a

reasonable way and in such a manner that its purpose can be realized.

The 1977 Treaty not only contains a joint investment programme, it also establishes a regime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a coordinated single unit; and the benefits of the project shall be equally shared. Since the Court has found that the Treaty is still in force and that, under its terms, the joint regime is a basic element, it considers that, unless the Parties agree otherwise, such a regime should be restored. The Court is of the opinion that the works at Cunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management regime. The dam at Cunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. It observes that re-establishment of the joint regime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty.

Having thus far indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force, the Court turns to the legal consequences of the internationally wrongful acts committed by the Parties, as it had also been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages.

The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

In the Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation. The Court observes, however, that given the fact, that there have been intersecting wrongs by both Parties, the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Cunovo complex, it must pay a proportionate share of the building and running costs.

Declaration of President Schwebel

I am largely in agreement with the Court's Judgment and accordingly I have voted for most of its operative paragraphs. I have voted against operative paragraph 1 B essentially because I view the construction of "Variant C", the "provisional solution", as inseparable from its being put into operation. I have voted against operative paragraph 1 D essentially because I am not persuaded that Hungary's position as the Party initially in breach deprived it of a right to terminate the Treaty in response to Czechoslovakia's material breach, a breach which in my view (as indicated by my vote on paragraph 1 B) was in train when Hungary gave notice of termination.

At the same time, I fully support the conclusions of the Court as to what should be the future conduct of the Parties and as to disposition of issues of compensation.

Declaration of Judge Rezek

Judge Rezek considers that the 1977 Treaty is no longer in existence, since it has been abrogated by the attitude of the two Parties. From that conclusion, however, he infers consequences very similar to those which the majority infers from the continued existence of the treaty. First, there is what has been accomplished, and accomplished in good faith. There is, also and above all, the very principle of good faith which must lead here to the fulfilment of reciprocal duties remaining from a treaty which has not been implemented through the reciprocal fault of the two Parties.

Separate opinion of Vice-President Weeramantry

Judge Weeramantry agreed with the majority of the Court in all their conclusions.

However, in his separate opinion, he addressed three questions dealing with aspects of environmental law — the principle of sustainable development in balancing the competing demands of development and environmental protection, the principle of continuing environmental impact assessment, and the question of the appropriateness of the use of an *inter partes* legal principle such as estoppel in the resolution of issues with *erga omnes* implications such as a claim that environmental damage is involved.

On the first question, his opinion states that both the right to development and the right to environmental protection are principles currently forming part of the corpus of international law. They could operate in collision with each other unless there was a principle of international law which indicated how they should be reconciled. That principle is the principle of sustainable development which, according to this opinion, is more than a mere concept, but is itself a recognized principle of contemporary international law.

In seeking to develop this principle, the Court should draw upon prior human experience, for humanity has lived for millennia with the need to reconcile the principles of development and care for the environment. Sustainable development is therefore not a new concept and, for developing it today, a rich body of global experience is available. The opinion examines a number of ancient irrigation civilizations for this purpose. The Court, as representing the main forms of civilization, needs to draw

Questions before the Court

1. Was the Republic of Hungary entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty attributed responsibility to the Republic of Hungary?

2. Was the Czech and Slovak Federal Republic entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system?

3. Did Slovakia, as successor to Czechoslovakia, become a party to the Treaty of 16 September 1977 as from 1 January 1993?

4. What is appropriate compensation for the injured parties?

Judgment (Majority Opinion)

INTERNATIONAL COURT OF JUSTICE

1997
25 September
General List
No. 92

YEAR 1997

25 September 1997

CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT

(HUNGARY/SLOVAKIA)

Treaty of 16 September 1977 concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks — "Related instruments".

Suspension and abandonment by Hungary, in 1989, of works on the Project — Applicability of the Vienna Convention of 1969 on the Law of Treaties — Law of treaties and law of State responsibility — State of necessity as a ground for precluding the wrongfulness of an act — "Essential interest" of the State committing the act — Environment — "Grave and imminent peril" — Act having to constitute the "only means" of safeguarding the interest threatened — State having "contributed to the occurrence of the state of necessity".

Czechoslovakia's proceeding, in November 1991, to "Variant C" and putting into operation, from October 1992, this Variant — Arguments drawn from a proposed principle of approximate application — Respect for the limits of the Treaty — Right to an equitable and reasonable share of the resources of an international watercourse — Commission of a wrongful act and prior conduct of a preparatory character — Obligation to mitigate damages — Principle concerning only the calculation of damages — Countermeasures — Response to an internationally wrongful act — Proportionality — Assumption of unilateral control of a shared resource.

Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments — Legal effects — Matter falling within the law of treaties — Articles 60 to 62 of the Vienna Convention on the Law of Treaties — Customary law — Impossibility of performance — Permanent disappearance or destruction of an "object" indispensable for execution — Impossibility of performance resulting from the breach, by the party invoking it, of an obligation under the Treaty — Fundamental change of circumstances — Essential basis of the consent of the parties — Extent of obligations still to be performed — Stability of treaty relations — Material breach of the Treaty — Date on which the breach occurred and date of notification of termination — Victim of a breach having itself committed a prior breach of the Treaty — Emergence of new norms of environmental law — Sustainable development — Treaty provisions permit-

ting the parties, by mutual consent, to take account of those norms — Repudiation of the Treaty — Reciprocal non-compliance — Integrity of the rule pacta sunt servanda *— Treaty remaining in force until terminated by mutual consent.*

Legal consequences of the Judgment of the Court — Dissolution of Czechoslovakia — Article 12 of the Vienna Convention of 1978 on Succession of States in respect of Treaties — Customary law — Succession of States without effect on a treaty creating rights and obligations "attaching" to the territory — Irregular state of affairs as a result of failure of both Parties to comply with their treaty obligations — Ex injuria jus non oritur *— Objectives of the Treaty — Obligations overtaken by events — Positions adopted by the parties after conclusion of the Treaty — Good faith negotiations — Effects of the Project on the environment — Agreed solution to be found by the Parties — Joint régime — Reparation for acts committed by both Parties — Co-operation in the use of shared water resources — Damages — Succession in respect of rights and obligations relating to the Project — Intersecting wrongs — Settlement of accounts for the construction of the works.*

JUDGMENT

Present: *President* SCHWEBEL; *Vice-President* WEERAMANTRY; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Judge* ad hoc SKUBISZEWSKI; *Registrar* VALENCIA-OSPINA.

In the case concerning the Gabčíkovo-Nagymaros Project,

between

the Republic of Hungary,

represented by

H.E. Mr. György Szénási, Ambassador, Head of the International Law Department, Ministry of Foreign Affairs,

as Agent and Counsel;

H.E. Mr. Dénes Tomaj, Ambassador of the Republic of Hungary to the Netherlands,

as Co-Agent;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationales of Paris,

Mr. Alexandre Kiss, Director of Research, Centre national de la recherche scientifique (retd.),

Mr. László Valki, Professor of International Law, Eötvös Loránd University, Budapest,

Mr. Boldizsár Nagy, Associate Professor of International Law, Eötvös Loránd University, Budapest,
Mr. Philippe Sands, Reader in International Law, University of London, School of Oriental and African Studies, and Global Professor of Law, New York University,
Ms Katherine Gorove, consulting Attorney,

as Counsel and Advocates;

Dr. Howard Wheater, Professor of Hydrology, Imperial College, London,
Dr. Gábor Vida, Professor of Biology, Eötvös Loránd University, Budapest, Member of the Hungarian Academy of Sciences,
Dr. Roland Carbiener, Professor emeritus of the University of Strasbourg,
Dr. Klaus Kern, consulting Engineer, Karlsruhe,

as Advocates;

Mr. Edward Helgeson,
Mr. Stuart Oldham,
Mr. Péter Molnár,

as Advisers;

Dr. György Kovács,
Mr. Timothy Walsh,
Mr. Zoltán Kovács,

as Technical Advisers;

Dr. Attila Nyikos,

as Assistant;

Mr. Axel Gosseries, LL.M.,

as Translator;

Ms Éva Kocsis,
Ms Katinka Tompa,

as Secretaries,

and

the Slovak Republic,

represented by

H.E. Dr. Peter Tomka, Ambassador, Legal Adviser of the Ministry of Foreign Affairs,

as Agent;

Dr. Václav Mikulka, Member of the International Law Commission,

as Co-Agent, Counsel and Advocate;

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus of International Law at the University of Cambridge, former Member of the International Law Commission,

as Counsel;

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former Member of the International Law Commission,
Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the

Institute of Political Studies, Paris, Member of the International Law Commission,
Mr. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Columbia,
Sir Arthur Watts, K.C.M.G., Q.C., Barrister, Member of the Bar of England and Wales,
Mr. Samuel S. Wordsworth, avocat à la cour d'appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley, Paris,

as Counsel and Advocates;

Mr. Igor Mucha, Professor of Hydrogeology and Former Head of the Groundwater Department at the Faculty of Natural Sciences of Comenius University in Bratislava,
Mr. Karra Venkateswara Rao, Director of Water Resources Engineering, Department of Civil Engineering, City University, London,

Mr. Jens Christian Refsgaard, Head of Research and Development, Danish Hydraulic Institute,

as Counsel and Experts;

Dr. Cecília Kandráčová, Director of Department, Ministry of Foreign Affairs,
Mr. Luděk Krajhanzl, Attorney at Law, Vyroubal Krajhanzl Skácel and Partners, Prague,
Mr. Miroslav Liška, Head of the Division for Public Relations and Expertise, Water Resources Development State Enterprise, Bratislava,

Dr. Peter Vršanský, Minister-Counsellor, Chargé d'affaires *a.i.*, of the Embassy of the Slovak Republic, The Hague,

as Counsellors;

Miss Anouche Beaudouin, allocataire de recherche at the University of Paris X-Nanterre,
Ms Cheryl Dunn, Frere Cholmeley, Paris,
Ms Nikoleta Glindová, attaché, Ministry of Foreign Affairs,
Mr. Drahoslav Štefánek, attaché, Ministry of Foreign Affairs,

as Legal Assistants,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called "Hungary") to the Netherlands and the Chargé d'affaires *ad interim* of the Slovak Republic (hereinafter called "Slovakia") to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

"*The Republic of Hungary and the Slovak Republic,*

Considering that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as 'the Treaty'), and on the construction and operation of the 'provisional solution';

Bearing in mind that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project;

Recognizing that the Parties concerned have been unable to settle these differences by negotiations;

Having in mind that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabčíkovo-Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

Desiring that these differences should be settled by the International Court of Justice;

Recalling their commitment to apply, pending the Judgment of the International Court of Justice, such a temporary water management régime of the Danube as shall be agreed between the Parties;

Desiring further to define the issues to be submitted to the International Court of Justice,

Have agreed as follows:

Article 1

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

Article 2

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

(a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

Article 3

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

(a) a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

(b) a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties within such time-limits as the Court may order.

(d) The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

Article 4

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

Article 5

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article 6

(1) The present Special Agreement shall be subject to ratification.

(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.

(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals."

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, Members of the United Nations and other States entitled to appear before the Court.

4. Since the Court included upon the Bench no judge of Slovak nationality, Slovakia exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Krzysztof Jan Skubiszewski.

5. By an Order dated 14 July 1993, the Court fixed 2 May 1994 as the time-limit for the filing by each of the Parties of a Memorial and 5 December 1994 for the filing by each of the Parties of a Counter-Memorial, having regard to the provisions of Article 3, paragraph 2 *(a)* and *(b)*, of the Special Agreement. Those pleadings were duly filed within the prescribed time-limits.

6. By an Order dated 20 December 1994, the President of the Court, having heard the Agents of the Parties, fixed 20 June 1995 as the time-limit for the filing of the Replies, having regard to the provisions of Article 3, paragraph 2 *(c)*, of the Special Agreement. The Replies were duly filed within the time-limit thus prescribed and, as the Court had not asked for the submission of additional pleadings, the case was then ready for hearing.

7. By letters dated 27 January 1997, the Agent of Slovakia, referring to the provisions of Article 56, paragraph 1, of the Rules of Court, expressed his Government's wish to produce two new documents; by a letter dated 10 February 1997, the Agent of Hungary declared that his Government objected to their production. On 26 February 1997, after having duly ascertained the views of the two Parties, the Court decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of those documents under certain conditions of which the Parties were advised. Within the time-limit fixed by the Court to that end, Hungary submitted comments on one of those documents under paragraph 3 of that same Article. The Court authorized Slovakia to comment in turn upon those observations, as it had expressed a wish to do so; its comments were received within the time-limit prescribed for that purpose.

8. Moreover, each of the Parties asked to be allowed to show a video cassette in the course of the oral proceedings. The Court agreed to those requests, provided that the cassettes in question were exchanged in advance between the Parties, through the intermediary of the Registry. That exchange was effected accordingly.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after having ascertained the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. By a letter dated 16 June 1995, the Agent of Slovakia invited the Court

to visit the locality to which the case relates and there to exercise its functions with regard to the obtaining of evidence, in accordance with Article 66 of the Rules of Court. For his part, the Agent of Hungary indicated, by a letter dated 28 June 1995, that, if the Court should decide that a visit of that kind would be useful, his Government would be pleased to co-operate in organizing it. By a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit *in situ*; and, by a letter dated 3 February 1997, they jointly notified to it the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement of 14 November 1995. By an Order dated 5 February 1997, the Court decided to accept the invitation to exercise its functions with regard to the obtaining of evidence at a place to which the case relates and, to that end, to adopt the arrangements proposed by the Parties. The Court visited the area from 1 to 4 April 1997; it visited a number of locations along the Danube and took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties.

11. The Court held a first round of ten public hearings from 3 to 7 March and from 24 to 27 March 1997, and a second round of four public hearings on 10, 11, 14 and 15 April 1997, after having made the visit *in situ* referred to in the previous paragraph. During those hearings, the Court heard the oral arguments and replies of:

For Hungary: H.E. Mr. Szénási,
Professor Valki,
Professor Kiss,
Professor Vida,
Professor Carbiener,
Professor Crawford,
Professor Nagy,
Dr. Kern,
Professor Wheater,
Ms Gorove,
Professor Dupuy,
Professor Sands.

For Slovakia: H.E. Dr. Tomka,
Dr. Mikulka,
Mr. Wordsworth,
Professor McCaffrey,
Professor Mucha,
Professor Pellet,
Mr. Refsgaard,
Sir Arthur Watts.

12. The Parties replied orally and in writing to various questions put by Members of the Court. Referring to the provisions of Article 72 of the Rules of Court, each of the Parties submitted to the Court its comments upon the replies given by the other Party to some of those questions.

*

13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Hungary,

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

> "On the basis of the evidence and legal argument presented in the Memorial, Counter-Memorial and this Reply, the Republic of Hungary
>
> *Requests the Court to adjudge and declare*
>
> *First*, that the Republic of Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;
>
> *Second*, that the Czech and Slovak Federal Republic was not entitled to proceed to the 'provisional solution' (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);
>
> *Third*, that by its Declaration of 19 May 1992, Hungary validly terminated the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 16 September 1977;
>
> *Requests the Court to adjudge and declare further*
>
> that the legal consequences of these findings and of the evidence and the arguments presented to the Court are as follows:
>
> (1) that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic;
> (2) that the Slovak Republic bears responsibility to the Republic of Hungary for maintaining in operation the 'provisional solution' referred to above;
> (3) that the Slovak Republic is internationally responsible for the damage and loss suffered by the Republic of Hungary and by its nationals as a result of the 'provisional solution';
> (4) that the Slovak Republic is under an obligation to make reparation in respect of such damage and loss, the amount of such reparation, if it cannot be agreed by the Parties within six months of the date of the Judgment of the Court, to be determined by the Court;
> (5) that the Slovak Republic is under the following obligations:
>
> *(a)* to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;
> *(b)* to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution; and
> *(c)* to provide appropriate guarantees against the repetition of the damage and loss suffered by the Republic of Hungary and by its nationals."

On behalf of Slovakia,

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

"On the basis of the evidence and legal arguments presented in the Slovak Memorial, Counter-Memorial and in this Reply, and reserving the right to supplement or amend its claims in the light of further written pleadings, the Slovak Republic

Requests the Court to adjudge and declare:

1. That the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks, and related instruments, and to which the Slovak Republic is the acknowledged successor, is a treaty in force and has been so from the date of its conclusion; and that the notification of termination by the Republic of Hungary on 19 May 1992 was without legal effect.
2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributed responsibility to the Republic of Hungary.
3. That the act of proceeding with and putting into operation Variant C, the 'provisional solution', was lawful.
4. That the Republic of Hungary must therefore cease forthwith all conduct which impedes the full and bona fide implementation of the 1977 Treaty and must take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty.
5. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary is liable to pay, and the Slovak Republic is entitled to receive, full compensation for the loss and damage caused to the Slovak Republic by those breaches, plus interest and loss of profits, in the amounts to be determined by the Court in a subsequent phase of the proceedings in this case."

14. In the oral proceedings, the following submissions were presented by the Parties

On behalf of Hungary,

at the hearing of 11 April 1997:

The submissions read at the hearing were *mutatis mutandis* identical to those presented by Hungary during the written proceedings.

On behalf of Slovakia,

at the hearing of 15 April 1997:

"On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Slovak Republic,

Requests the Court to adjudge and declare:

1. That the Treaty, as defined in the first paragraph of the Preamble to the Compromis between the Parties, dated 7 April 1993, concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks and related instruments, concluded between Hungary and

Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 19 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect;

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary;
3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the 'provisional solution' and to put this system into operation from October 1992; and that the Slovak Republic was, and remains, entitled to continue the operation of this system;

4. That the Republic of Hungary shall therefore cease forthwith all conduct which impedes the bona fide implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties;
5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;
6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by those breaches together with interest thereon;
7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."

* * *

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.

It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the barrage system was designed to attain

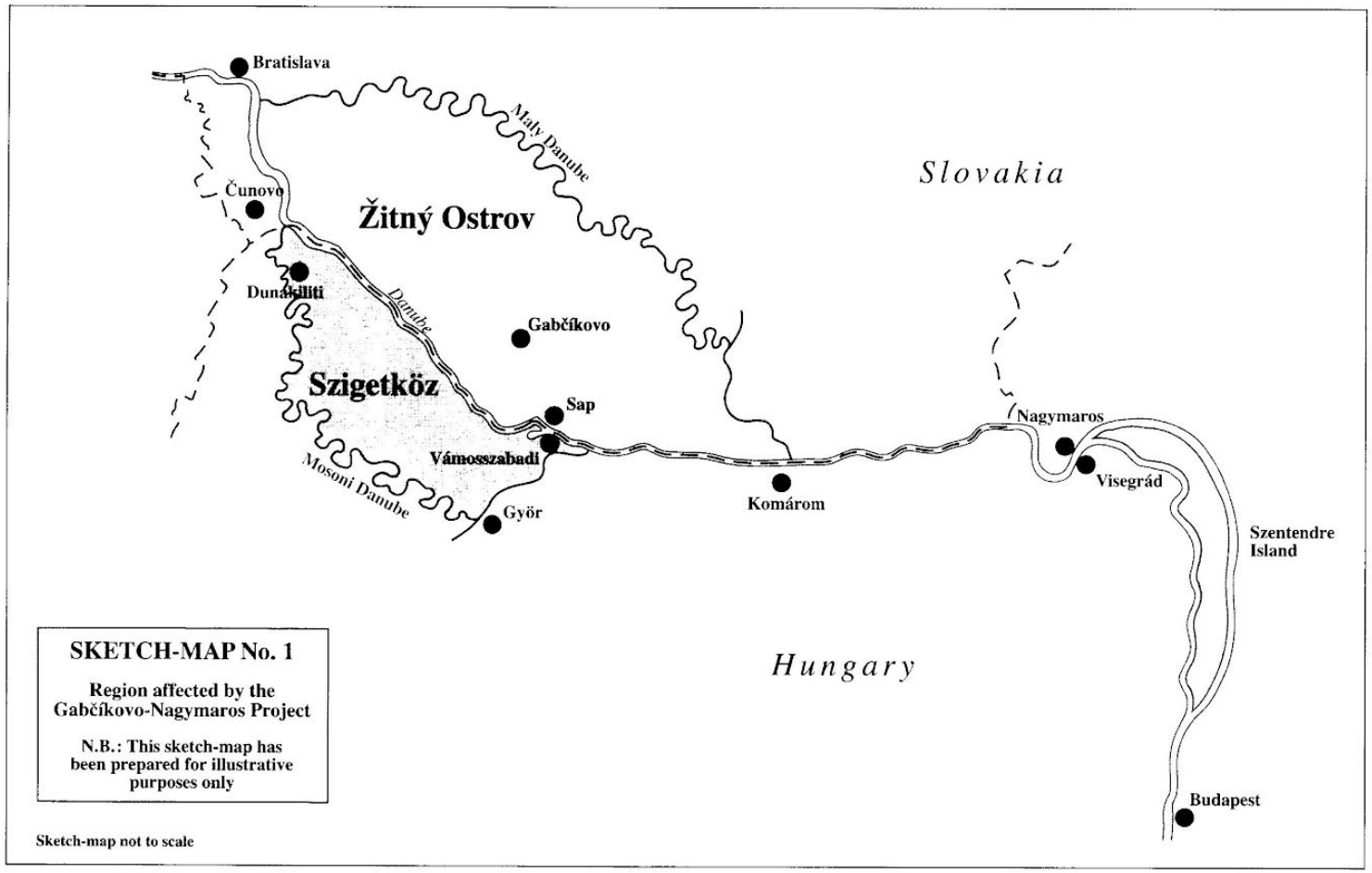
> "the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water

resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties".

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Malý Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Malý Danube and that channel, in Slovak territory, constitutes the Žitný Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetköz. Čunovo and, further downstream, Gabčíkovo, are situated in this sector of the river on Slovak territory, Čunovo on the right bank and Gabčíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).

17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.


Bratislava
Čunovo
Dunakiliti
Žitný Ostrov
Mały Danube
Danube
Gabčíkovo
Szigetköz
Sap
Vámosszabadi
Mosoni Danube
Győr
Komárom
Slovakia
Nagymaros
Visegrád
Szentendre Island
Budapest
Hungary
SKETCH-MAP No. 1
Region affected by the Gabčíkovo-Nagymaros Project
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale

Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

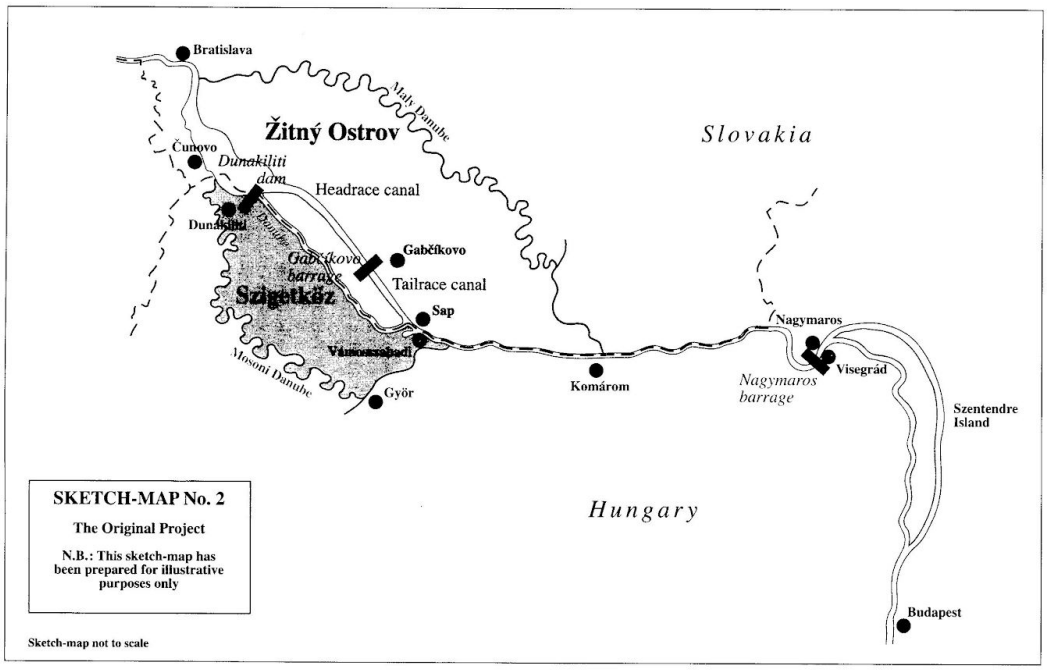
18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (see sketch-map No. 2, p. 21 below). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, *inter alia*, a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river; a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976; Article 4, paragraph 1, for its part, specified that "the joint investment [would] be carried out in conformity with the joint contractual plan".

