CR 97/7

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

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Public sitting

held on Monday 24 March 1997, at 10 a.m., at the Peace Palace,

President Schwebel presiding

in the case concerning **Gabcíkovo-Nagymaros Project**

(Hungary/Slovakia)

VERBATIM RECORD

ANNEE 1997

Audience publique

tenue le lundi 24 mars 1997, à 10 heures, au Palais de la Paix,

sous la présidence de M. Schwebel, Président

en l'affaire relative au **Projet Gabcíkovo-Nagymaros**

(Hongrie/Slovaquie)

COMPTE RENDU

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

Présents : M. Schwebel, Président
M. Weeramantry, Vice-Président
MM. Oda
Bedjaoui
Guillaume
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Parra-Aranguren,
Kooijmans
Rezek, juges

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The PRESIDENT: Please be seated. Good morning. We now turn to the oral presentation of the Slovak Republic and I call on the distinguished agent of the Slovak Republic, Dr. Peter Tomka.

Mr. TOMKA: Thank you Mr. President. Mr. President, Members of the Court, it is always a great honour for a lawyer to appear before you. I feel highly privileged to act as Slovakia's Agent in this case, brought before the World Court jointly by two Danubian States, Slovakia and Hungary. I am happy to join the distinguished Agent of Hungary in noting that this is the first case submitted to the Court on the basis of a Special Agreement concluded between two countries belonging to the regional group of Eastern European States in the United Nations, for whom this Court is the principal judicial organ.

The fact that Slovakia pleads second does not imply in any way that it is the defendant in this case. Since the Court has been seised of the case by the joint notification of a *compromis*, there can be neither claimant nor defendant.

In opening Slovakia's presentation, I should like to highlight certain of the main elements of this case — as Slovakia sees it — in contrast to the case Hungary has presented.

The Importance of the case

I turn first to the importance of this case. The Court will soon have a good look at the Gab_íkovo/Nagymaros Project during the site visit. From the sheer extent and scope of the Project, its importance to both Parties in this region of the Danube is self-evident. Not simply in terms of its cost to Czechoslovakia and to Slovakia — an investment of some 2.5 billion U.S. dollars. Not simply in the time and resources expended by both Czechoslovakia and Hungary — decades of intensive work and study by top scientists, engineers, environmentalists, hydrologists,

economists, builders and planners, which started 25 years prior to the 1977 Treaty, and continued during the 20 years that have elapsed since the Treaty was entered into. But, most important of all, in the promise the scheme held for the people of the region: the promise of protection from flooding, of clean energy, of better navigation, of benefits to agriculture, and of dealing with the problem of water pollution.

When this dispute arose in early 1989, about 90 per cent of the work on the Gab_íkovo section of the Project had already been completed under the 1977 Treaty. The site had already been cleared in preparation for the damming of the Danube and the filling of the reservoir and the bypass canal, scheduled to start in late 1989. The basic structures for the Gab_íkovo section were finished or nearing completion, and significant amounts of money had already been expended for the Nagymaros section. This was far from a "very partially implemented" Project, as Hungary described it here to the Court (CR 97/2, p. 92).

In May 1989 — just three months after the Parties had agreed to speed up the Project's schedule by 15 months at Hungary's urging — Hungary suddenly stopped work on Nagymaros. In July, despite formal assurances to the contrary, Hungary extended its stoppage to Gab_íkovo. It then proceeded to abandon Nagymaros in October, and by mid-1990 it had totally abandoned the Project. Every one of these acts was taken unilaterally by Hungary — and they were a surprise and rude shock to Czechoslovakia.

In its pleadings, Hungary asks the Court to find that Slovakia is under the obligation to restore this section of the Danube to the situation as it existed prior to putting into operation the Gab_íkovo section of the Project. In other words, to abandon entirely these works and to render useless this huge investment. This would mean emptying the _unovo reservoir and the bypass canal, and leaving the Gab_íkovo and

_unovo sites as unused masses of concrete and equipment — a long ugly scar on the landscape of Slovakia. The Court may get a good idea of what this would mean from the photographs appearing as *Nos. 2 and 3* in the *Judge's Folder*, which show the Gab_íkovo section around the time when Hungary took its first step toward the Project's abandonment. There was hardly the option to return this area to a "cow pasture", as Counsel for Hungary suggested (CR 97/4, p. 27).

If the Court were to grant Hungary's request, an unthinkable loss of resources would result for a country with a population of only slightly over 5 million people. It would render useless a functioning hydroelectric plant that furnishes some 10 per cent of the electrical power needs of Slovakia — a clean source of electrical power that Slovakia today requires. It would undo the solution agreed in the 1977 Treaty for resolving the serious flood control problems in this sector of the Danube following the devastating floods in 1954 and 1965.

And the serious navigational bottlenecks that existed in this sector of the Danube, which have been remedied in part by the bypass canal (and were to have been solved downstream in the Nagymaros section), would reappear. The navigational improvements under the G/N Project must be viewed in conjunction with the plans of other European States — the Netherlands, Germany, France and Austria (upstream of the Project); and Croatia, Yugoslavia, Bulgaria, Romania, and Ukraine (downstream), not to speak of Hungary itself. For this sector of the Danube forms part of the great international waterway across Europe from the North Sea to the Black Sea (as shown by the map at *No. 12 in the Judge's Folder*). This expanded waterway became a reality after the completion of Germany's huge investment in the Rhine-Main-Danube Canal in 1992 — a vast engineering undertaking lasting 30 years and costing Germany some 4 billion DM.

This gives the Court some idea of the *importance* of this case — to Slovakia, to this region of the Danube and to the other European States upstream and downstream of the G/N Project.

In this regard, Mr. President, has the Court heard — or even read — one good word about this Project from the Hungarian side? Slovakia is still waiting for just one favourable comment. I think the Court may well be surprised when it actually sees the Project after all this adverse talk. Perhaps this is why Hungary was initially not so enthusiastic about the idea of a site visit.

And the Court will recall that Hungary insisted the other day that the *status quo* in the Gab_íkovo section of the Project is "simply not sustainable" — either in terms of future friendly relations between Slovakia and Hungary or in terms of the environment (CR 97/2, p. 97). Hungary took the view that the 1977 Treaty cannot be forced on it because valid concerns about vital interests of Hungary have emerged that could not be resolved to Hungary's satisfaction by mutually agreed amendments to the 1977 Treaty (CR 97/2, p. 93). In so saying, Hungary has, indeed, put its finger on what this case is about on the legal plane — that this is a treaty case. It primarily concerns Hungary's failure to carry out its obligations under the 1977 Treaty.

The nature of the case

Hungary argues that the 1977 Treaty was a terrible mistake — supposedly an ill-prepared, ill-conceived piece of socialist megalomania.

Mr. President, that is nonsense. Well before the advent of COMECON, schemes were being considered for improving this stretch of the Danube. Hundreds of careful background studies had been made prior to 1977. And this is not a Project resulting from "pressure" from the Soviet Union, as Hungary claims. To the contrary, it was Hungary who took the initiative

of requesting assistance from the Soviet Union. The pressure was exerted in the other direction; and the Soviet Union ultimately promised — in November 1977 — to provide technical know-how and to deliver six turbine units for the Nagymaros hydropower plant that Hungary abandoned in the early stages of its construction.

But setting all this aside, the Court will note that Hungary does not deny the validity of the 1977 Treaty. Hungary seeks to justify its abandonment of the Project under what it considers to be a *valid treaty* — just as it seeks to justify its subsequent purported termination of an admittedly *valid treaty*.

It is undeniable that Hungary's conduct, to which the questions in Article 2 of the Special Agreement are addressed, was fundamentally incompatible with its obligations under the Treaty. However, Hungary's written pleadings sought to justify this prima facie breach primarily by an argument of "ecological necessity". Now, during its first-round oral presentation, Hungary has considerably broadened its defence to include the supposed failure to be able to demonstrate the overall viability of the Project at the time of Hungary's breaches in 1989 and at the time of its attempt to terminate the Treaty in May 1992. Slovakia's counsel will address these arguments and demonstrate that they are unfounded.

In this regard, in its Reply (HR, para. 1.08) and several times during its oral presentation (CR 97/3, p. 74; CR 97/6, p. 10), Hungary has stated that the European Bank for Reconstruction and Development had evaluated the G/N Project and found it to be of "dubious economic value". It even claimed that the World Bank expressed a similar view (CR 97/6, p. 10). But neither one of these banking institutions was ever asked for financial assistance or ever studied the Project. The letters from them, dated May 1992, placed in evidence by Hungary, were responses to inquiries from environmental groups, in order to bolster Hungary's

arguments for terminating the 1977 Treaty. The Court may be interested to know that in connection with the second phase of Variant C, the J. P. Morgan Bank in 1995 and 1996 assembled a group of banks to provide the financial assistance which was requested by Slovakia at the time. Evidently, those banks arrived at a favourable evaluation of the Project.

Mr. President, the 1977 Treaty was not a rigid instrument under which no change could be contemplated. The 1977 Treaty and the international agreements linked to it were highly flexible. That is why the Treaty itself only established the Project's general lines and objectives, to be carried out under a Joint Contractual Plan, which the Treaty parties had the power to modify by agreement and which underwent many modifications. That is why there were continuing studies of problems emerging during construction, which led to modifications related, *inter alia*, to the environment and water quality.

Before 1989, where one party identified a problem and disclosed the evidence for its concern, the two parties jointly worked out an *agreed* solution. This they did frequently, and appropriate changes were made in the Treaty, in its related agreements and in the Joint Contractual Plan. But starting in May 1989, Hungary's approach changed radically. It assumed it could dictate its demands.

In effect, Hungary now takes the position that such treaties as the one in question can be ignored. According to Hungary, even where a formal, binding treaty exists, one party is free at any time to *demand* a revision of the treaty, or even to change its mind completely and *demand* that the treaty be terminated.

But, Mr. President, the law of treaties does not sanction such a one-sided approach. Otherwise, the original Treaty would be scarcely worth the paper it was written on. And the object and purpose of the 1977 Treaty was not to build a monument to socialist integration. It was

to construct and operate the G/N Project in order to provide electricity, flood control and improved navigation.

Mr. President, from the very start, Czechoslovakia has maintained its interest in the fulfilment of its treaty obligations with Hungary in order to achieve the object and purpose of the 1977 Treaty — that is in the *joint* construction and the *joint* operation of the G/N Project. But what was Czechoslovakia's option when Hungary abandoned the Project and *de facto* repudiated the Treaty ?

The abandonment of the Project — when about 90 per cent of the construction in the Gab_íkovo section had been completed — was clearly out of the question. So, after careful consideration — and after Hungary had repeatedly demonstrated its unwillingness to resume the Project — Czechoslovakia decided to complete the Gab_íkovo section of the Project and to put it into operation under Variant C. Later on, Slovakia's counsel will go into the legal justification for Czechoslovakia's taking this action.

But at this stage I feel it necessary to comment on Hungary's accusation in its written pleadings, and during its oral arguments, that Variant C was the culmination of Czechoslovakia's long-time attempts to gain greater access to the right bank of the Danube; that Variant C was the achievement of Czechoslovakia's aspirations, going back as far as the 1920s, to secure unilateral control over the hydroelectric potential of this common stretch of the Danube (HR, paras. 2.04-2.17; CR 97/2, p. 30; CR 97/4, pp. 74-75). It is too bad that Hungary has felt obliged to introduce into this case such a false and discordant political element.

I must reject on behalf of Slovakia, here and now, the false accusation in Hungary's Reply that Variant C stemmed from such "long-standing Czechoslovakia's designs". There is no basis whatsoever for such a statement; historically the facts and evidence show the exact

opposite (SM, para. 18). And I must also reject Hungary's attempt to characterize the cession of territory to Czechoslovakia under the Paris Peace Treaty as an annexation (CR 97/2, p. 30).

And it is evident that, on their face, had any such aspirations existed, they would have made no sense. Two of the prime objectives of the 1977 Treaty were flood control and the improvement of international navigation. These could only have been achieved through a joint action by the two States sharing this common stretch. The agreed plan for the Gab_íkovo-Nagymaros Project to produce peak power electricity at Gab_íkovo required the existence of the Nagymaros weir, which was located on Hungarian territory. Under the Treaty Project, the parties chose Dunakiliti as the place to dam the Danube, an installation located on Hungarian territory and, hence, subject to Hungary's control as a technical matter — hardly a choice revealing the supposed secret designs of Czechoslovakia. It was, in fact, a choice that made it possible for Hungary unilaterally to stop the Gab_íkovo section from proceeding.

Later in these proceedings, Slovakia will demonstrate how clearly the evidence shows that, until almost the last minute before damming, Czechoslovakia tried over and over again to get Hungary to agree to resume performance of the Gab_íkovo section *on a joint basis*; how Czechoslovakia attempted over and over again during 1991 and 1992 to resume the negotiations that were broken off by Hungary in early 1990 in order to find a way to resume the *joint performance* of the Project.

A joint operation was of the very essence of the Project under the 1977 Treaty. It is no longer being jointly operated simply because of Hungary's abandonment.

