International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1997

Public sitting

held on Monday 14 April 1997, at 10 a.m., at the Peace Palace,

President Schwebel presiding

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

(Hungary/Slovakia)

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VERBATIM RECORD

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ANNEE 1997

Audience publique

tenue le lundi 14 avril 1997, à 10 heures, au Palais de la Paix,

sous la présidence de M. Schwebel, Président

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

(Hongrie/Slovaquie)

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COMPTE RENDU

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Present:	President	Schwebel
	Vice-President	Weeramantry
	Judges	Oda
		Bedjaoui
		Guillaume
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
		Parra-Aranguren
		Kooijmans
		Rezek
	Judge *ad hoc*	Skubiszewski
	Registrar	Valencia-Ospina

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

Skubiszewski, juge *ad hoc*

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The PRESIDENT: Please be seated. This morning the Slovak Republic's oral presentation in reply begins and I call first on the distinguished Agent of Slovakia Dr. Tomka.

M. TOMKA :

1. INTRODUCTION DE L'AGENT

Monsieur le Président, Messieurs les Juges,

Permettez-moi, au moment où commencent les dernières plaidoiries orales de la République slovaque, de vous exprimer la reconnaissance de mon pays pour la visite que vous avez bien voulu effectuer sur les lieux, la disponibilité constante dont vous avez fait preuve et l'intérêt que vous avez manifesté.

J'ai la conviction que la peine que vous avez prise n'a pas été inutile et que cette descente sur les lieux vous aura permis d'apercevoir, plus concrètement que des plaidoiries peuvent le faire, combien la mise en oeuvre partielle du traité de 1977 a eu des effets bénéfiques sur la protection contre les inondations, l'amélioration de la navigation et de l'environnement et la préservation des branches du Danube qui, sans cela, eussent été appelées, inexorablement à s'assécher.

Aujourd'hui, le professeur Alain Pellet reviendra brièvement sur certaines questions relatives au droit applicable. Il sera suivi par M. Wordsworth, M. Mikulka, coagent de la Slovaquie, et le professeur McCaffrey qui examineront la prétention renouvelée de la Hongrie à s'appuyer sur la «nécessité» pour tenter de justifier et la suspension et l'abandon des travaux lui incombant, et la prétendue «terminaison» du traité de 1977. Demain matin, le professeur Mucha et M. Refsgaard examineront la situation actuelle et ses effets bénéfiques à tous les points de vue dans une perspective scientifique; sir Arthur Watts abordera ensuite les questions juridiques liées à la variante C et M. Pellet répondra à l'argumentation hongroise sur la tâche de la Cour et l'objet de son arrêt. Enfin, si vous le voulez bien, je reviendrai à cette barre pour résumer les points essentiels de notre argumentation avant de lire les conclusions finales de la Slovaquie.

Avant de terminer cette brève introduction, j'aimerais cependant faire une remarque, Monsieur le Président. Inaugurant les plaidoiries hongroises, le professeur Crawford a cru pouvoir déduire que nous nous ralliions à la thèse de la Hongrie du fait que nous n'avions pas répondu à certains de ses arguments (CR 97/12, p. 13). Je me permets d'attirer l'attention du conseil de la Hongrie sur l'article 60 du Règlement de la Cour : ce n'est pas parce que nous renoncions à notre argumentation antérieure que nous n'avons pas jugé utile de répondre à certains arguments de la Partie hongroise mais, simplement, parce qu'il nous a semblé superflu - et parce que c'est interdit par le Règlement - de répéter les faits et arguments déjà

invoqués dans nos écritures. Nous les maintenons dans leur intégralité; et cette remarque vaut aussi, bien sûr, pour le round de plaidoirie qui va suivre.

Je vous remercie Monsieur le Président, et je vous prie de bien vouloir donner la parole au professeur Pellet.

The PRESIDENT: Thank you, Dr. Tomka. I call on Professor Pellet.