According to Article 3, paragraph 1:

> "Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through . . . (. . . 'government delegates')."

Those delegates had, *inter alia*, "to ensure that construction of the System of Locks is . . . carried out in accordance with the approved joint contractual plan and the project work schedule". When the works were brought into operation, they were moreover "To establish the operating


Bratislava
Malý Dunaj
Žitný Ostrov
Slovakia
Čunovo
Dunakiliti dam
Headrace canal
Dunakiliti
Danube
Gabčíkovo barrage
Gabčíkovo
Tailrace canal
Szigetköz
Sap
Vámosszabadi
Mosoni Danube
Győr
Komárom
Nagymaros
Visegrád
Nagymaros barrage
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 2
The Original Project
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale

and operational procedures of the System of Locks and ensure compliance therewith."

Article 4, paragraph 4, stipulated that:

> "Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990."

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabčíkovo and Nagymaros would be "jointly owned" by the contracting parties "in equal measure". Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at the hydroelectric power plants (Art. 9).

According to Article 10, the works were to be managed by the State on whose territory they were located, "in accordance with the jointly-agreed operating and operational procedures", while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

> "The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge."

Paragraph 3 of that Article was worded as follows:

> "In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced."

Article 15 specified that the contracting parties

> "shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks".

Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.

Article 18, paragraph 1, provided as follows:

> "The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks."

It was stipulated in Article 19 that:

> "The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

> "*(d)* In the Dunakiliti-Hrušov head-water area, the State frontier shall run from boundary point 161.V.O.á. to boundary stone No. I.5. in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States."

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected "by the Contracting Parties on the basis of a separate treaty". No such treaty was concluded.

Finally a dispute settlement provision was contained in Article 27, worded as follows:

> "1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.
>
> 2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system

and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabčíkovo bypass canal would have a discharge capacity of 4,000 cubic metres per second (m^3/s). The power plant would include "Eight . . . turbines with 9.20 m diameter running wheels" and would "mainly operate in peak-load time and continuously during high water". This type of operation would give an energy production of 2,650 gigawatt/hours (GWh) per annum. The Plan further stipulated in paragraph 4.4.2:

> "The low waters are stored every day, which ensures the peak-load time operation of the Gabčíkovo hydropower plant . . . a minimum of 50 m^3/s additional water is provided for the old bed [of the Danube] besides the water supply of the branch system."

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500 m^3/s, the excess amounts of water would be channelled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

> "The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 m^3/s discharge must be released into the old Danube bed, in addition to the occasional possibilities for rinsing the bed."

The Joint Contractual Plan also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system." (Joint Contractual Plan, Summary Documentation, Vol. O-1-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a "hydropower station . . . type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 m^3/s" per day. The intended annual production was to be 1,025 GWh (i.e., 38 per cent of the production of Gabčíkovo, for an installed power only equal to 21 per cent of that of Gabčíkovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčíkovo.

*

21. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at

the same time as the Treaty itself. The Agreement moreover made some adjustments to the allocation of the works between the parties as laid down by the Treaty.

Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 (one amending Article 4, paragraph 4, of the 1977 Treaty and the other the Agreement on mutual assistance), to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 (which amended the Agreement on mutual assistance), to accelerate the Project.

22. As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

23. During this period, negotiations were being held between the parties. Czechoslovakia also started investigating alternative solutions. One of them, subsequently known as "Variant C", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (see sketch-map No. 3, p. 26 below). In its final stage, Variant C included the construction at Čunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was to have a smaller surface area and provide approximately 30 per cent less storage than the reservoir initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, *inter alia*, floodwater to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric power plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old bed of the Danube). The supply of water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures in the bypass canal at Dobrohošť and Gabčíkovo. A solution was to be found for the Hungarian bank. Moreover, the question of the deepening of the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained outstanding.

On 23 July 1991, the Slovak Government decided "to begin, in September 1991, construction to put the Gabčíkovo Project into operation by the provisional solution". That decision was endorsed by the Federal Czechoslovak Government on 25 July. Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted

Slovakia
Hungary
Bratislava
Čunovo
Čunovo dam
Dunakiliti
Dunakiliti dam
Headrace canal
Mały Danube
Žitný Ostrov
Gabčíkovo
Gabčíkovo barrage
Tailrace canal
Danube
Sap
Szigetköz
Vámosszabadi
Mosoni Danube
Győr
Komárom
Nagymaros
Visegrád
Szentendre Island
Budapest
SKETCH-MAP No. 3
"Variant C"
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale

to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

24. On 23 October 1992, the Court was seised of an "Application of the Republic of Hungary *v.* The Czech and Slovak Federal Republic on the Diversion of the Danube River"; however, Hungary acknowledged that there was no basis on which the Court could have founded its jurisdiction to entertain that application, on which Czechoslovakia took no action. In the meanwhile, the Commission of the European Communities had offered to mediate and, during a meeting of the two parties with the Commission held in London on 28 October 1992, the parties entered into a series of interim undertakings. They principally agreed that the dispute would be submitted to the International Court of Justice, that a tripartite fact-finding mission should report on Variant C not later than 31 October, and that a tripartite group of independent experts would submit suggestions as to emergency measures to be taken.

25. On 1 January 1993 Slovakia became an independent State. On 7 April 1993, the "Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo-Nagymaros Project" was signed in Brussels, the text of which is reproduced in paragraph 2 above. After the Special Agreement was notified to the Court, Hungary informed the Court, by a letter dated 9 August 1993, that it considered its "initial Application [to be] now without object, and . . . lapsed".

According to Article 4 of the Special Agreement, "The Parties [agreed] that, pending the final Judgment of the Court, they [would] establish and implement a temporary water management régime for the Danube." However, this régime could not easily be settled. The filling of the Čunovo dam had rapidly led to a major reduction in the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. On 26 August 1993, Hungary and Slovakia reached agreement on the setting up of a tripartite group of experts (one expert designated by each party and three independent experts designated by the Commission of the European Communities)

> "In order to provide reliable and undisputed data on the most important effects of the current water discharge and the remedial measures already undertaken as well as to make recommendations for appropriate measures."

On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement "concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube",

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On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement "concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube",

on 19 April 1995. That Agreement raised the discharge of water into the Mosoni Danube to 43 m^3/s. It provided for an annual average of 400 m^3/s in the old bed (not including flood waters). Lastly, it provided for the construction by Hungary of a partially underwater weir near to Dunakiliti with a view to improving the water supply to the side-arms of the Danube on the Hungarian side. It was specified that this temporary agreement would come to an end 14 days after the Judgment of the Court.

* * *

26. The first subparagraph of the Preamble to the Special Agreement covers the disputes arising between Czechoslovakia and Hungary concerning the application and termination, not only of the 1977 Treaty, but also of "related instruments"; the subparagraph specifies that, for the purposes of the Special Agreement, the 1977 Treaty and the said instruments shall be referred to as "the Treaty". "The Treaty" is expressly referred to in the wording of the questions submitted to the Court in Article 2, paragraph 1, subparagraphs *(a)* and *(c)*, of the Special Agreement.

The Special Agreement however does not define the concept of "related instruments", nor does it list them. As for the Parties, they gave some consideration to that question — essentially in the written proceedings — without reaching agreement as to the exact meaning of the expression or as to the actual instruments referred to. The Court notes however that the Parties seemed to agree to consider that that expression covers at least the instruments linked to the 1977 Treaty which implement it, such as the Agreement on mutual assistance of 16 September 1977 and its amending Protocols dated, respectively, 10 October 1983 and 6 February 1989 (see paragraph 21 above), and the Agreement as to the common operational regulations of Plenipotentiaries fulfilling duties related to the construction and operation of the Gabčíkovo-Nagymaros Barrage System signed in Bratislava on 11 October 1979. The Court notes that Hungary, unlike Slovakia, declined to apply the description of related instruments to the 1977 Treaty to the Joint Contractual Plan (see paragraph 19 above), which it refused to see as "an agreement at the same level as the other . . . related Treaties and inter-State agreements".

Lastly the Court notes that the Parties, in setting out the replies which should in their view be given to the questions put in the Special Agreement, concentrated their reasoning on the 1977 Treaty; and that they would appear to have extended their arguments to "related instruments" in considering them as accessories to a whole treaty system, whose fate was in principle linked to that of the main part, the 1977 Treaty. The Court takes note of the positions of the Parties and considers that it does not need to go into this matter further at this juncture.

* * *

27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 *(a)*, of the Special Agreement, the Court is requested to decide first

> "whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary".

28. The Court would recall that the Gabčíkovo-Nagymaros System of Locks is characterized in Article 1, paragraph 1, of the 1977 Treaty as a "single and indivisible operational system of works".

The principal works which were to constitute this system have been described in general terms above (see paragraph 18). Details of them are given in paragraphs 2 and 3 of Article 1 of the Treaty.

For Gabčíkovo, paragraph 2 lists the following works:

"*(a)* the Dunakiliti-Hrušov head-water installations in the Danube sector at r.km. (river kilometre(s)) 1860-1842, designed for a maximum flood stage of 131.10 m.B. (metres above sea-level, Baltic system), in Hungarian and Czechoslovak territory;

(b) the Dunakiliti dam and auxiliary navigation lock at r.km. 1842, in Hungarian territory;

(c) the by-pass canal (head-water canal and tail-water canal) at r.km. 1842-1811, in Czechoslovak territory;

(d) series of locks on the by-pass canal, in Czechoslovak territory, consisting of a hydroelectric power plant with installed capacity of 720 MW, double navigation locks and appurtenances thereto;

(e) improved old bed of the Danube at r.km. 1842-1811, in the joint Hungarian-Czechoslovak section;

(f) deepened and regulated bed of the Danube at r.km. 1811-1791, in the joint Hungarian-Czechoslovak section."

For Nagymaros, paragraph 3 specifies the following works:

"*(a)* head-water installations and flood-control works in the Danube sector at r.km. 1791-1696.25 and in the sectors of tributaries affected by flood waters, designed for a maximum flood stage of 107.83 m.B., in Hungarian and Czechoslovak territory;

(b) series of locks at r.km. 1696.25, in Hungarian territory, consisting of a dam, a hydroelectric power plant with installed capacity of 158 MW, double navigation locks and appurtenances thereto;

(c) deepened and regulated bed of the Danube, in both its branches, at r.km. 1696.25-1657, in the Hungarian section."

29. Moreover, the precise breakdown of the works incumbent on each party was set out in Article 5, paragraph 5, of the 1977 Treaty, as follows:

"5. The labour and supplies required for the realization of the joint investment shall be apportioned between the Contracting Parties in the following manner:

(a) The Czechoslovak Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the left bank, in Czechoslovak territory;
(2) the head-water canal of the by-pass canal, in Czechoslovak territory;
(3) the Gabčíkovo series of locks, in Czechoslovak territory;
(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;
(5) restoration of vegetation in Czechoslovak territory;

(b) The Hungarian Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;
(2) the Dunakiliti-Hrušov head-water installations on the right bank, in Hungarian territory;
(3) the Dunakiliti dam, in Hungarian territory;
(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;
(5) deepening of the bed of the Danube below Palkovičovo, in Hungarian and Czechoslovak territory;
(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;
(7) operational equipment of the Gabčíkovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;
(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;
(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;
(10) the Nagymaros series of locks, in Hungarian territory;
(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;
(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;
(13) restoration of vegetation in Hungarian territory."

30. As the Court has already indicated (see paragraph 18 above), Article 1, paragraph 4, of the 1977 Treaty stipulated in general terms that the "technical specifications" concerning the System of Locks would be included in the "joint contractual plan". The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977 (see paragraph 21 above). In accordance with the provisions of Article 1, paragraph 1, of that Agreement, the whole of the works of the barrage system were to have been completed in 1991. As indicated in paragraph 2 of that same article, a summary construction schedule was appended to the Agreement, and provision was made for a more detailed schedule to be worked out in the Joint Contractual Plan. The Agreement of 16 September 1977 was twice amended further. By a Protocol signed on 10 October 1983, the parties agreed first to postpone the works and the putting into operation of the power plants for four more years; then, by a Protocol signed on 6 February 1989, the parties decided, conversely, to bring them forward by 15 months, the whole system having to be operational in 1994. A new summary construction schedule was appended to each of those Protocols; those schedules were in turn to be implemented by means of new detailed schedules, included in the Joint Contractual Plan.

31. In spring 1989, the work on the Gabčíkovo sector was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabčíkovo dam was 85 per cent complete, and the bypass canal was between 60 per cent complete (downstream of Gabčíkovo) and 95 per cent complete (upstream of Gabčíkovo) and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 per cent complete, depending on the location. This was not the case in the Nagymaros sector where, although dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

32. In the wake of the profound political and economic changes which occurred at this time in central Europe, the Gabčíkovo-Nagymaros Project was the object, in Czechoslovakia and more particularly in Hungary, of increasing apprehension, both within a section of public opinion and in some scientific circles. The uncertainties not only about the economic viability of the Project, but also, and more so, as to the guarantees it offered for preservation of the environment, engendered a climate of growing concern and opposition with regard to the Project.

33. It was against this background that, on 13 May 1989, the Government of Hungary adopted a resolution to suspend works at Nagymaros, and ordered

> "the Ministers concerned to commission further studies in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment. In the interests of

the above, we must examine the international and legal consequences, the technical considerations, the obligations related to continuous navigation on the Danube and the environmental/ecological and seismic impacts of the eventual stopping of the Nagymaros investment. To be further examined are the opportunities for the replacement of the lost electric energy and the procedures for minimising claims for compensation."

The suspension of the works at Nagymaros was intended to last for the duration of these studies, which were to be completed by 31 July 1989. Czechoslovakia immediately protested and a document defining the position of Czechoslovakia was transmitted to the Ambassador of Hungary in Prague on 15 May 1989. The Prime Ministers of the two countries met on 24 May 1989, but their talks did not lead to any tangible result. On 2 June, the Hungarian Parliament authorized the Government to begin negotiations with Czechoslovakia for the purpose of modifying the 1977 Treaty.

34. At a meeting held by the Plenipotentiaries on 8 and 9 June 1989, Hungary gave Czechoslovakia a number of assurances concerning the continuation of works in the Gabčíkovo sector, and the signed Protocol which records that meeting contains the following passage:

"The Hungarian Government Commissioner and the Hungarian Plenipotentiary stated, that the Hungarian side will complete construction of the Gabčíkovo Project in the agreed time and in accordance with the project plans. Directives have already been given to continue works suspended in the area due to misunderstanding."

These assurances were reiterated in a letter that the Commissioner of the Government of Hungary addressed to the Czechoslovak Plenipotentiary on 9 June 1989.

35. With regard to the suspension of work at Nagymaros, the Hungarian Deputy Prime Minister, in a letter dated 24 June 1989 addressed to his Czechoslovak counterpart, expressed himself in the following terms:

"The Hungarian Academy of Sciences (HAS) has studied the environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabčíkovo-Nagymaros Barrage System (GNBS).

. . . . . .

Having studied the expected impacts of the construction in accordance with the original plan, the Committee *[ad hoc]* of the Academy [set up for this purpose] came to the conclusion that we do not have adequate knowledge of the consequences of environmental risks.

In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impacts will

ensue for certain, therefore, according to their recommendation, further thorough and time consuming studies are necessary."

36. The Hungarian and Czechoslovak Prime Ministers met again on 20 July 1989 to no avail. Immediately after that meeting, the Hungarian Government adopted a second resolution, under which the suspension of work at Nagymaros was extended to 31 October 1989. However, this resolution went further, as it also prescribed the suspension, until the same date, of the "Preparatory works on the closure of the riverbed at . . . Dunakiliti"; the purpose of this measure was to invite "international scientific institutions [and] foreign scientific institutes and experts" to co-operate with "the Hungarian and Czechoslovak institutes and experts" with a view to an assessment of the ecological impact of the Project and the "development of a technical and operational water quality guarantee system and . . . its implementation".

37. In the ensuing period, negotiations were conducted at various levels between the two States, but proved fruitless. Finally, by a letter dated 4 October 1989, the Hungarian Prime Minister formally proposed to Czechoslovakia that the Nagymaros sector of the Project be abandoned and that an agreement be concluded with a view to reducing the ecological risks associated with the Gabčíkovo sector of the Project. He proposed that that agreement should be concluded before 30 July 1990.

The two Heads of Government met on 26 October 1989, and were unable to reach agreement. By a Note Verbale dated 30 October 1989, Czechoslovakia, confirming the views it had expressed during those talks, proposed to Hungary that they should negotiate an agreement on a system of technical, operational and ecological guarantees relating to the Gabčíkovo-Nagymaros Project, "on the assumption that the Hungarian party will immediately commence preparatory work on the refilling of the Danube's bed in the region of Dunakiliti". It added that the technical principles of the agreement could be initialled within two weeks and that the agreement itself ought to be signed before the end of March 1990. After the principles had been initialled, Hungary "[was to] start the actual closure of the Danube bed". Czechoslovakia further stated its willingness to "conclu[de] . . . a separate agreement in which both parties would oblige themselves to limitations or exclusion of peak hour operation mode of the . . . System". It also proposed "to return to deadlines indicated in the Protocol of October 1983", the Nagymaros construction deadlines being thus extended by 15 months, so as to enable Hungary to take advantage of the time thus gained to study the ecological issues and formulate its own proposals in due time. Czechoslovakia concluded by announcing that, should Hungary continue unilaterally to breach the Treaty, Czechoslovakia would proceed with a provisional solution.

In the meantime, the Hungarian Government had on 27 October adopted a further resolution, deciding to abandon the construction of the

Nagymaros dam and to leave in place the measures previously adopted for suspending the works at Dunakiliti. Then, by Notes Verbales dated 3 and 30 November 1989, Hungary proposed to Czechoslovakia a draft treaty incorporating its earlier proposals, relinquishing peak power operation of the Gabčíkovo power plant and abandoning the construction of the Nagymaros dam. The draft provided for the conclusion of an agreement on the completion of Gabčíkovo in exchange for guarantees on protection of the environment. It finally envisaged the possibility of one or other party seising an arbitral tribunal or the International Court of Justice in the event that differences of view arose and persisted between the two Governments about the construction and operation of the Gabčíkovo dam, as well as measures to be taken to protect the environment. Hungary stated that it was ready to proceed immediately "with the preparatory operations for the Dunakiliti bed-decanting", but specified that the river would not be dammed at Dunakiliti until the agreement on guarantees had been concluded.

38. During winter 1989-1990, the political situation in Czechoslovakia and Hungary alike was transformed, and the new Governments were confronted with many new problems.

In spring 1990, the new Hungarian Government, in presenting its National Renewal Programme, announced that the whole of the Gabčíkovo-Nagymaros Project was a "mistake" and that it would initiate negotiations as soon as possible with the Czechoslovak Government "on remedying and sharing the damages". On 20 December 1990, the Hungarian Government adopted a resolution for the opening of negotiations with Czechoslovakia on the termination of the Treaty by mutual consent and the conclusion of an agreement addressing the consequences of the termination. On 15 February 1991, the Hungarian Plenipotentiary transmitted a draft agreement along those lines to his Czechoslovak counterpart.

On the same day, the Czechoslovak President declared that the Gabčíkovo-Nagymaros Project constituted a "totalitarian, gigomaniac monument which is against nature", while emphasizing that "the problem [was] that [the Gabčíkovo power plant] [had] already been built". For his part, the Czechoslovak Minister of the Environment stated, in a speech given to Hungarian parliamentary committees on 11 September 1991, that "the G/N Project [was] an old, obsolete one", but that, if there were "many reasons to change, modify the treaty . . . it [was] not acceptable to cancel the treaty . . . and negotiate later on".

During the ensuing period, Hungary refrained from completing the work for which it was still responsible at Dunakiliti. Yet it continued to maintain the structures it had already built and, at the end of 1991, completed the works relating to the tailrace canal of the bypass canal assigned to it under Article 5, paragraph 5 *(b)*, of the 1977 Treaty.

* *

39. The two Parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place.

Further, they do not dispute the fact that, however flexible they may have been, these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners.

40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a "state of ecological necessity".

Hungary contended that the various installations in the Gabčíkovo-Nagymaros System of Locks had been designed to enable the Gabčíkovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 km^2) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčíkovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows. At Gabčíkovo/Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 m^3/s, in addition to the water provided to the system of side-arms. That volume could be increased to 200 m^3/s during the growing season. Additional discharges, and in particular a number of artificial floods, could also be effected, at an unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetköz. Furthermore, the groundwater would then no longer have been supplied by the Danube — which, on the contrary, would have acted as a drain — but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir; instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built,

the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells would have deteriorated in this sector. What is more, the operation of the Gabčíkovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would have been severely jeopardized.

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a "state of ecological necessity" did indeed exist in 1989.

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 — in particular Articles 15 and 19 relating, respectively, to water quality and nature protection — in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project's impact on the environment; Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it imputes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

42. Hungary moreover contended from the outset that its conduct in the present case should not be evaluated only in relation to the law of treaties. It also observed that, in accordance with the provisions of Article 4, the Vienna Convention of 23 May 1969 on the Law of Treaties could not be applied to the 1977 Treaty, which was concluded before that Convention entered into force as between the parties. Hungary has indeed acknowledged, with reference to the jurisprudence of the Court, that in many respects the Convention reflects the existing customary law. Hungary nonetheless stressed the need to adopt a cautious attitude, while

suggesting that the Court should consider, in each case, the conformity of the prescriptions of the Convention with customary international law.

43. Slovakia, for its part, denied that the basis for suspending or abandoning the performance of a treaty obligation can be found outside the law of treaties. It acknowledged that the 1969 Vienna Convention could not be applied as such to the 1977 Treaty, but at the same time stressed that a number of its provisions are a reflection of pre-existing rules of customary international law and specified that this is, in particular, the case with the provisions of Part V relating to invalidity, termination and suspension of the operation of treaties. Slovakia has moreover observed that, after the Vienna Convention had entered into force for both parties, Hungary affirmed its accession to the substantive obligations laid down by the 1977 Treaty when it signed the Protocol of 6 February 1989 that cut short the schedule of work; and this led it to conclude that the Vienna Convention was applicable to the "contractual legal régime" constituted by the network of interrelated agreements of which the Protocol of 1989 was a part.