So this is what the case is about. It is about the legality of the conduct of the two Treaty parties under the 1977 Treaty in the light of the law of treaties and other rules of international law. This is clearly

reflected in the questions put to the Court in the Special Agreement — which brings me to the *next* matter I should like to take up: the *task* of the Court.

Task of the Court

- ***The Questions Put to the Court in Article 2 of the Special Agreement***

The task which the Special Agreement requests the Court to perform is set out in Article 2, whose text appears as *No. 4* in the *Judge's Folder*. Paragraph 1 of Article 2 asks the Court to decide three sets of questions, which appear in subparagraphs (a), (b) and (c). Subparagraph (a) concerns Hungary's conduct. *First*, was Hungary entitled to suspend and subsequently abandon, *in 1989*, the works at Nagymaros? *Second*, was it entitled, *in 1989*, to suspend and subsequently abandon the works on the Gab_íkovo part of the Project for which it was responsible?

Subparagraph (b) concerns Czechoslovakia's conduct: was it entitled to proceed, *in November 1991*, to the "provisional solution" and to put into operation *from October 1992* this system?

The final question (subparagraph (c)) concerns the legal effects of Hungary's Notification of Termination of the 1977 Treaty on 19 May 1992.

In paragraph 2 of Article 2, the Court is *also requested* to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on these questions.

The law to be applied by the Court in reaching its Judgment on these questions is set out at the beginning of Article 2. Counsel will address this issue of the applicable law later. I shall focus here on the importance of the specific questions put to the Court in terms of the role of the Court.

For Slovakia, these questions are the crux of the Special Agreement. The Court's answers will settle the issue of Treaty breach and resulting responsibility that lie at the heart of this dispute. *For Hungary*, the Court's answers to these questions would seem to be merely of background significance. Hungary's Reply puts it this way:

> "It is necessary to answer these questions in order to determine the *legal position in respect of the continuing dispute between Hungary and Slovakia* over the Original Project and over Variant C." (HR, para. 2; emphasis added.)

Let me mark this phrase: "the continuing dispute between Hungary and Slovakia". What is that supposed to mean? Does Hungary suggest that the Court's answers will decide matters as between Hungary *and Czechoslovakia*, but that the dispute *with Slovakia* will continue?

Hungary's position reflects, of course, its thesis that Slovakia was not successor to Czechoslovakia in respect of the 1977 Treaty. Hence, Hungary argues, none of its breaches of the Treaty involves any question of Hungary's responsibility to Slovakia.

On that view, what Hungary calls the "continuing dispute" between it and Slovakia is not governed by the 1977 Treaty and, we must assume, will not be resolved by the decision of the Court. Hungary concludes:

> "[O]nce the Court comes to the conclusion that Hungary was acting in good faith in an attempt to resolve genuine concerns about the Project, that history [the history of Hungary's breaches] has a somewhat limited relevance to the case." (HR, para. 1.147.)

Hungary appears to be telling the Court here that it need hardly bother with the questions put to it in Article 2 of the Special Agreement concerning Hungary's conduct.

Of course, this is palpably wrong. These actions and reactions that make up the conduct of the Treaty parties during this period, and are referred to in Article 2, constitute the very essence of this dispute. The Parties have put to the Court under the Special Agreement specific questions concerning the actions of Treaty parties at or during

identified periods of time precisely because the answers to those questions will resolve the dispute between Hungary and Slovakia. Yes, I repeat, Slovakia. And the questions do not become irrelevant if the Court accepts that Hungary acted in good faith. Those questions are specific. The dates are specific — and for good reason. They require specific findings from the Court. Moreover, the Court's answers will settle the dispute between Hungary and Slovakia. There will be no continuing dispute.

It is for these reasons that Slovakia asks the Court to pay particularly close attention to the continuing differences between the Parties over the events and conduct of the Treaty parties during the periods relevant to the questions under Article 2 and to the evidence relied on by each Party. In Slovakia's view, Hungary's account of what transpired is factually wrong in many material respects. It is evident that Hungary's case cannot be sustained on the basis of an accurate account of what took place between 1989 and 1992.

- ***Issues the Court Is Not Called Upon to Resolve***

Now, Mr. President, I should like to turn to what the Court has *not* been requested to do — and what this case is *not* about.

First, the question of a water management régime for the Danube, which Hungary has sought to inject into the case, clearly lies outside the scope of the case submitted to the Court by Special Agreement. However, the Agent of Hungary in his opening statement seems to have suggested that the Court does have a role to play in these matters (CR 97/2, p. 22). But it was never intended by the Parties that the Court should be invited to act as experts in water management. This was foreseen to be a technical matter for the Parties to reach agreement on once the Court's Judgment was rendered. As Counsel for Hungary rightly observed, "a water management system [will have to be] agreeable to both

States in front of you" (CR 97/4, p. 43). So this is clearly a matter for Slovakia and Hungary to agree on.

Second, the region of the Danube has been the subject of a number of bilateral and multilateral agreements among the riparian States, including Slovakia and Hungary. These directly concern the protection and preservation of the environment in the Danube region and the improvement of the quality of surface and ground water. Extensive research projects have been undertaken, such as the recently completed PHARE Report sponsored by the E.U., a project which Hungary, in late 1990, declined to participate in. These efforts are on the active agenda of the States of the Danube. The G/N Project, like all the other Danube river projects, operates alongside this framework.

Hence, the protection of the environment in this region of the Danube is in good hands. It is being closely watched by the Danube States in accordance with the current international standards, and the appropriate agreed measures are being taken. It is up to these States to make the difficult political choices that inevitably arise. And I should like to remind the Court that flood control and waste disposal measures, not to speak of providing a clean source of energy, concern the human dimension of the environment, which Hungary seems to ignore.

Third, in order to render its Judgment in this case, the Court is not called upon to master and resolve complex scientific and technical issues. That is why the question of water management was not referred to the Court. But since Hungary has tried to turn this case into a dispute about environmental protection, and has sought to defend its non-performance of the 1977 Treaty and related agreements on the basis of so-called "state of necessity", Slovakia has had to address the scientific arguments made by Hungary.

The Court, Mr. President, has not been called upon to be an arbiter of — to second guess — what Czechoslovakia and Hungary decided in the 1977 Treaty, any more than Slovakia is called upon to defend them. The question in this case is *not* whether the Parties to this dispute would make the same choices today if the Treaty did not exist. The Treaty must be applied. That is what the Special Agreement has asked the Court to do. Otherwise, treaty obligations and the principle of *pacta sunt servanda* would be rendered meaningless.

It will not have escaped the Court's attention that the word "environment" is entirely missing from the Special Agreement. But the matter of the protection of the environment and water quality was not omitted from the 1977 Treaty and its related agreements, and this includes the human aspects of the environment such as flood control, clean energy and dealing with the problem of waste disposal. And the Project's possible environmental effects were given careful study and attention both before and after 1977. That is why the questions in this case are about the performance by Czechoslovakia and Hungary of their Treaty obligations — and not directly about the environment.

Mr. President, the other day Counsel for Hungary drew attention to what he called the Court's "precious opportunity" in this case since it is, he said, the "first major environmental dispute to come to this Court" (CR 97/2, p. 98). But this case is first and foremost a *treaty* dispute. The opportunity for the Court, in Slovakia's view, is once again to carry out its judicial duty to apply the law as dispassionately in this case as in any other case — even though this case involves the sorts of environmental and economic issues that sometimes become highly charged politically and emotionally.

The environmental arguments now put forward by Hungary have an interesting history. In 1981, when the Hungarian Government sought to

postpone the G/N Project for entirely economic reasons, it went to its Academy of Sciences asking for environmental arguments to strengthen the Hungarian negotiating position. A confidential letter of Mr. Marjai, its Deputy Prime Minister, placed in evidence by both sides, reveals that the Academy failed miserably to come up with any convincing environmental reasons for delaying the Project (SM, paras. 3.37-3.49; SC-M, paras. 4.21-4.33). Nevertheless, in 1983, Czechoslovakia joined in a Protocol postponing the Project to help ease the economic troubles of Hungary, although not for as long as Hungary had initially asked.

But then, not long afterward, Hungary was able to secure financial loans and credit from Austria. So it switched its position and pressed Czechoslovakia to agree to speed up the Project's schedule. This time the protection of the environment was one of Hungary's arguments for *accelerating* the construction schedule (SM, para. 3.11 and Ann. 49). A new Protocol was entered into by the Treaty parties in February 1989 advancing the schedule by some 15 months.

Barely three months had passed after this, when, lo and behold, Hungary started its suspensions and abandonments of the Project in breach of the Treaty with the suspension of all work on the Nagymaros section. What reason did Hungary give? Environmental protection. But the evidence shows that perhaps the main factor leading Hungary to suspend and then to abandon Nagymaros was the *added cost* of environmental protection brought about by having to carry out the expensive waste disposal measures for water quality protection required before putting Nagymaros into operation under the accelerated schedule (SC-M, para. 4.46 ; SR, paras. 7.13-7.17). In other words, Hungary put economic concerns ahead of water quality.

Now, during the oral proceedings, economic considerations seem to be making a come back; Hungary has stressed the issue of the Project's economic viability.

Mr. President, Slovakia believes the protection of the environment to be too important a matter to be bounced around like a shuttle-cock.

Concluding Remarks

Mr. President, Members of the Court, I should like to bring my statement to a close with these final remarks. They relate to Hungary's unilateral actions in 1989 to suspend and abandon the G/N Project in breach of the Treaty. Had these actions really been inspired by the fear of risk to the environment or risk to water quality, this dispute could readily have been settled at the time. The settlement would have allowed Gab_íkovo to go forward on a jointly agreed (although possibly revised) basis, while Nagymaros and peak power operation at Gab_íkovo were being studied by joint or trilateral commissions (and while the damage claims of Czechoslovakia were being sorted out). The facts of this dispute clearly establish this to be so (SR, paras. 7.26-7.40, 8.05-8.21). They demonstrate that there was plenty of time to study what to do about Nagymaros and about peak power operation. And Hungary itself proposed in 1989 to proceed with Gab_íkovo under a guarantees agreement — a proposal that Czechoslovakia quickly indicated it was ready to accept.

But this did not happen. Of course, this was a tumultuous period in both countries. Both Governments had a lot of other things on their minds. It was a time when programs and projects identified with the past came in for intense political attack. In Hungary, the G/N Project had become a favourite target of political opposition. Moreover, Hungary admits that it was in the midst of severe economic difficulties. And its requirements for additional sources of electric power had been

substantially reduced as a result of new projects completed after the 1977 Treaty, notably the large fossil-burning plant at Dunamenti and the four-reactor nuclear power plant south of Budapest on the Danube at Paks. So the G/N Project seemed to Hungarian eyes to be no longer necessary. But that gave Hungary no right to deprive Czechoslovakia of its rights under the Treaty.

Moreover, for Hungary, it became a useful negotiating tactic — as well as politically and legally expedient — to invoke "environmental necessity" as its main reason for opposing proceeding with the Project. But, of course, there remained practical difficulties that were insurmountable. There was a Treaty standing in the way. And Hungary was unable to produce any credible evidence of a state of necessity.

It was totally unrealistic for Hungary to have imagined at the time that Czechoslovakia would agree to the abandonment of the Project and to the Treaty's termination in the circumstances. It was far too late; and the question of further postponement and even abandonment had been carefully reviewed during the 1980s and formally and officially resolved in favour of accelerating the Project (SR, paras. 7.06-7.16). Not to proceed with the Project would have created tremendous environmental hazards as a result of the incomplete and unused structures. It would also have meant a return to a situation of serious floods and major obstacles to navigation along this international waterway, not to mention the problems of water pollution and the sinking water level in the region, with its adverse environmental impacts, which would remain unresolved. Czechoslovakia displayed the greatest flexibility in searching for a solution to the dispute, but it could not agree to the impossible.

Faced with daunting economic and political pressures, Hungary unilaterally took decisions that reflected its own failure to weigh adequately the impossible position in which its Treaty partner,

Czechoslovakia, would be placed unless some solution to proceeding with Gab_íkovo were found. Such a solution was ready and waiting in October 1989 had the real problem for Hungary been one of environmental impact. But it wasn't. It was a political and an economic problem for which Hungary decided that total abandonment of the Project was the only solution - a solution to which there was not the remotest chance of reaching agreement with Czechoslovakia. And it was a solution in violation of Hungary's Treaty obligations.

I must emphasize that the last thing Czechoslovakia wanted to happen at the time was for the G/N Project to become a thorn in the side of the new relationship being forged with Hungary. During 1991 and 1992, Czechoslovakia repeatedly put forward compromise proposals as a basis for the joint resumption of the Project with environmental guarantees. And it delayed the actual damming of the Danube under Variant C as long as it could without the loss of a fourth year in putting Gab_íkovo into operation. But Hungary's sole purpose was to abandon the Project and terminate the Treaty.

After four years of operation of Gab_íkovo under Variant C, it can be demonstrated on the basis of actual data and monitoring that, had the Treaty parties proceeded in 1989 with the Gab_íkovo section of the Project in accordance with Hungary's own proposal, it would be operating successfully today *on a joint basis*.