M. PELLET : Merci, Monsieur le Président.

2. LE DROIT APPLICABLE

Monsieur le Président, Messieurs les Juges,

1. Nous avons déjà longuement parlé du droit applicable et, comme l'agent de la Slovaquie vient de le rappeler, il ne serait pas convenable de répéter ce qui a déjà été dit. J'y suis d'autant moins enclin que nos contradicteurs ont eu la bonté d'affirmer à plusieurs reprises (cf. CR 97/12, p. 11 et suiv., M. Crawford, p. 62-63, M. Sands ou CR 97/13, p. 56, M. Dupuy) que nous étions d'accord avec eux. J'ai la faiblesse de penser qu'ils le sont avec nous. Mais peu importe, l'essentiel serait que nous soyons d'accord. Malheureusement, je n'en suis pas certain, ou plutôt nous sommes, apparemment d'accord sur un certain nombre de principes importants - je n'y reviendrai donc pas -, mais, en ce qui concerne leur application, c'est autre chose.

Il me faut donc préciser les choses à au moins deux points de vue; en ce qui concerne :

1° la définition même «du traité» et ses liens avec divers autres instruments; et

2° la succession de la Slovaquie à ce fameux traité;

en outre, en introduction aux interventions qui vont suivre, je dirai quelques mots au sujet de la notion *juridique* de «nécessité».

I. LA DÉFINITION DU «TRAITÉ» ET SES LIENS AVEC DIVERS AUTRES INSTRUMENTS CONVENTIONNELS

2. Monsieur le Président, l'alinéa premier du préambule du compromis du 7 avril 1993 évoque les contestations qui ont surgi entre la Tchécoslovaquie et la Hongrie «concernant l'application et la terminaison du traité relatif à la construction et au fonctionnement du système de barrage de Gabcíkovo-Nagymaros, ... *et des instruments y afférents*», il précise

expressément que ce sont ce traité d'une part, *et* ces instruments y afférents d'autre part, qui sont, dans la suite du texte, «dénommés le 'traité'». Par ailleurs, l'article 2 du compromis envisage l'application par la Cour «de tous autres traités qu'elle jugera applicables».

Ainsi, d'emblée, l'accent est mis sur le fait que le traité de 1977 est indissociable d'autres instruments. Le compromis ne précise pas quels sont ces instruments, mais la chose ne fait guère de doute : il s'agit d'une part de conventions existantes auxquelles le traité *stricto sensu* renvoie, d'autre part, des accords qui sont nécessaires pour le mettre en application. Les deux Parties se sont longuement expliquées sur ce point (cf. MS, par. 6.06-6.54, p. 224-240; CMS, par. 2.57-2.99, p. 37-40 ou RS, par. 2.04-2.28, p. 24-34; et MH, chap. IV, par. 4.24-4.54, p. 121-134; CMH, par. 4.04-4.19, p. 188-194 ou RH, par. 1.14-1.21, p. 14-16) et M. Kiss y est revenu lors de sa première intervention, le 3 mars dernier (CR 97/2, p. 40-52). Sur le principe donc, nous sommes d'accord : c'est bien d'un ensemble conventionnel que la Cour est appelée à connaître. Mais les choses se gâtent lorsqu'il s'agit de déterminer la consistance et les contours exacts de ce complexe d'instruments juridiques, et les relations qu'ils entretiennent les uns avec les autres.

a)*Définition du traité - la nature conventionnelle du plan contractuel conjoint et ses conséquences*

3. Monsieur le Président, il peut paraître surprenant, à ce stade ultime des plaidoiries, de revenir sur la définition de l'instrument qui est au coeur de nos débats depuis le début de l'affaire. Mais nous croyons que c'est important car, en s'en tenant à une définition tronquée, la Hongrie s'est employée à donner une vue totalement erronée, non seulement du droit applicable mais de son contexte factuel et cela s'est traduit par l'incroyable insistance mise sur le concept dépassé, «dinosaurien» aurait dit M. l'agent de la Hongrie, de «projet original», qui n'a plus aucune espèce de consistance si l'on examine la situation actuelle de bonne foi.