44. In the course of the proceedings, Slovakia argued at length that the state of necessity upon which Hungary relied did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. At the same time, it cast doubt upon whether "ecological necessity" or "ecological risk" could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act.

In any event, Slovakia denied that there had been any kind of "ecological state of necessity" in this case either in 1989 or subsequently. It invoked the authority of various scientific studies when it claimed that Hungary had given an exaggeratedly pessimistic description of the situation. Slovakia did not, of course, deny that ecological problems could have arisen. However, it asserted that they could to a large extent have been remedied. It accordingly stressed that no agreement had been reached with respect to the modalities of operation of the Gabčíkovo power plant in peak mode, and claimed that the apprehensions of Hungary related only to operating conditions of an extreme kind. In the same way, it contended that the original Project had undergone various modifications since 1977 and that it would have been possible to modify it even further, for example with respect to the discharge of water reserved for the old bed of the Danube, or the supply of water to the side-arms by means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977 Treaty — particularly its Articles 15 and 19 — and maintained, *inter alia*, that according to the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 relating to the Joint Contractual Plan, research into the impact of the Project on the environment was not the exclusive responsibility of Czechoslovakia but of either one of the parties, depending on the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in viola-

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Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in viola-

bility provisionally adopted by the International Law Commission on first reading, *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 32).

48. The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

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49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

"*Article 33. State of Necessity*

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(*b*) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(*a*) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(*b*) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(*c*) if the State in question has contributed to the occurrence of the state of necessity." (*Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the "state of necessity" as being

> "the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State" (*ibid.*, para. 1).

It concluded that "the notion of state of necessity is . . . deeply rooted in general legal thinking" (*ibid.*, p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

> "in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness . . ." (*ibid.*, p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must

have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an "essential interest" to a matter only of the "existence" of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, "a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]" (*ibid.*, p. 35, para. 3); and specified, with reference to State practice, that "It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States." (*Ibid.*, p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

> "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the "peril" invoked by Hungary, of its "grave and imminent" nature, as well as of the absence of any "means" to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

As the Court has already indicated (see paragraphs 33 *et seq.*), Hungary on several occasions expressed, in 1989, its "uncertainties" as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a "peril" in the sense of a component element of a state of necessity. The word "peril" certainly evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, "grave" and "imminent" "peril" existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gab-

čikovo power plant would "mainly operate in peak-load time and continuously during high water", the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court's appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a "grave peril" for the environment in the area, one would be bound to conclude that the peril was not "imminent" at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčíkovo sector. It will recall that Hungary's concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szigetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it appre-

hended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the *ad hoc* Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

> "The measuring results of an at least five-year monitoring period following the completion of the Gabčíkovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included."

The report concludes as follows:

> "It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.
>
> The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use."

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989.

The Court moreover considers that Hungary could, in this context

also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, "the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim *summum jus summa injuria*" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly,

for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impair[ed] an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudge the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(a)*, of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

* * *

60. By the terms of Article 2, paragraph 1 *(b)*, of the Special Agreement, the Court is asked in the second place to decide

> "*(b)* whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution'

> and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)".

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunakiliti, Czechoslovakia informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was *inter alia* expressed as follows in Czechoslovakia's Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

> "Should the Republic of Hungary fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabčíkovo dam as agreed in the Joint Construction Plan."

As the Court has already indicated (see paragraph 23), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of those solutions implied an agreement between the parties, with the exception of one variant, subsequently known as "Variant C", which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalizing the planning of Variant C; it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991.

On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the

Gabčíkovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabčíkovo sector. Hungary, for its part, took the view that:

> "In the case of a total lack of understanding the so-called C variation or 'theoretical opportunity' suggested by the Czecho-Slovak party as a unilateral solution would be such a grave transgression of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years";

it further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:

> "Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.
>
> The preparatory works for diverting the water of the Danube near the Dunakiliti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations."

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

> "the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabčíkovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic".

On the same day, the Government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube.

By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against "any unilateral step that would be in contradiction with the interests of our [two] nations and international law" and indicated that they considered it "very important [to] receive information as early as possible on the

details of the provisional solution". For its part, Czechoslovakia, in a Note Verbale dated 27 August 1991, rejected the argument of Hungary that the continuation of the works under those circumstances constituted a violation of international law, and made the following proposal:

> "Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabčíkovo system of locks and a solution of the system of locks based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution."

64. The construction permit for Variant C was issued on 30 October 1991. In November 1991 construction of a dam started at Čunovo, where both banks of the Danube are on Czechoslovak (now Slovak) territory.

In the course of a new inter-governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Gabčíkovo-Nagymaros Project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from the European Communities. However whereas, for Hungary, the work of that Committee would have been meaningless if Czechoslovakia continued construction of Variant C, for Czechoslovakia, the suspension of the construction, even on a temporary basis, was unacceptable.

That meeting was followed by a large number of exchanges of letters between the parties and various meetings between their representatives at the end of 1991 and early in 1992. On 23 January 1992, Czechoslovakia expressed its readiness "to stop work on the provisional solution and continue the construction upon mutual agreement" if the tripartite committee of experts whose constitution it proposed, and the results of the test operation of the Gabčíkovo part, were to "confirm that negative ecological effects exceed its benefits". However, the positions of the parties were by then comprehensively defined, and would scarcely develop any further. Hungary considered, as it indicated in a Note Verbale of 14 February 1992, that Variant C was in contravention

> "of [the Treaty of 1977] . . . and the convention ratified in 1976 regarding the water management of boundary waters.
>
> . . . . . .
>
> with the principles of sovereignty, territorial integrity, with the inviolability of State borders, as well as with the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention";

and the suspension of the implementation of Variant C was, in its view, a prerequisite. As for Czechoslovakia, it took the view that recourse to Variant C had been rendered inevitable, both for economic and ecologi-

cal as well as navigational reasons, because of the unlawful suspension and abandonment by Hungary of the works for which provision was made in the 1977 Treaty. Any negotiation had, in its view, to be conducted within the framework of the Treaty and without the implementation of Variant C — described as "provisional" — being called into question.

65. On 5 August 1992, the Czechoslovak representative to the Danube Commission informed it that "work on the severance cutting through of the Danube's flow will begin on 15 October 1992 at the 1,851.759-kilometre line" and indicated the measures that would be taken at the time of the "severance". The Hungarian representative on the Commission protested on 17 August 1992, and called for additional explanations.

During the autumn of 1992, the implementation of Variant C was stepped up. The operations involved in damming the Danube at Čunovo had been scheduled by Czechoslovakia to take place during the second half of October 1992, at a time when the waters of the river are generally at their lowest level. On the initiative of the Commission of the European Communities, trilateral negotiations took place in Brussels on 21 and 22 October 1992, with a view to setting up a committee of experts and defining its terms of reference. On that date, the first phase of the operations leading to the damming of the Danube (the reinforcement of the riverbed and the narrowing of the principal channel) had been completed. The closure of the bed was begun on 23 October 1992 and the construction of the actual dam continued from 24 to 27 October 1992: a pontoon bridge was built over the Danube on Czechoslovak territory using river barges, large stones were thrown into the riverbed and reinforced with concrete, while 80 to 90 per cent of the waters of the Danube were directed into the canal designed to supply the Gabčíkovo power plant. The implementation of Variant C did not, however, come to an end with the diversion of the waters, as there still remained outstanding both reinforcement work on the dam and the building of certain auxiliary structures.

The Court has already referred in paragraph 24 to the meeting held in London on 28 October 1992 under the auspices of the European Communities, in the course of which the parties to the negotiations agreed, *inter alia*, to entrust a tripartite Working Group composed of independent experts (i.e., four experts designated by the European Commission, one designated by Hungary and another by Czechoslovakia) with the task of reviewing the situation created by the implementation of Variant C and making proposals as to urgent measures to adopt. After having worked for one week in Bratislava and one week in Budapest, the Working Group filed its report on 23 November 1992.

66. A summary description of the constituent elements of Variant C appears at paragraph 23 of the present Judgment. For the purposes of the question put to the Court, the official description that should be adopted is, according to Article 2, paragraph 1 *(b)*, of the Special Agreement, the one given in the aforementioned report of the Working Group

of independent experts, and it should be emphasized that, according to the Special Agreement, "Variant C" must be taken to include the consequences "on water and navigation course" of the dam closing off the bed of the Danube.

In the section headed "Variant C Structures and Status of Ongoing Work", one finds, in the report of the Working Group, the following passage:

> "In both countries the original structures for the Gabčíkovo scheme are completed except for the closure of the Danube river at Dunakiliti and the
>
> (1) Completion of the hydropower station (installation and testing of turbines) at Gabčíkovo.
>
> Variant C consists of a complex of structures, located in Czecho-Slovakia . . . The construction of these are planned for two phases. The structures include . . .:
>
> (2) By-pass weir controlling the flow into the river Danube.
> (3) Dam closing the Danubian river bed.
> (4) Floodplain weir (weir in the inundation).
> (5) Intake structure for the Mosoni Danube.
> (6) Intake structure in the power canal.
> (7) Earth barrages/dykes connecting structures.
> (8) Ship lock for smaller ships (15 m × 80 m).
> (9) Spillway weir.
> (10) Hydropower station.
>
> The construction of the structures 1-7 are included in Phase 1, while the remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995."

* *

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary's unlawful actions. It claimed

that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrongdoing State. It argued furthermore that "Mitigation of damages is also an aspect of the performance of obligations in good faith." For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunakiliti/Gabčíkovo and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia's conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia's obligations under other treaties, in particular the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia's arguments rested on an erroneous presentation of the facts and the law. Hungary denied, *inter alia*, having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that "no such rule" of "approximate application" of a treaty exists in international law; as to the argument derived from "mitigation of damage[s]", it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

* *

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčíkovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have

led to considerable financial losses, and that it could have given rise to serious problems for the environment.

73. Czechoslovakia repeatedly denounced Hungary's suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the Project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungary, and on many occasions called upon the latter to resume performance of its obligations under the Treaty.

When Hungary steadfastly refused to do so — although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia — and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabčíkovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia "was entitled to proceed, in November 1991" to Variant C, and "to put [it] into operation from October 1992".

75. With a view to justifying those actions, Slovakia invoked what it described as "the principle of approximate application", expressed by Judge Sir Hersch Lauterpacht in the following terms:

> "It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument — not to change it." (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried

out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 141, and *Yearbook of the International Law Commission*, 1993, Vol. II, Part 2, p. 57, para. 14).

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80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained."

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

*

82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that "Variant C could be presented as a justified countermeasure to Hungary's illegal acts".

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law.

83. In order to be justifiable, a countermeasure must meet certain conditions (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249. See also *Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, pp. 443 *et seq.*; also Articles 47 to 50 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 144-145.)

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary's suspension and abandon-

ment of works and that it was directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 *et seq.*), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

> "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23,* p. 27).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obliga-

tions under international law, and that the measure must therefore be reversible.

* *

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(b)*, of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

* * *

89. By the terms of Article 2, paragraph 1 *(c)*, of the Special Agreement, the Court is asked, thirdly, to determine "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as "a serious breach of international law" and stated that, unless work was suspended while further enquiries took place, "the Hungarian Government [would] have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty". In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations "on every level", it could not agree "to stop all work on the provisional solution".

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutu-

ally acceptable solution. Commission involvement would depend on each Government not taking "any steps . . . which would prejudice possible actions to be undertaken on the basis of the report's findings". The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee "without any preliminary conditions"; criticizing Hungary's approach, he refused to suspend work on the provisional solution, but added, "in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States".

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions "inappropriate".

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia's refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

* *

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had "remained inflexible" and continued with its implementation of Variant C, "a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty".

Slovakia, for its part, denied that a state of necessity existed on the

basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

> "*Article 61*
>
> *Supervening Impossibility of Performance*
>
> 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
>
> 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

Hungary declared that it could not be "obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage". It concluded that

> "By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform."

In Hungary's view, the "object indispensable for the execution of the treaty", whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, "a legal situation which was the raison d'être of the rights and obligations".

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical "disappearance or destruction" of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility "if the impossibility is the result of a breach by that party . . . of an obligation under the treaty".

95. As to "fundamental change of circumstances", Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

"Article 62

Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

Hungary identified a number of "substantive elements" present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of "socialist integration", for which the Treaty had originally been a "vehicle", but which subsequently disappeared; the "single and indivisible operational system", which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the "framework treaty" into an "immutable norm"; and, finally, the transformation of a treaty consistent with environmental protection into "a prescription for environmental disaster".

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

"*Article 60*

Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as "the best possible approximate application" of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungary argued, its termination was "forced by the other party's refusal to suspend work on Variant C".

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather "to the language of self-help or reprisals".

* *

98. The question, as formulated in Article 2, paragraph 1 *(c)*, of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment

and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

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101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

*

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968*, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it

would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

*

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that

> "Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances" (*I.C.J. Reports 1973*, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of

environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

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105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.

The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (in which case the Vienna Convention did not apply):

> "Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith." (*I.C.J. Reports 1980*, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days

after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

> "It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

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111. Finally, the Court will address Hungary's claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the

Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*I.C.J. Reports 1996*, p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

* *

115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(c)*, of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

* * *

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, "There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party" and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that

> "the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project",

Hungary sought to distinguish between, on the one hand, rights and obligations such as "continuing property rights" under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized "as the successor to the Government of the CSFR" with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-

by-case basis; and Hungary emphasized that no agreement was ever reached with regard to the 1977 Treaty.

119. Hungary claimed that there was no rule of succession which could operate in the present case to override the absence of consent.

Referring to Article 34 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, in which "a rule of automatic succession to all treaties is provided for", based on the principle of continuity, Hungary argued not only that it never signed or ratified the Convention, but that the "concept of automatic succession" contained in that Article was not and is not, and has never been accepted as, a statement of general international law.

Hungary further submitted that the 1977 Treaty did not create "obligations and rights . . . relating to the régime of a boundary" within the meaning of Article 11 of that Convention, and noted that the existing course of the boundary was unaffected by the Treaty. It also denied that the Treaty was a "localized" treaty, or that it created rights "considered as attaching to [the] territory" within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States. The 1977 Treaty was, Hungary insisted, simply a joint investment. Hungary's conclusion was that there is no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia.

120. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary's notification in May 1992, remains in force between itself, as successor State, and Hungary.

Slovakia acknowledged that there was no agreement on succession to the Treaty between itself and Hungary. It relied instead, in the first place, on the "general rule of continuity which applies in the case of dissolution"; it argued, secondly, that the Treaty is one "attaching to [the] territory" within the meaning of Article 12 of the 1978 Vienna Convention, and that it contains provisions relating to a boundary.

121. In support of its first argument Slovakia cited Article 34 of the 1978 Vienna Convention, which it claimed is a statement of customary international law, and which imposes the principle of automatic succession as the rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist. Slovakia maintained that State practice in cases of dissolution tends to support continuity as the rule to be followed with regard to bilateral treaties. Slovakia having succeeded to part of the territory of the former Czechoslovakia, this would be the rule applicable in the present case.

122. Slovakia's second argument rests on "the principle of *ipso jure* continuity of treaties of a territorial or localized character". This rule, Slovakia said, is embodied in Article 12 of the 1978 Convention, which in part provides as follows:

"*Article 12*
Other Territorial Regimes

. . . . . .

2. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory."

According to Slovakia, "[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law". The 1977 Treaty is said to fall within its scope because of its "specific characteristics . . . which place it in the category of treaties of a localized or territorial character". Slovakia also described the Treaty as one "which contains boundary provisions and lays down a specific territorial régime" which operates in the interest of all Danube riparian States, and as "a dispositive treaty, creating rights *in rem*, independently of the legal personality of its original signatories". Here, Slovakia relied on the recognition by the International Law Commission of the existence of a "special rule" whereby treaties "intended to establish an objective régime" must be considered as binding on a successor State (*Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, Vol. III, doc. A/CONF.80/16/Add.2, p. 34). Thus, in Slovakia's view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.

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123. The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Convention reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational régime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of other users of the Dan-

ube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified "treaties of a territorial character" as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (*Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, Vol. III, doc. A/CONF.80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties" (*ibid.*, p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force (*ibid.*, pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

124. It might be added that Slovakia also contended that, while still a constituent part of Czechoslovakia, it played a role in the development of the Project, as it did later, in the most critical phase of negotiations with Hungary about the fate of the Project. The evidence shows that the Slovak Government passed resolutions prior to the signing of the 1977 Treaty in preparation for its implementation; and again, after signature, expressing its support for the Treaty. It was the Slovak Prime Minister who attended the meeting held in Budapest on 22 April 1991 as the Plenipotentiary of the Federal Government to discuss questions arising out of the Project. It was his successor as Prime Minister who notified his Hun-

garian counterpart by letter on 30 July 1991 of the decision of the Government of the Slovak Republic, as well as of the Government of the Czech and Slovak Federal Republic, to proceed with the "provisional solution" (see paragraph 63 above); and who wrote again on 18 December 1991 to the Hungarian Minister without Portfolio, renewing an earlier suggestion that a joint commission be set up under the auspices of the European Communities to consider possible solutions. The Slovak Prime Minister also wrote to the Hungarian Prime Minister in May 1992 on the subject of the decision taken by the Hungarian Government to terminate the Treaty, informing him of resolutions passed by the Slovak Government in response.

It is not necessary, in the light of the conclusions reached in paragraph 123 above, for the Court to determine whether there are legal consequences to be drawn from the prominent part thus played by the Slovak Republic. Its role does, however, deserve mention.

* * *

125. The Court now turns to the other legal consequences arising from its Judgment.

As to this, Hungary argued that future relations between the Parties, as far as Variant C is concerned, are not governed by the 1977 Treaty. It claims that it is entitled, pursuant to the Convention of 1976 on the Regulation of Water Management Issues of Boundary Waters, to "50% of the natural flow of the Danube at the point at which it crosses the boundary below Čunovo" and considers that the Parties

> "are obliged to enter into negotiations in order to produce the result that the water conditions along the area from below Čunovo to below the confluence at Sap become jointly defined water conditions as required by Article 3 *(a)* of the 1976 Convention".

Hungary moreover indicated that any mutually accepted long-term discharge régime must be "capable of avoiding damage, including especially damage to biodiversity prohibited by the [1992 Rio Convention on Biological Diversity]". It added that "a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region" should be carried out.

126. Hungary also raised the question of financial accountability for the failure of the original project and stated that both Parties accept the fact that the other has "proprietary and financial interests in the residues of the original Project and that an accounting has to be carried out". Furthermore, it noted that:

> "Other elements of damage associated with Variant C on Hungarian territory also have to be brought into the accounting . . ., as well as electricity production since the diversion",

and that: "The overall situation is a complex one, and it may be most easily resolved by some form of lump sum settlement."

127. Hungary stated that Slovakia had incurred international responsibility and should make reparation for the damage caused to Hungary by the operation of Variant C. In that connection, it referred, in the context of reparation of the damage to the environment, to the rule of *restitutio in integrum*, and called for the re-establishment of "joint control by the two States over the installations maintained as they are now", and the "re-establishment of the flow of [the] waters to the level at which it stood prior to the unlawful diversion of the river". It also referred to reparation of the damage to the fauna, the flora, the soil, the sub-soil, the groundwater and the aquifer, the damages suffered by the Hungarian population on account of the increase in the uncertainties weighing on its future *(pretium doloris)*, and the damage arising from the unlawful use, in order to divert the Danube, of installations over which the two Parties exercised joint ownership.

Lastly, Hungary called for the "cessation of the continuous unlawful acts" and a "guarantee that the same actions will not be repeated", and asked the Court to order "the permanent suspension of the operation of Variant C".

128. Slovakia argued for its part that Hungary should put an end to its unlawful conduct and cease to impede the application of the 1977 Treaty, taking account of its "flexibility and of the important possibilities of development for which it provides, or even of such amendments as might be made to it by agreement between the Parties, further to future negotiations". It stated that joint operations could resume on a basis jointly agreed upon and emphasized the following:

> "whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future.
>
> . . . . . .
>
> Provided the bypass canal and the Gabčíkovo Power-station and Locks — both part of the original Treaty, and not part of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunakiliti and Čunovo, bearing Nagymaros in mind."

It indicated that the Gabčíkovo power plant would not operate in peak mode "if the evidence of environmental damage [was] clear and accepted by both Parties". Slovakia noted that the Parties appeared to agree that an accounting should be undertaken "so that, guided by the Court's findings on responsibility, the Parties can try to reach a global settlement". It

added that the Parties would have to agree on how the sums due are to be paid.

129. Slovakia stated that Hungary must make reparation for the deleterious consequences of its failures to comply with its obligations, "whether they relate to its unlawful suspensions and abandonments of works or to its formal repudiation of the Treaty as from May 1992", and that compensation should take the form of a *restitutio in integrum*. It indicated that "Unless the Parties come to some other arrangement by concluding an agreement, *restitutio in integrum* ought to take the form of a *return* by Hungary, *at a future time*, to its obligations under the Treaty" and that "For compensation to be 'full' . . ., to 'wipe out all the consequences of the illegal act' . . ., a payment of compensation must . . . *be added* to the *restitutio* . . ." Slovakia claims compensation which must include both interest and loss of profits and should cover the following heads of damage, which it offers by way of guidance:

(1) Losses caused to Slovakia in the Gabčíkovo sector: costs incurred from 1990 to 1992 by Czechoslovakia in protecting the structures of the G/N project and adjacent areas; the cost of maintaining the old bed of the River Danube pending the availability of the new navigation canal, from 1990 to 1992; losses to the Czechoslovak navigation authorities due to the unavailability of the bypass canal from 1990 to 1992; construction costs of Variant C (1990-1992).

(2) Losses caused to Slovakia in the Nagymaros sector: losses in the field of navigation and flood protection incurred since 1992 by Slovakia due to the failure of Hungary to proceed with the works.

(3) Loss of electricity production.

Slovakia also calls for Hungary to "give the appropriate guarantees that it will abstain from preventing the application of the Treaty and the continuous operation of the system". It argued from that standpoint that it is entitled "to be given a formal assurance that the internationally wrongful acts of Hungary will not recur", and it added that "the maintenance of the closure of the Danube at Čunovo constitutes a guarantee of that kind", unless Hungary gives an equivalent guarantee "within the framework of the negotiations that are to take place between the Parties".

*

130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the *past* conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty.

131. Now the Court has, on the basis of the foregoing findings, to

determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

* *

132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.

133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.

This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčíkovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Čunovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of

energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.

136. It could be said that that part of the obligations of performance which related to the construction of the System of Locks — in so far as they were not yet implemented before 1992 — have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Čunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabčíkovo and Nagymaros was prescribed by the Treaty itself. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak hour mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of

Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the *North Sea Continental Shelf* cases:

> "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (*I.C.J. Reports 1969*, p. 47, para. 85).

142. What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and

must be performed by them in good faith." This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.

Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that contracting party in the jointly prescribed manner.

The Court is of the opinion that the works at Čunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Čunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a *de facto* status into a treaty-based régime.