Mr. President, this brings me to the end of my statement. My colleague and good friend from the Czech Republic, Slovakia's Co-Agent, Dr. Mikulka will now go into the background of the 1977 Treaty, the problems it was intended to solve, and its scheme for doing so. I should be most obliged if you would call on Dr. Mikulka to continue with Slovakia's presentation.

Mr. President, Members of the Court, thank you for your kind attention.

The PRESIDENT : Thank you, Dr. Tomka. I now call on Dr. Mikulka.

M. MIKULKA :

LE TRAITE DE 1977

OBJET ET CARACTÈRES GÉNÉRAUX

Monsieur le Président, Messieurs les Juges, c'est un grand honneur pour moi d'apparaître pour la première fois devant votre Haute Juridiction.

A. Introduction

La Hongrie a donné une image extrêmement confuse du projet prévu par le traité de 1977. Dans ses écritures, elle le dépeint comme le gaspillage à grande échelle de ressources rares, conçu à la seule fin de répondre aux objectifs idéologiques des régimes communistes tchécoslovaque et hongrois, aux intérêts de l'Union soviétique et du COMECON. Un «dinosaure» appartenant à «une ère ancienne», qui n'aurait jamais été viable sur le plan économique (HM, par. 16; HC-M, par. 7.38-7.39; HR, par. 3.82-3.86). Pendant sa première présentation orale, la Hongrie a repris sans cesse ce thème.

La Hongrie affirme que le projet a été mal conçu dès le départ, sans tenir compte des nécessités de la protection de l'environnement. Donc, dit-elle en substance, elle ne peut être responsable de la violation de ses obligations au titre d'un traité qui heurtait le sens commun. La Hongrie essaie, de cette manière, de détourner l'attention de la suspension et de l'abandon du projet, en rupture de ses obligations au titre du traité, pour la polariser sur ce qu'elle déclare être les dangers environnementaux du projet.

L'équipe de plaidoirie de la Slovaquie montrera plus tard que les allégations hongroises concernant l'impact du projet sur l'environnement ne sont pas fondées et que cet impact a, au contraire, fait l'objet d'études soigneuses et approfondies. Pour l'instant, je me bornerai à préciser les véritables objectifs du traité de 1977 et les problèmes qu'il visait à résoudre. Ceci permettra à la Cour de se faire une idée précise des graves conséquences qui ont résulté des actes de suspension et d'abandon du projet par la Hongrie et de la situation impossible dans laquelle la Tchécoslovaquie s'est trouvée à la suite de cela.

La Cour connaît déjà la région du Danube concernée par le projet de Gab_íkovo-Nagymaros qui apparaît sur l'écran.

Cette partie du fleuve a fait l'objet d'interventions humaines depuis près d'un millénaire. A l'origine, ces interventions étaient centrées sur la culture des terres inondables et fertiles de la région. On a essayé de limiter les inondations régulières du Danube en construisant des digues et en asséchant les terres à l'extérieur de ces digues. Puis on s'est efforcé de canaliser le fleuve de façon à ce que les bateaux puissent y naviguer sans danger. Vous pouvez voir sur l'écran la transformation qui en est résultée. Une ligne bleue représente le Danube vers 1960. Elle a été superposée sur une carte de la

région de 1736. Vous pouvez constater, Messieurs les Juges, que les méandres du fleuve ont été éliminés et que le courant s'est trouvé concentré dans un chenal unique à courant rapide.

J'aimerais ici souligner deux points. *Premièrement*, lorsque le projet était à l'étude dans les années soixante et soixante-dix, cette région du Danube n'était pas du tout un paysage vierge dans son état naturel. *Deuxièmement*, l'aménagement antérieur au commencement du projet avait été sporadique, sans coordination et quelquefois dommageable pour l'environnement.

Le traité de 1977 devait permettre, pour la première fois, une approche *coordonnée* et à *long terme* de l'aménagement de cette partie du Danube.

B. <u>Le caractère intégré et commun du projet prévu par le traité</u>

La plus grande partie du Danube entre Bratislava et Budapest est commune aux deux Etats. Son aménagement ne pouvait résulter que d'un projet *commun*, comportant nécessairement des structures situées sur le territoire de chacun des deux Etats. Le projet commun établi par le traité de 1977 a été le résultat de vingt années de négociations bilatérales, au cours desquelles un grand nombre de solutions techniques différentes ont été étudiées.

Quatre alternatives différentes figurent dans le *Dossier des Juges* sous les *n^{os} 5 à 8* à titre d'exemple. Ceci ne représente qu'un petit échantillon des nombreuses approches envisagées.

Le projet finalement convenu devait comprendre deux sections : la section de Gab_íkovo et celle de Nagymaros. Et comme l'article 1 du traité l'indique clairement, l'intention était de construire un «système d'ouvrages opérationnel unique et indivisible» (MH, vol. 3, annexe 21, p. 249). Le plan général apparaît sur l'écran *(Dossier des Juges, n^{o} 9)*.

Commençons par la section de Gab_íkovo. Le remplissage du réservoir dépendait du barrage-déversoir de Dunakiliti. A côté de celui-ci — ici sur la carte —, on trouve l'endroit où le fleuve devait être barré.

Une fois le Danube barré, le niveau d'eau dans le réservoir et la décharge d'eau le long du canal de dérivation vers la centrale électrique de Gab_íkovo devaient être contrôlés par l'ouverture et la fermeture des portes du barrage de Dunakiliti. Ce barrage constituait la clé du fonctionnement de la section de Gab_íkovo. Et cette clé était entre les mains de la Hongrie étant donné que le barrage était situé sur son territoire.

En aval de Dunakiliti, dans l'ancien lit du Danube, des mesures ont été envisagées pour adapter le lit de la rivière en prévision d'un débit réduit. Le niveau d'eau de l'ancien Danube devait être maintenu par une série de digues subaquatiques afin de conserver un niveau approprié de nappe phréatique dans le secteur adjacent (MS, par. 2.49).

Venons-en maintenant au secteur de Nagymaros où un autre barrage et une centrale hydro-électrique étaient prévus, tous en territoire hongrois. La clé du fonctionnement du secteur aval du projet était donc, elle aussi, entre les mains de la Hongrie.

La partie amont, ou de retenue, de la section de Nagymaros comprenait néanmoins également un système étendu de digues latérales, d'installations de protection contre les inondations, de canaux de drainage et de stations de pompage, comme on peut le voir sur la carte projetée en ce moment. Ce système, si on le considère dans son ensemble, était situé, en grande partie, sur le territoire slovaque. Ceci était nécessaire parce qu'en augmentant le niveau d'eau du Danube en amont de Nagymaros, l'eau serait refoulée dans les sections inférieures des affluents de la rive gauche du Danube, situés en territoire slovaque. Avec l'abandon de Nagymaros par la Hongrie, l'investissement considérable effectué par la Tchécoslovaquie pour réaliser ces travaux a été rendu parfaitement inutile.

Ces faits mettent en évidence deux autres caractéristiques importantes du projet prévu par le traité. *Premièrement*, il s'agissait d'un projet intégré dont les *deux* sections ne pouvaient être construites et exploitées que grâce à l'effort *commun* des deux parties au traité. *Deuxièmement*, la Hongrie avait le contrôle ultime de toutes les opérations clés du projet, contrôle dont elle a fortement abusé.

C. <u>Les objectifs étroitement interdépendants du projet prévu par le traité</u>

Comme la plupart des aménagements du Danube et des autres cours d'eau européens, le projet de Gab_íkovo-Nagymaros était un *projet à buts multiples*. Ainsi que la Hongrie l'admet dans son mémoire (par. 1.15), ces objectifs étaient au nombre de quatre : la production d'électricité, l'amélioration de la navigation, la protection contre les inondations et le développement régional, et tout cela, comme la Hongrie l'admet, «was consistent with environmental protection» (MH, par. 4.21). J'évoquerai chacun de ces objectifs tour à tour.

i) La production d'électricité

Je commence par la production d'électricité. Le projet de Gab_íkovo-Nagymaros était l'un des derniers des très nombreux projets hydro-électriques réalisés le long du Danube, du Rhin et des autres cours d'eau européens, sur cette importante voie navigable, qui traverse l'Europe d'est en ouest et qui apparaît sur la carte reproduite dans le *Dossier des Juges, n° 11*. Tous les Etats riverains européens exploitent cette source d'énergie propre et renouvelable partout où elle existe. A peu près la moitié seulement des aménagements du Danube projetés en Autriche avait été achevée à la date de signature du traité de 1977; et une centrale hydro-électrique est encore en construction aujourd'hui à Freudenau, en aval de Vienne. Je ferai observer qu'aucun de ces Etats riverains du Danube en amont de Bratislava n'était membre du COMECON et que l'on ne peut leur prêter l'intention de répondre aux désirs de l'Union soviétique.

Avant même les négociations bilatérales qui ont conduit à l'adoption du projet de Gab_íkovo-Nagymaros, la Tchécoslovaquie et la Hongrie avaient chacune, indépendamment et séparément, étudié la meilleure manière d'utiliser le potentiel hydro-électrique du Danube dans cette partie du fleuve. Le plan contractuel conjoint, qui reflétait les perceptions des deux parties au traité au début du projet, avait souligné les besoins croissants en énergie électrique des deux pays à la lumière de leur croissance économique rapide. Ce document insiste également sur le fait que, du point de vue de l'environnement, l'énergie hydro-électrique était particulièrement recommandable (MH, vol. 3, annexe 24, p. 299) : il s'agit d'une énergie propre, provenant d'une utilisation plus rationnelle de ressources naturelles disponibles et renouvelables et dont la production réduit le besoin d'importer le pétrole ou le charbon nécessaires à l'alimentation des centrales thermiques (*ibid*.).

Le projet était censé satisfaire un pourcentage important des besoins en énergie de la Tchécoslovaquie et de la Hongrie (MH, vol. 3, p. 299). L'électricité produite revêtait une importance particulière pour les deux parties au traité du fait que Gab_íkovo devait également fonctionner en mode de pointe. Ceci signifie que la production d'électricité pouvait être augmentée pendant les heures de demande de pointe.

Il n'y avait rien là d'inhabituel : l'exploitation en période de pointe était, et reste aujourd'hui, une pratique commune dans les Etats européens et comme la Hongrie l'admet : «Il est de pratique courante que des systèmes de barrage fonctionnent en mode de pointe, même sur les fleuves ... comme

le Danube et le haut Rhin.» (C-MH, par. 1-211.) Ceci a été néanmoins à nouveau obscurci par ses experts lors de la présentation orale (voir M. Kern, CR 97/3, p. 28).

La Hongrie a créé une impression gravement trompeuse des effets possibles de l'exploitation en mode de pointe sur l'environnement du fait qu'elle s'est bornée à décrire exclusivement les effets possibles du mode d'exploitation le plus extrême. Elle admet cependant qu'un mode opérationnel extrême était purement théorique; ce n'était en effet que l'une des nombreuses *alternatives possibles* parmi celles qui étaient alors en discussion. Du reste, comme le reconnaît également la Hongrie, les règles opérationnelles n'avaient pas été déterminées au début de 1989 (C-MH, par. 1.210, C-MH, vol. 4 1), annexe 6, p. 396) et, pour citer encore une fois nos contradicteurs : «[s]i le fonctionnement en mode de pointe est effectué de façon modérée, il ne causera probablement pas de dommages additionnels à l'écosystème riverain» (C-MH, par. 1.211).

Ceci, néanmoins, n'a pas empêché les experts de la Hongrie pendant la procédure orale de continuer de présenter le même tableau dénaturé (CR 97/2, p. 62, vidéo commentaire sur le fonctionnement en mode de pointe; MM. Vida et Kern, CR 97/3, p. 27 et suiv.)

La Hongrie omet également de mentionner que la mise en œuvre de ce mode de production dépendait de l'action coordonnée des parties à Dunakiliti et à Gab_íkovo. Par conséquent, aucun plan d'exploitation en mode de pointe n'aurait pu entrer en vigueur sans l'accord complet et la coopération des deux parties au traité.

Je souhaite signaler dès maintenant à quel point il est remarquable qu'un grand nombre des arguments scientifiques de la Hongrie dépend entièrement d'hypothèses concernant les effets supposés du mode de production de pointe, en ignorance du fait que la Tchécoslovaquie a formellement proposé en 1989 d'abandonner ce mode *si* des études communes devaient confirmer les craintes de la Hongrie (MS, vol. IV, annexe 76). Dans sa présentation orale, la Hongrie s'est bien gardée de signaler ce point essentiel à la Cour. Il est cependant fondamental car il établit l'absence totale de justification à l'abandon de Nagymaros par la Hongrie en octobre 1989.

(ii) La navigation

Monsieur le Président, un autre objectif du traité de 1977 était d'améliorer la navigation de cette partie encore difficile du Danube. Le but du projet était de rendre le fleuve navigable entre

Bratislava et Budapest pendant environ 330 jours par an — au lieu d'à peu près la moitié de cela (MS, par. 1.47).

