The PRESIDENT: Please be seated. Judge Guillaume regrets that he is unable to be present this morning. May I now call on Sir Arthur Watts to continue his presentation, please

Mr. WATTS:

6.CZECHOSLOVAKIA'S ATTEMPTS TO PERFORM THE 1977 TREATY BY MEANS OF VARIANT C

(b) *Legality of Variant C (cont.)*

Thank you, Mr. President, Members of the Court. Mr. President, when the Court adjourned yesterday, I had just been saying that where a State refuses to co-operate in performing its treaty obligations, its treaty partners do not have to sit back and simply watch the agreed enterprise come to an end; they can adapt the agreed undertaking so that it can survive as well as possible. I added that precedents did not lie thick on the ground — for the good reason that the conduct of States rarely calls for this principle to be invoked in disputes between them.

Even so, Mr. President, there *are* precedents. Let me offer two examples in State practice. At various times in and after 1946 a permanent member of the Security Council chose not to participate in the voting in the Council. Did the Council's work come to an end? Of course not, Mr. President. The other parties adapted their practices, and their application of Article 27 of the Charter, so as to allow the Council to continue functioning as nearly as possible as envisaged in the Charter. As the Court acknowledged in its 1971 *Namibia* Opinion, this *later* came to be treated as an accepted re-interpretation of Article 27 (*I.C.J. Reports 1971*, p. 22); but *at the outset* it amounted to an adaptation of the Charter while still keeping as close as possible to the original Charter system. Much the same thing happened in 1965 and 1966, when a Member State of the EEC refused to co-operate in the EEC Council of Ministers. There were severe political difficulties, but legally the EEC Council did not come to an end: the remaining parties adapted the rules to allow the Council to continue to work as nearly as possible as had been originally intended.

It will, I know, be said that those examples are rather special. So too, Mr. President, are the circumstances of this case. And in any event, special circumstances, when they mount up, submerge their "special" character in the wider principle which they exemplify.

And the examples *do* mount up, Mr. President. Thus the Arbitration Commission set up by the International Conference on Former Yugoslavia concluded, in its Opinion No. 9 (*ILR*, 1992, Vol. 92, p. 203), that the successor States must settle all aspects of succession by agreement, drawing on the principles of the two Vienna Conventions of 1978 and 1983. But it then had to consider what the position would be if one or more of those States refused to co-operate. It concluded, in Opinion No. 12 (*ILR*, 1993, Vol. 96, p. 723), that the non-co-operating State would be in breach of its international obligations, and that the other States were entitled to conclude agreements *inter se* conforming to the principles of the two Vienna Conventions: but that, of course, necessarily implied that conformity with those Conventions would only be approximate, since the non-co-operation of one (or more) of the successor States would prevent their terms being applied literally.

This Court, Mr. President, has also had some experience of States not co-operating in the application of their international treaty obligations. Some States, although committed to accept the jurisdiction of the Court, have nevertheless denied that jurisdiction in a particular case, and turned their back on the Court. Did the Court just give up, Mr. President? Of course not. It sought to apply the Statute and Rules of Court, adapted as might be necessary to take account of the situation created by the non-co-operating State. Thus the failure of a State to appear means that the terms of Article 62 (2) of the Rules, requiring a State objecting to the Court's jurisdiction to set out its objections, cannot be observed: this does not paralyse the Court — it simply takes upon itself the task of identifying possible objections (e.g., *Fisheries Jurisdiction, I.C.J. Reports 1973*, at pp. 7-8).

In Slovakia's Reply, attention was drawn to this Court's various Opinions on *South West Africa* (SR, para. 6.14). Let me spell out just what the Court said in those Opinions. Faced with South Africa's breaches of the Mandate and its unwillingness to co-operate with the United Nations over this Mandate, coupled with the demise of the League of Nations, the Court recognized that it was appropriate for the Mandate to be applied approximately. Thus the Court, in the Advisory Opinion on the *Status of South West Africa*, accepted that, with the substitution of the United Nations for the League of Nations, the degree of supervision of Mandates by the General Assembly "should conform *as far as possible* to the procedure followed in this respect by the Council of the League of Nations" (*I.C.J. Reports 1950*, at p. 138; emphasis added). And those words "as far as possible" were explained

by the Court in its 1955 Opinion on *South West Africa Voting Procedures*: the Court said that since of course in the circumstances the General Assembly could not follow precisely the procedures which the Council of the League had adopted, "the expression 'as far as possible' was designed to allow for adjustments and modifications necessitated by legal or practical considerations" (*I.C.J. Reports 1955*, at p. 77).

The principle of approximate application was well articulated a year later by Judge Lauterpacht in the *Hearings of Petitioners from South West Africa* case. Given that the United Nations had to apply the Mandate in a manner somewhat different from, although close to, the manner set out in it, Judge Lauterpacht had no doubt that this approximate application accorded with legal principle. He said:

> "It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object." (*I.C.J. Reports 1956*, at p. 46.)

Mr. President, Professor Dupuy sought, on 6 March (CR 97/5, pp. 27 ff.), to discredit Judge Lauterpacht's view. He drew attention to the institutional framework to which it related, and to the very special characteristics of Mandates as compared with the alleged ordinariness of the 1977 Treaty.

These arguments are, Mr. President, unconvincing. Of course, the *Petitioners* case, like the other *South West Africa* cases — indeed, like any case — was concerned with its particular circumstances. But that does not mean that principles emerging from the case have no application in any other circumstances: of course they have, where — as here — the circumstances of another case make the application of those principles appropriate. Many aspects of the several *South West Africa* cases are accepted as being of general relevance — and Professor Kiss, Mr. Sands and Professor Crawford, for example, were all happy to quote from the 1971 *Namibia* Opinion when it suited Hungary that they should do so (CR 97/5, p. 12; CR 97/6, pp. 18,29). The suggestion that a relevant distinction between the *Petitioners* case and this one is that the former was concerned with a Mandate while the present is concerned with the 1977 Treaty ignores the fact that, notwithstanding that Mandates had certain special legal characteristics, this Court has held that the "Mandate [for South West Africa], in fact and in law, is an international agreement having the character of a treaty or

convention" (*South West Africa, Preliminary Objections, I.C.J. Reports 1962*, pp. 319 and 330-2). And in comparing the Mandate system with the 1977 Treaty, that Treaty is more than just a static set of treaty obligations: it established an integrated, evolutionary, an on-going system for a complex river development enterprise.

As a final point in this immediate context, nothing in the Vienna Convention on the Law of Treaties precludes the best possible, approximate application of a treaty in circumstances such as those of the present case. Professor Dupuy argued (CR 97/5, p. 38, para. 16) that, even if Hungary were in breach of its obligations under the 1977 Convention, Article 60 of the two Vienna Conventions allowed Czechoslovakia only two choices — termination of the Treaty, or its suspension. But this, Mr. President, ignores the inadequacy of either of those courses as an effective remedy for Czechoslovakia, as I noted yesterday, and disregards Article 42 — that Article governs the operation of Article 60 and makes it clear that, *if a State wishes to terminate or suspend a treaty*, it may only do so by applying the provisions of the Convention: it says nothing about other action which a State may take when faced with a breach by its treaty partner — for example, non-forcible counter-measures, or claiming compensation, or — as Slovakia submits, in a situation like the present — applying the treaty as nearly as possible as the circumstances allow.

This same principle finds support in the general obligation of an injured party to mitigate its damages. Had Czechoslovakia done nothing, but left the whole site derelict until such time as the Court might award damages, the damages would have been astronomical — several billions of dollars. Yet Czechoslovakia had a legal obligation to minimize those losses, and the only effective way to do that was to put the Treaty Project into operation as far as possible. It would be a mistake to think that the duty to mitigate damage was some afterthought, conjured up for the purpose of the case. In the Note Verbale sent by Czechoslovakia's Foreign Ministry to the Hungarian Embassy on 27 August 1991, Czechoslovakia referred expressly to its preparation for a provisional solution as being "guided by its efforts to minimize damage ..." (SM, Vol. 4, Ann. 96; SR, para. 9.23).

Professor Dupuy sought to deny the existence of any such principle (CR 97/5, pp. 42-45). Once more, he dismissed as irrelevant the various municipal law cases cited by Slovakia; and once more I note that this Court has often referred to practice in municipal law. But this time, he dismissed

also the decisions of the Iran-US Claims Tribunal. This is truly surprising, since it is acknowledged that a significant contribution to international law has been made by the jurisprudence of international Claims Tribunals — especially when like the Iran-US Tribunal, they are required to apply, *inter alia*, such principles of international law as they find applicable (Claims Settlement Declaration, Art. V: *ILM*, Vol. XX (1981), at p. 232).

Having nevertheless, tried to dismiss the relevance of that international tribunal, Professor Dupuy chided Czechoslovakia for not producing any precedent from international practice. Mr. President, let me try again. Very clear statements by the United Nations Compensation Commission (concerning claims against Iraq) demonstrate very clearly that the principle of mitigation of damage forms part of international law. In their Report on *Individual Claims for Damages up to US $ 100,000* the Commissioners, in September 1994, said this:

> "Finally, this Panel is of the opinion that the compensation payable to claimants should reflect claimants' efforts to mitigate their losses. International law recognizes, and indeed in certain instances imposes, an obligation on the part of an injured party to mitigate his or her losses." (UN Doc. S/AC.26/1994/3, of 21 December 1994, p. 192.)

Two years later, in the *Well Blow-out Claim*, the Commissioners, last November, noted:

> "that under the general principles of international law relating to mitigation of damages, which have also been recognized by the Governing Council, the claimant was not only permitted but indeed obligated to take reasonable steps to fight the oil-well fires in order to mitigate the loss, damage or injury being caused by those fires" (S/AC.26/1996/5/Ann. of 18 December 1996, p. 18).

Mr. President, in the face of all the judicial authority which Slovakia has adduced, international as well as municipal, it is clear that the duty of an injured party to mitigate damage does, as maintained by Slovakia, arise under international law in a case such as this.

The Practical Option of "Approximate Application": was Variant C such?

Mr. President, I would now like to turn to the question whether, as a practical matter, Variant C can be regarded as an approximate application of the Treaty Project. The map on the screen demonstrates this.

You will see the location of Dunakiliti. That is where the Treaty required Hungary to build a dam across the Danube. The Dunakiliti weir was the intended control point, a kind of "tap". The

result would be that, upstream of the dam, the waters would back up, fill the reservoir and flow down the bypass canal through to the Gabcíkovo power station and locks.

Hungary has claimed that Variant C was really a "new activity" (Professor Nagy, CR 97/5, p. 31), or something "fundamentally different" from the Treaty Project (Professor Kiss, CR 97/5, p. 12). Again, Mr. President, let us not be led astray by labels; let us look at the substance. The map now on the screen shows at a glance how basically similar Variant C and the Treaty Project are.

What Variant C involved was really quite simple. At Cunovo both banks of the river belonged to Czechoslovakia. So here it was possible for Czechoslovakia to replace the function of Dunakiliti by building a complex of structures entirely on its own territory. It was also necessary for Czechoslovakia to build an associated small dyke just South of the main dam to retain the waters of the new reservoir and a longer, dividing dyke along the left bank of the old river, to retain the waters of the new reservoir. And, of course, the reservoir had to be smaller than the original scheme. Those few physical changes in the Gabcíkovo section were not only all within Czechoslovak territory, but all of them were also *within* the reservoir area as original planned.

Professor Nagy (CR 97/4, pp. 35-37; also HR, paras. 7.15-7.16) has contended that, compared with the Treaty Project, the changes were more extensive. Let me begin with two general observations. First, some of the alleged changes are said to have occurred *after* October 1992: they are thus not relevant to the question of what Czechoslovakia was entitled to do *in October 1992*.

Second, Hungary ignores the extent to which changes were the result of Czechoslovakia's careful respect for Hungary's territorial sovereignty: it was, for example, precisely for that reason that a dam was built at Cunovo.

Now let me be more specific, Mr. President. Professor Nagy identified what he called "seven major interferences not envisaged by the 1977 Treaty". Apart from the main structure at Cunovo and the associated dykes to which I have referred, they were all directly consequential upon those main elements. Thus the flow in the main Danube between Cunovo and Dunakiliti was reduced, as a direct consequence of the dam having to be re-sited at Cunovo because of Hungary's refusal to resume damming at Dunakiliti; a new by-pass weir was built to allow water to flow into the main Danube bed — again, directly consequential upon the re-siting of the dam, and *precisely* to allow water to

continue to flow into the main Danube, as it would have under the original plan; and a new inundation weir was built, and a new intake was constructed into the Mosoni Danube — again, *precisely* so that Czechoslovakia could, in the new situation forced upon it, keep as close as possible to the original Project.

So, Mr. President, none of the matters noted by Hungary adds anything of substance to what Slovakia has described as the essential elements of Variant C.