It appears from various parts of the record that, given the current state

of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

> "Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention." (General Assembly doc. A/51/869 of 11 April 1997.)

* *

148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

150. Reparation must, "as far as possible", wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out "as far as possible" if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What it is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Čunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.

151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Čunovo complex, it must pay a proportionate share of the building and running costs.

* * *

155. For these reasons,

THE COURT,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. By fourteen votes to one,

Finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judge* Herczegh;

B. By nine votes to six,

Finds that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. By ten votes to five,

Finds that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution";

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

AGAINST: *Judges* Oda, Koroma, Vereshchetin, Parra-Aranguren; *Judge* ad hoc Skubiszewski;

D. By eleven votes to four,

Finds that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Herczegh, Fleischhauer, Rezek;

(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. By twelve votes to three,

Finds that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer, Rezek;

B. By thirteen votes to two,

Finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

C. By thirteen votes to two,

Finds that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

D. By twelve votes to three,

Finds that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Oda, Koroma, Vereshchetin;

E. By thirteen votes to two,

Finds that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and 2 C of the present operative paragraph.

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of September, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Hungary and the Government of the Slovak Republic, respectively.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judge REZEK append declarations to the Judgment of the Court.

Vice-President WEERAMANTRY and Judges BEDJAOUI and KOROMA append separate opinions to the Judgment of the Court.

Judges ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, VERESHCHETIN and PARRA-ARANGUREN and Judge *ad hoc* SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

(Initialled) S.M.S.
(Initialled) E.V.O.

Separate Opinion of Judge Koroma

SEPARATE OPINION OF JUDGE KOROMA

I have voted in favour of most of the operative part of the Judgment, principally because I concur with the Court's finding, in response to the questions submitted to it in the Special Agreement, that Hungary was not entitled to suspend and subsequently to abandon in 1989 the works on the Nagymaros Project and on the part of the Gabčíkovo Project on the Danube river for which it was responsible under the 1977 Treaty, that the Treaty continues to be in force and consequently governs the relationship between the Parties.

In making such a finding the Court not only reached the right decision in my view, but reached a decision which is in accordance with the 1977 Treaty, and is consistent with the jurisprudence of the Court as well as the general principles of international law. Foremost among these principles is that of *pacta sunt servanda* which forms an integral part of international law. Any finding to the contrary would have been tantamount to denying respect for obligations arising from treaties, and would also have undermined one of the fundamental principles and objectives of the United Nations Charter calling upon States "to establish conditions under which justice and respect for the obligations arising from treaties . . . can be maintained", and "to achieve international co-operation in solving problems of an economic, social . . . character".

When Czechoslovakia (later Slovakia) and Hungary agreed by means of the 1977 Treaty to construct the Gabčíkovo-Nagymaros barrage system of locks on the Bratislava-Budapest sector of the river for the development and broad utilization of its water resources, particularly for the production of energy, and for purposes connected with transport, agriculture and other sectors of the national economy, this could be seen as a practical realization of such objectives, since the Danube has always played a vital part in the commercial and economic life of its riparian States, underlined and reinforced by their interdependence.

Prior to the adoption of the Treaty and the commencement of the Project itself, both Czechoslovakia and Hungary had recognized that whatever measures were taken to modify the flow of the river, such as those contemplated by the Project, they would have environmental effects, some adverse. Experience had shown that activities carried on upstream tended to produce effects downstream, thus making international co-operation all the more essential. With a view to preventing, avoiding and mitigating such impacts, extensive studies on the environment were undertaken by the Parties prior to the conclusion of the Treaty. The Treaty itself, in its Articles 15, 19 and 20, imposed strict obligations regarding

the protection of the environment which were to be met and complied with by the contracting parties in the construction and operation of the Project.

When in 1989 Hungary, concerned about the effects of the Project on its natural environment, suspended and later abandoned works for which it was responsible under the 1977 Treaty this was tantamount to a violation not only of the Treaty itself but of the principle of *pacta sunt servanda*.

Hungary invoked the principle of necessity as a legal justification for its termination of the Treaty. It stated, *inter alia*, that the construction of the Project would have significantly changed that historic part of the Danube with which the Project was concerned; that as a result of operation in peak mode and the resulting changes in water level, the flora and fauna on the banks of the river would have been damaged and water quality impaired. It was also Hungary's contention that the completion of the Project would have had a number of other adverse effects, in that the living conditions for the biota of the banks would have been drastically changed by peak-mode operation, the soil structure ruined and its yield diminished. It further stated that the construction might have resulted in the waterlogging of several thousand hectares of soil and that the groundwater in the area might have become over-salinized. As far as the drinking water of Budapest was concerned, Hungary contended that the Project would have necessitated further dredging; this would have damaged the existing filter layer allowing pollutants to enter nearby water supplies.

On the other hand, the PHARE Report on the construction of the reservoir at Čunovo and the effect this would have on the water quality offered a different view. The Report was commissioned by the European Communities with the co-operation of, first, the Government of the Czech and Slovak Federal Republic and, later, the Slovak Republic. It was described as presenting a reliable integrated modelling system for analysing the environmental impact of alternative management régimes in the Danubian lowland area and for predicting changes in water quality as well as conditions in the river, the reservoir, the soil and agriculture.

As to the effects of the construction of the dam on the ecology of the area, the Report reached the conclusion that whether the post-dam scenarios represented an improvement or otherwise would depend on the ecological objectives in the area, as most fundamental changes in ecosystems depended on the discharge system and occurred slowly over many years or decades, and, no matter what effects might have been felt in the ecosystem thus far, they could not be considered as irreversible.

With regard to water quality, the Report stated that groundwater quality in many places changed slowly over a number of years. With this in mind, comprehensive modelling, some of which entailed modelling impacts for periods of up to 100 years, was undertaken and the conclu-

sion reached that no problems were predicted in relation to groundwater quality.

The Court in its Judgment, quite rightly in my view, acknowledges Hungary's genuine concerns about the effect of the Project on its natural environment. However, after careful consideration of the conflicting evidence, it reached the conclusion that it was not necessary to determine which of these points of view was scientifically better founded in order to answer the question put to it in the Special Agreement. Hungary had not established to the satisfaction of the Court that the construction of the Project would have led to the consequences it alleged. Further, even though such damages might occur, they did not appear imminent in terms of the law, and could otherwise have been prevented or redressed. The Court, moreover, stated that such uncertainties as might have existed and had raised environmental concerns in Hungary could otherwise have been addressed without having to resort to unilateral suspension and termination of the Treaty. In effect, the evidence was not of such a nature as to entitle Hungary to unilaterally suspend and later terminate the Treaty on grounds of ecological necessity. In the Court's view, to allow that would not only destabilize the security of treaty relations but would also severely undermine the principle of *pacta sunt servanda.*

Thus it is not as if the Court did not take into consideration the scientific evidence presented by Hungary in particular regarding the effects on its environment of the Project, but the Court reached the conclusion that such evidence was not sufficient to allow Hungary unilaterally to suspend or terminate the Treaty. This finding, in my view, is not only of significance to Slovakia and Hungary — the Parties to the dispute — but it also represents a significant statement by the Court rejecting the argument that obligations assumed under a validly concluded treaty can no longer be observed because they have proved inconvenient or as a result of the emergence of a new wave of legal norms, irrespective of their legal character or quality. Accordingly, not for the first time and in spite of numerous breaches over the years, the Court has in this case upheld and reaffirmed the principle that every treaty in force is binding upon the parties and must be performed in good faith (Article 26 of the Vienna Convention on the Law of Treaties).

Nor can this finding of the Court be regarded as a mechanical application of the principle of *pacta sunt servanda* or the invocation of the maxim *summun jus summa injuria* but it ought rather to be seen as a reaffirmation of the principle that a validly concluded treaty can be suspended or terminated only with the consent of all the parties concerned. Moreover, the Parties to this dispute can also draw comfort from the Court's finding in upholding the continued validity of the Treaty and enjoining them to fulfil their obligations under the Treaty so as to achieve its aims and objectives.

I also concur with the Court's findings that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine its final decision. On the other hand, I cannot concur with the Court's finding that Czechoslovakia was not entitled to put Variant C into operation from October 1992. The Court reached this latter conclusion after holding that Hungary's suspension and abandonment of the works for which it was responsible under the 1977 Treaty was unlawful, and after acknowledging the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to abandon the greater part of the construction of the System of Locks for which it was responsible under the Treaty. The Court likewise recognized that huge investments had been made, that the construction at Gabčíkovo was all but finished, the bypass canal completed, and that Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect by completing work on the tailrace canal. The Court also recognized that not using the system would not only have led to considerable financial losses of some $2.5 billion but would have resulted in serious consequences for the natural environment.

It is against this background that the Court also reaffirmed the principle of international law that, subject to the appropriate limitations, a State party to a treaty, when confronted with a refusal by the other party to perform its part of an agreed project, is free to act on its own territory and within its own jurisdiction so as to realize the original object and purpose of the treaty, thereby limiting for itself the damage sustained and, ultimately, the compensatory damages to be paid by the other party.

As the Judgment recalled, Article 1 of the 1977 Treaty stipulated that the Gabčíkovo-Nagymaros Project was to comprise a "joint investment" and to constitute a "single and operational system of locks", consisting of two sections, Gabčíkovo and Nagymaros. According to Article 5, paragraph 5, of the Treaty, each of the contracting parties had specific responsibilities regarding the construction and operation of the System of Locks. Czechoslovakia was to be responsible for, *inter alia*:

"(1) the Dunakiliti-Hrušov head-water installations on the left bank, in Czechoslovak territory;
(2) the head-water canal of the by-pass canal, in Czechoslovak territory;
(3) the Gabčíkovo series of locks, in Czechoslovak territory;
(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;
(5) restoration of vegetation in Czechoslovak territory."

Hungary was to be responsible for, *inter alia*:

"(1) the Dunakiliti-Hrušov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;
(2) the Dunakiliti-Hrušov head-water installations on the right bank, in Hungarian territory;
(3) the Dunakiliti dam, in Hungarian territory;
(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;
(5) deepening of the bed of the Danube below Palkovičovo, in Hungarian and Czechoslovak territory;
(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;
(7) operational equipment of the Gabčíkovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;
(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;
(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;
(10) the Nagymaros series of locks, in Hungarian territory;
(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;
(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;
(13) restoration of vegetation in Hungarian territory."

In accordance with the Treaty and the concept of joint investment, some of those structures, such as the Dunakiliti weir, the bypass canal, the Gabčíkovo dam and the Nagymaros dam were to become joint property, irrespective of the territory on which they were located.

As noted in the Judgment, by the spring of 1989 the work on Gabčíkovo was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabčíkovo dam was 85 per cent complete, the bypass canal was between 60 per cent complete (downstream of Gabčíkovo) and 95 per cent complete (upstream of Gabčíkovo), and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 per cent complete. This was not the case in the Nagymaros sector where, although the dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

When Hungary, on 13 May 1989, decided to suspend works on the Nagymaros part of the Project because of alleged ecological hazards and later extended this to the Gabčíkovo section, thereby preventing the scheduled damming of the Danube in 1989, this had a considerable,

negative impact on the Project — which was envisaged as an integrated project and depended on the actual construction of the planned installations at Nagymaros and Gabčíkovo. Hungary's contribution was therefore considered indispensable, as some of the key structures were under its control and situated on its territory.

Following prolonged and fruitless negotiations with Hungary regarding the performance of their obligations under the Treaty, Czechoslovakia proceeded, in November 1991, to what came to be known as the "provisional solution", or Variant C. This was put into operation from October 1992 with the damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory with resulting consequences on water and the navigation channel. It entailed the diversion of the Danube some 10 kilometres upstream of Dunakiliti on Czechoslovak territory. In its final stage it included the construction at Čunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was designed to have a smaller surface area and provided approximately 30 per cent less than the storage initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, *inter alia*, flood water to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old course of the Danube). The supply of the water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures on the bypass canal at Dobrohošt and Gabčíkovo. Not all problems were solved: a solution was to be found for the Hungarian bank, and the question of lowering the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained.

In justification of the action, Slovakia contended that this solution was as close to the original project as possible and that Czechoslovakia's decision to proceed with it was justified by Hungary's decision to suspend and subsequently abandon the construction works at Dunakiliti, which had made it impossible for Czechoslovakia to attain the object and purpose contemplated by the 1977 Treaty. Slovakia further explained that Variant C represented the only possibility remaining to it of fulfilling the purposes of the 1977 Treaty, including the continuing obligation to implement the Treaty in good faith. It further submitted that Variant C for the greater part was no more than what had already been agreed to by Hungary, and that only those modifications were made which had become necessary by virtue of Hungary's decision not to implement its obligations under the Treaty.

In spite of what appeared to me not only a cogent and reasonable explanation for its action but also an eminently legal justification for

Variant C, the Court found that, though there was a strong factual similarity between Variant C and the original Project in its upstream component (the Gabčíkovo System of Locks), the difference from a legal point of view was striking. It observed that the basic characteristics of the 1977 Treaty provided for a "joint investment", "joint ownership" of the most important construction of the Gabčíkovo-Nagymaros Project and for the operation of this "joint property" as a "co-ordinated single unit". The Court reasoned that all this could not be carried out by unilateral action such as that involving Variant C and that, despite its physical similarity with the original Project, it differed sharply in its legal characteristics. The Court also found that, in operating Variant C, Slovakia essentially appropriated for its own use and benefit between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river downstream of Gabčíkovo. This act, in the Court's view, deprived Hungary of its right to an equitable share of the natural resources of the river, this being not only a shared international watercourse but an international boundary river.

In the light of these findings, the Court concluded that Czechoslovakia, by putting into operation Variant C, did not apply the Treaty, but, on the contrary, violated certain of its express provisions and in so doing committed an internationally wrongful act. In its reasoning, the Court stated that it had placed emphasis on the "putting into operation" of Variant C, the unlawfulness residing in the damming of the Danube.

This finding by the Court calls for comment. In the first place, it is to be recalled that the Court found that Hungary's suspension and unilateral termination of the Treaty was unlawful. Secondly, the Court held that a State party confronted, as Czechoslovakia was, with a refusal by the other party to perform its part of an agreed project is entitled to act on its own territory and within its own jurisdiction so as to realize the object and purpose of the treaty. This notwithstanding, the Court took exception to the fact that Variant C did not meet the requirements of Articles 1, 8, 9 and 10 of the 1977 Treaty regarding a "single and operational system of locks", "joint ownership" and "use and benefits of the system of locks in equal measure". In its view, "by definition all this could not be carried out by unilateral measure". This stricture of Variant C is not, in my respectful opinion, warranted. The unilateral suspension and termination of the Treaty and the works for which Hungary was responsible under it had amounted not only to a repudiation of the Treaty; it frustrated the realization of the Project as a *single* and operational system of works, *jointly* owned and used for the benefit of the contracting parties in equal measure. As a result of Hungary's acts, the objective of the original Project could only have been achieved by Slovakia alone operating it; according to the material before the Court, Variant C constituted the minimum modification of the original Project necessary to enable the aim and objective of the original Project to be

realized. It should be recalled that but for the suspension and abandonment of the works, there would have been no Variant C, and without Variant C, the objective of the act of Hungary which the Court has qualified as unlawful would have been realized thus defeating the object and purpose of the Treaty. In my view Variant C was therefore a genuine application of the Treaty and it was indispensable for the realization of its object and purpose. If it had not proceeded to its construction, according to the material before the Court, Czechoslovakia would have been stranded with a largely finished but inoperative system, which had been very expensive both in terms of cost of construction and in terms of acquiring the necessary land. The environmental benefits in terms of flood control, which was a primary object and purpose of the Treaty, would not have been attained. Additionally, the unfinished state of the constructions would have exposed them to further deterioration through continued inoperation.

Variant C was also held to be unlawful by the Court because, in its opinion, Czechoslovakia, by diverting the waters of the Danube to operate Variant C, unilaterally assumed control of a shared resource and thereby deprived Hungary of its right to an equitable share of the natural resources of the river — with the continuing effects of the diversion of these waters upon the ecology of the riparian area of the Szigetköz — and failed to respect the degree of proportionality required by international law.

The implication of the Court's finding that the principle of equitable utilization was violated by the diversion of the river is not free from doubt. That principle, which is now set out in the Convention on the Non-Navigational Uses of International Watercourses, is not new.

While it is acknowledged that the waters of rivers must not be used in such a way as to cause injury to other States and in the absence of any settled rules an equitable solution must be sought (case of the *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*), this rule applies where a treaty is absent. In the case under consideration Article 14, paragraph 2, of the 1977 Treaty provides that the contracting parties may, without giving prior notice, both withdraw from the Hungarian-Czechoslovak section of the Danube, and subsequently make use of the quantities of water specified in the water balance of the approved Joint Contractual Plan. Thus, the withdrawal of excess quantities of water from the Hungarian-Czechoslovak section of the Danube to operate the Gabčíkovo section of the system was contemplated with compensation to the other party in the form of an increased share of electric power. In other words, Hungary had agreed within the context of the Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube). Accordingly, it would appear that the normal entitlement of the Parties

to an equitable and reasonable share of the water of the Danube under general international law was duly modified by the 1977 Treaty which considered the Project as a *lex specialis*. Slovakia was thus entitled to divert enough water to operate Variant C, and more especially so if, without such diversion, Variant C could not have been put into productive use. It is difficult to appreciate the Court's finding that this action was unlawful in the absence of an explanation as to how Variant C should have been put into operation. On the contrary, the Court would appear to be saying by implication that, if Variant C had been operated on the basis of a 50-50 sharing of the waters of the Danube, it would have been lawful. However, the Court has not established that a 50-50 ratio of use would have been sufficient to operate Variant C optimally. Nor could the Court say that the obligations of the Parties under the Treaty had been infringed or that the achievement of the objectives of the Treaty had been defeated by the diversion. In the case concerning the *Diversion of Water from the Meuse*, the Court found that, in the absence of a provision requiring the consent of Belgium, "the Netherlands are entitled . . . to dispose of the waters of the Meuse at Maestricht" provided that the treaty obligations incumbent on it were not ignored (*Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 30). Applying this test in the circumstances which arose, Variant C can be said to have been permitted by the 1977 Treaty as a reasonable method of implementing it. Consequently Variant C did not violate the rights of Hungary and was consonant with the objectives of the Treaty régime.

Moreover the principle of equitable and reasonable utilization has to be applied with all the relevant factors and circumstances pertaining to the international watercourse in question as well as to the needs and uses of the watercourse States concerned. Whether the use of the waters of a watercourse by a watercourse State is reasonable or equitable and therefore lawful must be determined in the light of all the circumstances. To the extent that the 1977 Treaty was designed to provide for the operation of the Project, Variant C is to be regarded as a genuine attempt to achieve that objective.

One consequence of this finding by the Court is its prescription that unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the wrongful suspension and abandonment by Hungary of the works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia.

While this finding would appear to aim at encouraging the Parties to negotiate an agreement so as realize the aims and objectives of the Treaty, albeit in a modified form, it appears to suggest that the Court considered the wrongful conduct of the Parties to be equivalent. This somehow emasculates the fact that the operation of Variant C would not

have been necessary if the works had not been suspended and terminated in the first place. It was this original breach which triggered the whole chain of events. At least a distinction should have been drawn between the consequences of the "wrongful conduct" of each Party, hence my unwillingness to concur with the finding. While Article 38, paragraph 2, of its Statute allows the Court to decide a case *ex aequo et bono*, this can only be done with the agreement of the parties to a dispute.

The Judgment also alluded to "the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz". It is not clear whether by this the Court had reached the conclusion that significant harm had been caused to the ecology of the area by the operation of Variant C.

In the light of the foregoing considerations, I take the view that the operation of Variant C should have been considered as a genuine attempt by an injured party to secure the achievement of the agreed objectives of the 1977 Treaty, in ways not only consistent with that Treaty but with international law and equity.

In his separate opinion in the case concerning the *Diversion of Water from the Meuse*, Judge Hudson stated that

> "[W]hat are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals, . . ." (*Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 76).

He went on to point out that

> "It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are . . .: 'He who seeks equity must do equity.' It is in line with such maxims that 'a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper' (13 *Halsbury's Laws of England* (2nd ed., 1934), p. 87). A very similar principle was received into Roman Law. The obligations of a vendor and a vendee being concurrent, 'neither could compel the other to perform unless he had done, or tendered, his own part' (Buckland, *Text Book of Roman Law* (2nd ed., 1932), p. 493)." (*Ibid.*, p. 77.)

Judge Hudson took the view that:

> "The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be

> thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness." (*P.C.I.J., Series A/B, No. 70*, p. 77.)

Judge Hudson continued,

> "Yet, in a particular case in which it is asked to enforce the obligation to make reparation, a court of international law cannot ignore special circumstances which may call for the consideration of equitable principles." (*Ibid.*, p. 78.)

It is my view that this case, because of the circumstances surrounding it, is one which calls for the application of the principles of equity.

The importance of the River Danube for both Hungary and Slovakia cannot be overstated. Both countries, by means of the 1977 Treaty, had agreed to co-operate in the exploitation of its resources for their mutual benefit. That Treaty, in spite of the period in which it was concluded, would seem to have incorporated most of the environmental imperatives of today, including the precautionary principle, the principle of equitable and reasonable utilization and the no-harm rule. None of these principles was proved to have been violated to an extent sufficient to have warranted the unilateral termination of the Treaty. The Court has gone a long way, rightly in my view, in upholding the principle of the sanctity of treaties. Justice would have been enhanced had the Court taken account of special circumstances as mentioned above.

(*Signed*) Abdul G. KOROMA.

Separate Opinion of Judge Weeramantry

SEPARATE OPINION OF VICE-PRESIDENT WEERAMANTRY

Introduction

This case raises a rich array of environmentally related legal issues. A discussion of some of them is essential to explain my reasons for voting as I have in this very difficult decision. Three issues on which I wish to make some observations, supplementary to those of the Court, are the role played by the principle of sustainable development in balancing the competing demands of development and environmental protection; the protection given to Hungary by what I would describe as the principle of continuing environmental impact assessment; and the appropriateness of the use of *inter partes* legal principles, such as estoppel, for the resolution of problems with an *erga omnes* connotation such as environmental damage.

A. The Concept of Sustainable Development

Had the possibility of environmental harm been the only consideration to be taken into account in this regard, the contentions of Hungary could well have proved conclusive.

Yet there are other factors to be taken into account — not the least important of which is the developmental aspect, for the Gabčíkovo scheme is important to Slovakia from the point of view of development. The Court must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development.

The Court has referred to it as a concept in paragraph 140 of its Judgment. However, I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case. Without the benefits of its insights, the issues involved in this case would have been difficult to resolve.

Since sustainable development is a principle fundamental to the determination of the competing considerations in this case, and since, although it has attracted attention only recently in the literature of international law, it is likely to play a major role in determining important environmental disputes of the future, it calls for consideration in some detail. Moreover, this is the first occasion on which it has received attention in the jurisprudence of this Court.

When a major scheme, such as that under consideration in the present case, is planned and implemented, there is always the need to weigh considerations of development against environmental considerations, as their underlying juristic bases — the right to development and the right to environmental protection — are important principles of current international law.