Néanmoins, la Hongrie s'efforce de faire croire à la Cour que les problèmes de navigation étaient sans importance (voir Mme Gorove, CR 97/3, p. 68 et suiv.)

Une telle position n'est guère compatible avec les conclusions, opposées, de la commission du Danube qui a classé la partie du Danube située en aval de Bratislava, dans le secteur de Gab_íkovo, comme l'une des trois sections les plus difficiles pour la navigation le long du Danube tout entier (MH, vol. 3, annexe 24, p. 299; MS, par. 1.41).

Avant le projet, ce secteur du Danube contenait environ 15 gués où la profondeur minimum requise par la commission du Danube n'était pas atteinte à plus d'un mètre près (HM, vol. 3, annexe 24, p. 301). La situation dans les bassins des docks de Bratislava était également très critique; la profondeur de l'eau y était insuffisante d'un mètre et demi. Cette situation en période de basses eaux est illustrée par la photo apparaissant dans le *Dossier des Juges, n^{n} 10*.

Le plan contractuel conjoint contredit aussi la thèse hongroise, puisque, sur le point qui nous occupe, il souligne qu'entre Bratislava et Gonyu, sur une distance d'environ 70 km, le Danube constitue un goulot d'étranglement pour la navigation internationale (HM, vol. 3, annexe 24, p. 300).

Il est devenu particulièrement urgent de trouver un remède à ces problèmes de navigation à la suite de l'amélioration de la navigation dans les parties supérieures du Danube avec la construction de barrages en Allemagne et en Autriche — et après la disparition des deux autres obstacles majeurs pour la navigation, situés en aval à la Porte de Fer d'une part, et dans le delta de la Mer Noire d'autre part. Le rôle de plus en plus important du Danube dans le cadre général d'un réseau international de voies d'eau navigables est devenu particulièrement évident après que la construction du canal Rhin-Main-Danube eut commencé en 1962; ce point est également relevé dans le plan contractuel conjoint (MH, vol. 3, annexe 24, p. 300). Cette voie navigable qui traverse l'Europe d'est en ouest est indiquée sur la carte sur l'écran (on peut aussi la trouver dans le *Dossier du juge n^{o} 12*). Cependant, la navigation ainsi améliorée ne représente, aux yeux de la Hongrie, rien de plus qu'un «avantage accessoire» (Mme Gorove, CR 97/3, p. 68, par. 30).

Pendant sa présentation orale, la Hongrie a avancé l'argument qu'il y avait eu une baisse récente du trafic international dans cette partie du Danube (*ibid.*, par. 35, p. 76). Deux précisions

doivent être données à cet égard : *premièrement* cette diminution n'a évidemment joué aucun rôle dans la décision prise par les Parties *en 1977; deuxièmement*, cette baisse a été la conséquence, d'une part, des changements des systèmes politiques et économiques des pays de l'Europe de l'Est, et, d'autre part, des événements qui affectaient l'ex-Yougoslavie — ce sont des effets purement conjoncturels.

J'aimerais faire remarquer à la Cour que, au titre de l'article 13 de la convention de 1976 concernant la réglementation en matière d'eaux frontières, dont la Hongrie fait si grand cas, ainsi que du chapitre VI du traité de 1977, les Parties sont convenues de se conformer aux recommandations de la commission du Danube. Celle-ci estimait qu'une profondeur de navigation de 3,5 mètres était indispensable dans toutes les sections de retenue, et que les autres sections devaient avoir une profondeur d'au moins 2,5 mètres (MS, par. 1.37). La Hongrie a omis de mentionner cette convention dans sa présentation orale, dans laquelle elle indique, de manière trompeuse, que les normes de la commission n'étaient que des recommandations (CR 97/3, p. 69-70). Certes, il ne s'agissait, au départ, que de recommandations, mais les parties au traité de 1977 avaient formellement accepté de les suivre.

Les exigences de la commission du Danube devaient être respectées, en partie, par le transfert de la navigation internationale de la section du Danube la plus difficile pour la navigation dans le canal de dérivation. En amont, le réservoir assurerait la profondeur requise pour la navigation, ainsi qu'un accès considérablement amélioré au port de Bratislava. En aval, après le confluent du canal avec le Danube, le respect des paramètres de navigation requis devait être assuré au moyen de l'excavation du lit de la rivière jusqu'à Gönyu puis par la retenue des eaux en amont du barrage de Nagymaros.

Conformément au plan contractuel, toutes ces améliorations devaient entraîner une augmentation de la capacité de navigation allant jusqu'à 200 pour cent (MH, vol. 3, p. 301). La route navigable assurée par le projet a été expressément approuvée par la commission du Danube, qui, pour citer ses propres termes, a décrit le projet comme le «seul moyen logique» de répondre aux besoins de la navigation dans ce secteur (MS, annexe 137, p. 245).

De même, l'allégation de la Hongrie selon laquelle des conditions satisfaisantes de navigation pouvaient être assurées par des «mesures traditionnelles» (Gorove, CR 97/3, p. 70) est tout aussi

infondée. Ces mesures — dragage, régulation du lit de la rivière, fermeture des bras du fleuve, fortification des berges, etc. — se sont révélées être à la fois coûteuses et inefficaces à long terme. Les effets néfastes de ces «mesures traditionnelles» ont été démontrés dans les décennies qui ont précédé la construction du projet. Ces mesures ont contribué à une dégradation marquée du cours d'eau et à la détérioration progressive de l'environnement. C'est précisément pour cela que les parties au traité ont choisi la solution du projet plutôt que de se baser sur des «mesures traditionnelles».

En effet, comme les experts de la Communauté européenne l'ont noté dans leur rapport de novembre 1992 : «Dans le passé, les mesures prises pour ... la navigation limitaient les possibilités du développement du Danube et de la zone de la plaine inondable.» Le rapport continue en indiquant que le détournement de la navigation dans le canal de dérivation a eu un avantage collatéral : il a créé une opportunité unique pour un développement de la plaine inondable plus proche des conditions naturelles (CE, rapport du groupe de travail du 23 novembre 1992, MS, annexe 12, p. 58).

Monsieur le Président, je m'aperçois qu'il me faut encore environ une demi-heure pour terminer cette plaidoirie. Préférez-vous que je continue ou que nous fassions une pause maintenant ?

The PRESIDENT : Please, proceed.

M. MIKULKA : Merci, Monsieur le Président.

iii) La protection contre les inondations

Je passe maintenant à la protection contre les inondations, un autre objectif principal du traité de 1977. L'impact des crues du Danube dans cette région a été enregistré pendant près de mille ans. Des registres plus détaillés ont été tenus depuis 1897. Un tableau des principales inondations depuis l'an 1012 apparaît dans le mémoire slovaque (par. 1.21).

Dans un passé lointain, les eaux du Danube inondaient d'importantes régions du delta intérieur sur une faible profondeur. Mais cet équilibre naturel a commencé à être perturbé par l'intervention de l'homme. Les zones forestières des régions amont ayant été déboisées pour permettre l'exploitation agricole, le potentiel de retenue naturelle des eaux a diminué. De plus, les inondations ne pouvaient plus se disperser, car les eaux étaient enfermées dans des digues de protection. Comme l'explique le rapport de novembre 1992 du groupe d'experts de la Communauté européenne : «Avec les endiguements passés, surtout au cours du siècle dernier, les périodes de pointe des crues sont devenues plus abruptes et plus élevées.» (SM, annexe 12, p. 15.)

Il faut bien voir que la situation de cette partie du Danube est inhabituelle. Ceci est illustré par le diagramme sur l'écran (que l'on trouve également dans le *Dossier des Juges, n° 13*). Le fleuve coule en haut d'un cône alluvial formé de gravier et de sable hautement perméables, descendant de chaque côté jusqu'au Petit Danube et au bras Moson du Danube. De ce fait, le Danube surplombe la région environnante, si bien que lorsque les digues de protection cèdent, une vaste zone est inondée.

Dans ses efforts pour diminuer l'importance du projet pour la protection contre les inondations, la Hongrie a omis de mentionner une autre caractéristique géographique de la région. En aval de Sap — ici sur la carte — où le risque d'inondation est le plus important, la Slovaquie est particulièrement vulnérable. Les élévations de terrain et les collines bordant la rive droite du Danube (c'est-à-dire le côté hongrois) offrent une protection appréciable contre les inondations, tandis que la basse plaine inondable du côté slovaque, par contraste, forme un exutoire naturel où les eaux peuvent s'engouffrer. Vous pouvez voir sur l'écran les conséquences de ceci, sur une photo de l'inondation de 1965 dans la région de Sturovo, superposée sur la carte. Si nous agrandissons la photo, nous

pouvons voir les collines en Hongrie sur la rive droite qui protègent ce côté de la rivière contre les inondations, par contraste avec les basses plaines facilement inondables du côté slovaque.

Les inondations de 1954 et de 1965 ont été deux catastrophes naturelles majeures dans l'histoire récente des deux pays. En 1954, une grande partie du Szigetköz hongrois a été inondée, ainsi que 10 000 hectares de terres slovaques. En 1965, les digues ont cédé sous la pression des eaux en deux endroits du côté slovaque : 49 villages et plus de 50 kilomètres carrés ont été inondés. La zone inondée apparaît sur la carte à l'écran. Plus de 53 000 habitants ont dû être évacués.

Les photos superposées sur la carte projetées à l'écran montrent l'étendue de la catastrophe. Dans le cas de ces deux inondations de 1954 et 1965, les dommages en termes actuels se sont élevés à plusieurs centaines de millions de dollars. Au moment de l'inondation de 1965, les négociations sur le projet de Gab_íkovo-Nagymaros progressaient lentement. L'inondation leur a donné un nouvel élan.

Mme Gorove espérait faire croire à la Cour qu'en 1977, les risques d'inondation, en tout cas dans la région du Szigetköz, étaient maîtrisés. Cela est contredit par les positions des parties au traité à l'époque qui ressortent du plan contractuel conjoint de 1976. Ainsi, cet instrument insiste sur le fait que les digues existantes, en dépit de l'importance de l'investissement déjà effectué, n'offraient pas de protection suffisante contre les inondations pour les vastes zones situées des deux côtés du fleuve. Il y est aussi noté que les risques d'inondation croissaient.

Le projet a été conçu pour pouvoir faire face aux inondations même les plus sérieuses. Dans le secteur de Gab_íkovo, le contrôle des inondations devait être obtenu essentiellement en répartissant les eaux d'inondation entre le canal de dérivation et l'ancien lit de la rivière. La protection des régions situées de chaque côté du réservoir devait être assurée par la reconstruction des digues qui incorporaient de nouvelles marges de sécurité et de nouvelles mesures anti-suintement.

Dans la région en aval de Sap, qui a été particulièrement affectée par l'inondation catastrophique de 1965, la protection contre les inondations comportait les mesures suivantes, illustrées sur la carte qui apparaît à l'écran. *Premièrement*, des excavations du lit de la rivière dans la section critique. *Deuxièmement*, une reconstruction substantielle des digues pour empêcher l'érosion du sous-sol et le suintement. *Troisièmement* — et essentiellement sur la rive gauche (slovaque) de la rivière — un système étendu de canaux et de stations de pompage (qui figurent en vert ici sur la carte). Cet important investissement en faveur du contrôle des inondations n'a pu être envisagé que

grâce au fait que le projet devait remplir de multiples fonctions, notamment la production d'électricité et l'amélioration de la navigation, ce qui assurait son amortissement au plan financier.

La Hongrie prétend que la protection contre les inondations «aurait pu être atteinte par d'autres moyens moins chers». Mais, en avançant cet argument, la Hongrie ne pense qu'à ses propres intérêts et non aux besoins communs des deux parties au traité.

De toutes manières, l'argument de la Hongrie n'est pas pertinent. Les parties sont convenues dans le traité d'un système spécifique de protection contre les inondations pour répondre à leurs besoins communs. Il est inutile d'arguer aujourd'hui qu'elles auraient pu retenir d'autres systèmes : elles ne l'ont pas fait.

L'importance du projet aux fins de la protection contre les inondations a été reconnue par des études indépendantes comme les rapports Bechtel (commandé par la Hongrie elle-même au milieu de 1989) et Hydro-Québec (commandé par la Tchécoslovaquie en 1990).

(iv) Le développement régional

J'en viens enfin au développement régional, le quatrième objectif du projet. Je vise par là l'occasion unique offerte par le projet d'apporter des améliorations importantes à la région (principalement dans les domaines de la gestion de l'eau, de l'agriculture et des forêts), et de mettre fin à la dégradation de l'environnement. Le traité envisageait que certains de ces objectifs seraient atteints dans le cadre des «investissements nationaux» ainsi nommés par les Parties.

Parmi ces investissements nationaux, le plus important était probablement le programme de construction des stations de traitement des eaux usées pour lutter contre la pollution de l'eau du Danube.