But, Mr. President, there is a wider issue. Hungary, in drawing attention to various allegedly adverse changes, ignores the basic question — whose fault were they? They were Hungary's fault — they were made inevitable by Hungary's default. Thus for Hungary to complain that the Danube had been dammed at a different place, and that the Cunovo reservoir is 30% smaller than the originally planned Hrusov-Dunakiliti reservoir, as if they were just a whim on the part of Czechoslovakia, is laughable — who, I would ask, prevented the dam being built where originally planned, and thus prevented the reservoir being its proper size? As for the apparent complaint that the system now functions with only limited peak power operation instead of the originally planned regular peak-power operation (CR 97/4, p. 37, para. 18), it is wrong on the facts (there is no peak power operation at Gabcíkovo), and in any event, who put paid to the planned peak-power system, by abandoning Nagymaros? Hungary, Mr. President, and Hungary alone, and the same can be said about Hungary's complaint (*ibid.*, pp 38-39) that Hungary has lost what was to be a *joint* control of the operation of the system, instead of which it is now under unilateral Slovakian control: whose fault is that, Mr. President? And whose fault is it if Hungary has lost benefits which were to be expected? Again, Hungary's, and Hungary's alone.

In fact, however, Hungary is *not* deprived, by Variant C, of benefits expected to flow from the original Treaty Project. Its essential aims were all achieved in the Gabcíkovo section, as regards flood control, navigation, and the production of electricity.

So, Mr. President, Gabcíkovo as it now operates, thanks to Variant C, is as close an approximation to the Treaty Project as can be devised in the face of Hungary's breach. Without Nagymaros, without Dunakiliti, it is the best approximation that could be constructed. It is important to bear in mind that Variant C was in large measure the same as that Project — the very term

"Variant" C shows that it is but a variation of the original Project. It comprises the continuation of parts of the Project as originally agreed, and then those variations to the agreed Project necessarily consequential upon Hungary's unlawful abandonment of it. So when Hungary complains about the unlawfulness of Variant C, Hungary is in large measure complaining about the performance of matters originally agreed in the 1977 Treaty.

The Court will have read the attempts by Hungary to show that Variant C was an ecological disaster. Well, you will soon see the area with your own eyes. My colleague, Dr. Mikulka, will take you through the evidence shortly. He will show you — on the basis of hard evidence of the actual results of four years of operation (see SR, Vol. 3) — that the environmental impacts of Variant C have been grossly exaggerated by Hungary, and, indeed, often created by Hungary itself. In any event, as I have already noted, the benefits of Variant C, environmental and otherwise, have been considerable.

Counter-measures

Mr. President, in its Memorial, Hungary devoted considerable space to arguing that Variant C could not be justified as a "counter-measure" (HM, paras. 7.88-7.118). This, however, misunderstands Czechoslovakia's position. And then, during these oral proceedings, Hungary raised a related argument — that "approximate application" was Slovakia's sole legal argument to justify the adoption of Variant C (CR 97/5, p. 30). This, too, misunderstands Slovakia's position. Let me correct both misunderstandings together.

Mr. President, a counter-measure is an act which, prima facie, is wrongful. However, its wrongfulness is precluded, or excused, if certain conditions are met. But Czechoslovakia never believed Variant C to be a wrongful act. Consequently Czechoslovakia never justified Variant C as a "counter-measure" (SC-M, paras. 11.54-11.74).

Slovakia trusts that this view of the matter will commend itself to the Court. If, however, the Court takes the contrary view and regards Variant C as, prima facie, a wrongful act by Czechoslovakia, then Slovakia would indeed have an alternative legal argument. Slovakia would submit that Variant C could be justified in law as a "counter-measure".

All the necessary conditions would have been satisfied when Czechoslovakia was forced to adopt and, in October 1992, implement Variant C. There would have been a prior illegal act by Hungary — he breach of the Treaty; and it is a breach which continues to this very day. Hungary would have failed to comply with its obligations to remedy that breach, for example by resuming compliance with its obligations under the 1977 Treaty. Czechoslovakia's reaction — Variant C, which was conceived as a provisional and reversible solution — could be seen as an attempt to induce Hungary to re-establish the situation which existed before Hungary's wrongful act, namely compliance with Hungary's Treaty obligations: Variant C could then have been reversed, and the original agreed Project could have gone ahead. The adoption of Variant C would have been shown to be necessary in the circumstances — it was, as a last resort, the only way in which Czechoslovakia could salvage something from the agreed Treaty Project by its own efforts. Czechoslovakia could be seen to have done all that could have been asked of it beforehand to initiate a meaningful dialogue with Hungary, but Hungary rendered all attempts at bilateral negotiation futile, and refused to allow independent third-party examination of the matter. Finally, the implementation of Variant C would qualify as an appropriate, proportionate response: indeed, it could scarcely be considered *disproportionate*, since the act would be the fulfilment, as far as possible, of what the two Parties had agreed upon.

I turn, now, to consider — relatively briefly — some further arguments advanced by Hungary.

Variant C : Provisional or Permanent?

Slovakia has always said that Variant C was envisaged as only a provisional, and reversible, solution: thus, if the Parties returned to their original treaty scheme, the provisional solution could be replaced by the original, agreed scheme (SM para. 4.82; SC-M, para. 6.17). And I note that the EC Working group, in its report of 23 November 1992 (SM, para. 1.19; and Ann. 12) confirmed the Slovak view that a return to the Treaty Project was still technically feasible.

Hungary argues that the sheer strength and solidity of the Variant C structures suggests that they are intended to be permanent. But how else, Mr. President, would Hungary have the structures

built? In a makeshift fashion, so that the first Danube flood would wash them away? The argument is not serious.

Nevertheless, Slovakia repeats once more that Variant C was conceived as "provisional" and "reversible", and would not bar a return to the original Treaty Project. But — and this is an important qualification — a return to the Treaty Project *today* could only be on the basis that Hungary agreed fully to perform its treaty obligations and to compensate Slovakia for the extra investment involved in Variant C and the cost of returning to the original Project.

Variant C: in conflict with Legal Obligations?

Mr. President, Hungary advances a series of arguments designed to show that Variant C involved a breach of various legal obligations binding on Czechoslovakia . Let me briefly take these in turn.

(i) *The 1977 Treaty.*

As regards the 1977 Treaty, it takes a good deal of nerve, Mr. President, for a Party which has torn up a Treaty to accuse the other Party of being in breach of it, when that other Party has simply tried to perform the treaty as best it could.

All the same, Mr. President, Hungary has persistently alleged that Variant C "diverted" the Danube. This is emotive and inaccurate language. The Danube remains exactly where it was; all that has happened is that, under normal conditions, the main flow has been directed into the navigation canal. But that is what Hungary agreed to in the 1977 Treaty.

Second, Hungary has said that there were differences between Variant C and the Treaty Project. And I have already dealt with that argument.

Third, Hungary contends that the 1977 Treaty prohibits unilateral operation. Not quite, Mr. President. What the Treaty provides for is *joint* operation. But how do you get joint operation when one Party refuses to operate at all?

Fourth, Hungary says Czechoslovakia breached its obligations to consult and negotiate. This is astonishing. Czechoslovakia tried and tried again to consult and negotiate, but could get nowhere. And how could Czechoslovakia consult and negotiate about the *performance* of the Treaty when Hungary instructed its negotiators to talk only about the *termination* of the Treaty?

Mr. President, these too are not serious arguments.

(ii) *The 1976 Boundary Waters Agreement*

Then Hungary argues (HC-M, paras. 6.63-6.65; CR 97/6, pp. 31-34) that the 1976 Boundary Waters Agreement is still in force and that Czechoslovakia was in breach of certain obligations under it by putting Variant C into effect in the way it did.

There are several answers to these arguments, and they can be put briefly.

First, as my colleague Professor McCaffrey explained on 25 March, the 1977 Treaty was, in relation to the Boundary Waters Agreement, the *lex specialis*, and also the *lex posterior:* so on both counts, its obligations prevail. And Variant C of course was but an application of that Treaty.

Second, in any event, the Parties had, in the 1977 Treaty, agreed special water management arrangements to apply to the Project in the Gabcikovo section. Variant C was, as I have shown, designed to give effect to the 1977 Treaty Project in all its essentials, so far as it lay in Czechoslovakia's power to do so. It was not a new project, dissociated from the 1977 Treaty. It was an *application* of that Treaty — a best-possible application of it: and Variant C essentially carried on those agreed water management arrangements.

Third, so far as Article 3 of the 1976 Agreement requires the parties to inform each other of changes and to negotiate as appropriate, Czechoslovakia did, as Professor Pellet explained, *fully* inform Hungary of the proposals for Variant C, and did all it could to consult with Hungary about them: but Hungary rejected Czechoslovakia's approaches.

(iii) *The 1948 Danube Convention and the 1977 Treaty regarding Hungary's frontiers*

The next suggestion is that Variant C violates the 1948 Danube Convention. Now this, to say the least, is curious. The principal obligation under Article 3 of the Danube Convention is to maintain and improve navigation. This was also a primary aim of the 1977 Treaty and, of course, the bypass canal is built exactly as the Treaty required. You will see it. You will see the improvement. And now, with the ship-lock built at Cunovo, the old river, too, can be used for navigation. If Variant C really were a breach of the Danube Convention, is it not strange that no such allegation has ever been made by the Danube Commission? Instead, the position is precisely the opposite: the Danube Commission has always wanted to see the bypass canal as provided for in the Treaty Project and now in Variant C.

Then we have a quite separate argument by Hungary — for example, put before the Court on 6 March by Professor Kiss (CR 97/5, p. 13) — to the effect that Variant C violated Hungary's Danube frontier. This, says Professor Kiss, was established as the principal channel of the Danube, but Variant C, by changing the main navigational channel, has affected the frontier. But Mr. President, that change to the main navigational channel was agreed in the 1977 Treaty; and what is more the

Parties also agreed that the *boundary* was *not* to change. Article 22 (1) *(a)* of the 1977 Treaty — which Professor Kiss omitted to mention — provided that the frontier was to remain the same: that is, in the old river bed, running along the centre line of the main navigation channel or "thalweg". And the "thalweg" in the old river is still there, clearly identifiable, so the boundary remains as it was, unchanged. The argument has no substance, Mr. President.

(iv) ***The 1958 Convention concerning fishing in the Danube***

Hungary has, next, suggested (CR 97/5, pp. 16-17) that Czechoslovakia is in some way in breach of its obligations under the 1958 Danube Fishery Convention, either by failing to improve the natural conditions for fish in the Danube, or by not drawing up and putting into joint operation measures guaranteeing normal fish migration. There are three short answers, Mr. President: first, as a factual matter, the conditions for fish in the relevant part of the Danube have *not* been made worse by Variant C; second, how could Czechoslovakia do anything *jointly* when Hungary was refusing to co-operate? and third, Hungary is, again, wrong to look at the operation of Variant C as if it were some new invention: it is not — it is an application of the 1977 Treaty, and its implications are those already agreed by Hungary in that Treaty, including the right for the parties to take the measures they think "appropriate" for the protection of fishing interests.

(v) ***The 1992 London Agreed Minutes***

Then we come to Professor Kiss's comments on the so-called "London Agreement" of 28 October 1992 (CR 97/5, p. 18, para. 30). I would first note, Mr. President, that this document is not formally a treaty at all, but the "Agreed Minutes of the Meeting" which took place on that date (see SM, para. 4.97-4.102; and Ann. 128); and it was stated not to prejudice the legal rights of the Parties. Professor Kiss says that it was publicly repudiated by Czechoslovakia. However, Mr. President, on 4 November 1992, just a few days later, the Czechoslovak Government informed the European Commission in writing that the Czechoslovak Government "had approved the Minutes" of the London meeting, and would "respect the positions of the fact-finding mission and expert working group" which were to be set up (SM, para. 4.100 and Ann. 129). This, Mr. President, is the very opposite of the "repudiation" alleged by Hungary.

As Slovakia has explained in its Memorial (paras. 4.97-4.99), Czechoslovakia's undertakings in the Agreed Minutes were not the immediate and open-ended commitments which Hungary seeks to show; rather, they would either only arise at some future, unspecified, time, or were limited to a few days during which the work of the fact-finding mission was to be completed. There was never any agreement that the work on Variant C, or its operation, would be suspended pending the outcome of third-party involvement — whether via the EC or this Court. Czechoslovakia could never have agreed to give up even that partial degree of implementation of the original Project. Hungary had already succeeded in postponing the damming of the Danube and the diversion of the waters into the new bypass canal for three years. It would have been quite impractical, and highly damaging to the massive structures already built, as well as to the surrounding environment, to let them stand exposed and idle indefinitely.

In any event, Mr. President, it would be wrong to treat the London meeting as a defining moment in the general scheme of events: it was part of a continuing process of discussion, some elements of which went no further, but others of which led to formal agreements — like, indeed, the Special Agreement pursuant to which this case is now before this Court.

(vi) ***The environmental impact of Variant C***

Hungary also argued that, in executing Variant C, Czechoslovakia breached an obligation under Article 19 of the 1977 Treaty to establish the impact of the original project on the environment, and that this obligation was ignored in relation to Variant C.