In the present case we have, on the one hand, a scheme which, even in the attenuated form in which it now remains, is important to the welfare of Slovakia and its people, who have already strained their own resources and those of their predecessor State to the extent of over two billion dollars to achieve these benefits. Slovakia, in fact, argues that the environment would be improved through the operation of the Project as it would help to stop erosion of the river bed, and that the scheme would be an effective protection against floods. Further, Slovakia has traditionally been short of electricity, and the power generated would be important to its economic development. Moreover, if the Project is halted in its tracks, vast structural works constructed at great expense, even prior to the repudiation of the Treaty, would be idle and unproductive, and would pose an economic and environmental problem in themselves.

On the other hand, Hungary alleges that the Project produces, or is likely to produce, ecological damage of many varieties, including harm to river bank fauna and flora, damage to fish breeding, damage to surface water quality, eutrophication, damage to the groundwater régime, agriculture, forestry and soil, deterioration of the quality of drinking water reserves, and sedimentation. Hungary alleges that many of these dangers have already occurred and more will manifest themselves, if the scheme continues in operation. In the material placed before the Court, each of these dangers is examined and explained in considerable detail.

How does one handle these considerations? Does one abandon the Project altogether for fear that the latter consequences might emerge? Does one proceed with the scheme because of the national benefits it brings, regardless of the suggested environmental damage? Or does one steer a course between, with due regard to both considerations, but ensuring always a continuing vigilance in respect of environmental harm?

It is clear that a principle must be followed which pays due regard to both considerations. Is there such a principle, and does it command recognition in international law? I believe the answer to both questions is in the affirmative. The principle is the principle of sustainable development and, in my view, it is an integral part of modern international law. It is clearly of the utmost importance, both in this case and more generally.

I would observe, moreover, that both Parties in this case agree on the

applicability to this dispute of the principle of sustainable development. Thus, Hungary states in its pleadings that:

> "Hungary and Slovakia agree that the principle of sustainable development, as formulated in the Brundtland Report, the Rio Declaration and Agenda 21 is applicable to this dispute . . .
>
> International law in the field of sustainable development is now sufficiently well established, and both Parties appear to accept this." (Reply of Hungary, paras. 1.45 and 1.47.)

Slovakia states that "inherent in the concept of sustainable development is the principle that developmental needs are to be taken into account in interpreting and applying environmental obligations" (Counter-Memorial of Slovakia, para. 9.53; see also paras. 9.54-9.59).

Their disagreement seems to be not as to the existence of the principle but, rather, as to the way in which it is to be applied to the facts of this case (Reply of Hungary, para. 1.45).

The problem of steering a course between the needs of development and the necessity to protect the environment is a problem alike of the law of development and of the law of the environment. Both these vital and developing areas of law require, and indeed assume, the existence of a principle which harmonizes both needs.

To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result.

Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development.

This case offers a unique opportunity for the application of that principle, for it arises from a Treaty which had development as its objective, and has been brought to a standstill over arguments concerning environmental considerations.

The people of both Hungary and Slovakia are entitled to development for the furtherance of their happiness and welfare. They are likewise entitled to the preservation of their human right to the protection of their environment. Other cases raising environmental questions have been considered by this Court in the context of environmental pollution arising from such sources as nuclear explosions, which are far removed from development projects. The present case thus focuses attention, as no other case has done in the jurisprudence of this Court, on the question of the harmonization of developmental and environmental concepts.

(a) *Development as a Principle of International Law*

Article 1 of the Declaration on the Right to Development, 1986, asserted that "The right to development is an inalienable human right." This Declaration had the overwhelming support of the international community[1] and has been gathering strength since then[2]. Principle 3 of the Rio Declaration, 1992, reaffirmed the need for the right to development to be fulfilled.

"Development" means, of course, development not merely for the sake of development and the economic gain it produces, but for its value in increasing the sum total of human happiness and welfare[3]. That could perhaps be called the first principle of the law relating to development.

To the end of improving the sum total of human happiness and welfare, it is important and inevitable that development projects of various descriptions, both minor and major, will be launched from time to time in all parts of the world.

(b) *Environmental Protection as a Principle of International Law*

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is

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[1] 146 votes in favour, with one vote against.

[2] Many years prior to the Declaration of 1986, this right had received strong support in the field of human rights. As early as 1972, at the Third Session of the Institut international de droits de l'homme, Judge Kéba Mbaye, President of the Supreme Court of Senegal and later to be a Vice-President of this Court, argued strongly that such a right existed. He adduced detailed argument in support of his contention from economic, political and moral standpoints. (See K. Mbaye, "Le droit au développement comme un droit de l'homme", *Revue des droits de l'homme*, 1972, Vol. 5, p. 503.)

Nor was the principle without influential voices in its support from the developed world as well. Indeed, the genealogy of the idea can be traced much further back even to the conceptual stages of the Universal Declaration of Human Rights, 1948.

Mrs. Eleanor Roosevelt, who from 1946 to 1952 served as the Chief United States representative to Committee III, Humanitarian, Social and Cultural Affairs, and was the first Chairperson, from 1946 to 1951, of the United Nations Human Rights Commission, had observed in 1947, "We will have to bear in mind that we are writing a bill of rights for the world and that one of the most important rights is the opportunity for development." (M. Glen Johnson, "The Contribution of Eleanor and Franklin Roosevelt to the Development of the International Protection for Human Rights", *Human Rights Quarterly*, 1987, Vol. 9, p. 19, quoting Mrs. Roosevelt's column, "My Day", 6 February 1947.)

General Assembly resolution 642 (VII) of 1952, likewise, referred expressly to "integrated economic and social development".

[3] The Preamble to the Declaration on the Right to Development (1986) recites that development is a comprehensive, economic, social and cultural process which aims at the constant improvement and well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

While, therefore, all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.

(c) *Sustainable Development as a Principle of International Law*

After the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved.

It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development.

The concept of sustainable development can be traced back, beyond the Stockholm Conference of 1972, to such events as the Founex meeting of experts in Switzerland in June 1971[4]; the conference on environment and development in Canberra in 1971; and United Nations General Assembly resolution 2849 (XXVI). It received a powerful impetus from the Stockholm Declaration which, by Principle 11, stressed the essentiality of development as well as the essentiality of bearing environmental considerations in mind in the developmental process. Moreover, many other Principles of that Declaration[5] provided a setting for the development of the concept of sustainable development[6] and more than one-third of the Stockholm Declaration related to the harmonization of environment and development[7]. The Stockholm Conference also produced an Action Plan for the Human Environment[8].

[4] See *Sustainable Development and International Law*, Winfried Lang (ed.), 1995, p. 143.

[5] For example, Principles 2, 3, 4, 5, 8, 9, 12, 13 and 14.

[6] These principles are thought to be based to a large extent on the Founex Report — see *Sustainable Development and International Law*, Winfried Lang (ed.), *supra*, p. 144.

[7] *Ibid.*

[8] Action Plan for the Human Environment, United Nations doc. A/CONF.48/14/Rev.1. See especially Chapter II which devoted its final section to development and the environment.

The international community had thus been sensitized to this issue even as early as the early 1970s, and it is therefore no cause for surprise that the 1977 Treaty, in Articles 15 and 19, made special reference to environmental considerations. Both Parties to the Treaty recognized the need for the developmental process to be in harmony with the environment and introduced a dynamic element into the Treaty which enabled the Joint Project to be kept in harmony with developing principles of international law.

Since then, it has received considerable endorsement from all sections of the international community, and at all levels.

Whether in the field of multilateral treaties[9], international declarations[10]; the foundation documents of international organizations[11]; the practices of international financial institutions[12]; regional declarations and planning documents[13]; or State practice[14], there is a wide and general recognition of the concept. The Bergen ECE Ministerial Declaration on Sustainable Development of 15 May 1990, resulting from a meeting of

[9] For example, the United Nations Convention to Combat Desertification (The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Droughts and/or Desertification, Particularly in Africa), 1994, Preamble, Art. 9 (1); the United Nations Framework Convention on Climate Change, 1992 (*ILM*, 1992, Vol. XXXI, p. 849, Arts. 2 and 3); and the Convention on Biological Diversity (*ILM*, 1992, Vol. XXXI, p. 818, Preamble, Arts. 1 and 10 — "sustainable use of biodiversity").

[10] For example, the Rio Declaration on Environment and Development, 1992, emphasizes sustainable development in several of its Principles (e.g., Principles 4, 5, 7, 8, 9, 20, 21, 22, 24 and 27 refer expressly to "sustainable development" which can be described as the central concept of the entire document); and the Copenhagen Declaration, 1995 (paras. 6 and 8), following on the Copenhagen World Summit for Social Development, 1995.

[11] For example, the North American Free Trade Agreement (Canada, Mexico, United States) (NAFTA, Preamble, *ILM*, 1993, Vol. XXXII, p. 289); the World Trade Organization (WTO) (paragraph 1 of the Preamble of the Marrakesh Agreement of 15 April 1994, establishing the World Trade Organization, speaks of the "optimal use of the world's resources in accordance with the objective of sustainable development" — *ILM*, 1994, Vol. XXXIII, pp. 1143-1144); and the European Union (Art. 2 of the ECT).

[12] For example, the World Bank Group, the Asian Development Bank, the African Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development all subscribe to the principle of sustainable development. Indeed, since 1993, the World Bank has convened an annual conference related to advancing environmentally and socially sustainable development (ESSD).

[13] For example, the Langkawi Declaration on the Environment, 1989, adopted by the "Heads of Government of the Commonwealth representing a quarter of the world's population" which adopted "sustainable development" as its central theme; Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, Bangkok, 1990 (doc. 38a, p. 567); and Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region, 1983 (para. 10: "sustainable, environmentally sound development").

[14] For example, in 1990, the Dublin Declaration by the European Council on the Environmental Imperative stated that there must be an acceleration of effort to ensure that economic development in the Community is "sustainable and environmentally sound"

Ministers from 34 countries in the ECE region, and the Commissioner for the Environment of the European Community, addressed "The challenge of sustainable development of humanity" (para. 6), and prepared a Bergen Agenda for Action which included a consideration of the Economics of Sustainability, Sustainable Energy Use, Sustainable Industrial Activities, and Awareness Raising and Public Participation. It sought to develop "sound national indicators for sustainable development" (para. 13 *(b)*) and sought to encourage investors to apply environmental standards required in their home country to investments abroad. It also sought to encourage UNEP, UNIDO, UNDP, IBRD, ILO, and appropriate international organizations to support member countries in ensuring environmentally sound industrial investment, observing that industry and government should co-operate for this purpose (para. 15 *(f)*)[15]. A Resolution of the Council of Europe, 1990, propounded a European Conservation Strategy to meet, *inter alia*, the legitimate needs and aspirations of all Europeans by seeking to base economic, social and cultural development on a rational and sustainable use of natural resources, and to suggest how sustainable development can be achieved[16].

The concept of sustainable development is thus a principle accepted not merely by the developing countries, but one which rests on a basis of worldwide acceptance.

In 1987, the Brundtland Report brought the concept of sustainable development to the forefront of international attention. In 1992, the Rio Conference made it a central feature of its Declaration, and it has been a focus of attention in all questions relating to development in the developing countries.

(*Bulletin of the European Communities*, 6, 1990, Ann. II, p. 18). It urged the Community and Member States to play a major role to assist developing countries in their efforts to achieve "long-term sustainable development" (*ibid.*, p. 19). It said, in regard to countries of Central and Eastern Europe, that remedial measures must be taken "to ensure that their future economic development is sustainable" *(ibid.)*. It also expressly recited that:

> "As Heads of State or Government of the European Community, . . . [w]e intend that action by the Community and its Member States will be developed . . . on the principles of sustainable development and preventive and precautionary action." (*Ibid.*, Conclusions of the Presidency, Point 1.36, pp. 17-18.)

[15] *Basic Documents of International Environmental Law*, Harald Hohmann (ed.), Vol. 1, 1992, p. 558.

[16] *Ibid.*, p. 598.

The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.

The concept has a significant role to play in the resolution of environmentally related disputes. The components of the principle come from well-established areas of international law — human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighbourliness — to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements. It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be neglected.

The general support of the international community does not of course mean that each and every member of the community of nations has given its express and specific support to the principle — nor is this a requirement for the establishment of a principle of customary international law.

As Brierly observes:

> "It would hardly ever be practicable, and all but the strictest of positivists admit that it is not necessary, to show that every state has recognized a certain practice, just as in English law the existence of a valid local custom or custom of trade can be established without proof that every individual in the locality, or engaged in the trade, has practised the custom. This test of *general* recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international . . ."[17]

Evidence appearing in international instruments and State practice (as in development assistance and the practice of international financial institutions) likewise amply supports a contemporary general acceptance of the concept.

Recognition of the concept could thus, fairly, be said to be worldwide[18].

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[17] J. Brierly, *The Law of Nations*, 6th ed., 1963, p. 61; emphasis added.

[18] See, further, L. Krämer, *EC Treaty and Environmental Law*, 2nd ed., 1995, p. 63, analysing the environmental connotation in the word "sustainable" and tracing it to the Brundtland Report.

(d) *The Need for International Law to Draw upon the World's Diversity of Cultures in Harmonizing Development and Environmental Protection*

This case, which deals with a major hydraulic project, is an opportunity to tap the wisdom of the past and draw from it some principles which can strengthen the concept of sustainable development, for every development project clearly produces an effect upon the environment, and humanity has lived with this problem for generations.

This is a legitimate source for the enrichment of international law, which source is perhaps not used to the extent which its importance warrants.

In drawing into international law the benefits of the insights available from other cultures, and in looking to the past for inspiration, international environmental law would not be departing from the traditional methods of international law, but would, in fact, be following in the path charted out by Grotius. Rather than laying down a set of principles *a priori* for the new discipline of international law, he sought them also *a posteriori* from the experience of the past, searching through the whole range of cultures available to him for this purpose[19]. From them, he drew the durable principles which had weathered the ages, on which to build the new international order of the future. Environmental law is now in a formative stage, not unlike international law in its early stages. A wealth of past experience from a variety of cultures is available to it. It would be pity indeed if it were left untapped merely because of attitudes of formalism which see such approaches as not being entirely *de rigueur*.

I cite in this connection an observation of Sir Robert Jennings that, in taking note of different legal traditions and cultures, the International Court (as it did in the *Western Sahara* case):

> "was asserting, not negating, the Grotian subjection of the totality of international relations to international law. It seems to the writer, indeed, that at the present juncture in the development of the international legal system it may be more important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions . . ."[20]

Moreover, especially at the frontiers of the discipline of international

[19] Julius Stone, *Human Law and Human Justice*, 1965, p. 66: "It was for this reason that Grotius added to his theoretical deductions such a mass of concrete examples from history."

[20] Sir Robert Y. Jennings, "Universal International Law in a Multicultural World", in *International Law and the Grotian Heritage: A Commemorative Colloquium on the Occasion of the Fourth Centenary of the Birth of Hugo Grotius*, edited and published by the T.M.C. Asser Institute, The Hague, 1985, p. 195.

law, it needs to be multi-disciplinary, drawing from other disciplines such as history, sociology, anthropology, and psychology such wisdom as may be relevant for its purpose. On the need for the international law of the future to be interdisciplinary, I refer to another recent extra-judicial observation of that distinguished former President of the Court that:

> "there should be a much greater, and a practical, recognition by international lawyers that the rule of law in international affairs, and the establishment of international justice, are inter-disciplinary subjects"[21].

Especially where this Court is concerned, "the essence of true universality"[22] of the institution is captured in the language of Article 9 of the Statute of the International Court of Justice which requires the "representation of the *main forms of civilization* and of the principal legal systems of the world" (emphasis added). The struggle for the insertion of the italicized words in the Court's Statute was a hard one, led by the Japanese representative, Mr. Adatci[23], and, since this concept has thus been integrated into the structure and the Statute of the Court, I see the Court as being charged with a duty to draw upon the wisdom of the world's several civilizations, where such a course can enrich its insights into the matter before it. The Court cannot afford to be monocultural, especially where it is entering newly developing areas of law.

This case touches an area where many such insights can be drawn to the enrichment of the developing principles of environmental law and to a clarification of the principles the Court should apply.

It is in this spirit that I approach a principle which, for the first time in its jurisprudence, the Court is called upon to apply — a principle which will assist in the delicate task of balancing two considerations of enormous importance to the contemporary international scene and, potentially, of even greater importance to the future.

(e) *Some Wisdom from the Past Relating to Sustainable Development*

There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are specially pertinent to the concept of sustainable development which was well

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[21] "International Lawyers and the Progressive Development of International Law", *Theory of International Law at the Threshold of the 21st Century*, Jerzy Makarczyk (ed.), 1996, p. 423.

[22] Jennings, "Universal International Law in a Multicultural World", *op. cit.*, p. 189.

[23] On this subject of contention, see *Procès-Verbaux of the Proceedings of the Committee, 16 June-24 July 1920*, esp. p. 136.

recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia — in fact, the whole world. This is a rich source which modern environmental law has left largely untapped.

As the Court has observed, "Throughout the ages mankind has, for economic and other reasons, constantly interfered with nature." (Judgment, para. 140.)

The concept of reconciling the needs of development with the protection of the environment is thus not new. Millennia ago these concerns were noted and their twin demands well reconciled in a manner so meaningful as to carry a message to our age.

I shall start with a system with which I am specially familiar, which also happens to have specifically articulated these two needs — development and environmental protection — in its ancient literature. I refer to the ancient irrigation-based civilization of Sri Lanka[24]. It is a system which, while recognizing the need for development and vigorously implementing schemes to this end, at the same time specifically articulated the need for environmental protection and ensured that the technology it employed paid due regard to environmental considerations. This concern for the environment was reflected not only in its literature and its technology, but also in its legal system, for the felling of certain forests was prohibited, game sanctuaries were established, and royal edicts decreed that the natural resource of water was to be used to the last drop without any wastage.

This system, some details of which I shall touch on[25], is described by

[24] This was not an isolated civilization, but one which maintained international relations with China, on the one hand, and with Rome (1st c.) and Byzantium (4th c.), on the other. The presence of its ambassadors at the Court of Rome is recorded by Pliny (lib. vi c. 24), and is noted by Grotius — *De Jure Praedae Commentarius*, G. L. Williams and W. H. Zeydol (eds.), *Classics of International Law*, James B. Scott (ed.), 1950, pp. 240-241. This diplomatic representation also receives mention in world literature (e.g., Milton, *Paradise Regained*, Book IV). See also Grotius' reference to the detailed knowledge of Ceylon possessed by the Romans — Grotius, *Mare Liberum* (Freedom of the Seas), trans. R. van Deman Magoffin, p. 12. The island was known as Taprobane to the Greeks, Serendib to the Arabs, Lanka to the Indians, Ceilao to the Portuguese, and Zeylan to the Dutch. Its trade with the Roman Empire and the Far East was noted by Gibbon

[25] It is an aid to the recapitulation of the matters mentioned that the edicts and works I shall refer to have been the subject of written records, maintained contemporaneously and over the centuries. See footnote 38 below.

Arnold Toynbee in his panoramic survey of civilizations. Referring to it as an "amazing system of waterworks"[26], Toynbee describes[27] how hill streams were tapped and their water guided into giant storage tanks, some of them four thousand acres in extent[28], from which channels ran on to other larger tanks[29]. Below each great tank and each great channel were hundreds of little tanks, each the nucleus of a village.

The concern for the environment shown by this ancient irrigation system has attracted study in a recent survey of the Social and Environmental Effects of Large Dams[30], which observes that among the environmentally related aspects of its irrigation systems were the "erosion control tank" which dealt with the problem of silting by being so designed as to collect deposits of silt before they entered the main water storage tanks. Several erosion control tanks were associated with each village irrigation system. The significance of this can well be appreciated in the context of the present case, where the problem of silting has assumed so much importance.

Another such environmentally related measure consisted of the "forest tanks" which were built in the jungle above the village, not for the purpose of irrigating land, but to provide water to wild animals[31].

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[26] Arnold J. Toynbee, *A Study of History*, Somervell's Abridgment, 1960, Vol. 1, p. 257.

[27] *Ibid.*, p. 81, citing John Still, *The Jungle Tide*.

[28] Several of these are still in use, e.g., the *Tissawewa* (3rd c. BC); the *Nuwarawewa* (3rd c. BC); the *Minneriya tank* (275 AD); the *Kalawewa* (5th c. AD); and the *Parakrama Samudra* (Sea of Parakrama, 11th c. AD).

[29] The technical sophistication of this irrigation system has been noted also in Joseph Needham's monumental work on *Science and Civilization in China*. Needham, in describing the ancient irrigation works of China, makes numerous references to the contemporary irrigation works of Ceylon, which he discusses at some length. See especially, Vol. 4, *Physics and Physical Technology*, 1971, pp. 368 *et seq.* Also p. 215: "We shall see how skilled the ancient Ceylonese were in this art."

[30] Edward Goldsmith and Nicholas Hildyard, *The Social and Environmental Effects of Large Dams*, 1985, pp. 291-304.

[31] For these details, see Goldsmith and Hildyard, *ibid.*, pp. 291 and 296. The same authors observe:

> "Sri Lanka is covered with a network of thousands of man-made lakes and ponds, known locally as *tanks* (after *tanque*, the Portuguese word for reservoir). Some are truly massive, many are thousands of years old, and almost all show a high degree of sophistication in their construction and design. Sir James Emerson Tennent, the nineteenth century historian, marvelled in particular at the numerous channels that were dug underneath the bed of each lake in order to ensure that the flow of water was 'constant and equal as long as any water remained in the tank'."

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dozen, between 25,000 and 30,000 minor reservoirs were fed from these reservoirs through an intricate network of canals[34].

The philosophy underlying this gigantic system[35], which for upwards of two thousand years served the needs of man and nature alike, was articulated in a famous principle laid down by an outstanding monarch[36] that "not even a little water that comes from the rain is to flow into the ocean without being made useful to man"[37]. According to the ancient chronicles[38], these works were undertaken "for the benefit of the country", and "out of compassion for all living creatures"[39]. This complex of irrigation works was aimed at making the entire country a granary. They embodied the concept of development *par excellence*.

Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century BC. The ancient chronicles record that when the King (Devanampiya Tissa, 247-207 BC) was on a hunting trip (around 223 BC), the Arahat[40] Mahinda, son of the Emperor Asoka of India, preached to him

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[34] On the irrigation systems, generally, see H. Parker, *Ancient Ceylon, op. cit.*; R. L. Brohier, *Ancient Irrigation Works in Ceylon*, 1934; Edward Goldsmith and Nicholas Hildyard, *op. cit.*, pp. 291-304. Needham, describing the ancient canal system of China, observes that "it was comparable only with the irrigation contour canals of Ceylon, not with any work in Europe" (*op. cit.*, Vol. 4, p. 359).

[35] "so vast were the dimensions of some of these gigantic tanks that many still in existence cover an area from fifteen to twenty miles in circumference" (Tennent, *op. cit.*, Vol. I, p. 364).

[36] King Parakrama Bahu (1153-1186 AD). This monarch constructed or restored 163 major tanks, 2,376 minor tanks, 3,910 canals, and 165 dams. His masterpiece was the Sea of Parakrama, referred to in footnote 33. All of this was conceived within the environmental philosophy of avoiding any wastage of natural resources.

[37] See Toynbee's reference to this:

> "The idea underlying the system was very great. It was intended by the tank-building kings that none of the rain which fell in such abundance in the mountains should reach the sea without paying tribute to man on the way." (*Op. cit.*, p. 81.)