Il y a trente ans, le Danube recevait de grandes quantités d'eaux usées non traitées de Vienne, de Bratislava et de villes hongroises comme Gyor, Komarom et Budapest. Comme l'alimentation en eau potable de Bratislava, Budapest et d'autres villes et villages de la région dépend du Danube, il est devenu urgent de résoudre le problème de la qualité de l'eau. Il est certain que l'un des effets les plus importants du traité de 1977 a été d'accélérer les plans d'assainissement des eaux du Danube dans ce secteur.

Comme la Slovaquie l'a montré dans sa réplique, le coût supplémentaire résultant de l'accélération de ce programme parallèlement à celle du projet lui-même a constitué un facteur

important à l'origine de la suspension puis de l'abandon de Nagymaros par la Hongrie. C'est un exemple très frappant de blocage par la Hongrie pour des raisons purement financières, de l'un des programmes les plus importants de protection de l'environnement dans la région — l'amélioration de la qualité de l'eau.

Pour ce qui est du développement agricole, le Zitny Ostrov et le Szigetköz ont toujours été des régions fertiles, mais une grande partie des terres cultivées a dû faire l'objet d'une irrigation intense. Le projet devait fournir l'eau supplémentaire nécessaire au renforcement prévu par ce système d'irrigation.

D. <u>Le caractère évolutif du projet</u>

Monsieur le Président, j'en viens maintenant au caractère essentiellement évolutif du projet.

Comme je l'ai rappelé il y a un instant, le projet de Gab_íkovo-Nagymaros a été conçu pour répondre à une série d'objectifs importants qui étaient aussi valables en 1989 qu'ils l'avaient été en 1977. Mais tous les aspects du projet ne pouvaient pas être spécifiés en détails en 1977. Le projet a donc été conçu comme évolutif par nature. Quelles que soient les précautions prises et le nombre des études effectuées, en présence d'un projet comme celui-ci, il est inévitable d'avoir à faire face à des impondérables. La mesure de son succès est l'efficacité des adaptations qui lui sont apportées lorsque surgissent des problèmes exigeant des aménagements. Le plan contractuel conjoint et les autres structures de gestion commune et de concertation créées par le traité de 1977 et les accords collatéraux ont été conçus à cette fin.

Cet important instrument n'était pas, pour autant, complètement rigide en 1989-1990, lorsqu'il a été abandonné par la Hongrie, et les tentatives incongrues de celle-ci pour justifier ses actions par référence au «projet initial», c'est-à-dire au projet exactement tel qu'il se présentait en septembre 1977, sont totalement vides de sens (voir RS, par. 11.10 et suiv.).

Prenons l'exemple des forêts et, plus généralement, de l'environnement : des problèmes comme le creusement progressif du lit du fleuve, sont devenus urgents durant la réalisation du projet. Ceci a eu une influence néfaste sur l'environnement de la plaine inondable. Les forêts ont commencé à s'assécher, en particulier dans la région proche de Bratislava. Il en est résulté, en outre, une diminution appréciable du débit dans le cours du bras Moson du Danube. Dans le cadre de l'adaptation continue du projet, après 1977, les Parties ont incorporé dans le plan contractuel conjoint

des mesures destinées à restaurer le débit dans les bras latéraux en vue de revitaliser la plaine inondable et ses forêts.

E. <u>Le partage des responsabilités</u>

J'en viens enfin à mon dernier point : la réalisation concrète des objectifs du projet de Gab_íkovo-Nagymaros et aux dispositions concernant la construction contenues dans le traité de 1977. La répartition des tâches au titre du traité était basée initialement sur une distribution égale des coûts et un partage égal de la main-d'œuvre et des fournitures. Elle a été ajustée plus tard pour répondre aux difficultés économiques de la Hongrie.

Pour s'en tenir aux grandes lignes, la Tchécoslovaquie devait construire la partie gauche du réservoir, la partie amont du canal de dérivation, la centrale hydro-électrique, les écluses de navigation à Gab_íkovo,ainsi que les installations de contrôle des inondations sur la rive gauche dans le secteur de Nagymaros, en territoire slovaque. La Hongrie devait construire le côté droit du réservoir de Dunakiliti, le barrage de Dunakiliti et la section aval du canal de dérivation dans le secteur de Gab_íkovo. Elle était également responsable de l'excavation du lit du Danube en dessous de Sap et des travaux d'aménagement de l'ancien lit du fleuve.

Dans le secteur de Nagymaros, la Hongrie était responsable des travaux de contrôle des inondations de la section en amont de Nagymaros, en territoire hongrois. Elle devait construire le barrage de Nagymaros et était aussi responsable de l'excavation du lit du Danube en aval de Nagymaros.

Conformément à ce qu'implique le concept même d'investissement commun, le traité prévoyait que certaines structures deviendraient la propriété commune des Parties, indépendamment du territoire sur lequel elles étaient situées. Vous pouvez voir ces structures sur la carte. Ce sont :

— le barrage-déversoir de Dunakiliti;

— le canal de dérivation;

— le barrage de Gab_íkovo; et

— le barrage de Nagymaros.

Monsieur le Président, en quoi ces faits sont-ils pertinents en ce qui concerne le litige causé par la suspension puis par l'abandon unilatéraux du projet par la Hongrie ? Ils le sont en ce qu'ils montrent que lorsque la Hongrie a pris ces décisions, motivée par ses propres problèmes financiers et

à la suite de pressions internes, ses actions ont eu un impact considérable sur la Tchécoslovaquie qui a fait les frais de ces problèmes purement intérieurs de la Hongrie. Car le projet était un projet *intégré* qui dépendait de la construction effective des installations prévues à Nagymaros et à Gab_íkovo. C'était aussi un projet *commun* — c'était un *investissement commun* — dont la planification, la construction et l'exécution dépendaient des *efforts conjoints* des deux parties au traité. Le concours de la Hongrie était indispensable : les opérations clés étaient sous son contrôle et certaines structures clés étaient situées sur son territoire.

C'était, en outre, un projet *à buts multiples.* Ceci signifie que les actions unilatérales de la Hongrie de suspension et d'abandon du projet privaient la Tchécoslovaquie *de tous* les avantages du traité. L'abandon de la Hongrie n'a pas seulement privé la Tchécoslovaquie d'une source précieuse d'électricité. Il la privait aussi de la sécurité qu'auraient donnée les mesures de contrôle des inondations qui avaient été convenues. Il la privait — ainsi que le reste de l'Europe — d'améliorations considérables de la navigation sur ce cours d'eau international. Et il laissait la Tchécoslovaquie seule pour faire face à de très sérieux problèmes d'environnement : un réservoir et un canal de dérivation vides ainsi que des masses de béton et d'équipement inutilisés.

Monsieur le Président, Messieurs les Juges, je vous remercie de votre attention et je vous prie, Monsieur le Président, de bien vouloir donner, peut-être après la pause, la parole à M. Samuel Wordsworth qui entamera la présentation slovaque des aspects du traité de 1977 relatifs à l'environnement.

The PRESIDENT: Thank you so much, Dr. Mikulka. The Court will now suspend for fifteen minutes.

The Court adjourned from 11.30 to 11.45 a.m.

The PRESIDENT: Please be seated. I call now on Mr. Wordsworth.

Mr. WORDSWORTH:

3. THE ENVIRONMENTAL ASPECTS OF THE 1977 TREATY

(a) The Pre-1977 Period: Studies and Negotiations

Mr. President, Members of the Court, it is an honour and a privilege to appear before you for the first time.

In this presentation, I wish to get across one straightforward point: that before the conclusion of the 1977 Treaty, the Parties had already carried out extensive research into the G/N Project's potential environmental impacts — in spite of Hungary's claims to the contrary. In addition to multiple previous studies, Czechoslovakia had carried out a huge study in the years 1975-1976, called the Bioproject. Hungary had also completed a major 5-year joint project on Danube water quality, the partners on this project being none other than the World Health Organisation (WHO) and the United Nations Development Programme (UNDP) (UNDP/WHO Project, Terminal Report, No. HUN/71/505-HUN/PIP001).

I shall return to these and other Project impact studies shortly. But, before turning to the detail, why is it so important to establish, as a matter of *fact*, that the Parties had extensively studied environmental impacts prior to concluding the 1977 Treaty?

First, this *fact* undermines Hungary's arguments on environmental impact assessment. Putting to one side Hungary's reluctance even to argue that there was a duty under international law to carry out an EIA prior to 1977, the Treaty parties met the highest standards of the time.

Second, this *fact* undermines Hungary's arguments on fundamental change of circumstances. The extensive studies show that the Treaty parties were fully aware of the importance and possible extent of environmental impact in 1977. There could therefore be no fundamental change between 1977 and 1992 in this respect.

Third, this *fact* undermines Hungary's arguments on necessity. The Treaty parties knew what they were doing in 1977. They had studied potential impacts. They had consciously decided to accept certain impacts and they had addressed the issue of how to minimize other possible impacts. There could therefore be no question of new, previously unconsidered impacts suddenly being revealed in 1989 and giving rise to a real state of necessity.

In short, the *fact* that extensive studies were carried out in the pre-Treaty period is severely damaging to Hungary's case. What, then, does the evidence show?

For a start, the evidence shows that even at the very beginning of Project development, the question of the impact of any barrage scheme on ground water, forestry, agriculture and the

environment was very much on the Parties' agenda. Indeed, even the documents which Hungary submits in support of its thesis of exceptional "pressure" from COMECON are most significant in this respect (e.g., HM, para. 3.40). To take a few examples:

- in the protocol of December 1954, the parties expressed their agreement that the necessary remedial measures should be taken where agriculture or forestry would be affected by water level changes (HM, Vol. 3, Ann. 14);
- in various protocols and reports of 1958, the importance of maintaining ground water levels in Zitný Ostrov and Szigetköz was stressed (e.g. HM, Vol. 4, Ann. 3, HR, Vol. 3, Ann. 36);
- again, at a 1960 meeting of the joint technical committee, Czechoslovak concerns as to Project impact on ground waters were addressed (HR, Vol. 3, Ann. 41).

But expressions of concern are clearly not sufficient to protect the environment. What did the Parties actually do to study possible impacts?

Well, Slovakia has submitted a detailed list of some 364 research papers that were taken into account in the formulation of the G/N Project up to the end of 1973. This list is contained in Volume 3 to Slovakia's Memorial. It takes up about a third of that volume. And this is only a *list* — the studies themselves would fill several book-cases. It is also a *joint* list, compiled jointly by Czechoslovak and Hungarian institutions and recording the studies carried out by *both* Parties. It is therefore an important piece of evidence, which shows that the Parties were in agreement about the need to carry out detailed research into the Project — from *all* angles. Some studies focus on energy, others on controlling flooding and improving navigation, others still on impacts to water quality, forestry, agriculture and the environment.

Hungary responds to the existence of the 1973 joint list and all the research it evidences in three ways. *First*, it attempts to undermine the evidentiary importance of this list by suggesting that it had had no opportunity to examine the studies it refers to (HC-M, para. 1.26). But I stress, this is a *joint* list. The studies in the list — including those relating to the environment — are, as often as not, Hungarian studies. As such, they must already be in Hungary's possession.

To take a concrete example, the list refers to a series of studies on a subject on which Hungary placed great emphasis during its oral pleadings. This is: the effect of dredging downstream of Nagymaros, including the possible impacts of dredging on the drinking water supplies of Budapest

(SM, Vol. 3, Ann. 23, at p.29). The studies in question were carried out by Hungarian organizations. The scientists responsible were Hungarian. Copies must be accessible in Hungary's archives. It can make *no* sense for Hungary, now, to ask Slovakia for copies of these reports or to imply that important evidence is somehow being withheld. Nor does it make much sense for Hungary to claim that such important topics as Project impacts to Budapest's drinking water supplies had been left unconsidered in the pre-Treaty era.

Second, Hungary seeks to undermine the joint list by the claim that it is not the quantity of studies that counts, but their quality (HC-M, para. 1.26; HR, para. 1.66). The simple fact that 364 studies were taken into account in Project planning prior to 1974 is considered by Hungary to be meaningless and Slovakia is criticized for suggesting otherwise. This does seem peculiar. The fact that a huge number of studies was carried out *is* clearly indicative of an attention to research and a concern for the identification of possible impacts. Of course, if Hungary had submitted a gram of evidence to the contrary, if it had examined some of the studies and showed them to be somehow valueless, then there might be some reason to doubt the value of this list. But Hungary has submitted no such evidence.

Instead, Hungary told this Court during its oral presentation that the "existence of 'hundreds of studies' is not ... an alternative for a proper environmental impact assessment" (CR 97/3, p. 60). But there was *no* duty under international law in the pre-Treaty period to carry out a proper environmental impact assessment, whatever that may be, and Hungary's contention is anyway contradicted by the evidence annexed to its own Memorial. I refer to the Hungarian Environmental Impact Assessment of 1985. This document reviews the nature of preceding research and confirms that the scientific studies of the 1950s and 1960s covered the ecological effects of the Barrage system, *exceeding* the standards of the time. It continues:

> "Already at that time there were — with the presently used definition — Environmental Impact Assessments under way, which were continued in the 1970s." (HM, Vol. 5 (I), Ann. 4, at p. 15.)