Mr. President, this argument is unfounded. My colleagues Professor McCaffrey and Mr. Wordsworth have amply demonstrated that the obligations under the 1977 Treaty in this context were satisfied by numerous studies and assessments which were made, both before and after 1977.

Finally, as Dr. Mikulka will explain, careful monitoring has shown, as expected, that in fact Variant C has posed even fewer problems for the environment than the Treaty Project would have.

(vii) ***Customary international law relating to the environment***

I now come to Hungary's more general arguments concerning the law of the environment in relation to Variant C. And here Hungary largely recycles its arguments made in respect of the 1977 Treaty itself. Professor McCaffrey has already responded to these arguments in that context.

But in relation specifically to Variant C, Slovakia has two broad responses. First, Variant C is the result of Czechoslovakia's good faith attempt to implement the Treaty as best it could, in the face of its unjustified repudiation by Hungary; and Variant C is thus again an application of the Treaty, and so — like that Treaty itself — does not violate the rules of general international law to which Hungary refers. Second, even taken on its own, Variant C does not violate those rules.

As to Hungary's insistence on the prohibition of transfrontier damage (HR, paras. 3.56-3.63), Slovakia does not challenge the obligation to refrain from causing significant transboundary harm. But, there are three important points. **First**, there was nothing in the implementation of the 1977 Treaty by the Parties that violated this obligation. On the contrary, the greatest instances of transboundary harm were those caused by Hungary's failure to undertake certain necessary measures. **Second,** any "harm" Hungary complains of resulting from the implementation of Variant C was, since Variant C was a best possible application of the Treaty Project, accepted by Hungary in the 1977 Treaty itself. And **third**, in any event, Variant C has not in fact caused transfrontier harm, as my colleague Dr. Mikulka will show later.

(viii) ***Obligations concerning the equitable use of International Watercourses.***

Mr. President, let me turn now to the argument that, in constructing Variant C, Czechoslovakia violated the principles governing the equitable use of shared watercourses.

Slovakia has no difficulty whatsoever with the principle of equitable utilization. Indeed, the entire Treaty Project is an expression of that principle, and Variant C is in the circumstances the closest possible application of the 1977 Treaty.

The core of the concept of equitable utilisation is the achievement of a balance of benefits and burdens for the riparian States concerned — as Hungary has recognized (HR, p. 135, para. 3.59) and this was precisely the case with the Gabcikovo-Nagymaros Project.

And there cannot be any doubt that the utilization in question in the present case — namely, the putting into operation of the Project — *was* accepted by the two States in the 1977 Treaty. Variant C, *as such*, was not of course accepted by both Parties. But nothing in the concept of equitable participation, and nothing in Article 5 (2) of the ILC's Draft Articles on International Watercourses, made such acceptance obligatory. There was an agreement — the 1977 Treaty — and

Czechoslovakia was, through Variant C, simply seeking to implement that agreement as best it could in the circumstances caused by Hungary's breach.

In any event, Mr. President, Variant C is in fact itself consistent with the principle of equitable and reasonable utilization.

As to the duty, Mr. President, to cause "no significant harm", there was no significant harm to Hungary, as Dr. Mikulka will show.

(ix) *Permanent sovereignty*

Let me finally, Mr. President, turn to the principle of permanent sovereignty over natural resources. Hungary persists in its Reply in asserting that this principle is somehow relevant to this dispute, and that Variant C somehow infringes it (HR, 3-48). But Hungary also insists — and Slovakia agrees — that the Danube is a "shared natural resource". Mr. President, how can a State have permanent sovereignty over a *shared* natural resource? The two concepts deal with quite different situations. Hungary's reference to permanent sovereignty over natural resources, as if the Danube were simply a *national* resource under Hungarian sovereignty, is simply a confusion of concepts.

- o O o -

Mr. President, that concludes my argument on the lawfulness of Variant C. I have sought to demonstrate that

(1) following Hungary's abandonment of the Treaty Project, the circumstances left Czechoslovakia with no practical alternative to the adoption of Variant C, even though Variant C was not Czechoslovakia's preferred course;

(2) Variant C did not involve Czechoslovakia in any breach of its international obligations; and

(3) on the contrary, Czechoslovakia was fully entitled in international law to adopt and proceed with Variant C.

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

I should be grateful, Mr. President, if you would now call upon my colleague, Dr. Mikulka, Co-Agent for Slovakia, to address the Court.

The PRESIDENT: Thank you, Sir Arthur. I now call upon Dr. Mikulka.

Mr. MIKULKA:

The Present Position : Impacts of the Implementation of the Gabcíkovo section of the G/N Project through Variant C

Mr. President, in a few minutes, I shall take the Court through Slovakia's short video presentation. But I wish, first, to dwell on two issues that arise out of Hungary's lengthy treatment — in Volume 2 of its Counter-Memorial, in Volume 2 of its Reply, and now in its oral pleadings — of the supposed impacts of the implementation of the Gabcíkovo section of the Project through Variant C.

First, the Special Agreement lays down various questions as to the Parties' legal entitlement to perform various acts between May 1989 and October 1992. How can events after October 1992, in particular, after-the-fact evidence of the impacts of Project implementation through Variant C, be relevant to the Special Agreement's questions? Hungary did not address this question during its oral presentation; yet it did rely almost exclusively on evidence of impact contained in reports of 1994 and 1995. Slovakia is not troubled by Hungary's evidence. It has its own, better evidence of what the impacts of Variant C have been or will be — the PHARE reports, the EC Working Group reports, the analyses of the Slovak monitoring programs. In this presentation, Slovakia shall respond to the claims of adverse environmental impact post-1992 made at such length by Hungary; but it nonetheless questions the legal relevance of the 1994-1995 evidence on which Hungary's claims are based.

The *second* issue : although Hungary relies so heavily on the 1994 and 1995 reports, at the same time it insists that the evidence of *actual* impacts recorded by Slovakia's scientists is of little value — because four years is not enough time for environmental impacts to manifest themselves (CR 97/4, at p. 62).

Leaving aside the fact that the PHARE programme has made its predictions on long-term modelling; leaving aside the fact that the EC Expert reports concluded in 1993 that Project implementation through Variant C would not have significant adverse effects to the region's surface and groundwater — conclusions that would clearly not have been made without scientific foundation; leaving these points aside, Hungary's insistence on the unreliability of short term impacts is surely nothing more than a sign of its own defensiveness. Once again, Hungary asks the Court to refer to

increasingly unrealistic standards of impact assessment. For Hungary, it is not enough if Project impacts were extensively studied, it is not enough if there was an Environmental Impact Assessment, it is not enough if there are four years of hard evidence of actual impacts. Hungary always wants more.

Slovakia's approach has been very different. The most complete evidence of actual impacts was placed before the Court in the Data and Monitoring Reports contained in Volume III to the Slovak Reply. An even more detailed description of actual impacts is publicly available in this blue volume compiled by the Faculty of Natural Sciences in Bratislava (Environmental Impact Review, Comenius University, Bratislava, 1995).

Slovakia's scientists have not just looked at the actual data from October 1992 onwards. They have made a series of detailed comparisons between this data and the data from the pre-dam era which, in many cases, was collected over decades. From such a comparison, it is possible to see whether the implementation of the Gabcíkovo section has caused any significant changes, and also to make well-founded predictions as to whether adverse impacts may be expected in the long term future. And, of course, the state-of-the-art modelling under the PHARE program has taken all this one stage further.

I come now to Slovakia's video presentation. Of course there is a limit to what can now be shown. Water quality impacts, for example, do not lend themselves to video presentations. Thus, in seeing what now follows, I would respectfully request the Court to bear in mind the conclusions of the EC Working Group of Experts in their report of December 1993, when it was explained that Project implementation through Variant C would have *no significant impact* on the quality of the region's surface water and groundwater:

> "The impacts on the *surface* water quality are expected to be insignificant."
>
> "The impacts on the *groundwater* quality are in general expected to be insignificant." (HM, Vol. 5 (II), Ann. 19, at pp. 783-784.)

VIDEO PRESENTATION

Mr. President, Slovakia's video presentation starts with a few shots of the Danube as it passes the Devin gate and enters Bratislava.

The Gabcíkovo project, in fact, starts just below Bratislava. Here is the upper part of the reservoir with its shallow waters and small islands.

The main flow of the Danube water comes from the reservoir into the bypass canal. Here are the navigation locks and this is the whole Gabcíkovo barrage complex, with its hydroelectric power plant which operates at a "run-of-river" mode.

Between the bypass canal and the old riverbed lies the Slovak floodplain with its extensive system of river branches.

Here we are back on the reservoir, which is connected to the old riverbed at Cunovo through the bypass weir, the navigation lock and — during flood discharges — through the inundation weir. The reservoir also enables greatly increased discharges into the Mosoni Danube — this is the intake at Cunovo, discharging around 40 m3/s into the Mosoni. The Mosoni flows only in Hungarian territory and it was dry for most parts of the year in the pre-dam state.

Thanks to the reservoir, there is also an increase in the water on the Maly Danube which flows on Slovak territory.

The next section is devoted to the branches.

On both sides of the Danube, there is an extensive system of river branches, providing differing habitats for flora and fauna.

In the far past the river branches were connected with the main flow and during floods the Danube used to flood the whole inundation area.

In the decades preceding the damming of the river a significant deepening of the main riverbed occurred: decreased gravel transport, dredging, and riverbed erosion led to a drop in the water level of the Danube and the disconnection of the river branches from its main flow.

While during floods the Danube still flooded the whole inter-dyke area, under low discharges the branches did not receive any flow and often dried up.

This phenomenon threatened the whole floodplain area. Far-reaching changes in the environment began to be felt. And the symptoms of drying-up are still visible today at many places in the floodplain forest.

In May 1993 Slovakia put into operation the system of direct discharge into the river branches. The Dobrohost intake allows for the discharge of 200 m3/s. Technical means are available to achieve the optimum discharge, taking into account environmental needs.

The floodplain is divided into several sectors with cross-sectional dykes, where the water flows from one sector into another and finally meets the old Danube.

The floodplain forest is not the original forest of a century or more ago. Here you can see that it is largely made up of a series of forestry plantations, mainly of one species of poplar.

The water flow and water levels are controlled by opening and closing culverts in the cross-sectional dykes, enabling a variety of habitats to be created in different types of branches.

The next section is devoted to the old riverbed.

The old riverbed between Cunovo and Gabcíkovo receives water from the reservoir through the bypass weir. The discharge ranges between 250 and 600 m3/s.

Just next to the Dunakiliti weir, an underwater weir was built by Hungary following the April 1995 Agreement.

The weir is a 4 m high dyke partially overflowing with water — a means of restoring water levels in the old riverbed to the pre-dam conditions on a length of about 10 kilometres.

The impounded water has also created a connection between the Danube and the Hungarian branch system, providing a direct discharge there as well.

Downstream of Dunakiliti, the old riverbed still awaits similar measures. The river drains groundwater from the area next to the old riverbed.

Here, now, is a schematic presentation of how this problem could be solved by construction of a series of underwater weirs.

In the next sequence, I wish to show the Court how the inundation of the floodplain can be achieved through technical measures.

At Dobrohost, the waterflow through the intake structure is increased. The culverts in the dykes that separate the different sections of the side arms are closed. The water levels in the dyke branches build up and then flood over into the forest.

The timing of the inundation can be optimized in accordance with the discharge conditions in the Danube.

Here, the brown colour of the flood water contrasts with the blue seepage water in the two recreation lakes.

What we have just seen is a flood achieved by technical means, beneficial to the environment. By way of comparison, I would just like to show you a few shots of the catastrophic flood of 1965, which I described to you in my first presentation.

Today, the upper part of the Project region — both in Slovakia and Hungary — is protected against even the most severe flood, thanks to Gabcíkovo part of the Project. Downstream of Sap, however, the region is not protected as envisaged by the G/N Project.

In the final sequence of Slovakia's video presentation, I wish to look briefly at the impact of the Gabcíkovo section of the Project on the region's bird populations.

Birds, like fish, are useful indicators of environmental impact. And, since the damming in October 1992, the impacts here have been overwhelmingly positive.

An important new habitat has been created in the reservoir and increases in the overall numbers of birds, the number of species and the number of rare species have been recorded.

The side arm areas are the preferred nesting habitats for many species.

Mr. President, the shots that we have just seen show the flood plain during the growth season. We move now into autumn, and then into winter. During the winter, the discharge into the side arms is lowered — as would be the case under natural conditions and in accordance with ecological demands.

The season we have not covered in our video is the early spring, but this you will see on the spot next week.

Mr. President, Members of the Court, thank you very much for your attention. May I now ask you to call on Professor Mucha who will further Mr. Refsgaard's analysis of the impacts of the

implementation of the Gabcíkovo section through Variant C by looking at the findings of Slovak and joint Slovak/Hungarian monitoring in terms of water issues. Thank you, Mr. President.

The PRESIDENT: Thank you so much, Dr. Mikulka. May I call now on Professor Mucha.