[38] *The Mahavamsa*, Turnour's translation, Chap. XXXVII, p. 242. The *Mahavamsa* was the ancient historical chronicle of Sri Lanka, maintained contemporaneously by Buddhist monks, and an important source of dating for South Asian history. Commencing at the close of the 4th century AD, and incorporating earlier chronicles and oral traditions dating back a further eight centuries, this constitutes a continuous record for over 15 centuries — see *The Mahavamsa or The Great Chronicle of Ceylon*, translated into English by Wilhelm Geiger, 1912, Introduction, pp. ix-xii. The King's statement, earlier referred to, is recorded in the *Mahavamsa* as follows:

> "In the realm that is subject to me are . . . but few fields which are dependent on rivers with permanent flow . . . Also by many mountains, thick jungles and by widespread swamps my kingdom is much straitened. Truly, in such a country not even a little water that comes from the rain must flow into the ocean without being made useful to man." (*Ibid.*, Chap. LXVIII, verses 8-12.)

[39] See also, on this matter, Emerson Tennent, *op. cit.*, Vol. I, p. 311.

[40] A person who has attained a very high state of enlightenment. For its more technical meaning, see Walpola Rahula, *History of Buddhism in Ceylon*, 1956, pp. 217-221.

a sermon on Buddhism which converted the king. Here are excerpts from that sermon:

> "O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it."[41]

This sermon, which indeed contained the first principle of modern environmental law — the principle of trusteeship of earth resources — caused the king to start sanctuaries for wild animals — a concept which continued to be respected for over twenty centuries. The traditional legal system's protection of fauna and flora, based on this Buddhist teaching, extended well into the eighteenth century[42].

The sermon also pointed out that even birds and beasts have a right to freedom from fear[43].

The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. It translated well into environmental attitudes. *"Alienum"* in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach.

This marked concern with environmental needs was reflected also in royal edicts, dating back to the third century BC, which ordained that certain primeval forests should on no account be felled. This was because adequate forest cover in the highlands was known to be crucial to the irrigation system as the mountain jungles intercepted and stored the monsoon rains[44]. They attracted the rain which fed the river and irrigation systems of the country, and were therefore considered vital.

Environmental considerations were reflected also in the actual work of construction and engineering. The ancient engineers devised an answer to the problem of silting (which has assumed much importance in the present case), and they invented a device (the *bisokotuwa* or valve pit), the counterpart of the sluice, for dealing with this environmental prob-

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[41] This sermon is recorded in *The Mahavamsa*, Chap. XIV.

[42] See K. N. Jayatilleke, "The Principles of International Law in Buddhist Doctrine", *Recueil des cours de l'Académie de droit international*, Vol. 120, 1967, p. 558.

[43] For this idea in the scriptures of Buddhism, see *Digha Nikaya*, III, Pali Text Society, p. 850.

[44] Goldsmith and Hildyard, *op. cit.*, p. 299. See, also, R. L. Brohier, "The Interrelation of Groups of Ancient Reservoirs and Channels in Ceylon", *Journal of the Royal Asiatic Society (Ceylon)*, 1937, Vol. 34, No. 90, p. 65. Brohier's study is one of the foremost authorities on the subject.

lem[45], by controlling the pressure and the quantity of the outflow of water when it was released from the reservoir[46]. Weirs were also built, as in the case of the construction involved in this case, for raising the levels of river water and regulating its flow[47].

This juxtaposition in this ancient heritage of the concepts of development and environmental protection invites comment immediately from those familiar with it. Anyone interested in the human future would perceive the connection between the two concepts and the manner of their reconciliation.

Not merely from the legal perspective does this become apparent, but even from the approaches of other disciplines.

Thus Arthur C. Clarke, the noted futurist, with that vision which has enabled him to bring high science to the service of humanity, put his finger on the precise legal problem we are considering when he observed: "the small Indian Ocean island . . . provides textbook examples of many modern dilemmas: *development* versus *environment*"[48], and proceeds immediately to recapitulate the famous sermon, already referred to, relating to the trusteeship of land, observing, "For as King Devanampiya Tissa was told three centuries before the birth of Christ, we are its guardians — *not* its owners."[49]

The task of the law is to convert such wisdom into practical terms —

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[45] H. Parker, *Ancient Ceylon, op. cit.*, p. 379:

> "Since about the middle of the last century, open wells, called 'valve towers' when they stand clear of the embankment or 'valve pits' when they are in it, have been built in numerous reservoirs in Europe. Their duty is to hold the valves, and the lifting-gear for working them, by means of which the outward flow of water is regulated or totally stopped. Such also was the function of the *bisokotuwa* of the Sinhalese engineers; they were the first inventors of the valve-pit more than 2,100 years ago."

[46] H. Parker, *op. cit.* Needham observes:

> "Already in the first century AD they [the Sinhalese engineers] understood the principle of the oblique weir . . . But perhaps the most striking invention was the intake-towers or valve towers *(Bisokotuwa)* which were fitted in the reservoirs perhaps from the 2nd Century BC onwards, certainly from the 2nd Century AD . . . In this way silt and scum-free water could be obtained and at the same time the pressure-head was so reduced as to make the outflow controllable." (Joseph Needham, *Science and Civilization in China, op. cit.*, Vol. 4, p. 372.)

[47] K. M. de Silva, *A History of Sri Lanka*, 1981, p. 30.

[48] Arthur C. Clarke, "Sri Lanka's Wildlife Heritage", *National Geographic*, August 1983, No. 2, p. 254; emphasis added.

[49] Arthur C. Clarke has also written:

> "Of all Ceylon's architectural wonders, however, the most remarkable — and certainly the most useful — is the enormous irrigation system which, for over two thousand years, has brought prosperity to the rice farmers in regions where it may not rain for six months at a time. Frequently ruined, abandoned and rebuilt, this legacy of the ancient engineers is one of the island's most precious possessions. Some of its artificial lakes are ten or twenty kilometres in circumference, and abound with birds and wildlife." (*The View from Serendip*, 1977, p. 121.)

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[48] Arthur C. Clarke, "Sri Lanka's Wildlife Heritage", *National Geographic*, August 1983, No. 2, p. 254; emphasis added.

[49] Arthur C. Clarke has also written:

> "Of all Ceylon's architectural wonders, however, the most remarkable — and certainly the most useful — is the enormous irrigation system which, for over two thousand years, has brought prosperity to the rice farmers in regions where it may not rain for six months at a time. Frequently ruined, abandoned and rebuilt, this legacy of the ancient engineers is one of the island's most precious possessions. Some of its artificial lakes are ten or twenty kilometres in circumference, and abound with birds and wildlife." (*The View from Serendip*, 1977, p. 121.)

not enter the irrigation area unless it was strictly required, and was not allowed to pass through the plots in the rainy season. There was thus no over-irrigation, salinity was reduced, and water-borne diseases avoided[54].

Sir Charles Dundas, who visited the Chagga in the first quarter of this century, was much impressed by the manner in which, throughout the long course of the furrows, society was so organized that law and order prevailed[55]. Care of the furrows was a prime social duty, and if a furrow was damaged, even accidentally, one of the elders would sound a horn in the evening (which was known as the call to the furrows), and next morning everyone would leave their normal work and set about the business of repair[56]. The furrow was a social asset owned by the clan[57].

Another example is that of the *qanats*[58] of Iran, of which there were around 22,000, comprising more than 170,000 miles[59] of underground irrigation channels built thousands of years ago, and many of them still functioning[60]. Not only is the extent of this system remarkable, but also the fact that it has functioned for thousands of years and, until recently, supplied Iran with around 75 per cent of the water used for both irrigation and domestic purposes.

By way of contrast, where the needs of the land were neglected, and massive schemes launched for urban supply rather than irrigation, there was disaster. The immense works in the Euphrates Valley in the third millennium BC aimed not at improving the irrigation system of the local tribesmen, but at supplying the requirements of a rapidly growing urban society (e.g., a vast canal built around 2400 BC by King Entemenak) led to seepage, flooding and over-irrigation[61]. Traditional farming methods and later irrigation systems helped to overcome the resulting problems of waterlogging and salinization.

China was another site of great irrigation works, some of which are still in use over two millennia after their construction. For example, the ravages of the Mo river were overcome by an excavation through a

[54] Goldsmith and Hildyard, *op. cit.*, p. 284.
[55] Sir Charles Dundas, *Kilimanjaro and Its Peoples*, 1924, p. 262.
[56] Goldsmith and Hildyard, *op. cit.*, p. 289.
[57] See further Fidelio T. Masao, "The Irrigation System in Uchagga: An Ethno-Historical Approach", *Tanzania Notes and Records*, No. 75, 1974.
[58] *Qanats* comprise a series of vertical shafts dug down to the aquifer and joined by a horizontal canal — see Goldsmith and Hildyard, *op. cit.*, p. 277.
[59] Some idea of the immensity of this work can be gathered from the fact that it would cost around one million dollars to build an eight kilometres *qanat* with an average tunnel depth of 15 metres (*ibid.*, p. 280).
[60] *Ibid.*, p. 277.
[61] Goldsmith and Hildyard, *op. cit.*, p. 308.

mountain and the construction of two great canals. Needham describes this as "one of the greatest of Chinese engineering operations which, now 2,200 years old, is still in use today"[62]. An ancient stone inscription teaching the art of river control says that its teaching "holds good for a thousand autumns"[63]. Such action was often inspired by the philosophy recorded in the *Tao Te Ching* which "with its usual gemlike brevity says 'Let there be no action [contrary to Nature] and there will be nothing that will not be well regulated'".[64] Here, from another ancient irrigation civilization, is yet another expression of the idea of the rights of future generations being served through the harmonization of human developmental work with respect for the natural environment.

Regarding the Inca civilization at its height, it has been observed that it continually brought new lands under cultivation by swamp drainage, expansion of irrigation works, terracing of hillsides and construction of irrigation works in dry zones, the goal being always the same — better utilization of all resources so as to maintain an equilibrium between production and consumption[65]. In the words of a noted writer on this civilization, "in this respect we can consider the Inca civilization triumphant, since it conquered the eternal problem of *maximum use* and *conservation of soil*"[66]. Here, too, we note the harmonization of developmental and environmental considerations.

Many more instances can be cited of irrigation cultures which accorded due importance to environmental considerations and reconciled the rights of present and future generations. I have referred to some of the more outstanding. Among them, I have examined one at greater length, partly because it combined vast hydraulic development projects with a meticulous regard for environmental considerations, and partly because both development and environmental protection are mentioned in its ancient records. That is sustainable development *par excellence*; and the principles on which it was based must surely have a message for modern law.

Traditional wisdom which inspired these ancient legal systems was able to handle such problems. Modern legal systems can do no less, achieving a blend of the concepts of development and of conservation of the environment, which alone does justice to humanity's obligations to itself and

[62] *Op. cit.*, Vol. 4, p. 288.
[63] *Ibid.*, p. 295.
[64] Needham, *Science and Civilization in China*, Vol. 2, *History of Scientific Thought*, 1969, p. 69.
[65] Jorge E. Hardoy, *Pre-Columbian Cities*, 1973, p. 415.
[66] John Collier, *Los indios de las Americas*, 1960, cited in Hardoy, *op. cit.*, p. 415. See also Donald Collier, "Development of Civilization on the Coast of Peru", in *Irrigation Civilizations: A Comparative Study*, Julian H. Steward (ed.), 1955.

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to cause wanton damage, even to an enemy's territory in the course of military conflict[70].

Europe, likewise, had a deep-seated tradition of love for the environment, a prominent feature of European culture, until the industrial revolution pushed these concerns into the background. Wordsworth in England, Thoreau in the United States, Rousseau in France, Tolstoy and Chekhov in Russia, Goethe in Germany spoke not only for themselves, but represented a deep-seated love of nature that was instinct in the ancient traditions of Europe — traditions whose gradual disappearance these writers lamented in their various ways[71].

Indeed, European concern with the environment can be traced back through the millennia to such writers as Virgil, whose *Georgics*, composed between 37 and 30 BC, extols the beauty of the Italian countryside and pleads for the restoration of the traditional agricultural life of Italy, which was being damaged by the drift to the cities[72].

This survey would not be complete without a reference also to the principles of Islamic law that inasmuch as all land belongs to God, land is never the subject of human ownership, but is only held in trust, with all the connotations that follow of due care, wise management, and custody for future generations. The first principle of modern environmental law — the principle of trusteeship of earth resources — is thus categorically formulated in this system.

The ingrained values of any civilization are the source from which its legal concepts derive, and the ultimate yardstick and touchstone of their validity. This is so in international and domestic legal systems alike, save that international law would require a worldwide recognition of those values. It would not be wrong to state that the love of nature, the desire for its preservation, and the need for human activity to respect the

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[70] Nagendra Singh, *Human Rights and the Future of Mankind*, 1981, p. 93.

[71] Commenting on the rise of naturalism in all the arts in Europe in the later Middle Ages, one of this century's outstanding philosophers of science has observed:

> "The whole atmosphere of every art exhibited direct joy in the apprehension of the things around us. The craftsmen who executed the later mediaeval decorative sculpture, Giotto, Chaucer, Wordsworth, Walt Whitman, and at the present day the New England poet Robert Frost, are all akin to each other in this respect." (Alfred North Whitehead, *Science and the Modern World*, 1926, p. 17.)

[72] See the *Georgics*, Book II, l. 36 ff.; l. 458 ff. Also *Encyclopaedia Britannica*, 1992, Vol. 29, pp. 499-500.

requisites for its maintenance and continuance are among those pristine and universal values which command international recognition.

The formalism of modern legal systems may cause us to lose sight of such principles, but the time has come when they must once more be integrated into the corpus of the living law. As stated in the exhaustive study of *The Social and Environmental Effects of Large Dams*, already cited, "We should examine not only what has caused modern irrigation systems to *fail*; it is much more important to understand what has made traditional irrigation societies to *succeed*."[73]

Observing that various societies have practised sustainable irrigation agriculture over thousands of years, and that modern irrigation systems rarely last more than a few decades, the authors pose the question whether it was due to the achievement of a "congruence of fit" between their methods and "the nature of land, water and climate"[74]. Modern environmental law needs to take note of the experience of the past in pursuing this "congruence of fit" between development and environmental imperatives.

By virtue of its representation of the main forms of civilization, this Court constitutes a unique forum for the reflection and the revitalization of those global legal traditions. There were principles ingrained in these civilizations as well as embodied in their *legal systems*, for legal systems include not merely written legal systems but traditional legal systems as well, which modern researchers have shown to be no less legal systems than their written cousins, and in some respects even more sophisticated and finely tuned than the latter[75].

Living law which is daily observed by members of the community, and compliance with which is so axiomatic that it is taken for granted, is not deprived of the character of law by the extraneous test and standard of reduction to writing. Writing is of course useful for establishing certainty, but when a duty such as the duty to protect the environment is so well accepted that all citizens act upon it, that duty is part of the legal system in question[76].

Moreover, when the Statute of the Court described the sources of international law as including the "general principles of law recognized

[73] Goldsmith and Hildyard, *op. cit.*, p. 316.

[74] *Ibid.*

[75] See, for example, M. Gluckman, *African Traditional Law in Historical Perspective*, 1974, *The Ideas in Barotse Jurisprudence*, 2nd ed., 1972, and *The Judicial Process among the Barotse*, 1955; A. L. Epstein, *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, 1954.

[76] On the precision with which these systems assigned duties to their members, see Malinowski, *Crime and Custom in Savage Society*, 1926.

by civilized nations", it expressly opened a door to the entry of such principles into modern international law.

(f) *Traditional Principles That Can Assist in the Development of Modern Environmental Law*

As modern environmental law develops, it can, with profit to itself, take account of the perspectives and principles of traditional systems, not merely in a general way, but with reference to specific principles, concepts, and aspirational standards.

Among those which may be extracted from the systems already referred to are such far-reaching principles as the principle of trusteeship of earth resources, the principle of intergenerational rights, and the principle that development and environmental conservation must go hand in hand. Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community. When it is used by humans, every opportunity should be afforded to it to replenish itself. Since flora and fauna have a niche in the ecological system, they must be expressly protected. There is a duty lying upon all members of the community to preserve the integrity and purity of the environment.

Natural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people. There should be no waste, and there should be a maximization of the use of plant and animal species, while preserving their regenerative powers. The purpose of development is the betterment of the condition of the people.

Most of them have relevance to the present case, and all of them can greatly enhance the ability of international environmental law to cope with problems such as these if and when they arise in the future. There are many routes of entry by which they can be assimilated into the international legal system, and modern international law would only diminish itself were it to lose sight of them — embodying as they do the wisdom which enabled the works of man to function for centuries and millennia in a stable relationship with the principles of the environment. This approach assumes increasing importance at a time when such a harmony between humanity and its planetary inheritance is a prerequisite for human survival.

* * *

Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia

of human experience, it has an important part to play in the service of international law.

B. The Principle of Continuing Environmental Impact Assessment

(a) *The Principle of Continuing Environmental Impact Assessment*

Environmental Impact Assessment (EIA) has assumed an important role in this case.

In a previous opinion[77] I have had occasion to observe that this principle was gathering strength and international acceptance, and had reached the level of general recognition at which this Court should take notice of it[78].

I wish in this opinion to clarify further the scope and extent of the environmental impact principle in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring[79].

The greater the size and scope of the project, the greater is the need for a continuous monitoring of its effects, for EIA before the scheme can never be expected, in a matter so complex as the environment, to anticipate every possible environmental danger.

In the present case, the incorporation of environmental considerations into the Treaty by Articles 15 and 19 meant that the principle of EIA was also built into the Treaty. These provisions were clearly not restricted to EIA before the project commenced, but also included the concept of

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[77] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, I.C.J. Reports 1995*, p. 344. See, also, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996*, p. 140.

[78] Major international documents recognizing this principle (first established in domestic law under the 1972 National Environmental Protection Act of the United States) are the 1992 Rio Declaration (Principle 17); United Nations General Assembly resolution 2995 (XXVII), 1972; the 1978 UNEP Draft Principles of Conduct (Principle 5); Agenda 21 (paras. 7.41 *(b)* and 8.4); the 1974 Nordic Environmental Protection Convention (Art. 6); the 1985 EC Environmental Assessment Directive (Art. 3); and the 1991 Espoo Convention. The status of the principle in actual practice is indicated also by the fact that multilateral development banks have adopted it as an essential precaution (World Bank Operational Directive 4.00).

[79] *Trail Smelter Arbitration* (United Nations, *Reports of International Arbitral Awards, (RIAA)*, 1941, Vol. III, p. 1907).

monitoring during the continuance of the project. Article 15 speaks expressly of monitoring of the water quality during the *operation* of the System of Locks, and Article 19 speaks of compliance with obligations for the protection of nature arising in connection with the construction and *operation* of the System of Locks.

Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme.

Over half a century ago the *Trail Smelter Arbitration*[80] recognized the importance of continuous monitoring when, in a series of elaborate provisions, it required the parties to monitor subsequent performance under the decision[81]. It directed the Trail Smelter to install observation stations, equipment necessary to give information of gas conditions and sulphur dioxide recorders, and to render regular reports which the Tribunal would consider at a future meeting. In the present case, the Judgment of the Court imposes a requirement of joint supervision which must be similarly understood and applied.

The concept of monitoring and exchange of information has gathered much recognition in international practice. Examples are the Co-operative Programme for the Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe, under the ECE Convention, the Vienna Convention for the Protection of the Ozone Layer, 1985 (Arts. 3 and 4), and the Convention on Long-Range Transboundary Air Pollution, 1979 (Art. 9)[82]. There has thus been growing international recognition of the concept of continuing monitoring as part of EIA.

The Court has indicated in its Judgment (para. 155 (2) (C)) that a joint operational régime must be established in accordance with the Treaty of 16 September 1977. A continuous monitoring of the scheme for its environmental impacts will accord with the principles outlined, and be a part of that operational régime. Indeed, the 1977 Treaty, with its contemplated régime of joint operation and joint supervision, had itself a built-in régime of continuous joint environmental monitoring. This principle of environmental law, as reinforced by the terms of the Treaty and as now incorporated into the Judgment of the Court (para. 140), would require the Parties to take upon themselves an obligation to set up the machinery for continuous watchfulness, anticipation and evaluation

[80] *RIAA*, 1941, Vol. III, p. 1907.
[81] See *ibid.*, pp. 1934-1937.
[82] *ILM*, 1979, Vol. XVIII, p. 1442.

operate on the basis of environmental norms as though they were frozen in time when the Treaty was entered into.

This inter-temporal aspect of the present case is of importance to all treaties dealing with projects impacting on the environment. Unfortunately, the Vienna Convention offers very little guidance regarding this matter which is of such importance in the environmental field. The provision in Article 31, paragraph 3 *(c)*, providing that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account, scarcely covers this aspect with the degree of clarity requisite to so important a matter.

Environmental concerns are live and continuing concerns whenever the project under which they arise may have been inaugurated. It matters little that an undertaking has been commenced under a treaty of 1950, if in fact that undertaking continues in operation in the year 2000. The relevant environmental standards that will be applicable will be those of the year 2000.

As this Court observed in the *Namibia* case, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53), and these principles are "not limited to the rules of international law applicable at the time the treaty was concluded"[84].

Environmental rights are human rights. Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.

Support for this proposition can be sought from the opinion of Judge Tanaka in *South West Africa*, when he observed that a new customary law could be applied to the interpretation of an instrument entered into more than 40 years previously (*I.C.J. Reports 1966*, pp. 293-294). The ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standards of yesterday. Judge Tanaka reasoned that a party to a humanitarian instrument has no right to act in a manner which is today considered inhuman, even though the action be taken under an instrument of 40 years ago. Likewise, no action should be permissible which is today considered environmentally

[84] *Oppenheim's International Law*, R. Y. Jennings and A. Watts (eds.), 1992, p. 1275, note 21.

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[84] *Oppenheim's International Law*, R. Y. Jennings and A. Watts (eds.), 1992, p. 1275, note 21.

unsound, even though it is taken under an instrument of more than 20 years ago.

Mention may also be made in this context of the observation of the European Court of Human Rights in the *Tyrer* case that the Convention is a "living instrument" which must be interpreted "in the light of present-day conditions"[85].

It may also be observed that we are not here dealing with questions of the *validity* of the Treaty which fall to be determined by the principles applicable at the time of the Treaty, but with the *application* of the Treaty[86]. In the application of an environmental treaty, it is vitally important that the standards in force *at the time of application* would be the governing standards.

A recognition of the principle of contemporaneity in the application of environmental norms applies to the joint supervisory régime envisaged in the Court's Judgment, and will be an additional safeguard for protecting the environmental interests of Hungary.

C. The Handling of *Erga Omnes* Obligations in *Inter Partes* Judicial Procedure

(a) *The Factual Background: The Presence of the Elements of Estoppel*

It is necessary to bear in mind that the Treaty of 1977 was not one that suddenly materialized and was hastily entered into, but that it was the result of years of negotiation and study following the first formulations of the idea in the 1960s. During the period of negotiation and implementation of the Treaty, numerous detailed studies were conducted by many experts and organizations, including the Hungarian Academy of Sciences.

The first observation to be made on this matter is that Hungary went into the 1977 Treaty, despite very clear warnings during the preparatory studies that the Project might involve the possibility of environmental damage. Hungary, with a vast amount of material before it, both for and against, thus took a considered decision, despite warnings of possible danger to its ecology on almost all the grounds which are advanced today.