4. Les Parties n'ont pas de divergence sur ce que l'on pourrait considérer comme une liste «minimale» des «instruments afférents au traité de 1977 (MH, vol. 3, annexe 21, p. 241), qui comprend l'accord sur l'assistance mutuelle signé le même jour (*ibid.*, annexe 22, p. 293) les protocoles qui ont modifié, en 1983, ces deux instruments (*ibid.*, annexes 28 et 29, p. 334 et 335) et, en 1989, l'accord sur l'assistance mutuelle seulement (*ibid.*, annexe 30, p. 338). Il faut y ajouter l'accord de 1979 sur le statut conjoint (*ibid.*, annexe 26, p. 329) et divers instruments postérieurs d'importance moindre, dont ceux que mentionne l'article 24, paragraphe 1, du traité de base.

Indissociables de celui-ci, ces «instruments y afférents» doivent subir le même sort que lui. Cela veut dire en particulier que la Hongrie doit être tenue pour responsable de ses violations à leur égard, et qu'ils demeurent en principe en vigueur. En principe, car il y a une exception, qui concerne le protocole de 1989, qui, à la demande de la Partie hongroise, prévoyait l'accélération des travaux et leur achèvement en 1994. Monsieur le Président, nous sommes en 1997 et comme même votre Haute Juridiction ne dispose pas de la machine à remonter le temps, force est de se rendre à l'évidence : cet instrument n'est plus susceptible d'application; la Hongrie en a rendu l'exécution impossible par la suspension des travaux lui incombant à Nagymaros puis à Gabcíkovo en mai et en octobre 1989, engageant ainsi sa responsabilité, si bien que les deux Parties devront négocier de bonne foi un nouveau calendrier pour l'achèvement des travaux.

5. Mais de tous les «instruments y afférents», le plus important est sans aucun doute celui sur lequel nos amis hongrois ont jeté un voile de plus en plus impudique à mesure du développement de l'affaire. Je veux parler du plan contractuel conjoint.

Dans son mémoire, la Hongrie, tout en lui déniant un caractère conventionnel, n'en reconnaît pas moins que :

> « Plutôt que du traité lui-même, c'est du plan contractuel conjoint que le projet a tiré une grande partie de sa substance. Ainsi qu'il est stipulé dans le traité de 1977, c'est dans le plan que devaient être réglées des questions comme les spécifications techniques (art. 1, par. 4), les dimensions des ouvrages, le calendrier des opérations du projet et la responsabilité des frais d'exploitation, d'entretien et de réparation (art. 4, par. 2, et 12, par.2), le problème crucial de la spécification de l'équilibre hydraulique (art. 14, par. 2) et l'élaboration des moyens de protection de la qualité des eaux (art.15, par. 1) et de la nature (art. 19).» (MH, par. 4.14, p. 116.)

Toutefois, dès son contre-mémoire, la Partie hongroise s'efforce de minimiser l'importance de cet instrument, puisqu'elle se borne à contester sa nature conventionnelle (CMH, par. 4.08, p. 190). Elle insiste sur ce point dans sa réplique (cf. RH, par. 1.16, p. 14).

Ce faisant, Monsieur le Président, la Hongrie trahit ses véritables préoccupations : il s'agit pour elle d'échapper à toute responsabilité pour la violation des obligations lui incombant au titre du plan contractuel conjoint, dont elle avait, au début de l'affaire, reconnu l'extrême importance. Elle en est restée à cette thèse durant ses plaidoiries orales : M. Kiss, a concédé, lors de son intervention du 3 mars, que le plan contractuel conjoint complète le traité et exprime l'unité du «projet intégré, unique et indivisible» prévu par le traité (CR 97/2, p. 40-45); mais M. Nagy s'est employé à présenter cet instrument comme un document sans portée conventionnelle et de nature purement technique, et à le «diaboliser» en le décrivant comme le reflet «of the specific role of a socialist State as investor in a transborder economic venture» (CR 97/3, p. 20).