Professor MUCHA:

The Impacts of Variant C on Surface and Groundwater Quality

Mr. President, Members of the Court, I would like to begin my statement by discussing the impact of Variant C on groundwater levels. Hungary has placed great emphasis on *decreases* in groundwater levels. But it does not tell the whole story. *First*, the filling of the upstream reservoir in October 1992 resulted in an *increase* of groundwater levels in the significant area. This is shown up on the screen (Judges' Folder No. 30). The light blue indicates an increase of up to 0.5 m while the dark blues indicate greater increases. The major change occurred in the areas adjacent to the reservoir, where groundwater levels increased by as much as 3 m.

This increase was also felt on Hungarian territory, although Hungary insists that even increases in groundwater levels are adverse impacts (CR 97/4, at p. 59). But the increase here has meant the restoration of water levels known some 30 years ago, and cannot possibly be considered as adverse (Judges' Folder No. 31). The map now on the screen shows the *decrease* in groundwater levels that occurred between 1962 and 1992 (prior to the damming). The darker red/brown areas are where the water levels had dropped by up to 3 m *prior* to 1992.

Second, it is true that the groundwater level dropped in the area downstream of the Cunovo weir, in particular along the old riverbed. However, as soon as Slovakia put into operation the system of direct recharge to the river branch system in May 1993 on its side of the river, there was an *increase* in the groundwater level there and the area affected by the draining of the old riverbed was considerably narrowed. The positive impact of this direct recharge on groundwater levels was confirmed by the EC Experts (SM, Vol.II, Ann. 19, at p. 360) and has now been confirmed in the PHARE report. This report found that through "filling the river branch system, the groundwater levels were brought back to the pre-dam level" (Final Report, Vol. 1, p. 5-3).

Hungary has nonetheless questioned the extent of the impact of the direct recharge (CR 97/4, at p .69). But thanks to the system of *joint* monitoring established under the Agreement of 19 May 1995, we know for certain that the direct recharge system has had a beneficial impact on groundwater levels on

both sides of the river including the Hungarian side. Unfortunately, Hungary has not been willing to exchange data on the inundation area on its side of the river. But we do have the data from various other monitoring wells in Szigetköz, which is shown up on the screen (Table 1) and also in the Judges' Folder. And, if the results from the joint monitoring of these wells in 1995 is compared with the results from 1992, that is, prior to the damming, we can see — on the basis of *Hungarian* data — that on the major part of Hungarian territory the groundwater levels have in fact *increased* (Joint Annual Report of the Environment Monitoring in 1995, May 1996, Judges' Folder No. 33).

The groundwater levels in the Hungarian wells are shown for the years 1992, 1994 and 1995. The first column gives the identification number of the observation well. The second column gives the 1992 pre-dam level, whilst columns three and four show the groundwater levels before and after the direct recharge scheme was put into operation. A comparison of the 1992 and the 1995 figures shows that in almost every single case, groundwater levels have *increased* since the damming and since the direct recharge system was put into operation. This directly rebuts Hungary's contentions on their topic (CR 97/4, at p. 69 and Illustration No. 12-18). And, I may just add that Hungary's allegations of a loss of natural sub-irrigation in the Szigetköz are based on results from the situation *prior* to the implementation of the direct recharge into its side arms in May 1995 (CR 97/4, at p. 63).

I turn now to the issue of *water quality*. I wish to look, first, at the *surface* water quality in this stretch of the Danube. Under the joint Slovak-Hungarian water quality programme, a classification based on 6 water quality classes has been agreed and this is applied in the Slovak monitoring system. This monitoring has revealed that since the damming of the Danube, *no significant changes* in water quality have occurred. There has even been an improvement in respect of certain parameters (SR, Vol. III, p. 24).

The Slovak findings are confirmed by the December 1996 report of the Slovak-Hungarian Transboundary Water Commission (see Tendency and Dynamics of Water Quality Changes of the Danube River and its Tributaries, Bratislava and Budapest, December 1996). This report compared the water quality of the Danube spanning a six year period both prior to and after the damming. Fourteen variables were monitored in order to record possible changes.

The Table up on the screen (Table 2) shows the overall findings of this report. This Table can also be found on the Judges' Folder (No. 34). The first column identifies the sampling location. The second column gives the number of determinants indicating improvements after the damming, while columns three and four show the number of determinants either indicating deterioration or no change. This Table is clear evidence that the self-purifying processes in the reservoir have had a positive impact on Danube water quality. This impact is also evident on the Danube stretch downstream on Hungarian territory. This means that the water quality of the Danube that eventually reaches the bank-filtered wells supplying Budapest will be *better* than in the pre-dam conditions.

The upstream reservoir has this positive impact on water quality because it is not a single body of slow flowing water. The reservoir conditions are typical for river and flood-plain ecotopes: a moderate to fast flowing main channel, moderately flowing deep and shallow river branches, and flood-plain water bodies with variable flow velocity. The settlement of aquatic vegetation in shallow water and on the banks contributes to the self-purification.

Hungary has claimed that there is a problem of enhanced eutrophication activity in the reservoir (CR 97/4, at p. 67). But, once again, *joint* monitoring has confirmed satisfactory results. The Table on the screen (Table 3 and in the Judges' Folder) is based on the findings of the December 1996 report of the Slovak-Hungarian Transboundary Water Commission (see, Tendency and Dynamics of Water Quality Changes of the Danube River and its Tributaries, Bratislava and Budapest, December 1996). If the pre-dam chlorophyll *a* figures — at Medvedov, Komarno or Budapest — are compared with the post-dam figures, it is seen in most cases that there has been a slight *decrease* in this measure of eutrophication.

One of the specific aims of the PHARE report was "to assess whether eutrophication problems in the reservoir can be expected or not" (Final Report, Vol. 1, pp. 5-19). The assessment given was clear, that "no eutrophication problems in the reservoir will occur" (*ibid*., pp. 5-20). Similarly, PHARE has predicted no major problems in the Old Danube and no eutrophication problems in the Slovak river branch system (*ibid*., pp. 5-13 and 5-18). This is confirmed by the monitoring of actual impacts. No significant phytoplankton growth has been observed either in the river branches, or in the old Danube riverbed, or in the Danube downstream of its confluence with the tailrace canal (SR, Vol. 3, pp. 30-33).

Now, let me turn to *groundwater* quality. The groundwater processes in the Danubian Lowland have been monitored for more than 30 years and an enormous database has been built up — as confirmed in all the EC and PHARE reports. The system of groundwater observation wells ensuring weekly or daily data collection can be seen on the map (SR, Illus. No. 5), and there are hundreds of such wells in Zitný Ostrov. This fact demonstrates how ill-founded are Hungary´s claims about the lack of basic knowledge concerning groundwater processes in this region. More than 300 parameters are regularly measured (see SR, Vol. 3, p. 19). Examples of similarly extensive monitoring systems in other parts of Europe are decidedly rare.

And what does all this monitoring show? The results, which have been presented to the Court by Slovakia in its Reply, show that the groundwater quality in general has not changed (SR, Vol. 3, pp. 16-17). The main factor influencing the groundwater quality is the quality of the water in the Danube and in its side arms. But there are no significant pollutants which could propagate into groundwater from the Danube (*ibid*., at p. 15). And, since the damming, the Danube water quality has improved — as I have just shown. Also, since the implementation of the direct recharge into the side arms, the water quality has improved there also.

Hungary places great focus on the content of iron and manganese in groundwater (CR 97/4, at p. 65). But iron and manganese are not pollutants, they are part of the geological composition of this aquifer, just as in so many other aquifers in Europe. Whether iron and manganese is dissolved in water depends on the oxygen conditions in the groundwater. It is not surprising that, as Hungary asserts, excess iron and manganese was recorded in wells close to its side arms in 1994 in the upper part of the aquifer *(ibid.)*. But prior to the direct recharge of Hungary's side arms from May 1995, and as part of the long-term conditions in the pre-dam state, poor oxygen conditions next to side arms with little or no flow *would be expected*. Of course, groundwater containing iron and manganese can be treated by water aeration and sedimentation of iron and manganese oxides. But the problem can be avoided by siting wells away from dead or stagnant river branches that contain sediments with organic matter.

I wish to stress that the groundwater in the upstream aquifer is of immense importance to Slovakia. This is the groundwater that is supplied to the inhabitants of Bratislava and other Slovak towns and villages. It does not, of course, supply drinking water to Budapest. Looking up on the screen,

the Kalinkovo waterworks is the closest to the reservoir and, should any negative development occur, it would necessarily be first felt here, where special water quality experimentation are carried out. The Šamorín water supply system is close to the lower part of the reservoir, while the Gabcíkovo water supply system is representative of the middle part of the territory influenced by Project implementation. The comparison of groundwater quality at all three places before and after the damming of the Danube shows only non-significant changes in the water chemistry (SR, Vol. 3, pp. 15-16 and Gabcíkovo part of the Hydroelectric Power Project - Environmental Impact Review, Faculty of Natural Sciences, Bratislava, pp. 57-64).

The Rusovce water supply system, located in the area close to the boundary with Hungary, is typical of the groundwater conditions on the right side of the Danube. Before the damming of the Danube, the groundwater quality was characterized by relatively high content of sulphate, and chloride because of the groundwater flow from urban sites and industrial sites *(ibid.)*. Since the damming, there has been a continuous and beneficial decrease of these chemical components because of the more intensive infiltration of Danube water into the aquifer. This points to a positive improvement in groundwater quality, which will also be felt downstream on Hungarian territory.

To conclude this discussion of surface water and groundwater, I want to stress that the real causes for concern — as all the monitoring and analysis of results have confirmed — pre-dated implementation of the Project. There are, *first*, surface water pollution caused by industry, agriculture and lack of waste water treatment and, *second*, water and sediment quality in the river branches. In this respect, the Project has had obviously beneficial impacts in that it has given impetus to the construction of waste water treatment plants in both Slovakia and Hungary and has allowed an increase of water flows into the river branch system and the Mosoni Danube.

Mr. President, Members of the Court, I thank you for your attention. Mr. President, may I respectfully propose that the Court take a break now and call on Dr. Mikulka thereafter.

The PRESIDENT: Thank you so much, Professor Mucha. The Court will suspend for 15 minutes.

The Court adjourned from 11.20 to 11.40 a.m.

The PRESIDENT: Please be seated. I call on Dr. Mikulka.

Mr. MIKULKA:

Other Impacts

Mr. President, I shall conclude Slovakia's presentation on the impacts of the Project to date by looking at those matters that are directly affected by surface water and groundwater impacts — soils, forestry, flora and fauna.

Soils

I turn, first, to impacts to the region's soils. As a result of Project implementation, there has been an overall improvement in the soil moisture régime (SR, Vol. III, pp. 44 and 54). According to Hungary, however, Slovak monitoring at three locations has shown a "systematic decline" in soil moisture (CR 97/4 at p. 70). This is misleading. The "systematic decline" in two of the three cases to which Hungary refers, and I quote the Slovak monitoring report, reflects the "decreasing trend" of the pre-dam period which, it is "expected" will be turned into a "slightly increasing" trend (SR, Vol. III. p. 44). In the third location, a real decrease has been recorded, but this "was not caused by an important decrease of the groundwater level, but by the structure of the porous media" *(ibid.)*.

The conclusion that the new soil moisture régime on the Slovak side of the Danube is more favourable (SR, Vol. III, p. 53) is no less true for the Szigetköz in Hungary. Indeed, when Hungary allowed the direct discharge into its branch system in May 1995, groundwater levels in the Szigetköz increased correspondingly, as Professor Mucha has just demonstrated.

Forestry/Flora

Turning to the region's floodplain forests, both sides are in agreement that these are of considerable importance. Indeed, they have been the object of botanical studies since the early 1950s. The documentation and inventory of flora and floodplain ecosystems on the Slovak side was completed in 1986 (SR, Vol. III, p. 74). There is, accordingly, a solid body of scientific knowledge that enables an objective evaluation of the impacts of the Project here.

So what impact did the damming have? *First*, it had an immediate, positive impact on the floodplain ecosystems below Bratislava. Here the groundwater level increased significantly and several

signs of the recovery of forests can be seen: the leaf loss during late summer decreased considerably in comparison with the pre-dam situation; an increase in the annual growth of trees has been recorded; abundant natural reforestation of poplar from seeds (previously rare in this area) now occurs; the renovation of the most humid type of willow-poplar forest has also begun. Even previously dead side arms outside of the floodplain are now filled with rising groundwater, and the return of conditions for vegetation existing some 40 years ago is apparent (SR, Vol. III, pp. 81-86).

Second, in the inundation area, the groundwater level is now for the greater part less than 1.5 metres under the surface, easily within the reach of tree roots. And the soil moisture can be further increased by means of the artificial inundation of the forest. As you saw during the video presentation, the technical means for increasing or decreasing water levels are available so as to simulate natural conditions and groundwater fluctuations.

In terms of the impact of the new water régime on the floodplain forest, the results of monitoring show:

- trees in good health, without traces of decline,
- an improvement or, at most, no change in the annual growth of poplars,
- the natural (spontaneous) reforestation of certain tree species, which was previously unobserved (SR, Vol. III, p. 84).