Secondly, Hungary, having entered into the Treaty, continued to treat it as valid and binding for around 12 years. As early as 1981, the Gov-

[85] Judgment of the Court, *Tyrer* case, 25 April 1978, para. 31, publ. Court A, Vol. 26, at 15, 16.

[86] See further Rosalyn Higgins, "Some Observations on the Inter-Temporal Rule in International Law", in *Theory of International Law at the Threshold of the 21st Century, op. cit.*, p. 173.

ernment of Hungary had ordered a reconsideration of the Project and researchers had then suggested a postponement of the construction, pending more detailed ecological studies. Yet Hungary went ahead with the implementation of the Treaty.

Thirdly, not only did Hungary devote its own effort and resources to the implementation of the Treaty but, by its attitude, it left Czechoslovakia with the impression that the binding force of the Treaty was not in doubt. Under this impression, and in pursuance of the Treaty which bound both Parties, Czechoslovakia committed enormous resources to the Project. Hungary looked on without comment or protest and, indeed, urged Czechoslovakia to more expeditious action. It was clear to Hungary that Czechoslovakia was spending vast funds on the Project — resources clearly so large as to strain the economy of a State whose economy was not particularly strong.

Fourthly, Hungary's action in so entering into the Treaty in 1977 was confirmed by it as late as October 1988 when the Hungarian Parliament approved of the Project, despite all the additional material available to it in the intervening space of 12 years. A further reaffirmation of this Hungarian position is to be found in the signing of a Protocol by the Deputy Chairman of the Hungarian Council of Ministers on 6 February 1989, reaffirming Hungary's commitment to the 1977 Project. Hungary was in fact interested in setting back the date of completion from 1995 to 1994.

Ninety-six days after the 1989 Protocol took effect, i.e., on 13 May 1989, the Hungarian Government announced the immediate suspension for two months of work at the Nagymaros site. It abandoned performance on 20 July 1989, and thereafter suspended work on all parts of the Project. Formal termination of the 1977 Treaty by Hungary took place in May 1992.

It seems to me that all the ingredients of a legally binding estoppel are here present[87].

The other Treaty partner was left with a vast amount of useless project construction on its hands and enormous incurred expenditure which it had fruitlessly undertaken.

(b) *The Context of Hungary's Actions*

In making these observations, one must be deeply sensitive to the fact that Hungary was passing through a very difficult phase, having regard

[87] On the application of principles of estoppel in the jurisprudence of this Court and its predecessor, see *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53*, p. 22; *Fisheries (United Kingdom* v. *Norway), I.C.J. Reports 1951*, p. 116; *Temple of Preah Vihear, I.C.J. Reports 1962*, p. 151. For an analysis of this jurisprudence, see the separate opinion of Judge Ajibola in *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, pp. 77-83.

to the epochal events that had recently taken place in Eastern Europe. Such historic events necessarily leave their aftermath of internal tension. This may well manifest itself in shifts of official policy as different emergent groups exercise power and influence in the new order that was in the course of replacing that under which the country had functioned for close on half a century. One cannot but take note of these realities in understanding the drastic official changes of policy exhibited by Hungary.

Yet the Court is placed in the position of an objective observer, seeking to determine the effects of one State's changing official attitudes upon a neighbouring State. This is particularly so where the latter was obliged, in determining its course of action, to take into account the representations emanating from the official repositories of power in the first State.

Whatever be the reason for the internal changes of policy, and whatever be the internal pressures that might have produced this, the Court can only assess the respective rights of the two States on the basis of their official attitudes and pronouncements. Viewing the matter from the standpoint of an external observer, there can be little doubt that there was indeed a marked change of official attitude towards the Treaty, involving a sharp shift from full official acceptance to full official rejection. It is on this basis that the legal consequence of estoppel would follow.

(c) *Is It Appropriate to Use the Rules of* Inter Partes *Litigation to Determine* Erga Omnes *Obligations?*

This recapitulation of the facts brings me to the point where I believe a distinction must be made between litigation involving issues *inter partes* and litigation which involves issues with an *erga omnes* connotation.

An important conceptual problem arises when, in such a dispute *inter partes*, an issue arises regarding an alleged violation of rights or duties in relation to the rest of the world. The Court, in the discharge of its traditional duty of deciding *between the parties*, makes the decision which is in accordance with justice and fairness *between the parties*. The procedure it follows is largely adversarial. Yet this scarcely does justice to rights and obligations of an *erga omnes* character — least of all in cases involving environmental damage of a far-reaching and irreversible nature. I draw attention to this problem as it will present itself sooner or later in the field of environmental law, and because (though not essential to the decision actually reached) the facts of this case draw attention to it in a particularly pointed form.

There has been conduct on the part of Hungary which, in ordinary

As this vital branch of law proceeds to develop, it will need all the insights available from the human experience, crossing cultural and disciplinary boundaries which have traditionally hemmed in the discipline of international law.

(Signed) Christopher Gregory WEERAMANTRY.

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inter partes litigation, would prevent it from taking up wholly contradictory positions. But can momentous environmental issues be decided on the basis of such *inter partes* conduct? In cases where the *erga omnes* issues are of sufficient importance, I would think not.

This is a suitable opportunity, both to draw attention to the problem and to indicate concern at the inadequacies of such *inter partes* rules as determining factors in major environmental disputes.

I stress this for the reason that *inter partes* adversarial procedures, eminently fair and reasonable in a purely *inter partes* issue, may need reconsideration in the future, if ever a case should arise of the imminence of serious or catastrophic environmental danger, especially to parties other than the immediate litigants.

Indeed, the inadequacies of technical judicial rules of procedure for the decision of scientific matters has for long been the subject of scholarly comment[88].

We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation.

When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.

The present case offers an opportunity for such reflection.

* * *

Environmental law is one of the most rapidly developing areas of international law and I have thought it fit to make these observations on a few aspects which have presented themselves for consideration in this case.

[88] See, for example, Peter Brett, "Implications of Science for the Law", *McGill Law Journal*, 1972, Vol. 18, p. 170, at p. 191. For a well-known comment from the perspective of sociology, see Jacques Ellul, *The Technological Society*, trans. John Wilkinson, 1964, pp. 251, 291-300.

Dissenting Opinion of Judge Oda

DISSENTING OPINION OF JUDGE ODA

INTRODUCTION

1. I have voted against operative paragraph 1 C of the Judgment (para. 155) as I am totally unable to endorse the conclusions that, on the one hand, "Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" and, on the other hand, that "Czechoslovakia was not entitled to put into operation, from October 1992, this 'provisional solution'" and I cannot subscribe to the reasons given in the Judgment in support of those conclusions.

I have also voted against operative paragraph 2 D (para. 155). I have done so because the request made by myself and other judges to separate this paragraph into two so that it could be voted on as two separate issues was simply rejected for a reason which I do not understand. I have therefore had to vote against this paragraph as a whole, although I had wanted to support the first part of it.

I am in agreement with the conclusions that the Court has reached on the other points of the operative paragraph of the Judgment. However, even with regard to some of the points which I support, my reasoning differs from that given in the Judgment. I would like to indicate several points on which I differ from the Judgment through a brief presentation of my overall views concerning the present case.

I. THE 1977 TREATY AND THE JOINT CONTRACTUAL PLAN (JCP) FOR THE GABČIKOVO-NAGYMAROS SYSTEM OF LOCKS

2. *(The Project.)* The dispute referred to the Court relates to a Project concerning the management of the river Danube between Bratislava and Budapest, which a number of specialists serving the Governments of Czechoslovakia and Hungary, as well as those employed in corporations of those two States (which were governed in accordance with the East European socialist régime), had been planning since the end of the Second World War under the guidance of the Soviet Union.

It is said that Hungary had, even before the rise of the communist régime, proposed the building of a power plant at Nagymaros on Hungarian territory. However, with the co-operation of the socialist countries and under the leadership of the Soviet Union, the initiative for the management of the river Danube between Bratislava and Budapest was taken over by Czechoslovakia, and the operational planning was undertaken by technical staff working for COMECON.

The Project would have entailed the construction of (i) a bypass canal to receive water diverted at the Dunakiliti dam (to be constructed on Hungarian territory) and (ii) two power plants (one at Gabčíkovo on the bypass canal on Czechoslovak territory and one at Nagymaros on Hungarian territory). It may well have been the case that the bypass canal was also required for the future management of the river Danube with respect to flood prevention and the improvement of international navigation facilities between Bratislava and Budapest. However, the bypass canal was aimed principally at the operation of the Gabčíkovo power plant on Czechoslovak territory and the Dunakiliti dam, mostly on Hungarian territory, was seen as essential for the filling and operation of that canal, while the Nagymaros System of Locks on Hungarian territory was to have been built for the express purpose of generating electric power at Nagymaros and partially for the purpose of supporting the peak-mode operation of the Gabčíkovo power plant.

The whole Project would have been implemented by means of "joint investment" aimed at the achievement of "a single and indivisible operational system of works" (1977 Treaty, Art. 1, para. 1).

3. *(The 1977 Treaty.)* The Project design for the Gabčíkovo-Nagymaros System of Locks had been developed by administrative and technical personnel in both countries and its realization led to the conclusion, on 16 September 1977, of the Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks. I shall refer to this Treaty as the 1977 Treaty.

The 1977 Treaty was signed by the Heads of each Government (for Czechoslovakia, the Prime Minister; for Hungary, the Chairman of the Council of Ministers), and registered with the United Nations Secretariat (*UNTS*, Vol. 236, p. 241). It gave, on the one hand, an overall and general picture (as well as some details of the construction plan) of the Project for the Gabčíkovo-Nagymaros System of Locks (which would, however, have in essence constituted a "partnership" according to the concept of municipal law) (see 1977 Treaty, Chaps. I-IV), while, on the other hand, it aimed, as an ordinary international treaty, to serve as an instrument providing for the rights and duties of both parties in relation to the future management of the river Danube (see 1977 Treaty, Chaps. V-XI).

Under the plan described in the 1977 Treaty, the cost of the "joint investment" in the system of locks was to have been borne by the respective parties and the execution of the plan, including labour and supply, was to have been apportioned between them (1977 Treaty, Art. 5). The Dunakiliti dam, the bypass canal, the Gabčíkovo series of locks and the Nagymaros series of locks were to have been owned jointly (1977 Treaty, Art. 8) and the parties assumed joint responsibility for the construction of those structures. More concretely, the project for the diversion of the waters of the river Danube at Dunakiliti (on Hungarian territory) into

the bypass canal (on the territory of Czechoslovakia), and the construction of the dams together with the power stations at Gabčíkovo and Nagymaros were to have been funded jointly by the parties. The electric power generated by those two power stations was to have been available to them in an equal measure (1977 Treaty, Art. 9).

It must be noted, however, that the 1977 Treaty does not seem to have been intended to prescribe in detail the content of the construction plan, that being left to the Joint Construction Plan to be drafted by the parties — which, for the sake of convenience, I shall refer to as the JCP. While some detailed provisions in Chapters I-IV of the 1977 Treaty concerning the completion of the Project did in fact, as stated above, correspond to provisions subsequently incorporated into the JCP, the Preamble to the 1977 Treaty confines itself to stating that "[Hungary and Czechoslovakia] decided to conclude an Agreement concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks". The 1977 Treaty lacks the form of words usually present in any international treaty which generally indicates that the parties have *thus agreed the following text* (which text usually constitutes the main body of the treaty). This fact further reinforces the view that the 1977 Treaty is intended only to indicate the basic construction plan of the Project and to leave the details of planning to a separate instrument in the form of the JCP.

4. *(The Joint Contractual Plan.)* The drafting of the JCP was already anticipated in the Agreement regarding the Drafting of the Joint Contractual Plan concerning the Gabčíkovo-Nagymaros Barrage System of 6 May 1976 (hereinafter referred to as the 1976 Agreement[1]), signed by plenipotentiaries at the level of Deputy Minister. The Hungarian translation states in its Preamble that

> "[the parties] have decided on the basis of a mutual understanding with regard to the joint implementation of the Hungary-Czechoslovakia Gabčíkovo-Nagymaros Barrage System . . . to conclude an Agreement for the purpose of drafting a Joint Contractual Plan for the barrage system".

As stated above, the 1976 Agreement was concluded in order to facilitate the future planning of the Project and the 1977 Treaty provided some guidelines for the detailed provisions to be included in the JCP, which was to be developed jointly by the representatives of both States as well as by the enterprises involved in the Project. The time-schedule for the implementation of the construction plan was subsequently set out in the Agreement on Mutual Assistance in the Course of Building the Gab-

[1] This Agreement is not to be found, even in the *World Treaty Index*, 1983. The English text is to be found in the documents presented by both Parties but they are not identical (Memorial of Slovakia, Vol. 2, p. 25; Memorial of Hungary, Vol. 3, p. 219).

II. The Suspension and Subsequent Abandonment of the Works by Hungary in 1989

(Special Agreement, Art. 2, para. 1 *(a)*; Art. 2, para. 2)

1. Special Agreement, Article 2, Paragraph 1 (a)

8. Under the terms of the Special Agreement, the Court is requested to answer the question

> "whether [Hungary] was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to [Hungary]" (Art. 2, para. 1 *(a)*).

9. *(Actual situation in the late 1980s.)* This question put in the Special Agreement should, in my view, have been more precisely worded to reflect the actual situation in 1989. The work on the Gabčíkovo Project had by that time already been completed; the work at Nagymaros was still at a preliminary stage, that is, the work on that particular barrage system had, to all intents and purposes, not even started.

Hungary's actions in 1989 may be summed up as follows: firstly, on 13 May 1989, Hungary decided to suspend work at Nagymaros pending the completion of various environmental studies. Secondly, Hungary decided, on the one hand, on 27 October 1989, to abandon the Nagymaros Project and, on the other, to maintain the status quo at Dunakiliti, thus rendering impossible the diversion of waters to the bypass canal at that location. Hungary had, however, made it clear at a meeting of the plenipotentiaries in June 1989 that it would continue the work related to the Gabčíkovo sector itself, so the matter of the construction of the Gabčíkovo Barrage System itself was not an issue for Hungary in 1989. The chronology of Hungary's actions is traced in detail in the Judgment.

10. *(Violation of the 1977 Treaty.)* Whatever the situation was in 1989 regarding the works to be carried out by Hungary, and in the light of the fact that the failure to complete the Dunakiliti dam and the auxiliary structures (the sole purpose of which was to divert water into the bypass canal) would have made it impossible to operate the whole Gabčíkovo-Nagymaros System of Locks as "a single and indivisible operational system of works" (1977 Treaty, Art. 1, para. 1), Hungary should have been seen to have incurred international responsibility for its failure to carry out the relevant works, thus being in breach of the 1977 Treaty. It is to be noted that, at that stage, Hungary did not raise the matter of the termination of the 1977 Treaty but simply suspended or abandoned the works for which it was responsible.

In the light of the actions taken by Hungary with regard to the Gabčíkovo-Nagymaros System of Locks, there can be no doubt that in 1989 Hungary violated the 1977 Treaty. The question remains, however, whether Hungary was justified in violating its treaty obligations. I fully share the view of the Court when it concludes that

6. *(The lack of provision in the JCP for dispute settlement.)* One may well ask how the parties should have settled any differences of views which might have occurred between the two States with regard to the design and planning of the construction or the amendment of that design. The designing or the amendment of the design should have been effected with complete agreement between the two parties but the 1976 Agreement, which was the first document providing for the future design of the JCP, scarcely contemplated the possibility of the two sides being unable to reach an agreement in this respect. The 1976 Agreement states that, if the investment and planning organs cannot reach a mutual understanding on the issues which are disputed within the co-operation team, the investors shall report to the Joint Committee for a solution. There was no provision for a situation in which the Joint Committee might prove unable to settle such differences between the parties. It was assumed that there was no authority above the Joint Committee which would be competent to determine the various merits of the plan or of proposed amendments to it.

In view of the fact that this Project was to be developed by COMECON under Soviet leadership, it may have been tacitly considered that no dispute would ever get to that stage. In the event that no settlement could be reached by the Joint Committee, one or the other party would inevitably have had to proceed to a unilateral amendment. However, such an amendment could not have been approved unconditionally but would have had to have been followed by a statement of the legitimate reasons underlying its proposal.

7. *(The 1977 Treaty and the Joint Contractual Plan.)* It is therefore my conclusion that, on the one hand, the 1977 Treaty between Czechoslovakia and Hungary not only provided for a generalized régime of rights and duties accepted by each of them in their mutual relations with regard to the management of the river Danube (1977 Treaty, Chaps. V-XI), but also bound the parties to proceed jointly with the construction of the Gabčíkovo-Nagymaros System of Locks (the construction of (i) the Dunakiliti dam which would permit the operation of the bypass canal, (ii) the Gabčíkovo dam with its power plant and (iii) the Nagymaros dam with its power plant). The construction of the Gabčíkovo-Nagymaros System of Locks might have constituted a type of "partnership" which would have been implemented through the JCP (1977 Treaty, Chaps. I-IV).

On the other hand, the JCP was designed to incorporate detailed items of technical planning as well as provisions for their amendment or revision and did not necessarily have the same legal effect as the 1977 Treaty, an international treaty.

Those two instruments, that is, the 1977 Treaty and the JCP (which was designed and modified after 1977), should be considered as separate instruments of differing natures from a legal point of view.

čikovo-Nagymaros Dam of 16 September 1977 (hereinafter referred to as the 1977 Agreement[2]), the same date on which the 1977 Treaty was signed[3]. It was not made clear whether those two Agreements of 1976 and 1977 themselves constituted the JCP or whether the JCP would be further elaborated on the basis of these Agreements.

In fact, the text of the JCP seems to have existed as a separate instrument but neither Party has submitted it to the Court in its concrete and complete form. A "summary description" of the JCP, dated 1977, was presented by Hungary (Memorial of Hungary, Vol. 3, p. 298) while Slovakia presented a "summary report" as a part of the "JCP Summary Documentation" (Memorial of Slovakia, Vol. 2, p. 33). Neither of those documents gave a complete text but they were merely compilations of excerpts. Neither document gave a precise indication of the date of drafting. What is more, one cannot be certain that those two documents as presented by the two Parties are in fact identical. The Judgment apparently relies on the document presented by Hungary and received in the Registry on 28 April 1997 in reply to a question posed by a Judge on 15 April 1997 during the course of the oral arguments. This document, the Joint Contractual Plan's Preliminary Operating Rules and Maintenance Mode, contains only extremely fragmentary provisions. I submit that the Court did not, at any stage, have sufficient knowledge of the JCP in its complete form.

5. *(Amendment of the Joint Contractual Plan.)* I would like to repeat that the JCP is a large-scale plan involving a number of corporations of one or the other party, as well as foreign enterprises, and that the JCP, as a detailed construction plan for the whole Project, should not be considered as being on the same level as the 1977 Treaty itself which, however, also laid down certain guidelines for the detailed planning of the Project. As in the case of any construction plan of a "partnership" extending over a long period of time, the JCP would in general have been, and has been in fact, subject to amendments and modifications discussed between the parties at working level and those negotiations would have been undertaken in a relatively flexible manner where necessary, in the course of the construction, without resort to the procedures relating to amendment of the 1977 Treaty. In other words, the detailed provisions of the construction plan of the JCP to implement the Project concerning the Gabčíkovo-Nagymaros System of Locks as defined in the 1977 Treaty should be considered as separate from the 1977 Treaty itself.

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[2] This Agreement is not to be found, even in the *World Treaty Index*, 1983. The English text is to be found in the documents presented by both Parties but they are not identical (Memorial of Slovakia, Vol. 2, p. 71; Memorial of Hungary, Vol. 3, p. 293).

[3] The time-limit for the construction plan was revised in the Protocol concerning the Amendment of the [1977] Treaty signed on 10 October 1983; see also the Protocol concerning the Amendment of the 1977 Agreement signed on 10 October 1983 and the Protocol concerning the Amendment of the 1977 Agreement signed on 6 February 1989.

> "Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the [1977] Treaty . . . attributed responsibility to it" (Judgment, operative paragraph 155, point 1 A)

and that Hungary's wrongful act could not have been justified in any way.

Let me examine the situation in more detail. Hungary relies, in connection with the Dunakiliti dam and the diversion of waters into the bypass canal at Dunakiliti, upon the deterioration of the environment in the Szigetköz region owing to the reduced quantity of available water in the old Danube river bed. In my view, however, the decrease in the amount of water flowing into the old bed of the Danube as a result of the operation of the bypass canal would have been an inevitable outcome of the whole Project as provided for in the 1977 Treaty.

11. *(Hungary's ill-founded claim of ecological necessity.)* Certain effects upon the environment of the Szigetköz region were clearly anticipated by and known to Hungary at the initial stage of the planning of the whole Project. Furthermore, there was no reason for Hungary to believe that an environmental assessment made in the 1980s would give quite different results from those obtained in 1977, and require the total abandonment of the whole Project.

I have no doubt that the Gabčíkovo-Nagymaros System of Locks was, in the 1970s, prepared and designed with full consideration of its potential impact on the environment of the region, as clearly indicated by the fact that the 1977 Treaty itself incorporated this concept as its Article 19 (entitled Protection of Nature), and I cannot believe that this assessment made in the 1970s would have been significantly different from an ecological assessment 10 years later, in other words, in the late 1980s. It is a fact that the ecological assessment made in the 1980s did not convince scientists in Czechoslovakia.

I particularly endorse the view taken by the Court when rejecting the argument of Hungary, that ecological necessity cannot be deemed to justify its failure to complete the construction of the Nagymaros dam, and that Hungary cannot show adequate grounds for that failure by claiming that the Nagymaros dam would have adversely affected the downstream water which is drawn to the bank-filtered wells constructed on Szentendre Island and used as drinking water for Budapest (Judgment, para. 40).

12. *(Environment of the river Danube.)* The 1977 Treaty itself spoke of the importance of the protection of water quality, maintenance of the bed of the Danube and the protection of nature (Arts. 15, 16, 19), and the whole structure of the Gabčíkovo-Nagymaros System of Locks was certainly founded on an awareness of the importance of environmental protection. It cannot be said that the drafters of either the Treaty itself or of

the JCP failed to take due account of the environment. There were, in addition, no particular circumstances in 1989 that required any of the research or studies which Hungary claimed to be necessary, and which would have required several years to be implemented. If no campaign had been launched by environmentalist groups, then it is my firm conviction that the Project would have gone ahead as planned.

What is more, Hungary had, at least in the 1980s, no intention of withdrawing from the work on the Gabčíkovo power plant. One is at a loss to understand how Hungary could have thought that the operation of the bypass canal and of the Gabčíkovo power plant, to which Hungary had not objected at the time, would have been possible without the completion of the works at Dunakiliti dam.

13. *(Ecological necessity and State responsibility.)* I would like to make one more point relating to the matter of environmental protection under the 1977 Treaty. The performance of the obligations under that Treaty was certainly the joint responsibility of both Hungary and Czechoslovakia. If the principles which were taken as the basis of the 1977 Treaty or of the JCP had been contrary to the general rules of international law — environmental law in particular — the two States, which had reached agreement on their joint investment in the whole Project, would have been held *jointly* responsible for that state of affairs and *jointly* responsible to the international community. This fact does not imply that the *one party* (Czechoslovakia, and later Slovakia) bears responsibility *towards the other* (Hungary).