Thus, according to Hungary in 1985, the pre-Treaty studies were of great value and were in the nature of environmental impact assessments. Bold assertions aside, Hungary has submitted no hard evidence in the current proceedings to contradict this appraisal.

Hungary's *third* and final attempt to explain away the 1973 joint list is to argue that the number of studies devoted, in particular, to the environment, is not so high. In its Reply, Hungary complains that, of the approximately 100 pre-1974 studies on the joint list that relate to environmental issues, only 16 addressed the subjects of water quality, biology and nature protection (HR, para. 1.69). It then seeks to reduce this number further in an attempt to convince this Court that only a handful of truly relevant studies were carried out in the pre-Treaty era.

This is *not* correct. Hungary ignores the fact that, in addition to the 16 studies to which it refers, at least 21 studies in the list address the topic of ground water - which is perhaps the most important topic in terms of environmental impact. It ignores the fact that a further seven studies in the list address the issue of channel dredging downstream of Nagymaros which, according to Hungary, is a determining factor so far as Budapest's drinking water is concerned. It ignores the fact that another 12 studies focused on riverbed morphology in the old Danube section — another topic that Hungary examined at great length in its oral pleadings. And so on.

And, most important of all, Hungary ignores the fact that this list is not intended to be the definitive list of pre-Treaty studies. For a start, it stops at the end of 1973, not in 1977 when the Treaty was signed. And, in reality, it represents only a fraction of studies on the G/N Project's environmental impact area. To take one example, the bibliography of research on the fauna of Zitny Ostrov records over 1000 research pieces completed prior to 1977, both by Czechoslovak *and* foreign authors (Kalivodova *et al*., *Selected Zoological Bibliography*, 1987, UEBE SAV, Bratislava).

To take a second and even more striking example, in Hungary's written pleadings there is a reference to the annotated bibliography of, and I quote Hungary, the "most important environmental studies" related to the G/N Project (HC-M, para. 2.37). Here is this bibliography, prepared in 1994 by the Hungarian Academy of Sciences (*Annotated References to the Bos (Gab_íkovo)-Nagymaros Barrage System Project*, Hungarian Academy of Sciences, Budapest, 1994). Again, like any bibliography, this is no more than a list — a list nearly 300 pages long. And if we take this list, and count up the studies carried out *prior to 1977*, we find that — according to the Hungarian Academy of Sciences — some 176 "important" environmental studies were carried out. That is quite a few studies. Hence, the 1974 joint list, which I have just been looking at, represents no more than the tip

of the iceberg of environmental research in the Project area. But, of course, the existence of 'hundreds of studies' is not considered to be of any relevance by Hungary.

Research in the Years 1975-1976

Mr. President, I wish, now, to look at the environmental research carried out in the two years immediately preceding the conclusion of the 1977 Treaty. For, in the years 1975-1976, both Parties completed research works of great importance into the G/N Project's impacts on the environment.

I turn, *first*, to Czechoslovakia's Bioproject, which may have become well-known to this Court because of the procedural issue that it has created. I will say more of this in a moment. But, first, some background: the Bioproject was undertaken by the Slovak Academy of Sciences and other organizations in the period 1975-1976 (HM, Vol. 5 (I), Ann. 9, at p. 281).

According to a contemporary article published in the Slovak Journal *Environment*, the aim of the Bioproject was to evaluate the environmental impacts of G/N Project construction and to formulate "the necessary measures ... to protect the environment ..." (*Journal for Theory and Environment*, March 1978, "Biological Project of the area of the waterworks system on the Danube-Gab_íkovo/Nagymaros", I. Daubner, L. Weismann). To meet these aims required not only new research and data collection, but also the compilation and assessment of the environmental impact research already carried out on the G/N Project (*ibid*.). The amount of this data and research is reflected in the size of the Bioproject. In total, the Bioproject comprised some 15 closing reports, 21 published volumes, 72 articles published in Czechoslovak and foreign journals, and 17 non-published works (*ibid*.).

And the Bioproject did not just give a rubber stamp approval to the G/N Project. To the contrary, it established a series of proposals that enabled important modifications to be made, modifications which aimed at guaranteeing the Danube's water quality, ensuring the purity of the upstream aquifer and protecting the environment (*ibid*.).

Now to the procedural issue. Hungary stated during its oral presentation that it has requested access to the Bioproject on several occasions during the present proceedings - but without success (CR 97/3, p. 60). Once again, it is implied that important evidence is being withheld. There are two points to make here.

First, not only was much of the Bioproject published back in the 1970s, not only was Hungary kept informed of the contents of the Bioproject, not least by a special conference at the Hungarian Academy of Sciences in Budapest, the results of which were also published (*Nové Slovo*,

No. 23/89, "Biological-Ecological conditions in the concerned territory of the construction of the System of Hydropower Projects on the Danube, Gab_íkovo-Nagymaros", L. Weismann and I. Daubner); but, also, Hungary has had *for years* its very *own copy* of the Bioproject. Hungary states that it has been unable to locate the Bioproject studies in its archives (CR 97/3, p.60). But, the Bioproject documents were formally handed over to Hungary in November 1984, which was the time when Hungary was conducting its own Environmental Impact Assessment, completed in 1985 (see, the Meeting of Plenipotentiaries of 28-29 November 1984 and Annex 2 thereof signed by the heads of the Joint Operating Group on 23 November 1984 — accepted into evidence by the Court on 26 February 1997). If Hungary really wanted to comment on the contents of the Bioproject, it has therefore had more than a dozen years in which to do so.

Second, Slovakia has chosen not to introduce into evidence the mass of studies that make up the Bioproject simply because it does not refer to the contents of the individual studies; rather, it relies on the Bioproject in its entirety as evidence that a serious and extensive study of G/N Project impact was made prior to 1977. Hungary does not contest the existence of an extensive study called the Bioproject. A review of the Bioproject's contents is contained in one of the annexes to Hungary's Memorial, the Hydro-Québec report of December 1990 (HM, Vol. 5 (I), Ann. 9, at pp. 281-286). And Slovakia certainly does not propose that the Court examine 15 closing reports, 21 published volumes, and 87 published and non-published works in order to be satisfied that an extensive study was indeed completed.

In its written pleadings, Hungary did focus on the review of the Bioproject contained in the Hydro-Québec report and, in particular, its comment that the Bioproject did not compare barrage variants but, instead, aimed at the optimization of an already selected barrage design. According to Hungary, this is evidence that the Bioproject did not meet some un-spelt out criteria of what a mid-1970s environmental impact assessment should have looked like. It therefore quotes the relevant paragraph of the Hydro-Quebec assessment not only in its Memorial, but in its Counter-Memorial and in its Reply also (HM, para. 6.34; HC-M, para. 1.37; HR, para. 1.72). But in each case, the all-important last sentence to the paragraph in the report is left out by Hungary. This reads (in translation):

> "In this sense, the contemporary studies [i.e., the Bioproject] were *comparable* with those carried out in North America ..." (SM, Vol. 3, Ann. 28, at p. 239.)

Thus, in terms of the criticism singled out by Hungary, HQI concludes that the pre-1977 Czechoslovak studies were precisely *in line* with such international practice as there was at the time.

In any event, the key issue is not — as Hungary would have this Court believe — the *form* of pre-Treaty assessments like the Bioproject. The key issue is that when Czechoslovakia signed the 1977 Treaty, it had completed an in-depth study into G/N Project impacts. The findings of the Bioproject had been debated in a series of meetings between scientists and Czechoslovak ministries (*Journal for Theory and Environment*, March 1978, *op cit.*). Czechoslovakia therefore knew exactly what it was doing in 1977 — it understood, accepted and saw a means of minimizing the Treaty Project's environmental impacts.

What, then, of Hungary? Was it similarly well advised prior to the Treaty? The answer must be "yes", and there is plenty of evidence to show this. I have already shown that a fair share of the studies in the pre-1974 joint list were carried out by Hungary. I have also shown that there were 176 "important" environmental studies carried out prior to 1977, listed in the 1994 bibliography of the Hungarian Academy of Sciences — studies on topics such as the effect of the G/N Project on sediment deposition in the Danube, the ground water requirements for optimal soil conditions, the floodplain forests affected by the Project, water quality and the impact of the Project on water quality — all topics which Hungary treats as if they were unheard of prior to 1977 (*op. cit.*, Csoma J., at p. 55; Várallyay Gy., at p. 77; Babo I. and Járó Z., at p. 94; Abrahám M. and Várda, N., at pp. 128-129; Rotschein J. and Antonio V., at p. 206; VITUKI, at p. 219).

Hungary chose to pass over this evidence during its oral presentation. It also passed over the fact that, in the years 1972-1976, the Project's impacts on Danube water quality were examined in the Hungarian — United Nations Development Programme — World Health Organisation joint program that I referred to earlier. This is particularly surprising as, during its oral presentation, Hungary did claim that "water quality was almost entirely overlooked in the planning" for the G/N Project (CR 97/3, p. 5).

Yet, according to a June 1989 report frequently relied on by Hungary in its written pleadings, the "most important water quality problems" concerning the G/N Project were considered in the UNDP/WHO final report of 1976 (HM, Vol. 5, Ann. 7, at p. 134, UNDP/WHO Project, Terminal Report, No. Hun/71/505-Hun/PIP001). This 1976 report was the culmination of a *five* year co-

operation program, costing some *five million* dollars and involving a very substantial team of scientists from Hungary and elsewhere (*ibid*., at p. I, I-72 — I-86). And yet, the 5-year program and the report are ignored in both Hungary's written and oral pleadings.

But this is undoubtedly important evidence. *First*, the report is clearly a "comprehensive" document and shows, once again, that Hungary's scientists were conducting extensive research into the water quality of the Danube (e.g. HC-M, Vol. 4 (2), Ann. 13, at pp. 530, 541, 548, 555, 567 and 575). Its bibliography refers to dozens of studies and project reports, while the main text makes frequent reference to the substantial data base already created in the pre-Treaty era (*ibid*., IV-96 — IV-101 and I-48). *Second*, the report shows that, prior to the conclusion of the 1977 Treaty, the Hungarian Government must have been fully informed of potential Project impacts on water quality and was in a position to ensure the minimization of impacts in the light of all the evidence available.

So, what, then, did the report conclude in so far as Nagymaros is concerned? For the Nagymaros section, according to Hungary today, was the real threat to Budapest's drinking water — and the focus of the UNDP/WHO report was specifically on water quality and the water quality of the Budapest supply wells (*ibid*., I-43). Well, the report said that the Nagymaros barrage would not greatly alter flow conditions in the relevant stretch and that, consequently, the processes of sedimentation and biological conditions would not change greatly either (at p. III-22).

The Budapest water supply wells were therefore *not* threatened by the construction of the Nagymaros barrage. This conflicts with the predictions made during Hungary's oral pleadings a few weeks ago. But, then, we are only talking about the United Nations Development Programme, the World Health Organization, and a five-year research programme costing some five million dollars.

I do not want to leave this Court with the impression that everything in this report is favourable to the G/N Project, for the report did express concern as to impacts on water quality in the Gab_íkovo section. But, this concern was based, *first*, on the premise that the water quality of the Danube would continue to deteriorate — whereas, the Danube's water quality has in fact improved, in large part thanks to the G/N Project (*ibid*., I-42) and, *second*, it was based on an assessment of a very early version of the Project, with minimal or even no discharges into the old Danube channel. The Treaty parties subsequently modified the Project precisely in line with the report's concerns, as shall be amply demonstrated over the next few days. The important point is not only that potential risks

were *known* prior to Treaty signature, but also that the parties did *not* respond blindly to the existence of the risks.

Conclusions

Mr. President, Members of the Court, I come to my conclusions. During the pre-treaty period, the Parties were motivated by a desire to carry out the most thorough research into the selection, design and impacts of their barrage system; and both the amount of the research conducted and its scope is striking. This was *not* just a question of various project engineers doing a few environmental impact studies on the side. Those directly involved included the Czechoslovak Academy of Sciences, the Slovak Academy of Sciences, Comenius University in Bratislava, the Slovak Institutes for Water Research, Forestry, Fishing and Hydrobiology (*Nové Slovo*, No. 23/89, *op cit*.). Similar organizations were involved for the Hungarian side, including the Hungarian Academy of Sciences and, of course, in terms of water quality impacts, the World Health Organization and the United Nations Development Programme. What more could Hungary rationally expect or want?

The Parties' concern for the environment is also evident in the obligations they accepted in the 1977 Treaty, for there, they agreed to continue their research into the Project's impacts. Research work could not suddenly stop with the Treaty's signature. This was a long-term project, which the Parties *knew* would have some impact on the environment: thus, the process of studying how to minimize or eliminate adverse impacts would naturally continue and this was provided for in Article 5, paragraph 4, of the Treaty.