And, what of the biodiversity of the floodplain area? Has this suffered due to the Project implementation as Hungary claims? Well, of the total number of 1000 plant types existing in the Gabcíkovo-Nagymaros area, some 321 can be found in the Dobrohost-Sap inundation area. The monitoring over the past few years has revealed that not a single one of these 321 plant species has disappeared or is threatened (SR, Vol. III, pp. 85-86). On the contrary, an increase of protected species has been recorded as a direct result of the rise in the groundwater levels caused by Project implementation (*ibid*.).

Fauna

Turning now to fauna, and I shall focus on the impacts of the Project implementation through Variant C on fish fauna for Hungary has placed great emphasis on this subject. It is certainly correct that impacts to fish and other aquatic fauna are a useful indicator of environmental impact (CR 97/4, at p.

52). But it is important to remember that the causes of declining numbers of fish species and populations long pre-date the short-term impact of the damming.

The adverse impacts of the pre-dam situation on fish — the concentration of the Danube's waters into one fast flowing channel, the isolation of the side arms on both sides of the river, the construction of barrages on the upper Danube — have already been examined in some detail in Slovakia's pleadings (see, SR, paras. 12.45-12.53). Indeed, the Mixed Commission of the Danube Fisheries Convention (of which Hungary is, of course, a member) has repeatedly noted the adverse impacts of the factors that I have just mentioned (SR, Vol. II, Anns. 9 and 10).

I turn, then, to Hungary's claim that, before October 1992, an "extraordinary rich fish population of rheophile species" existed in the main Danube channel (CR 97/4, at p. 52). The Court is referred to Appendix 2 to Hungary's Memorial, but this Appendix lists certain sea migratory species that disappeared from this sector of the Danube in the 1970s (HM, Vol. 1, pp. 386-387). It is entirely true, as Hungarian counsel explained, that the Russian sturgeon "has not been recorded in the Danube near Bratislava since the diversion" (CR 97/4, at p. 53). But — it is also true that the last verified sightings of the Russian Sturgeon in this stretch of the river were in the 1960s (J. Holèik, 1996, "Vanishing Freshwater Fish Species of Slovakia" in *Conservation of Endangered Freshwater Fish in Europe*, A. Kirchofer & D. Hefti (eds.), Birkhauser Verlag, Basel, pp. 79-88).

Thus, the disappearance of the fish to which Hungary refers long pre-dated the damning in October 1992. What is more, the operation of the Gabcíkovo part of the Project has had several major, positive impacts. *First*, the *reservoir* created behind the Cunovo weir offers a new and important habitat for fish. As explained by the PHARE Final report:

> "The reservoir harbours suitable conditions for nearly all less critical rheophile species [that is species which prefer fast flowing water], up to limnic species depending on low velocities, sedimentation rates and depths ... The settlement of aquatic vegetation will create suitable living conditions for a wide range of species that hitherto were confined to shallow river arms." (Final Report, Vol. III, p. 9-9.)

Second, as to the *old riverbed*, we should not forget that the high velocities in the main channel that existed before the damming was not a natural environment. The bottom of the river is now more stable, extreme flow velocities no longer occur and, as a result, the food basis for fish is richer than in the pre-dam state (SR, Vol. III, pp. 110 and 94).

Nonetheless, Hungary alleges that "14 rheophile fish species typical for this reach" can no longer be found (CR 97/4, at p. 53). The source for this is a 1994 study. Clearly, the monitoring was not yet complete. By way of example, on 21 September 1995, the water level behind the underwater weir at rkm 1843 was lowered and it was possible to inspect the fish left between the stones of the weir. Hungarian scientists recorded in this one day, 7 of the 14 rheophile species that Hungary claims can no longer be found. I am referring to the *Evaluation of the function of the underwater weir* document prepared by the Hungarian Ministry for Transportation, Communication and Water Economy, and handed over to the Slovak monitoring agent in the framework of the Joint Slovak-Hungarian Agreement on 3 October 1995.

Third, with the implementation of the direct water supply into the Danube's *branch system*, the conditions for fish were considerably improved there. Already in 1995, just a few months after putting the water recharge system of the Slovak branches into operation, the presence of 29 species was confirmed and the regular occurrence of a total number of 55 species is expected (SR, Vol. III, p. 116). Again, Hungary claims that there have been adverse impacts, including the loss of 20,000 European mud minnows (CR 97/4, at p. 54). But this must be questioned. The European mud minnow is indeed an endangered species, and an international workshop was held on this species in Vienna in 1995. The Hungarian scientist, Dr. Keresztessy, submitted various maps of the location of this species in the pre-dam era, but on no map is the species said to be located in the Szigetköz. (K. Keresztessy 1995, Recent fish faunastical investigation in Hungary with special reference to Umbra Krameri Walbaum, 1792 (Pisces: Umbridee), Ann. Natuthist. Mus. Wien, 97 B, pp. 458-465, Vienna, Nov. 1945).

What of other aquatic fauna? The benthic fauna of the old riverbed, that is, the fauna living on the river bottom, have benefited because the extreme and atypical high flow velocities that characterized the pre-dam situation have disappeared. Aquatic fauna have also benefited in the reservoir and in the side arms (SR, Vol. III, pp. 93-100). The PHARE Final Report notes the importance of the new reservoir habitat and also predicts "an increase in primary and secondary aquatic production" in the side arms (Final report, Vol. I, pp. 5-22).

Mr. President, I wish to conclude this presentation by looking at two new allegations that Hungary made during the oral hearings of a few weeks ago.

First, Hungary has looked in some detail at the underwater weir constructed at rkm 1843. It claims that the impacts of this weir on water quality and sediment deposition provide a "direct example of the situation for any further weirs in the main Danube channel" (CR 97/4, at p. 71 and p. 5). This is not so. The weir that Hungary has built achieves the basic purpose of raising the Danube's water level upstream, but it is nonetheless an extremely crude construction.

Correctly designed, the underwater weir should be more than 250 metres long — this weir is only a fraction of that length. Also, only a small amount of the river flows over this weir, the major part of the flow being directed through the Dunakiliti weir. As planned, the whole of the rivers' waters would flow over the underwater weirs, and velocities would not drop as they do just behind the existing weir. Accordingly, this weir is *not* typical for the underwater weirs that should be constructed in the old Danube channel.

The use of underwater weirs, correctly designed, has been approved by the EC and PHARE experts. As Mr. Refsgaard pointed out yesterday, they are not the solution to everything, but they are a viable means of raising water levels in the old Danube channel without creating adverse water quality conditions.

Hungary's *second* new contention can be dealt with rather briefly. This is that the Gabcíkovo power plant is being operated at peak operation (CR 97/4, at p. 60). It is not. It is genuinely surprising that Hungary made this contention during its oral presentation, as Hungary's experts and Slovakia's experts have together examined precisely this issue and have concluded, without any ambiguity, that Gabcíkovo is being operated on constant, *not* peak operation, mode.

Conclusion

This concludes Slovakia's review of the facts concerning the impacts of the Gabcíkovo project on the environment.

The importance of this Project is that for the first time a reasonable balance can be achieved between the competing priorities. The transfer of navigation into a bypass canal has indeed, as the EC experts explained, created a unique opportunity. More natural conditions can be established in the floodplain area, whilst man may pursue his development interests in having good water supplies, good

navigation conditions, reliable flood protection, renewable energy supplies, and ample waters for agriculture, forestry and the environment.

Mr. President, Members of the Court, thank you very much for your attention. May I now ask you to call on Professor Alain Pellet.

The PRESIDENT: Thank you, Dr. Mikulka. Professor Pellet, please.

M. PELLET:

8. LES CONSÉQUENCES DE LA RESPONSABILITÉ DE LA HONGRIE

1. Monsieur le Président, Messieurs les Juges, dans cette ultime plaidoirie, il m'appartient de revenir sur ce que, dans leurs écritures, les Parties ont appelé «*Remedies*», un mot qui n'a pas vraiment d'équivalent en français — disons que je me propose de tirer les conséquences de la responsabilité de la Hongrie dans cette affaire.

Je tiens à préciser que ceci aurait dû être fait par notre éminent collègue le professeur Derek Bowett, qui avait établi un avant-projet de plaidoirie dont j'ai eu le privilège de pouvoir m'inspirer.

2. Dans ses conclusions, la Slovaquie a indiqué quelles étaient ces conséquences à ses yeux. Elles sont au nombre de cinq mais s'articulent, au fond, autour d'une idée fondamentale : le traité du 16 septembre 1977 est en vigueur et n'a jamais cessé de l'être. Ceci est l'une des déclarations que la Slovaquie prie la Cour de bien vouloir faire et il s'en déduit que la Hongrie d'une part doit l'exécuter pleinement et intégralement et, d'autre part, qu'elle est tenue d'indemniser la Slovaquie pour les pertes que les violations hongroises passées et actuelles lui ont causées.

J'examinerai donc successivement:

— d'abord, les constatations que les Parties prient la Cour de bien vouloir effectuer;

— ensuite, l'obligation d'exécution qui incombe à la Hongrie;

— enfin, l'indemnisation due à la Slovaquie.

I. LES CONSTATATIONS QUE LES PARTIES PRIENT LA COUR D'EFFECTUER

3. Monsieur le Président, le premier souci de la République slovaque est d'obtenir de la Cour une déclaration selon laquelle le traité de 1977 et les instruments connexes sont en vigueur et n'ont jamais cessé de l'être. Tel est l'objet de sa première conclusion (MS, p. 371) qui, en réalité, porte sur deux déclarations distinctes demandées à la Cour concernant respectivement d'une part le maintien en vigueur du traité et, d'autre part, l'absence d'effet de la notification de 1992. Cette première demande est prolongée par deux autres puisque la Slovaquie prie également la Cour de dire et juger :

> «2. Que la République de Hongrie n'était pas habilitée à suspendre puis à abandonner les travaux afférents au projet de Nagymaros et à la partie du projet de Gabcíkovo qui relevaient de sa responsabilité en application du traité de 1977.
>
> 3. Qu'il était licite de recourir à la variante C — la «solution provisoire» — et de la mettre en oeuvre.» (*Ibid*.)

Dans ses propres conclusions, la Hongrie prend l'exact contre-pied de ces demandes (cf. les quatre premières conclusions hongroises, MH, p. 339 ou RH, p. 183).

4. Monsieur le Président, il me paraît inutile de revenir en détail, à ce stade tardif, sur les motifs qui établissent, sans doute possible, que le traité de 1977 est toujours en vigueur et qu'il l'est entre la Slovaquie et la Hongrie.

Il suffit de constater qu'en le déclarant, la Cour non seulement décidera un point de droit sur lequel les Parties s'opposent nettement et qui constitue sans aucun doute le nœud du présent différend, mais encore elle contribuera à affermir le principe, si fondamental, selon lequel «tout traité en vigueur lie les parties» que la consécration des thèses défendues par la Hongrie remettrait très gravement en cause, et, avec lui, les fondements mêmes du droit international public.

5. Il va de soi que les mêmes considérations s'appliquent à l'ensemble des instruments connexes puisqu'aussi bien, comme l'a rappelé M. l'agent de la République de Hongrie dans son discours introductif, le principe n'est pas *pactum est servandum*, mais bien *pacta sunt servanda* (CR 97/2, p. 22). En d'autres termes, la déclaration de validité qu'il est demandé à la Cour de faire s'étend également aux accords qui complètent le traité de 1977 et auxquels la Hongrie a prétendu mettre fin par sa déclaration du 19 mai 1992, en particulier à l'accord d'assistance mutuelle de 1977, à celui de 1979 sur le statut conjoint et au plan contractuel conjoint tel qu'il a été progressivement amendé par les Parties.

6. Du même coup se trouve également justifiée la demande slovaque de déclaration établissant que la notification du 19 mai 1992 est dépourvue d'effet juridique, en tout cas sur la validité du traité lui-

même. Monsieur le Président, c'est une lapalissade : si le traité est toujours en vigueur, c'est que la Hongrie n'a pu y mettre fin ! Et la raison en est toujours la même : elle ne pouvait, pour ce faire, invoquer aucune cause licite justifiant l'extinction du traité. Je relève au demeurant qu'ici encore les deux Parties s'accordent pour demander une déclaration formelle à la Cour sur ce point, qui fait d'ailleurs l'objet d'une question expressément posée au paragraphe 1 *c)* de l'article 2 du compromis.

7. Le maintien en vigueur du traité suffit également à établir le bien-fondé de la deuxième conclusion de la Slovaquie. Si, comme elle le pense, les suspensions puis les abandons successifs de travaux s'analysent, en réalité et *de facto*, en autant de tentatives pour suspendre l'application des dispositions du traité puis pour y mettre fin, tous ces actes constituent des faits internationalement illicites puisqu'ils ne trouvent aucun fondement dans le droit des traités et que les procédures requises n'ont, au surplus, pas été suivies.