What is more, if a somewhat more rigorous consideration of environmental protection had been needed, this could certainly have been given by means of remedies of a technical nature to those parts of the JCP — not the 1977 Treaty itself — that concern the concrete planning or operation of the whole System of Locks. In this respect, I do not see how any of the grounds advanced by Hungary for its failure to perform its Treaty obligations (and hence for its violation of the Treaty by abandoning the construction of the Dunakiliti dam) could have been upheld as relating to a state of "ecological necessity".

14. *(General comments on the preservation of the environment.)* If I may give my views on the environment, I am fully aware that concern for the preservation of the environment has rapidly entered the realm of international law and that a number of treaties and conventions have been concluded on either a multilateral or bilateral basis, particularly since the Declaration on the Human Environment was adopted in 1972 at Stockholm and reinforced by the Rio de Janeiro Declaration in 1992, drafted 20 years after the Stockholm Declaration.

It is a great problem for the whole of mankind to strike a satisfactory balance between more or less contradictory issues of economic develop-

ment on the one hand and preservation of the environment on the other, with a view to maintaining sustainable development. Any construction work relating to economic development would be bound to affect the existing environment to some extent but modern technology would, I am sure, be able to provide some acceptable ways of balancing the two conflicting interests.

2. Special Agreement, Article 2, Paragraph 2

15. The Court is asked, under Article 2, paragraph 2, of the Special Agreement, to

> "determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article".

16. *(Responsibility of Hungary.)* In principle, Hungary must compensate Slovakia for "the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible". I was, however, in favour of the first part of operative paragraph 155, point 2 D, of the Judgment. As I stated at the outset, I had to vote against the whole of paragraph 155, point 2 D, as that first part of the paragraph was not put to the vote as a separate issue.

17. *(Difference between the Gabčíkovo Project and the Nagymaros Project.)* When one is considering the legal consequences of the responsibility incurred by Hungary on account of its violation of its obligations to Czechoslovakia under the 1977 Treaty and the JCP, it seems to me that there is a need to draw a further distinction between (i) Hungary's suspension of the work on the Dunakiliti dam for the diversion of water into the bypass canal, which rendered impossible the operation of the Gabčíkovo power plant, and (ii) its complete abandonment of the work on the Nagymaros System of Locks, each of which can be seen as having a completely different character.

18. *(The Dunakiliti dam and the Gabčíkovo plant.)* The construction of the Dunakiliti dam and of the bypass canal, which could have been filled only by the diversion of the Danube waters at that point, form the cornerstone of the whole Project. Without the Dunakiliti dam the whole Project could not have existed in its original form. The abandonment of work on the Dunakiliti dam meant that the bypass canal would be unusable and the operation of the Gabčíkovo power plant impossible. Hungary must assume full responsibility for its suspension of the works at Dunakiliti in violation of the 1977 Treaty.

The reparation to be paid by Hungary to Slovakia for its failure in this respect, as prescribed in the 1977 Treaty, will be considered in the fol-

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remained in force, as the notification of termination made by Hungary in 1992 could not have any legal effect (Judgment, para. 155, point 1 D).

2. Special Agreement, Article 2, Paragraph 2

29. No legal consequences will result from the Court's Judgment in this respect, since the notification of termination of the 1977 Treaty by Hungary must be seen as having had no legal effect.

V. The Final Settlement
(Special Agreement, Article 5)

30. Hungary and Slovakia have agreed under Article 5 of the Special Agreement, that: "Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution."

31. *(Negotiations under Article 5 of the Special Agreement.)* As I have already said, my views differ from those set out in the Judgment in that I believe that Czechoslovakia was entitled to proceed to the provisional solution, namely, not only the construction of the Čunovo dam but also the operation of that dam at Čunovo in November 1992 for diversion of water into the bypass canal. As I see it, Czechoslovakia did not violate the 1977 Treaty. It is my opinion that the "negotiations" between Hungary and Slovakia under Article 5 of the Special Agreement should be based on this understanding and not on the finding stated in the Judgment in its operative paragraph 155, points 1 C and 2 D.

32. *(The amendment of the Joint Contractual Plan.)* The implementation by Czechoslovakia of Variant C — the construction of the Čunovo dam and the damming of the waters for diversion into the bypass canal — was a means of executing the plan for the Gabčíkovo-Nagymaros System of Locks which had originally been agreed by the Parties. The implementation of Variant C will *not* remain a "provisional" solution but will, in future, form a part of the JCP.

The mode of operation at the Gabčíkovo power plant should be expressly defined in the amended JCP so as to avoid the need for operation in peak mode, as this has already been voluntarily abandoned by the Parties and does not need to be considered here.

The way in which the waters are divided at Čunovo should be negotiated in order to maintain the original plan, that is, an equitable share of the waters — and this should be spelt out in any revision or amendment of the JCP. The equitable sharing of the water must both meet Hungary's concern for the environment in the Szigetköz region and allow satisfactory operation of the Gabčíkovo power plant by Slovakia, as well as the

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In view of the statements I have made above, it is my firm belief that the modalities of the reparation to be paid by Hungary to Slovakia should be determined during the course of the negotiations to be held between the two States.

(Signed) Shigeru ODA.

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maintenance of the bypass canal for flood prevention and the improvement of navigation facilities. I would suggest that the JCP should be revised or some new version drafted during the negotiations under Article 5 of the Special Agreement in order to comply with the modalities which I have set out above.

33. *(Reassessment of the environmental effect).* Whilst the whole Project of the Gabčíkovo-Nagymaros System of Locks is now in operation, in its modified form (that is, with the Čunovo dam instead of the Dunakiliti dam diverting the water to the bypass canal and with the abandonment of the work on the Nagymaros dam/power plant), the Parties are under an obligation in their mutual relations, under Articles 15, 16 and 19 of the 1977 Treaty, and, perhaps in relations with third parties, under an obligation in general law concerning environmental protection, to preserve the environment in the region of the river Danube.

The Parties should continue the environmental assessment of the whole region and search out remedies of a technical nature that could prevent the environmental damage which might be caused by the new Project.

34. *(Reparation.)* The issues on which the Parties should negotiate in accordance with Article 5 of the Special Agreement are only related to the details of the reparation to be made by Hungary to Slovakia on account of its having breached the 1977 Treaty and its failure to execute the Gabčíkovo Project and the Nagymaros Project. The legal consequences of these treaty violations are different in nature, depending on whether they relate to one or other separate part of the original Project. Hungary incurred responsibility to Czechoslovakia (later, Slovakia) on account of its suspension of the Gabčíkovo Project and for the work carried out solely by Czechoslovakia to construct the Čunovo dam. In addition, Czechoslovakia is entitled to claim from Hungary the costs which it incurred during the construction of the Dunakiliti dam, which subsequently became redundant (see paras. 17 and 18 above).

With regard to the abandonment by Hungary of the Nagymaros dam, Hungary is not, in principle, required to pay any reparation to Slovakia as its action did not affect any essential interest of Slovakia (see para. 19 above). There is one point which should not be overlooked, that is, as the Nagymaros dam and power plant are, as Slovakia admits, no longer a part of the whole Project, the construction of the bypass canal from Čunovo would be mostly for the benefit of Slovakia and would provide no benefit to Hungary.

The main benefits of the whole Project now accrue to Slovakia, with the exception of the flood prevention measures and the improved facilities for international navigation, which are enjoyed by both States. This should be taken into account when assessing the reparation to be paid as a whole by Hungary to Slovakia.

Dissenting Opinion of Judge Vereshchetin

DISSENTING OPINION OF JUDGE VERESHCHETIN

I regret that I cannot associate myself with those parts of the Judgment according to which Czechoslovakia was not entitled to put the so-called Variant C ("provisional solution") into operation from October 1992 (Judgment, para. 155, point 1 C) and:

> "Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the 'provisional solution' by Czechoslovakia and its maintenance in service by Slovakia" (para. 155, point 2 D).

I firmly believe that Czechoslovakia was fully entitled in international law to put into operation Variant C as a countermeasure so far as its partner in the Treaty persisted in violating its obligations. Admittedly, Slovakia itself advanced this defence as "an alternative legal argument" and did not fully develop it. The logic is very clear and has been repeatedly explained by Slovakia. It does not believe Variant C to be a wrongful act, even prima facie, while any countermeasure, viewed in isolation from the circumstances precluding its wrongfulness, is a wrongful act in itself.

Slovakia takes the view that Variant C was a lawful, temporary and reversible solution necessitated by the action of its partner and prefers to defend its decision on the basis of the doctrine of "approximate application". However, a subjective view or belief of Slovakia cannot preclude the Court from taking a different view on the matter. The Court is bound by the questions put to it by the Parties in the Special Agreement, but not by the arguments they advanced in their pleadings.

In this regard a very pertinent comment can be found in the International Law Commission's Commentary to the Draft Articles on State Responsibility:

> "Whether a particular measure constitutes a countermeasure is an objective question . . . It is not sufficient that the allegedly injured State has a subjective belief that it is (or for that matter is not) taking countermeasures. Accordingly whether a particular measure in truth was a countermeasure would be . . . a matter for the tribunal itself to determine." (United Nations, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 162-163.)

The Parties requested the Court to decide:

> "whether the Czech and Slovak Federal Republic was *entitled* to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system . . ." (Special Agreement, Art. 2, para. 1 *(b)*; emphasis added).

Since the Court has decided that "Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" (Judgment, para. 155, point 1 B), I shall further focus my observations on the entitlement of Czechoslovakia to put this system into operation from October 1992.

Entitlement to respond by way of proportionate countermeasures stems from a prior wrongful act of the State which is the target of the countermeasures in question. According to the Court's jurisprudence, established wrongful acts justify "proportionate countermeasures on the part of the State which ha[s] been the victim of these acts . . ." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249). Entitlement to take countermeasures is circumscribed by a number of conditions and restrictions.

The most recent and authoritative attempt to codify the rules relating to countermeasures was made by the International Law Commission within the framework of its topic on State Responsibility (United Nations, *Official Records of the General Assembly, Fifty-first Session, Supplement. No. 10* (A/51/10)). Some of the provisions formulated by the ILC in this regard may be viewed as not merely codifying, but also developing customary rules relating to countermeasures (formerly known as reprisals). Therefore, I do not think that the Court in its assessment of the putting into operation of Variant C as a countermeasure may be overreaching the requirements established by the ILC draft for a countermeasure to be lawful.

Thus, to require that Variant C should have been the only means available in the circumstances to Czechoslovakia would amount to applying to countermeasures the criterion which the ILC considers to be indispensable for the invocation of "the state of necessity", but does not specifically mention in the text of the Articles dealing with countermeasures.

But even assuming this criterion should be applied to countermeasures as well, what other possible legal means allegedly open to Czechoslovakia could there be apart from countermeasures? Since the Court has found that Czechoslovakia was not entitled to put Variant C into operation, it should in all fairness have clearly indicated some other legal option or options whereby Czechoslovakia could effectively have asserted its rights under the Treaty and induced its partner to return to the performance of its obligations. In my analysis of the case, I have been unable to find any such effective alternative option available for Czechoslovakia in 1991 or 1992.

Certainly one of the legal means according to Article 60 of the Vienna Convention on the Law of Treaties could be the termination of the 1977 Treaty, in response to the material breach committed by the other party. But for Czechoslovakia would this not have amounted to bringing about by its own hand the result which Hungary had sought to achieve by its unlawful actions?

Another conceivable legal means might have been the formal initiation of a dispute settlement procedure under Article 27 of the 1977 Treaty. This Article stipulates that:

> "1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.
>
> 2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

At the time of the proceeding to Variant C (November 1991), "the matters in dispute" had long been in the hands of the Governments of the contracting parties. Therefore, no settlement could realistically be expected through a procedure at a much lower level when all the attempts to reach a settlement at the highest possible intergovernmental level had failed.

Would it be any more legally correct or, for that matter, realistic to insist that Czechoslovakia should have come to the Court before putting Variant C into operation in October 1992? Apart from the fact that Czechoslovakia was not legally bound to do so, it should be recalled that more than four years elapsed between the filing of the Application in the present case and the commencement of the hearings. One can easily imagine the amount of economic and environmental damage as well as the damage relating to international navigation that could have been caused by such a delay.

What should be borne in mind, however, is the fact that Czechoslovakia respected the obligation to negotiate prior to taking countermeasures. The time between the first suspension of works by Hungary in May 1989 and the proceeding to Variant C in November 1991 and subsequently putting this system into operation in October 1992 was replete with fruitless negotiations at different levels aimed at finding a resolution of the dispute (see paragraphs 61-64 of the Judgment). The history of these negotiations clearly shows that, at least from the end of 1990, the sole purpose of these negotiations for Hungary was the termination of the Treaty and the conclusion of a new agreement dealing only with the consequences of this termination, while for Czechoslovakia the purpose of negotiations was the continuation and completion of the Joint Project in some agreed form within the Treaty framework. Hungary's gradual withdrawal from the Joint Project in defiance of the 1977 Treaty led to the putting into operation of Variant C.

The basic conditions for the lawfulness of a countermeasure are (1) the presence of a prior illicit act, committed by the State at which the countermeasure is targeted; (2) the necessity of the countermeasure; and (3) its proportionality in the circumstances of the case. Certain kinds of acts are entirely prohibited as countermeasures, but they are not relevant to the present case (these acts being the threat or use of force, extreme economic or political coercion, infringement of the inviolability of diplomatic agents, derogations from basic human rights or norms of *jus cogens*).

I believe all the above-mentioned conditions were met when Czechoslovakia put Variant C into operation in October 1992. As to the first condition, it has been satisfied by the Court's findings that Hungary was not entitled to suspend and subsequently abandon the works relating to the Project or to terminate the Treaty (Judgment, para. 155, points 1 A and D). The unilateral suspension of the works by Hungary at Nagymaros and at Dunakiliti (initial breaches of the 1977 Treaty by way of non-performance) and later the abandonment of the work on the Project occurred before November 1991 — the date when, according to the Special Agreement, Czechoslovakia proceeded to the "provisional solution". The illicit termination of the Treaty by Hungary (19 May 1992) preceded the date when Czechoslovakia put Variant C into operation (October 1992 according to the Special Agreement).

Countermeasures may be seen as "necessary" only if they are aimed at bringing about the compliance of the wrongdoing State with its obligations and must be suspended once the illicit act has ceased. This requirement therefore presupposes that countermeasures are reversible by nature.

In the course of the pleadings Slovakia stated and repeated over and over again that Variant C was conceived as a provisional and reversible solution, as an attempt to induce Hungary to re-establish the situation which existed before its wrongful act. Significantly, the Working Group of Independent Experts of the Commission of the European Communities, in its report of 23 November 1992, did not deny the technical feasibility of the return to the Treaty Project:

> "In principle, the ongoing activities with Variant C could be reversed. The structures, excluding some of the underground parts like sheet piling and injections, could in theory be removed. The cost of removing the structures are roughly estimated to at least 30 per cent of the construction costs." (Memorial of Hungary, Vol. 5, Part II, Ann. 14, p. 434.)

This statement confirms that, at least at the time of the damming of the Danube, Variant C was a reversible measure and a return to some agreed joint scheme of the Treaty Project was possible.

The contention of Hungary regarding Czechoslovakia's hidden inten-

tions to act unilaterally — intentions which allegedly already existed in the past and still do — may be of scant relevance to the issue of the reversibility of Variant C.

The existence of such intentions at the governmental level and the readiness to realize them would hardly be compatible with Czechoslovakia's conduct after the suspension of works under the Treaty by Hungary. The Government of Czechoslovakia did not seize upon the opportunity which had emerged to terminate the 1977 Treaty and to complete the Project unilaterally, but instead tried to persuade its Hungarian counterpart to return to the performance of its treaty obligations. At the same time, the Government of Czechoslovakia expressed its willingness to meet many of Hungary's environmental concerns, proposing in October 1989 negotiations on agreements relating to technological, operational and ecological guarantees as well as to the limitation or exclusion of the peak mode operation of the Gabčíkovo-Nagymaros Barrage System. In any event, the veracity and fairness of the public commitments of Czechoslovakia and Slovakia to return to the Joint Project may not be refuted on the basis of mere conjectures, but could be tested only by the response of Czechoslovakia and Slovakia to the positive actions by Hungary.

It remains for us to examine one more basic condition for the lawfulness of a countermeasure, namely its proportionality in the circumstances of the case. It is widely recognized, in both doctrine and jurisprudence that the test of proportionality is very important in the régime of countermeasures and at the same time it is very uncertain and therefore complex.

To begin with, according to the ILC:

> "there is no uniformity . . . in the practice or the doctrine as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed" (United Nations, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), p. 146).

The ILC also observes that "reference to equivalence or proportionality in the narrow sense . . . is unusual in State practice" (*ibid.*, p. 147). That is why in the literature and arbitral awards it is suggested that the lawfulness of countermeasures must be assessed by the application of such negative criteria as "not [being] manifestly disproportionate", or "clearly disproportionate", *"pas hors de toute proportion"*[1], "not out of proportion", etc. The latter expression ("not out of proportion") was employed by the ILC in its most recent draft on State Responsibility. The text of the corresponding Article reads:

[1] In French in the original text.

> "any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State" (Art. 49).

In its Commentary the Commission says that "proportionality" should be assessed taking into account not only the purely "quantitative" element of damage caused, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the "seriousness of the breach" (United Nations, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), pp. 147-148).

If we take this approach which, in my view, adequately expresses State practice and jurisprudence, we should weigh the importance of the principle *pacta sunt servanda* breached by Hungary and the concrete effects of this breach on Czechoslovakia against the importance of the rules not complied with by Czechoslovakia and the concrete effects of this non-compliance on Hungary. The "degree(s) of gravity" in both cases need not necessarily be equivalent but, to use the words of the Air Services Agreement Award, must have "some degree of equivalence" (*International Law Reports*, Vol. 54, p. 338), or in the words of the ILC must "not be out of proportion".

The task is not an easy one and may be achieved only by way of approximation, which means with a certain degree of subjectivity. Weighing the gravity of the prior breach and its effects on the one hand, and the gravity of the countermeasure and its effects on the other, the Court should, wherever possible, have attempted in the first place to compare like with like and should have done so with due regard to all the attendant circumstances against the background of the relevant causes and consequences. Following this approach, the Court should have assessed by approximation and compared separately:

(1) the economic and financial effects of the breach as against the economic and financial effects of the countermeasure;
(2) the environmental effects of the breach as against the environmental effects of the countermeasure; and
(3) the effects of the breach on the exercise of the right to use commonly shared water resources as against the effects of the countermeasure on the exercise of this right.

All these assessments and comparisons should have specifically been confined to the span of time defined by the question put to the Court by the Parties, namely November 1991 to October 1992. It should not be forgotten that the very idea and purpose of a countermeasure is to induce the wrongdoing State to resume performance of its obligations. The sooner it does so the less damage it will sustain as a result of the countermeasure.

Czechoslovakia, clearly defined in the Treaty and expressly consented to by Hungary.

In response to this illicit act, Czechoslovakia likewise failed to act in accordance with its obligations under the 1977 Treaty. By putting into operation Variant C, it temporarily appropriated, on a unilateral basis and essentially for its own benefit, the amount of water from which originally, according to the Treaty and the Joint Contractual Plan, both States were entitled to benefit on equal terms. At the same time, Czechoslovakia reiterated its willingness to return to the previously agreed scheme of common use and control provided that Hungary ceased violating its obligations. The possibility of a revision by agreement of the original joint scheme was not excluded either.

In those circumstances and as long as Hungary failed to perform its obligations under the 1977 Treaty and thus, of its own choosing, did not make use of its rights under the same Treaty, Czechoslovakia, in principle, *by way of a countermeasure* and hence on a provisional basis, could channel into the Gabčíkovo structure as much water as had been agreed in the Joint Contractual Plan. Moreover, Article 14 of the 1977 Treaty provided for the possibility, under a certain condition, that each of the Parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan (see Judgment, para. 56).

Let it be assumed, however, that in view of all the attendant circumstances and the growing environmental concerns Czechoslovakia, as a matter of equity, should have discharged more water than it actually did into the old river bed and the Hungarian side-arms of the Danube. This assumption would have related to only one of the many aspects of the proportionality of the measure in question, which could not in itself warrant the general conclusion of the Court that Czechoslovakia was not entitled to put Variant C into operation from October 1992.

For the reasons stated above, I could not vote for paragraph 155, point 1 C, of the Judgment. Nor could I support paragraph 155, point 2 D, in so far as it does not, regrettably, differentiate between the obligation of the State which had committed a prior illicit act and that of the State which responded by way of a countermeasure. It goes without saying that my negative vote on paragraph 155, point 2 D, as a whole must not be understood as a vote against the first part of this paragraph.

(Signed) Vladlen S. VERESHCHETIN.

On the first point of comparison, according to Slovakia "by May 1989, a total of US$2.3 billion (CSK 13.8 billion) had been spent by Czechoslovakia on the G/N Project" (Memorial of Slovakia, para. 5.01). These figures, which naturally do not include the loss of energy production and the cost of the protection, maintenance and eventual removal of the existing structures, give the idea of the economic and financial losses which would inevitably have been sustained by Czechoslovakia in the event of a complete abandonment of the Project.

For its part, Hungary did not, either in its written pleadings or in its oral arguments, give any concrete figures evincing in monetary terms the amount of actual material damage sustained as a result of Czechoslovakia's resort to Variant C. Hungary claimed its entitlement to the payment by Slovakia of unspecified sums in compensation for possible future damage, or potential risk of damage, which might be occasioned by Variant C. Although it is true that "[n]atural resources have value that is not readily measured by traditional means" (Reply of Hungary, Vol. 1, para. 3.170), uncertain long-term economic losses, let alone the mere potential risk of such losses, may not be seen as commensurable with the real and imminent threat of having to write off an investment of such magnitude.

In terms of comparative environmental effects, Variant C could be seen as advantageous against the originally agreed project, due to a smaller reservoir and the exclusion of peak mode operation. On the other hand, in the event of the total abandonment of the project, the waterless bypass canal and other completed but idle structures would have presented a great and long-lasting danger for the environment of the whole region. As stated in the Judgment

> "It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission . . ., that not using the system . . . could have given rise to serious problems for the environment." (Para. 72.)

Also, it is necessary to compare the gravity and the effects of the breach of the 1977 Treaty by Hungary with the gravity and the effects of the response by Czechoslovakia in terms of their respective rights to the commonly shared water resources. Hungary and Czechoslovakia had agreed by treaty on a scheme for common use of their shared water resources, which use they evidently considered equitable and reasonable, at least at the time when this agreement was reached. Both States had made important investments for the realization of the scheme agreed upon. At the time when one of the States (Czechoslovakia) had completed 90 per cent of its part of the agreed work, the other State (Hungary) abruptly refused to continue discharging its treaty obligations. Due to the technical characteristics of the project, Hungary thereby deprived Czechoslovakia of the practical possibility of benefiting from the use of its part of the shared water resources for the purposes essential for

Appendix I: Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal

and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.

Everyone has the right to life, liberty and security of person.

Article 4.

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.

(1) Everyone has the right to a nationality.
(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.

(1) Everyone has the right to freedom of peaceful assembly and association.
(2) No one may be compelled to belong to an association.

Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
(2) Everyone has the right of equal access to public service in his country.
(3) The will of the people shall be the basis of the authority of government; this will shall be

expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.