Professor McCaffrey will now examine the environmental provisions of the 1977 Treaty, but I would like to leave the Court with one point in mind. Article 5 (4) of the Treaty, which I have just mentioned, established the division of research tasks between the parties, which was to be in accordance with the 1976 Joint Contractual Plan Agreement. In simple terms, the rule here was that research would be carried out on the basis of territorial division — the research obligations on *Czechoslovakia* existed in relation to *Czechoslovak* territory, whilst *Hungary's* obligations existed in relation to *Hungarian* territory (HM, Vol. 3, Ann. 18). This meant, for example, that Hungary alone was responsible for research on potential impacts to the Budapest bank filtered wells. And this is specifically confirmed by the 1976 Agreement (*ibid*., at p. 226 and see SC-M, para. 7.68).

Of course, this is as would be expected. Research into potential Project impacts on water supplies to Hungary's capital city had to be Hungary's exclusive domain. How could Czechoslovakia despatch its scientists to Budapest and have them engage in research already undertaken as part of the joint UNDP/WHO program which I have just been looking at?

My point is simple: if, as Hungary contends, it did not always meet its research obligations — if, for example, Hungary failed to carry out in-depth studies into the impacts of the Nagymaros barrage on Budapest's water supplies — it could *not* be entitled to abandon this part of the Project at a later date, on the basis that it had failed to discharge its own research obligations. A party cannot build a case on a state of necessity which, had it existed, would have been created by that party itself (Article 33 (2) *(c)* of the ILC Draft Articles on State Responsibility). Nor can a party suspend or terminate a treaty on the basis of its own breach (Article 60 (2) of the 1969 Vienna Convention).

Mr. President, Members of the Court, that concludes my presentation. May I now ask you to call on Professor Stephen McCaffrey, who will discuss the environmental protection mechanisms incorporated in the 1977 Treaty.

The PRESIDENT: Thank you, Mr. Wordsworth. I call now on Professor McCaffrey.

Mr. McCAFFREY: Thank you, Mr. President.

3. THE ENVIRONMENTAL ASPECTS OF THE 1977 TREATY

(b) Environmental safeguards under the Treaty

Mr. President, Members of the Court, it is a great honour and privilege to appear before you for the first time.

Mr. President, it is my task in this intervention to describe the scheme of the 1977 Treaty with regard to environmental safeguards. The main points I would like to leave with the Court are, first, that this is a forward-looking instrument that contains specific provisions on environmental protection; and second, that the Treaty clearly specifies the way those provisions are to be implemented.

What, then, are the environmental provisions of the 1977 Treaty? At first sight, they are three: Article 15, entitled "Protection of Water Quality"; Article 19, "Protection of Nature"; and

Article 20, "Fishing Interests". Articles 19 and 20 are contained in Chapter VII of the Treaty, which is entitled "Protection of the Natural Environment". The Parties' pleadings have focused principally upon Articles 15 and 19. Each of these Articles not only sets forth a general provision on the subject-matter it deals with; it also specifies the means by which that provision is to be effectuated. In both cases, the parties provided that the obligation in question is to be implemented through "the means specified in the joint contractual plan".

This is important because it shows that the Parties did not content themselves with merely including general provisions for the protection of the environment in the 1977 Treaty. They understood clearly that the Treaty was a framework instrument, providing for a project that would be of an evolving nature[1]. And they understood that, as such, the Treaty's provisions on the environment, like provisions on other subjects, would have to be implemented, not only in the light of the studies that *had* been conducted, but also in the light of *future* studies.

It is important to recall that the parties to the 1977 Treaty established in that instrument a joint cooperative mechanism. This mechanism enabled the parties to stay in constant communication and to co-operate on matters related to the implementation and operation of the Project. The mechanism to which I am referring consists of one representative from each party to the Treaty. These representatives are referred to in the English translation of the 1977 Treaty as "government delegates" (Art. 3) and in the 1979 Joint Statute Agreement as "government plenipotentiaries". The functions of the Plenipotentiaries are generally described in the 1977 Treaty as being to "direct and supervise" the "[o]perations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks" (Art. 3 (1)). To assist them in this task, the Treaty provides that the Plenipotentiaries are to "establish appropriate permanent and temporary joint agencies for the performance of their functions". The 1979 Joint Statute Agreement provides that the "plenipotentiaries shall be in permanent contact and discuss quarterly fulfilment of tasks stated in the Treaty" (Art. 5 (1)). Thus the Plenipotentiaries and the bodies they supervise may generally be likened to "commissioners" heading a joint commission. This institutional framework is the kind of concrete form of co-operation between States sharing freshwater resources that experts in the field urge States to establish. Such a mechanism is also foreseen in the draft articles adopted by the

[1] **E.g., SM, paras. 2.67-2.70.**

International Law Commission on the law of the non-navigational uses of international watercourses[2]. This is significant for the environment because it shows that the parties to the 1977 Treaty consciously established a mechanism through which to communicate and co-operate with regard to, among other things, any environmental question or problem that might arise during the implementation or operation of the Project. Unfortunately, Hungary failed to avail itself of this mechanism as a means of addressing its concerns, either in 1989 or thereafter, preferring to resort to unilateral action.

[2] Art. 24, *1994 ILC Yearbook*, p. 300.

And this, Mr. President, brings me to the settlement of disputes, a further function with which the Plenipotentiaries are entrusted under the 1977 Treaty. The dispute resolution procedure provided for in Article 27 of the Treaty is simple and easily set into motion. Disputes as to the "realization and operation of the system" are to be settled in the first instance by the Plenipotentiaries (Art. 27 (1)). If "they are unable to reach agreement on the matters in dispute, they shall refer [those matters] to the Governments of the Contracting Parties for decision" (Art. 27 (2)). In other words, disputes are to be resolved through the Treaty's joint mechanisms and, ultimately, bilateral negotiation at the government level. Any disputes on technical issues, or on the Project's environmental impact, would have to be resolved on the basis of objective scientific data, not on unverified unilateral assertions[3].

This procedure can itself be regarded as a form of co-operation. The Parties agree that the Article 27 dispute settlement procedure was flexible in nature. But this does not mean that one party could simply ignore Article 27 and act as it deemed fit. Moreover, the ambit of Article 27 was limited: it does not allow for the "revision" of the Treaty as Hungary has claimed[4]. The flexibility existed, but only within the framework of the Treaty; it did not mean that there was no obligation to fulfil the Treaty's provisions. Treaty revision might represent the outcome of negotiations between the parties. But this could only be a *possibility*, not the *right* of one of the parties.

Mr. President, in these oral proceedings Hungary has challenged Slovakia's interpretation of Article 27. It claims that, if one follows the Slovak line of argument, Czechoslovakia effectively had a veto over any modifications to the Project that Hungary deemed necessary[5]. Hence, so the argument goes, Hungary was locked into constructing the Project, irrespective of any conviction that the Project would cause serious environmental harm.

This is a strange argument indeed, for at least two reasons. First, the right of a party to insist on the performance of a treaty cannot be characterized as a "veto". And second, Hungary accepts that the Project *was* frequently modified during the construction period on the basis of the Parties' mutual agreement. But until such an agreement was reached, or pending bilateral discussions as envisaged by Article 27, the Treaty continued to apply.

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[3] See SM, para. 8.58.

[4] HM, para. 7.92.

[5] CR 97/4, p. 20. See also HC-M, para. 5.36.

In fact, it was Hungary that subsequently exercised a veto. In 1989, Hungary considered that — irrespective of Article 27 — it could veto the Treaty's implementation, abandoning the Project without the agreement of its Treaty partner. Hungary has thus always been dismissive of the Article 27 procedures — because it wishes to avoid the fact that it did *not follow* the procedures that were available and, in so doing, committed a breach of the Treaty. Article 27 existed, but Hungary ignored it. Full stop.

Hungary also argued in these oral proceedings that it had no obligation to utilize the Article 27 procedures because that article "has no application to disputes dealt with *directly between the governments*"[6]. The "dispute" to which Hungary refers is that resulting from its having *orally notified* the Czechoslovak Ambassador on 13 May 1989 of its - Hungary's — *decision* to suspend work at Nagymaros. On 15 May, two days later, Czechoslovakia protested this unilateral decision, noting that it put the entire Project in jeopardy, and that it had been taken "without any discussions with the Czechoslovak side"[7]. Hungary is thus saying that if it *notifies* its Treaty partner of its *unilateral decision* to suspend work, in clear violation of the Treaty, and its Treaty partner objects, Hungary can simply go ahead with the suspension, because Article 27 does not apply. Surely Hungary has it backwards: if Czechoslovakia protests Hungary's notification of suspension, regardless of the level on which it was given, Hungary must either cancel its plans or avail itself of the procedures under Article 27 for the settlement of disputes.

Mr. President, permit me to turn now to Articles 15 and 19 of the 1977 Treaty. In Article 15, the parties to the Treaty demonstrated their recognition of the importance of protecting water quality. In paragraph 1, Article 15 provides that the 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". Paragraph 1 of Article 15 thus contains two elements: the substantive obligation to "ensure ... that the quality of the water in the Danube is not impaired as a result of the construction and operation of [the Project]"; and second, the procedural means for implementing that obligation — namely, *agreement*, through the Joint Contractual Plan, on specific measures to be taken to protect water quality. Since any measures taken would affect a

[6] CR 97/4, p. 20 (emphasis added).

[7] SC-M, Vol. II, Ann. 10.

shared watercourse — the Danube — it is only logical that Article 15 left those measures to be worked out and agreed upon later by the Parties. This is just one of the ways in which the Parties foresaw that the Project would evolve and develop.

Paragraph 2 of Article 15 deals with the monitoring of water quality. It provides that such monitoring is to be carried out "on the basis of the agreement[] on frontier waters in force between the [parties]". This is a reference to the 1976 Agreement on the Management of Boundary Waters. By virtue of this reference, the 1976 Agreement continued to govern the monitoring of the quality of the water resources shared by Hungary and Czechoslovakia.

Article 3 of the 1976 Agreement deals with the general obligations of the parties. It refers three times to *mutually agreed* conditions. Thus, the 1976 Agreement presumed that there would be implementing agreements between the parties. It was precisely this function that the 1977 Treaty and related agreements performed in respect to the part of the Danube that related to the Project. Article 5 of the 1976 Agreement established the Commission on Boundary Waters, or Boundary Waters Commission, headed by a plenipotentiary from each country and composed of a total of eight members. The decisions of the Boundary Waters Commission take effect only after their approval by the Contracting Parties[8]. Among the functions of the Boundary Waters Commission, which are set out in Annex 1 to the 1976 Agreement, is "to assure water management co-operation and solution of technical and economic questions ..."[9]. The functions of the boundary waters plenipotentiaries relating specifically to the G/N Project are set out in another agreement, the 1979 Joint Statute Agreement between the parties. This agreement provides yet another illustration of the close inter-relationship among the complex of agreements between Hungary and Czechoslovakia. Article 10, paragraph 1, of the 1979 Joint Statute Agreement provides as follows:

> "The government plenipotentiaries for border waters under the [1976 Agreement] shall supervise water resource management functions, water ameliorations, measures to utilize water resources, protection of surface and underground waters against pollution, maintenance of fairway, maintenance of the bed of the Danube river, protection against the flood and ice movement."

By this provision, therefore, Hungary and Czechoslovakia entrusted the supervision of, among a variety of other things, the "protection of surface and underground waters against pollution" in

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[8] **Art. 5 (2).**

[9] **Ann. 1, Art. 2 (a).**

connection with the Project to the Boundary Waters Commission established under the 1976 Agreement. It will be recalled that under paragraph 1 of Article 15 of the 1977 Treaty the parties were to ensure, *through means specified in the Joint Contractual Plan*, that the quality of the water in the Danube was not impaired. As I mentioned a moment ago, decisions of the Boundary Waters Commission take effect under the 1976 Agreement only after approval by the governments of the contracting parties.

This was brought home forcefully on the 3 May 1989 when Hungary rejected[10] recommendations of the Boundary Waters Plenipotentiaries for a new agreement on water quality[11]. Ten days after rejecting this proposed water quality agreement Hungary suspended work at Nagymaros — citing, among other things, *environmental* concerns[12]! As Slovakia has shown in its Memorial, the unmistakable message here is that it was the *expense* of proceeding, rather than concerns about the environment, that motivated Hungary[13].

Mr. President, it is evident that the entire scheme of the 1977, 1976 and 1979 agreements is premised upon co-operation between Hungary and Czechoslovakia and ultimate approval by the two Governments. Therefore, irrespective of the merits of Hungary's position, what Hungary was *not* entitled to do was to resort to unilateral action; this simply was not open to it under the applicable agreements (let alone general international law). But this is, in fact, precisely what Hungary did.

As far as monitoring water quality under paragraph *2* of Article 15 is concerned, the Boundary Waters Commission did in fact adopt a number of measures for testing Danube water, as described in Slovakia's Memorial[14]. These measures were strengthened in early 1989. The report commissioned by Hungary in the summer of 1989 by Bechtel Environmental, the internationally known consulting firm in the field, compares the monitoring system with those in use in the United States. It describes the monitoring system that is in place as being "unique because it monitors more

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[10] **SM, para. 3.24.**

[11] **SM, Vol. III, Ann. 55.**

[12] **Hungarian Government Resolution "On the suspension of the operations at Nagymaros", 13 May 1989, HM, Vol. 4, Ann. 147.**

[13] **SM, paras. 3.31 *et seq.***

[14] **SM, paras. 3.16-3.24.**

parameters than the Columbia River Basin, Ohio River Basin, or Tennessee Valley Authority (TVA)". The Report concludes: "With a few additions, this system will represent a state-of-the-art monitoring programme for integrating environmental considerations with operations."[15] Indeed, a number of additions have been made. The operation of the monitoring system has also been evaluated favourably by the EC Working Group reports[16].