Il en va de même, comme je l'ai montré lors de l'audience de mardi matin, si l'on considère que les suspensions et les abandons successifs des travaux incombant à la Hongrie constituent des comportements détachables du traité. Dans ce dernier cas, ce n'est plus sur le terrain du droit des traités mais sur celui du droit de la responsabilité qu'il convient de se placer; mais, comme l'a montré mon collègue Stephen McCaffrey, les circonstances qui pourraient justifier ces actes clairement contraires au traité et aux instruments connexes n'existent pas davantage.

8. Il convient, Messieurs les Juges, de bien voir également que la réponse que vous donnerez à la question posée par l'article 2, paragraphe 1 *a)*, du compromis et aux demandes des Parties à ce sujet, telles qu'elles sont exprimées dans leurs conclusions, n'a pas d'incidence directe sur le problème de la validité de la variante C.

En effet, quel que soit le mode de raisonnement que vous retiendrez, le fait central, patent, clair, indiscutable, demeurera : le traité de 1977 n'a jamais cessé d'être valide. Il l'est bien sûr si, comme la Slovaquie le pense, vous décidez qu'aucune circonstance n'est de nature à exclure l'illicéité des comportements de la Hongrie qui lui sont contraires. Mais il l'est également si, par impossible, vous en veniez à décider que certains des comportements de la Hongrie peuvent être excusés : comme je pense l'avoir établi mardi matin, les circonstances excluant l'illicéité ont un effet sur la responsabilité de

l'auteur du comportement litigieux — qui se trouve exclue dans ce cas; elles n'en ont aucun sur la source des obligations, ce qui veut dire qu'en l'occurence que le traité demeure pleinement valide.

Et, du même coup, se trouve justifiée la troisième conclusion de la Slovaquie : la Tchécoslovaquie pouvait licitement recourir à la variante C et est en droit de le voir reconnaître. Que la Hongrie ait engagé sa responsabilité du fait de ses violations du traité — ce que croit fermement la République slovaque — ou que ces comportements soient jugés excusables, dans les deux cas, le traité demeure et la Slovaquie est en droit, et est même tenue, de le mettre en œuvre, du mieux qu'elle peut. Tel est l'objet de la variante C, dont sir Arthur Watts a montré qu'elle constitue, dans les circonstances que vous savez, l'exécution la plus approchée possible du traité, en tout état de cause, elle se justifierait comme une contre-mesure.

9. La Slovaquie a donc la ferme conviction, Monsieur le Président, Messieurs de la Cour, que la première conséquence des réponses que vous apporterez aux questions énoncées au paragraphe premier de l'article 2 du compromis est qu'elle est en droit d'obtenir de votre Haute Juridiction des déclarations confirmant d'une part la validité continue du traité et, d'autre part, le bien-fondé de sa conduite et l'illicéité des comportements de la Hongrie. Ces constatations sont le fondement indispensable à la détermination de la responsabilité de la Hongrie ou des conséquences en découlant.

Ces conséquences sont de deux sortes : d'une part, la Hongrie doit exécuter complètement le traité de 1977; d'autre part, elle doit indemniser la Slovaquie pour les conséquences préjudiciables de ses manquements.

II. L'OBLIGATION D'EXÉCUTION

10. Dans sa quatrième conclusion, la Slovaquie prie la Cour de tirer les conséquences de la validité continue du traité en lui demandant de dire et juger :

> «4. Que la République de Hongrie doit pour ces raisons [«ces raisons», ce sont les quatre constatations dont je viens de parler] doit mettre immédiatement un terme à toute conduite qui empêche l'application intégrale et de bonne foi du traité de 1977 et doit prendre toutes les mesures nécessaires pour s'acquitter des obligations que lui impose ce traité, sans autre retard, afin de faire en sorte que le traité soit à nouveau respecté.» (MS, p. 371.)

Cette conclusion se décompose donc en deux demandes complémentaires : la cessation de la conduite illicite de la Hongrie d'une part, l'exécution des obligations lui incombant en vertu du traité, d'autre part.

11. Il n'y a rien là que de très classique et la Slovaquie se borne à suivre votre jurisprudence constante dans des affaires de ce genre. Je pense en particulier aux affaires des *Otages* (*C.I.J. Recueil 1980*, p. 44; voir aussi l'ordonnance du 15 décembre 1979, *C.I.J. Recueil 1979*, p. 21) ou du *Nicaragua* (*C.I.J. Recueil 1986*, p. 149). Cette demande de cessation est également conforme aux dispositions de l'article 41 du projet d'articles de la CDI sur la responsabilité des Etats (cf. le rapport de la CDI à l'Assemblée générale sur les travaux de sa 48e session, 1996, A/51/10, p. 164 et le commentaire de cette disposition *in Annuaire de la CDI* 1993, vol. II, 2e partie, par. 16, p. 60; voir aussi en ce sens CR 97/6, p. 63, M. Dupuy).

Il en résulte dans la présente espèce que la Hongrie doit cesser l'omission constituée par la non-exécution du traité de 1977; c'est-à-dire qu'elle doit ... l'exécuter.

12. Ceci correspond d'ailleurs à un autre aspect, plus classique encore, du droit à la réparation : à l'obligation de *restitutio in integrum*. Comme l'a écrit Paul Reuter,

> «la mise en cause de la responsabilité fait bien naître une obligation nouvelle, celle de réparer, mais celle-ci consiste principalement à remettre les choses en état, *restitutio in integrum*, c'est-à-dire à assurer l'exécution la plus parfaite possible à l'obligation originaire» («Principes de droit international public», *RCADI* (1961-II), vol. 103, p. 595).

L'«exécution *la plus parfaite possible* à l'obligation originaire», ceci signifie évidemment, dans notre affaire, la mise en œuvre des obligations mises à la charge des Parties par le traité. C'est cette perspective de rétablissement de la «légalité internationale» qui a inspiré le célèbre *dictum* de la CPJI dans l'affaire relative à l'*Usine de Chorzów* :

> «la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis» (*arrêt du 13 septembre 1928, C.P.J.I. série A n° 17*, p. 47).

Et c'est cette formule que reprend en la précisant l'article 43 du projet d'articles de la CDI.

Dans le cas présent, «l'état qui aurait existé» si la Hongrie n'avait pas violé le traité de 1977 et ne l'avait pas illicitement proclamé terminé, est le suivant : les obligations de construction prévues par le traité seraient pleinement exécutées, la production d'électricité de pointe serait en cours, la navigation

serait grandement facilitée sur toute la portion du Danube couverte par le traité, les Parties géreraient ensemble l'investissement conjoint, veilleraient ensemble à la protection de l'environnement, etc.

Ce n'est que par l'exécution complète du traité, dans un délai le plus rapide possible, que cette situation peut être, non pas sans doute «rétablie » — car le temps qui passe ne se rattrape pas —, mais établie le plus complètement possible dans les termes prévus.

13. Bien entendu, cette obligation d'exécution pèse également sur la Slovaquie. Elle ne l'a jamais nié et l'accepte évidemment pleinement.

Et pourtant, ceci semble préoccuper la Hongrie qui soulève principalement deux problèmes à cet égard : celui de la propriété conjointe de l'investissement (qu'elle pose, il est vrai, surtout en termes de liquidation — cf. CR 97/6, p. 75, M. Dupuy) d'une part; celui du sort de la variante C, d'autre part. Ces préoccupations ne sont pas fondées.

En ce qui concerne la propriété conjointe de l'investissement, la Slovaquie s'est toujours déclarée prête à respecter pleinement, sur ce point comme sur tous les autres, la lettre et l'esprit du traité de 1977 (cf. CMS, par. 12.16, p. 361). Simplement, mais cela va de soi, cette propriété a, et ne peut avoir pour seul fondement que le traité, dont l'application ne saurait être sélective. En d'autres termes, propriété conjointe, oui évidemment, mais elle est la contrepartie du respect intégral par la Hongrie de ses obligations conventionnelles. Monsieur le Président, tous les *pacta sunt servanda* — sur cela nous sommes d'accord — mais aussi toutes les dispositions d'un *pactum sunt servandae* !

14. J'apporterai le même genre d'apaisements à nos amis hongrois, et aux mêmes conditions, en ce qui concerne la variante C. Comme la Slovaquie l'a redit dans sa réplique (voir par exemple, RS, par. 9.76, p. 243 ou par. 14.06, p. 355), cette solution, qui a permis de mettre provisoirement en application une partie du traité de 1977, est réversible.

Mais il est clair que les deux Parties n'ont pas la même conception de la notion de «réversibilité». Pour la Slovaquie, elle signifie non pas le retour au «projet original», ce concept si cher à nos contradicteurs et qui n'a guère de sens, mais la mise en œuvre du traité de 1977 tel qu'il a été progressivement adapté, précisé et complété — et peut encore l'être — à mesure de son développement. Pour la Hongrie, au contraire, l'idée de réversibilité est une notion floue et incertaine qui veut dire tantôt «retour à l'état de nature» ou, en tout cas, à la situation d'avant le traité (elle-même tout à fait

artificielle !) (cf. MH, communiqué du 15 juillet 1991 : "The Hungarian party ... urges the abandonment and demolition of the barrage",vol. 4, annexe 165, p. 390 ou MH, par. 3.110, p. 64), tantôt, et c'est ce qui semble découler de sa conclusion 5.b), le retour à l'«avant-variante C» (cf. MH, p.338 ou RH, p. 184) mais les conseils de la Hongrie ont précisé que, s'il ne s'agissait pas de détruire le barrage de Gabcíkovo (cf. CR 97/6, p. 66, M. Dupuy), il n'en fallait pas moins restaurer «le cours du Danube antérieur»à ce qu'ils appellent sa «diversion» (*ibid.*, M. Dupuy; voir aussi CR 97/4, p. 42, M. Nagy).

Et dans les ceux cas, les deux conceptions alternatives hongroises de la réversibilité, celle-ci, est en effet loin d'être assurée : lorsque vous visiterez les lieux, Messieurs les Juges, vous constaterez l'étendue et l'importance du canal d'amont de Gabcíkovo et du véritable lac de rétention qui a été créé (non pas du fait de la variante C, qui a seulement eu pour effet d'en limiter, et d'en déplacer légèrement, l'emprise, vous l'avez vu tout à l'heure, mais, tout simplement en application du traité initial). Rien n'est impossible, mais il faut bien reconnaître que la suppression pure et simple de cette immense retenue et son assainissement, seraient des tâches proprement titanesques qui, pour le coup, causeraient à l'environnement des dommages d'une extrême gravité. Quant à y créer une vaste étendue d'eau stagnante — ce qu'implique le retour à l'ancien lit du Danube de l'intégralité du débit traditionnel exigé par la Hongrie — cette demande témoigne, Monsieur le Président, d'un aveuglement écologique tout à fait effarant.

En revanche, le retour à l'application intégrale du traité — du traité tel qu'il est mis en œuvre par les amendements successifs du plan contractuel conjoint —, ce retour ne présente pas ces difficultés : il impliquerait l'extension du lac de rétention c'est-à-dire la fermeture du fleuve à Dunakiliti et l'inondation de la zone comprise entre la digue déjà construite en territoire hongrois en application du traité et celle établie en Slovaquie pour les besoins de la variante C. Cela ne veut pas dire que la chose aille de soi, ni qu'elle soit très facile, ni qu'elle ne soit pas très onéreuse; ni qu'il ne serait peut-être pas plus raisonnable d'envisager des aménagements moins coûteux. Mais, si la Cour l'ordonne, et si la Hongrie le souhaite cela n'a rien d'impossible.

Mais, ici encore, cela suppose que la Hongrie, de son côté, s'acquitte pleinement de ses obligations, de *toutes* ses obligations, en vertu du traité d'une part — et cela inclut la construction de l'élément Nagymaros, la production d'électricité de pointe (sans laquelle d'ailleurs, l'extension du lac de

retenue n'a pas d'intérêt économique ni écologique) et la clôture effective du Danube à Dunakiliti — et cela implique d'autre part, la réparation intégrale des dommages causés à la Slovaquie par les violations hongroises du traité, y compris le coût supplémentaire induit par l'aménagement de la variante C.

15. Cessation du fait illicite, *restitutio in integrum* se traduisant par l'exécution du traité, la trilogie ne serait pas complète sans les assurances et garanties de non-répétition dont parle l'article 46 du projet de la CDI.

La Slovaquie, Monsieur le Président, s'était abstenue d'en exiger dans ses conclusions écrites mais, à la réflexion, il lui apparaît que la précaution ne serait pas superflue : la Tchécoslovaquie puis la Slovaquie ont, dans le passé, expérimenté trop de revirements de la part de la Partie hongroise pour que l'on puisse être complètement rassuré sur ses intentions réelles d'appliquer un arrêt constatant la validité continue du traité et l'obligation de le mettre en œuvre. La Slovaquie est d'autant moins rassurée que certaines déclarations officielles ou officieuses hongroises renforcent le doute que l'on peut avoir à cet égard — pensons par exemple au fameux rapport Hardi (MH, vol. 5, première partie, p. 165) et les prétentions récentes des conseils de la Hongrie d'interdire à la Cour d'ordonner à la Partie hongroise l'exécution effective de ses obligations conventionnelles, au nom d'une prétendue doctrine interdisant «a judicial order of specific performance» (CR 97/5, p. 67, M. Sands; voir aussi CR 97/2, p. 94, M. Crawford), cette prétention n'est pas de nature à nous rassurer, Monsieur le Président ! Au surplus, le rétablissement de la fermeture du Danube à Dunakiliti donnera de fait à la Hongrie la possibilité de contrôler entièrement le système d'écluses de Gabcíkovo.