This review of the interrelationship between Article 15 of the 1977 Treaty and other agreements between the Parties highlights two aspects of the approach taken by Hungary and Czechoslovakia to the management and development of the Danube. First, the two countries had created a network of joint agreements relating to the Danube, and utilized those agreements in a complementary way. And second, Hungary and Czechoslovakia consistently provided in their agreements that any action taken or obligations created under them would be subject to approval by the governments of the two States. This is true, for example, of decisions of the Boundary Waters Commission under the 1976 Agreement, and of provisions of the Joint Contractual Plan under the 1977 Treaty. The provisions of these agreements must therefore be implemented through proposals of the plenipotentiaries that are approved by the respective governments. Among other things, Mr. President, this casts great doubt upon the validity of Hungary's attempt to interpret these articles to include all of the developing rules of general international law relating to the environment. But even if they could be so interpreted, this would not change the fact that the articles must be implemented through action by the relevant mechanisms, action that must ultimately be approved by the respective governments.

Mr. President, allow me now to turn to Article 19 of the 1977 Treaty. Entitled "Protection of Nature", Article 19 consists of a single paragraph — indeed, a single sentence. That sentence, however, confirms that Hungary and Czechoslovakia gave thought to protecting the natural environment in the context of providing for the construction and operation of the Project. Article 19 follows the same pattern as paragraph 1 of Article 15: it lays down a general provision, then provides for its implementation "through the means specified in the joint contractual plan". Article 19 therefore appears to be straightforward and consistent with other provisions of the Treaty in its basic approach.

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[15] SM, Vol. III, Ann. 27, p. 202. See also SM, para. 2.98.

[16] E.g., HM, Vol. 5 (Part II), Ann. 18.

However, Hungary has advanced a novel theory concerning the meaning of this article. Hungary seizes upon the word "obligations" in Article 19 and uses that word as a window through which it seeks to bring into the Treaty virtually the entire field of international environmental law, as it exists *today*. The trouble with this is that Hungary tries to use this body of law not to *complement* the Treaty, but as a sort of legal Trojan Horse, to *halt* the Project — that is, to *defeat* the very object and purpose of the Treaty. This is not a tenable interpretation of the article according to the standards of interpretation laid down in the Vienna Convention on the Law of Treaties.

As Slovakia has pointed out in its Reply, the translation of Article 19 contained in the United Nations *Treaty Series* unfortunately does not convey accurately the sense of the original language versions. Most critically, while the *UNTS* translation speaks of "*obligations* for the protection of nature", a more faithful translation would refer to "*requirements* for the protection of nature". The meaning of the relevant term is *factual* rather than *legal*. As so translated, Article 19, now on the screen behind me, reads: "The Contracting Parties shall, through the means specified in the Joint Contractual Plan, ensure compliance with the requirements for the protection of nature which arise in connection with the construction and operation of the System of Locks."

Mr. President, Slovakia has shown in its written pleadings[17] that Hungary's argument concerning interpretation of the 1977 Treaty in light of evolving general international law is not well founded in this case. I will revert to this point in a subsequent intervention. Slovakia has also shown that even taking the *Treaty Series* translation as accurate, Hungary's interpretation of the phrase "*obligations* for the protection of nature" is erroneous[18]. The interpretation advanced by Hungary, according to which the "obligations for the protection of nature" could override all the other obligations in the 1977 Treaty is, on its face, absurd. Furthermore, it completely ignores the last limb of the Article. That phrase makes it clear that what the article is referring to is the "obligations for the protection of nature arising *in connection with* the *construction* and *operation* of the System of Locks".

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[17] **SR, paras. 3.27-3.38.**

[18] **E.g., SR, paras. 2.45-2.46.**

In other words, Hungary and Czechoslovakia recognized that it was not possible to foresee in detail all of the ways in which nature might need to be protected *during* the construction and operation of the Project. The two countries therefore provided — as they did in Article 15 and other provisions of the Treaty — that these needs would be addressed through mutually agreed provisions of the Joint Contractual Plan. This explanation is more accurately reflected in the translation of Article 19 suggested by Slovakia, which refers to the "requirements" for the protection of nature; but it is also consistent with the version contained in the United Nations Treaty Series. The accuracy of this interpretation is confirmed by the fact that, as stressed in Chapter 1 of the 1977 Treaty, the fundamental object and purpose of the Treaty is precisely the construction and operation of the System of Locks. While Hungary and Czechoslovakia clearly did not ignore the protection of the environment in formulating the 1977 Treaty, it would turn that agreement on its head to suggest, as Hungary in effect does, that Article 19 could defeat the Treaty's object and purpose.

What Hungary really wants to do is to add to Article 19 an additional phrase that would read as follows: "But either party may unilaterally suspend or terminate the Treaty when, in its opinion, the requirements are not met."

Finally, Mr. President, a word about Article 20. That article is entitled "Fishing Interests". Like Article 19, it consists of a single sentence. It provides that the parties are to "take appropriate measures for the protection of fishing interests in conformity with the Danube Fisheries Agreement, concluded at Bucharest on 29 January 1958". These measures are to be taken "within the framework of national investment". Thus Article 20 follows an approach that is similar to that employed in paragraph 2 of Article 15: it refers to the requirements of another agreement that deals specifically with an aspect of the protection of nature. In the case of Article 20, the reference is to the Danube Fisheries Agreement.

The focus of this latter agreement is upon "fish of economic importance"[19]. Far from preventing or discouraging the construction of works on the Danube, the fisheries agreement itself envisages the construction of such works. It merely provides that the parties undertaking these projects should take measures to safeguard economically valuable fish stocks. Therefore, when Article 20 of the 1977 Treaty enjoins the parties to "take appropriate measures for the protection of

[19] **E.g., Article 5(1).**

fishing interests in conformity with the Danube Fisheries Agreement", it refers exactly these measures to safeguard economically valuable fish stocks when constructing works making up the Project.

To summarize, Mr. President, the 1977 Treaty constitutes an expression of the concrete forms of co-operation agreed to by the parties with regard to the Project, including mechanisms for communicating information, as well as for consultation and negotiation. In many ways, the Treaty thus represents what may be regarded today as an expression of the general principles of international environmental law and the law of international watercourses in the form of a blueprint for the sustainable development of the Parties' shared freshwater resources. The Treaty further represents the fulfilment of the Parties' efforts to consult concerning a project on a shared watercourse, as well as to assess the environmental impact of that project, to avoid or minimize undesirable environmental effects, and to reinforce positive environmental effects. But I wish to emphasize once again that the Treaty provides for *joint* action in this regard, not unilateral determinations.

Mr. President, Members of the Court, that concludes my presentation. Mr. President, I would be grateful if you would call upon my colleague, Mr. Wordsworth, who will continue our discussion of the Environmental Aspects of the 1977 Treaty by addressing the *application* of the environmental safeguards I have just discussed. Mr. President, Members of the Court, thank you very much for your kind attention.

The PRESIDENT: Thank you Professor McCaffrey. Mr. Wordsworth, do you wish to make a presentation this morning in pursuance of what Professor McCaffrey has just said?

Mr. WORDSWORTH: Mr. President with your permission I can commence my second presentation which was originally scheduled for tomorrow morning and then pause after about 7 or 8 minutes and then continue my presentation tomorrow morning.

The PRESIDENT: Yes, thank you.

Mr. WORDSWORTH:

3. THE ENVIRONMENTAL ASPECTS OF THE 1977 TREATY

c)The Application of the Environmental Safeguards in the 1977 Treaty: the History of Research into Project Impacts post-1977

Mr. President, Members of the Court, Professor McCaffrey has just shown that the 1977 Treaty was a "forward-looking instrument" that envisaged continuing attention to the protection of the environment. But, the question arises, what happened after that instrument was concluded? Did the parties forget all about environmental protection, did they abandon all their research and build up the G/N Project structures in indecent haste?

Counsel for Hungary, Ms Gorove, would have the Court believe that the answer to these questions is "yes". Again and again, we were told that the pre-1989 studies were "inadequate for proper decision making" (CR 97/3, at p. 53); that, by May 1989, there was "no proper basis on which to determine what the impacts of the Original Project were likely to be" (*ibid*., at p. 56); that "no proper environmental impact assessment had been carried out" by May 1989, even "in accordance with the modest standards of the time" (*ibid*, at p. 62).

Mr. President, if I may be allowed one short but rather apt quotation from Shakespeare's Hamlet, "I think the lady does protest too much". For, as I shall show in this presentation, there was ample research available to the Parties in May 1989 to enable them to make informed decisions on the Project. And, as I shall also show, the reason for so much "protest" from Hungary on this point is simply that the studies carried out prior to May 1989 did not support the decisions that Hungary actually took in 1989-1990 to suspend and abandon its performance of this Treaty.

Czechoslovak studies

I turn, first, to the studies carried out by Czechoslovakia. Hungary claims that Czechoslovakia breached its treaty obligations "by not carrying out any in-depth environmental study" (HR, para. 1.41). This can be dealt with rather briefly. For, by 1989, and specifically thanks to the G/N Project impact studies, the area of the Danube and its side arms was the best surveyed and studied area in Slovakia with regard to its water, flora and fauna (*Nové Slovo*, No. 23/89, "Biological-Ecological conditions in the Concerned Territory of the Construction of the System of Hydropower Projects on the Danube, Gab_íkovo-Nagymaros", L. Weismann and I. Daubner). After the completion of the Bioproject in 1976, more than 30 different organizations worked on further research into potential Project impacts to soil fertility, floodplain forestry, ground water and surface water quality (*ibid*., and see the HQI report, HM, Vol. 5 (I), Ann. 9, at p. 278).

The Slovak Academy of Sciences and various other bodies carried out two major updates of the Bioproject in the mid-1980s *(ibid.)*. Other environmental research works are recorded in the list of more than 100 studies that makes up Annex 24 to Slovakia's Memorial, and there are many more Czechoslovak studies listed in the 1994 bibliography prepared by the Hungarian Academy of Sciences (*Annotated References to the Bos (Gab_íkovo)-Nagymaros Danube Barrage System Project*, Hungarian Academy of Science, Budapest 1994). Also, in the 1980s, the Slovak

Academy's Centre of Biological and Ecological Studies carried out a special Landscape Ecology Program, which aimed to establish a new and sustainable balance between the human demands on the region and the need for environmental protection (HM, Vol. 5, Ann. 9, at p. 287).

Finally, in respect of Hungary's contention that Czechoslovakia's application to the EC PHARE program in 1990 amounted to a recognition of the inadequacy of its previous studies (CR 97/3, at p. 55), I refer to the conclusions of the independent experts of the PHARE Report. They recorded the difficulties in processing all the relevant information caused by the fact that "the number of relevant studies [is] so high, and the amount of available data [is] so large" (PHARE Final Report, Vol. 1, pp. 1-2).

In short, Czechoslovakia's scientists studied possible G/N Project impacts in the greatest detail in the 1980s. And this research was not carried out in a vacuum. For, at this time, the Czechoslovak and Hungarian Academies of Sciences worked together on two major joint programs.

In the years 1981-1985, the two Academies committed substantial resources to a joint co-operation program on G/N Project impact, focusing on: ground waters and soils, surface water flow rates, water quality and discharge conditions, flora and fauna, and the natural environment ("*Geological, Hydrological and Biological-Ecological Study of the Danube Lowland*" — see, SM, Ann. 64, at p. 80 and *Nové Slovo*, No. 23/89, *op cit*.). Joint plenary sessions of the experts of both Academies were held each year and the resulting protocols sent to the G/N Project plenipotentiaries *(ibid.)*. A detailed final report was produced in 1986, and a summary of the results of the co-operation program was published in both Slovak *and* Hungarian *(ibid.)*.

Then, in the years 1986-1990, the two Academies continued their joint research in a new co-operation program ("Landscape-Ecological Management of the Territory Affected by the Construction of the G/N Project", *ibid*.). The aim of this program was to consolidate the research already carried out by the two Academies and to arrive at further, concrete proposals for reducing any adverse environmental impacts of the G/N Project to the minimum *(ibid.)*. And, of course, given this degree of co-operation, Hungary had *ample* opportunity for telling Czechoslovakia that its environmental impact studies were inadequate — if this was what it had really believed at the time. Mr. President, I still have some 20 minutes to go. May I, with your permission, pause here

and conclude this presentation by looking at some of the key Hungarian evidence in the pre-1989 period tomorrow morning?

The PRESIDENT: Thank you so much, Mr. Wordsworth. The Court will now adjourn until tomorrow morning.

The Court rose at 1.00 p.m.