La Slovaquie n'entend pas revenir sur ce point, prévu par le traité; mais elle entend obtenir de la Hongrie la garantie formelle selon laquelle elle s'acquittera effectivement de ses obligations — et, encore une fois, de *toutes* ses obligations — en vertu du traité. La Slovaquie avoue cependant qu'elle serait plus rassurée si la fermeture du Danube demeurait à Cunovo. La Cour pourrait du reste décider en ce sens, sans, pour autant remettre en question l'idée d'exécution intégrale du traité, puisqu'il s'agit de tirer, sur le plan des règles secondaires, les conséquences de la situation nouvelle résultant des faits internationalement illicites de la Hongrie.

Sans doute, la Cour «ne peut ni ne doit envisager l'éventualité que l'arrêt resterait inexécuté» comme l'a dit la Cour permanente et comme elle l'a répété (*Usine de Chorzow, C.P.J.I. série A n° 17,*

p. 63; voir aussi arrêts du 20 décembre 1974, *Essais nucléaires, C.I.J. Recueil 1974,* p. 272 et 477 et arrêt du 26 novembre 1984, *C.I.J. Recueil 1984,* p. 437-438); toutefois, les raisons que je viens de mentionner et qui plaident en faveur du maintien de la fermeture du Danube à Cunovo conduisent en tout cas, à défaut, à prêter une attention toute particulière à l'exécution de l'arrêt et, si la Cour ne suivait pas cette suggestion, la Slovaquie la prierait formellement de préciser, comme elle l'a fait dans le passé — la Cour l'a fait dans le passé — que si le fondement de l'arrêt qu'elle va rendre était remis en cause, les Parties pourraient «demander un examen de la situation conformément aux dispositions du Statut», c'est une formule qui vous est familière, Messieurs les Juges (cf. les arrêts du 20 décembre 1974, *Essais nucléaires, C.I.J. Recueil 1974,* p. 272 et 477).

III. L'INDEMNISATION

16. Monsieur le Président, comme le rappelle la Commission du droit international dans l'article 42, paragraphe 1, de son projet sur la responsabilité des Etats :

> «L'Etat lésé est en droit d'obtenir de l'Etat qui a commis un fait internationalement illicite une réparation *intégrale*, sous une *ou plusieurs* des formes de réparation : restitution en nature, indemnisation, satisfaction et assurances et garanties de non-répétition.» (Cf. rapport préc. sur les travaux de la quarante-huitième session, p. 164; les italiques sont de nous.)

Or, en l'espèce, la *restitutio in integrum* n'est pas de nature «à effacer toutes les conséquences de l'acte illicite» pour reprendre le *dictum* de la Cour permanente dans l'*Usine de Chorzow* (*C.P.J.I. série A n° 17,* p. 47, préc.). Il faut noter en particulier que, malgré les apparences, la *restitutio* est, en réalité, toute entière orientée vers l'avenir : grâce à elle l'investissement conjoint *sera* réalisé dans les formes où il aurait dû l'être, mais cela laisse subsister les dommages qui ont été causés à la Slovaquie jusqu'à présent ou plutôt qui lui auront été causés au jour de l'exécution totale et intégrale de l'arrêt.

C'est la raison pour laquelle la Slovaquie, dans sa cinquième conclusion, a prié la Cour de dire et juger :

> «Qu'à la suite de ses violations du traité de 1977, la République de Hongrie est tenue de verser, et la République slovaque est en droit de recevoir, en raison des pertes et dommages que lesdites violations ont causés à la République slovaque, plus les intérêts et le manque à gagner, une pleine indemnisation d'un montant qu'il reviendra à la Cour de déterminer lors d'une phase subséquente de la présente instance.» (MS, p. 371.)

Cette conclusion appelle principalement deux remarques.

17. En premier lieu, cette demande n'est pas alternative.

> Aux termes de l'article 44, paragraphe 1, du projet de la CDI,
> «L'Etat lésé est en droit d'obtenir de l'Etat qui a commis un fait internationalement illicite une indemnisation pour le dommage causé par ce fait si, et dans la mesure où, le dommage n'est pas réparé par la restitution en nature.»

En l'espèce, la réparation n'est pas entièrement assurée par la *restitutio in integrum*, ici mal nommée. Elle n'est pas *in integrum*, je viens de m'en expliquer. En revanche, l'indemnisation ne saurait se substituer à l'exécution et ce n'est que dans la mesure où la restitution ne répare pas intégralement le dommage que la Slovaquie prie la Cour de bien vouloir ordonner une indemnisation.

L'insistance slovaque sur ce point tient à une raison bien compréhensible : si le principe de la primauté absolue de l'exécution était abandonné, il en résulterait que la partie qui viole un traité se verrait reconnaître le droit de «racheter» en quelque sorte ses obligations conventionnelles. Vous signez un traité; puis vous changez d'avis; et il vous suffit de payer. *Pacta sunt servanda* perd alors toute signification. L'Etat «s'offre», si je peux dire, une violation au mépris de la parole donnée.

Ainsi que cela résulte de l'article 44 du projet de la CDI, qui reflète sans doute possible le droit positif (cf. MH, par. 8.43, p. 255 ou RH, par. 3.166, p. 177), tel n'est pas le droit dès lors qu'aucune des excuses à la non-restitution énumérées à l'article 43 du même projet ne peut être invoquée. Or ces excuses ne peuvent certainement pas être invoquées en l'espèce :

— *premièrement*, nous venons de le voir, il n'est nullement impossible de revenir à l'application du traité, quitte à lui apporter, le cas échéant, quelques aménagements si les Parties en conviennent;

— *deuxièmement*, l'application du traité n'est évidemment incompatible avec aucune norme impérative du droit international général et la Hongrie ne le prétend d'ailleurs pas;

— *troisièmement*, la charge résultant de l'application du traité ne serait, assurément, pas hors de toute proportion avec les avantages en résultant pour l'Etat lésé; bien au contraire : la Hongrie, comme la Slovaquie, ne pourrait qu'en tirer de grands avantages tant en matière de production d'énergie «propre et renouvelable», que d'amélioration de la navigation, de la protection contre les inondations et, plus généralement, de l'environnement humain;

— et *quatrièmement*, la Hongrie ne prétend pas que la mise en œuvre du traité menace son indépendance politique ou sa stabilité économique : il est sûrement exact qu'elle lui impose une charge financière immédiate mais i) celle-ci constitue un investissement, source de profits futurs; ii) tel est

l'objet même du traité; et iii) en tout état de cause, pour lourde qu'elle soit, cette charge — qui a été supportée sans dommage particulier par la Tchécoslovaquie dans des circonstances difficiles — ne menace évidemment pas la stabilité économique de la Hongrie.

18. J'en viens, Monsieur le Président, à ma seconde remarque : la Hongrie a sur la question de l'indemnisation une attitude ambiguë puisque, dans le but de faire croire sans doute à sa «modération», elle entretient, sur ses positions à ce sujet un halo de mystère. Tantôt, elle reconnaît qu'une «compensation» est due à la Slovaquie (cf. CR 97/2, p. 34, M. Valky, p. 93-94, M. Crawford ou CR 97/4, p. 25, M. Crawford; voir aussi MH, par. 3. 110, p. 64; par. 7.97, p. 236, par. 9.18, p. 267 ou par. 9.24, p. 269; CMH, par. 6.106, p. 247 ou RH, par. 3.40, p. 127), tantôt, elle le conteste (cf. MH, vol. 4, annexe 27, p. 62) ou elle assortit son «offre» de conditions inacceptables (cf. MH, par. 3.96, p. 58 ou vol. 4, annexe 24, p. 52).

On peut penser, sans beaucoup de risques de se tromper, que cette valse hésitation s'explique par trois éléments : d'une part, la Hongrie sait qu'elle doit indemniser son partenaire pour ses manquements; d'autre part, elle a le sentiment, d'ailleurs fondé, que les sommes en cause risquent d'être extrêmement élevées; donc et enfin, elle s'efforce de minimiser ses obligations financières, voire de les nier.

Ceci est extrêmement apparent dans le fameux rapport Hardi de septembre 1989, après le commencement des manquements. L'accent y est mis sur «the presumable substantial damages payable if such international obligations [il s'agit des obligations découlant du traité] are not fulfilled» (MH, vol. 5, première partie, annexe 8, p. 163). Puis, non sans cynisme, les auteurs insistent sur la situation inconfortable dans laquelle se trouvera la Tchécoslovaquie du fait que «there is no court in to-day's international legal system that would be able to decide about such legal disputes without the consent of the parties involved» (*ibid.*, p. 165) et que, dès lors, «The Czechoslovak Government has elementary interest in reaching a compromise as this is the only way it can hope to recover some of its losses.» *(Ibid.)* Et de conclure : «the lengthy legal dispute will release us from any immediate or short-term payment obligation» (*ibid.*, p. 166; voir aussi les déclarations de M. Horn, alors secrétaire d'État et aujourd'hui premier ministre hongrois, devant l'Assemblée nationale, 6 octobre 1988, CMS, vol. II, annexe 8, p. 94-95).

Cela éclaire évidemment d'un jour très particulier les «offres de compensation» faites, ici ou là, et jusqu'à cette barre, par les autorités hongroises; c'est ce que l'on appelle chez moi, Monsieur le Président, une «offre de Gascon», qui consiste à faire une proposition avec la ferme intention de ne pas y donner suite; j'ignorais cette parenté entre la Hongrie et la Gascogne !

19. Il reste que tout ceci montre bien, en définitive, que la Hongrie est consciente qu'elle a une obligation d'indemnisation à l'égard de la Slovaquie. Mais sur quel fondement ?

Ici encore, la Slovaquie est extrêmement perplexe sur la position de la Hongrie dont les conseils ont fait valoir simultanément des argumentations fort différentes fondées tantôt sur le droit de la responsabilité, tantôt sur les dispositions du traité relatives à la compensation des frais exposés par chaque Partie.

Ainsi, le professeur Crawford a insisté sur le droit des parties (*sic*), à notre avis c'est une partie, à "compensation for a failed investment" (CR 97/4, p. 25; voir aussi 97/2, p. 94). Dans le même esprit, le professeur Dupuy, reprenant un thème récurrent des écritures hongroises (cf. MH, par. 11.09, p. 333; voir aussi, par exemple, la proposition hongroise du 22 avril 1991, citée *ibid.*, par. 3.126, p. 51-52), a assuré que :

«la Hongrie a toujours indiqué qu'il lui paraissait indispensable [de] procéder [à un bilan comparé des travaux accomplis par les deux Parties], notamment dans la perspective de la compensation (compensation a un sens très particulier en français) qu'elle était prête à verser à son partenaire» (CR 97/6, p. 75; voir aussi M. Sands, CR 97/5, p. 69).

Mais, comme ses collègues, il dénie à cette «offre» toute base conventionnelle du fait, assure-t-il, que la Slovaquie n'aurait «jamais été partie au traité de 1977». Il ne relie pas moins cette offre indirectement aux obligations découlant du traité au prétexte que la Slovaquie est, en vertu du deuxième alinéa du préambule du compromis, je cite M. Dupuy, «le seul et unique successeur de la Tchécoslovaquie pour ce qui se rapporte aux droits et obligations relatifs au projet de Gabcíkovo-Nagymaros». «C'est, conclut-il, dans cette mesure et sur une telle base juridique que la République de Hongrie est disposée à considérer le bilan des travaux» (*ibid.*, p. 76). Il ne me paraît pas utile, Monsieur le Président, de revenir sur l'artifice inacceptable de cette construction. Il suffit bien plutôt de constater qu'en clair, la Hongrie vous suggère ici que la Slovaquie a droit à indemnisation du fait de la non-exécution de l'investissement conjoint prévu par le traité; celui-ci est donc le fondement de la

compensation offerte du bout des lèvres. Qu'elle le veuille ou non, elle se place sur le terrain ... du traité de 1977, celui-là même auquel elle prétend avoir mis fin.

20. De toute façon, Monsieur le Président, Messieurs de la Cour, ce n'est pas ce dont il s'agit ici; l'obligation qui pèse sur la Hongrie d'indemniser la Slovaquie n'a pas sa source dans le traité, elle a sa source dans les principes généraux du droit de la responsabilité internationale, qu'avait remarquablement exprimés la Cour permanente, toujours dans l'affaire relative à l'*Usine de Chorzów* : «c'est un principe de droit international, voire une conception générale du droit, que toute violation d'un engagement comprend l'obligation de réparer» (*C.P.J.I. série A n° 17*, p. 29). C'est pour cette raison, et pour aucune autre, que la Hongrie doit verser à la Slovaquie une indemnité réparatrice des dommages qui ne peuvent pas être réparés par la *restitutio in integrum*.

Et ceci a d'importantes conséquences, Monsieur le Président, tant pour ce qui est de la détermination des préjudices que de leur évaluation. Il en résulte en particulier que les préjudices indemnisables sont ceux qui résultent des faits internationalement illicites de la Hongrie. D'autre part, il ne saurait être question de faire supporter le coût de ces dommages par les deux Parties à part égale : c'est la Hongrie et elle seule qui a manqué à ses obligations conventionnelles; c'est elle et elle seule qui doit porter la charge de ses manquements.

21. Je dois à la vérité de dire que les conseils de la Hongrie se sont parfois montrés conscients du problème car, tout en mettant en avant la base conventionnelle de la «compensation», toujours utilisée visiblement dans le sens français du mot, que la Hongrie sait devoir à la Slovaquie, ils n'ont pas écarté la possibilité de fonder cette obligation sur le droit de la responsabilité.

Le professeur Dupuy a très bien exprimé cette position alternative (même s'il ne l'a pas présentée comme telle), dans sa plaidoirie du 4 mars :

«le pays qui invoque à juste titre l'état de nécessité [c'est évidemment la Hongrie qu'il vise] devra le plus souvent *acquitter une compensation*, généralement sous forme d'indemnité, à son partenaire affecté par la non-réalisation de son obligation [le partenaire c'est la Slovaquie], ici, une obligation contractuelle».

Le professeur Crawford a abondé dans ce sens en faisant valoir que l'article 35 du projet de la CDI sur la responsabilité des Etats «envisage[s] compensation in situation of necessity» (CR 97/4, p. 25; voir aussi M. Sands, CR 97/5, p. 67).

Il est parfaitement exact, Monsieur le Président, que la CDI a estimé, dans cet article 35, que l'existence de circonstances excluant l'illicéité «ne préjuge pas des questions qui pourraient se poser à propos de l'indemnisation des dommages causés par» le fait d'un Etat contraire à ses obligations internationales. Et il est non moins exact que, ce faisant, elle avait tout particulièrement en tête la prétendue «excuse de nécessité» (cf. le commentaire du projet d'article 35, *Annuaire de la CDI* 1980, vol. II, 2e partie, p. 60; voir également les débats sur ce point à la CDI, *ibid.*, vol. I, p. 145 et 155 (Ago), p. 153 et 161 (M. Schwebel), p. 154 (Reuter), p. 157 (M. Sahovic), etc.)

Il est certain que cette précaution relève du bon sens et de l'équité et qu'il serait, assurément, inacceptable que la Slovaquie doive assurer la charge financière de la préservation d'un intérêt que la Hongrie prétend être essentiel pour elle alors qu'elle, Slovaquie, n'a fait que s'acquitter de ses obligations conventionnelles du mieux qu'elle l'a pu. Toutefois, Monsieur le Président, Messieurs les Juges, la République slovaque vous demande très solennellement de ne pas «saisir la perche» qui vous est ainsi tendue avec une certaine insistance par la Partie hongroise, si je puis m'exprimer ainsi.

Cette solution en effet n'a, dans notre affaire, que l'apparence de l'équité : elle supposerait que vous autorisiez la Hongrie à «acheter» les violations de ses obligations internationales, ce dont ni le droit ni la morale ne sauraient s'accommoder. Au surplus, la stabilité des situations conventionnelles s'en trouverait gravement menacée.

22. Monsieur le Président, le compromis comporte un article 5, dont le paragraphe 2 prévoit qu' «Aussitôt que l'arrêt leur aura été remis, les Parties engageront des négociations pour fixer les modalités de son exécution.»

Il est certainement sage que les Parties aient ainsi prévu de se donner à elles-mêmes une certaine souplesse; et ceci est, sans aucun doute, conforme à l'esprit du traité qui, comme les deux Parties l'ont souligné à satiété, (cf. CR 97/3, p. 10 et 21-23, M. Nagy; voir aussi MH, par. 4.13 et suiv., p. 115 et suiv., par. 4.21, p. 120, et CMH, par. 2.22-2.23, p. 105-106, ou RH, par. 1.76 et suiv., p. 35 et suiv.; MS, par. 3.01 et suiv., p. 103 et suiv., CMS, par. 2.20 et suiv., p. 25-26, par. 4.35, p. 91-92 ou RS, par. 2.12,

p. 28), constitue une convention-cadre susceptible d'aménagements et de précision et qu'elles peuvent au surplus, bien sûr, amender d'un commun accord.

Mais si la Slovaquie ne se refuse pas à priori à des aménagements du traité (qui pourraient être utiles, par exemple, pour fixer le sort définitif de la variante C, voire même pour préciser solennellement le régime de production d'électricité de pointe), tel ne saurait être l'objet premier des négociations prévues à l'article 5, paragraphe 2, du compromis. Il s'agit bien plutôt pour les Parties de fixer un nouveau calendrier pour l'achèvement des constructions prévues par le traité, puisqu'aussi bien le protocole de 1989 est devenu obsolète par la faute de la Hongrie, il s'agit de revivifier les structures de pilotage et de gestion communes, de modifier le plan contractuel conjoint — ce qui peut être fait par un simple accord des plénipotentiaires — de façon à l'adapter à la situation actuelle; bref, il s'agit d'apurer le passé et d'organiser la transition.

En outre, et il m'a semblé, en écoutant les professeurs Valki et Dupuy il y a trois semaines (CR 97/5, p. 49, M. Valki et CR 97/6, p. 57, M. Dupuy), que les Parties étaient d'accord sur ce point, celles-ci devront également négocier de bonne foi sur le montant de l'indemnisation sur la base des directives de la Cour concernant les catégories de préjudices indemnisables à prendre en considération et les critères et méthodes de leur évaluation, étant entendu que si ces négociations n'aboutissent pas dans un délai de six mois l'une ou l'autre des Parties pourra saisir à nouveau votre Haute Juridiction, comme le prévoit expressément l'article 5 du compromis.

Ce serait bien sûr le cas, Monsieur le Président, si, comme la Slovaquie ne veut pas l'imaginer, la Hongrie se refusait à procéder à l'exécution du traité que la Slovaquie prie la Cour de bien vouloir ordonner en toute priorité. Il va de soi que les dommages-intérêts à la charge de la Hongrie s'en trouveraient considérablement accrus. Mais, une telle attitude s'analyserait alors en un refus de mettre en œuvre la décision de la Cour, une décision que celle-ci «ne peut ni ne doit envisager» (*Usine de Chorzow*, préc.).

Toutefois, la Slovaquie espère vivement que cette nouvelle saisine ne sera pas nécessaire et que, dans l'esprit de modération dont elle se dit animée, la Hongrie se montrera aussi disposée à exécuter l'arrêt que vous rendrez, dans un esprit de coopération constructive, que la Slovaquie l'est elle-même.

Monsieur le Président, Messieurs les Juges, je vous remercie très vivement de votre patience renouvelée et je vous prie, Monsieur le Président, de bien vouloir donner la parole à M. l'agent de la République slovaque pour quelques mots très brefs mots de conclusion.

Merci, Monsieur le Président.

The PESIDENT : Thank you, Professor Pellet. May I call on the Agent of Slovakia, Dr. Tomka.

M. TOMKA :

9. <u>CONCLUSION DE L'AGENT</u>

Monsieur le Président, Messieurs les Juges, l'équipe de plaidoirie de la Slovaquie s'est efforcée de vous présenter la thèse de mon pays de façon aussi complète et aussi claire que possible et il ne me paraît pas nécessaire d'y revenir à ce stade de l'affaire et à cette heure tardive. Avant la visite que vous allez effectuer sur les lieux, la semaine prochaine, je voudrais seulement attirer votre attention sur un point, lié à cette visite.

Tout au long de cette première phase de la procédure orale, la Hongrie s'est employée, comme elle l'avait déjà fait auparavant non sans un certain succès médiatique, à se faire passer comme le champion de l'environnement, dont nous serions les contempteurs.

Ceci appelle deux remarques de ma part.

En premier lieu, la Slovaquie ne conteste nullement que les préoccupations liées à l'environnement sont de la plus haute importance, bien au contraire. Et, depuis sa jeune indépendance, elle a marqué son attachement constant et sincère à la défense et à la promotion du droit de l'environnement; comme en témoignent, par exemple, les nombreuses conventions auxquelles elle est partie dans ce domaine. Mais, bien souvent, il nous a semblé que nos amis hongrois oubliaient, que c'est justement de droit, et de droit seulement, qu'il s'agit devant vous. Et nous avons la conviction que c'est en ancrant les règles naissantes du droit de l'environnement dans le cadre plus général du droit international public, que votre arrêt rendra le meilleur service et à la cause de l'environnement et à celle du droit des gens.

Ma deuxième remarque est la suivante : en écoutant, il y a trois semaines, les plaidoiries de la Partie hongroise, j'ai eu le sentiment que, d'une certaine manière, deux conceptions de l'environnement s'opposaient devant vous. La Slovaquie attache, je le pense sincèrement, autant d'importance que la Hongrie, sinon plus; mais je pense aussi que nous avons de la protection de l'environnement une conception que je crois plus responsable, plus positive, et je dirais surtout plus «humaniste» que la Hongrie. Ce qui importe à nos yeux, c'est la protection de l'environnement *humain*. Comme le dit avec force le premier principe de la déclaration de Rio de 1992 : «Les êtres humains sont au centre des préoccupations relatives au développement durable. Ils ont droit à une vie saine et productive en harmonie avec la nature.» La protection contre les inondations, l'amélioration de l'irrigation et des conditions de navigation, la recherche d'une meilleure qualité des eaux de surface et souterraines participent évidemment à cet objectif et par la réalisation conjointe du projet de Gabcíkovo-Nagymaros les Parties auraient fortement contribué ensemble à sa mise en œuvre, en même temps qu'elles auraient utilisé une source d'énergie propre et renouvelable dans l'intérêt des deux peuples, slovaques et hongrois.

Tout au long de la présente procédure, la Partie hongroise s'est employée à tenter de vous convaincre, Messieurs les Juges, de trancher une querelle d'experts. Sans aucun doute, vous n'entrerez pas dans ce débat et, de toutes manières, ce n'est pas nécessaire pour régler l'affaire qui vous est soumise : il vous suffit de constater que, ni en 1977, ni en 1989, ni en 1992, ni aujourd'hui, l'environnement de la région concernée n'est le moins du monde menacé par le projet. Il a changé bien sûr — le projet l'impliquait à l'évidence — mais ceci a été le choix d'Etats souverains agissant en toute connaissance de cause. Mais de catastrophe écologique, pas le moindre signe.

Vous pourrez constater ceci de vos propres yeux la semaine prochaine lorsque nous aurons le plaisir de vous accueillir et de vous faire visiter les lieux. Oh, bien sûr, vous ne pénétrerez pas dans les profondeurs de la nappe phréatique ! mais vous pourrez, je vous le garantis, vous laver les dents en toute sécurité et boire sans inquiétude l'eau coulant de votre robinet à Bratislava (bien que nous ayons d'excellents vins à vous proposer) ! et ceci alors que Bratislava (contrairement à Budapest) est alimentée en eau potable par de l'eau pompée dans les puits situés dans la proximité du réservoir.

Plus sérieusement, vous constaterez que toutes les précautions sont prises pour assurer une surveillance constante de la qualité des eaux, aussi bien de surface que souterraines. Vous verrez aussi combien la navigation et la protection contre les redoutables crues du Danube se sont trouvées améliorées par la mise en œuvre partielle du projet grâce à la variante C. Et vous apprécierez à quel point cette mise en œuvre a eu, et aura plus encore à l'avenir, des effets bénéfiques sur la restauration de l'environnement naturel dans les branches du Danube.

Je souhaite aussi saisir cette occasion pour remercier nos partenaires hongrois pour l'esprit de coopération dont ils ont fait preuve dans la préparation de cette visite et pour souligner que votre venue, Messieurs de la Cour, est un événement historique puisque la Haute Juridiction renoue ainsi avec un précédent qui remonte à soixante ans maintenant : la descente sur les lieux de la Cour permanente dans l'affaire des *Prises d'eau à la Meuse*. Peut-être que les «histoires d'eau» aiguisent la curiosité de la Haute Juridiction ? Nous nous en réjouissons.

Monsieur le Président, Messieurs de la Cour, c'est avec à la fois beaucoup de confiance et beaucoup de joie que nous vous attendons !

Monsieur le Président, Messieurs les Juges, je vous remercie de votre attention.

The PRESIDENT : Thank you, Dr. Tomka. I wish to thank both Parties for their excellent expositions these past weeks. The Court looks forward to its visit next week and to the conclusion of the oral argument thereafter. The Court will now rise.

The Court rose at 1.00 a.m.