6. Mon bon maître Paul Reuter, dont je n'ai pas connaissance qu'il professât des convictions socialistes, n'était pas de cet avis lorsqu'il rappelait que les engagements internationaux portent sur des opérations de plus en plus complexes, si bien qu'il «devient de plus en plus difficile de conclure ces traités en une seule opération et [que] les Etats signent des accords de principe en renvoyant les mesures d'application à des accords ultérieurs qu'ils s'obligent à négocier» (P. Reuter, «De l'obligation de négocier», *Comunicazioni e studi*, n° 14, 1975, p. 712).

C'est exactement ce dont il s'agit ici : la Tchécoslovaquie et la Hongrie ont conclu un traité-cadre, le traité de 1977, portant sur une opération particulièrement complexe, l'investissement conjoint, dont il n'était pas question de fixer d'emblée les détails, *ne varietur*.

Les deux Parties ont donc décidé de renvoyer les mesures d'application à des accords ultérieurs qu'elles ont pris l'engagement de négocier au fur et à mesure des besoins, selon une procédure souple permettant les adaptations constantes qu'elles savaient inévitables. Ce n'est pas particulièrement «socialiste»; et c'est en tout cas très raisonnable.

Il ne fait pas de doute que ces accords ultérieurs - et ils ont été très nombreux - sont subordonnés au traité de base dont ils assurent la mise en oeuvre. Mais ceci ne les prive nullement de leur caractère conventionnel, qui est d'autant plus certain qu'ils trouvent leur fondement juridique non seulement dans un traité-cadre, mais dans deux, puisque dès le 6 mai 1976, les Parties avaient adopté un accord fixant la nature, la consistance et les modalités d'adoption et de modification du plan contractuel conjoint (MS, vol. II, annexe 3, p. 25 ou MH, vol. 3, p. 219). Fondé sur des traités, qu'il met en oeuvre et qu'il complète, celui-ci, négocié internationalement entre des Etats, est indiscutablement un accord «conclu par écrit entre Etats et régi par le droit international, consigné dans ... plusieurs instruments connexes» auxquels on a donné une dénomination particulière. C'est très exactement la définition d'un traité que donne la convention de Vienne de 1969. *Pacta sunt servanda*; les *pacta* qui forment le plan contractuel conjoint le sont comme tout accord et ils obligent la Hongrie; leur violation engage sa responsabilité.

7. Mais il y a plus. Et qui explique mieux encore pourquoi la Partie hongroise se montre si soucieuse de nier la nature conventionnelle du plan contractuel conjoint et de ne pas y voir un «instrument afférent» au traité de 1977.

Non sans quelque intrépidité, la Hongrie avait, au début de la procédure, rejoint la Slovaquie pour considérer que le traité était - du fait surtout de sa mise en oeuvre par le biais du plan contractuel conjoint - un instrument évolutif, souple, adaptable (voir par exemple MH, par. 4.13, p. 116).

Cette conviction - fondée pourtant - a faibli à mesure que le temps passait et il n'en reste plus guère de traces dans les plaidoiries orales, au point que, vendredi dernier, M. l'agent de la Hongrie en est venu à parler de «soi-disant souplesse» («*so-called 'flexibility'*») (CR 97/13, p. 83).

8. C'est que, Monsieur le Président, la Hongrie semble s'être convaincue qu'elle faisait fausse route : si «le traité» - c'est-à-dire l'ensemble conventionnel formé par le traité de 1977

et les instruments y afférents - est évolutif, souple et adaptable, la notion de «projet original» apparaît, au mieux, comme un objet d'étude pour historiens en mal de thèse et ne correspond plus à aucune réalité tangible et actuelle. Il devient totalement artificiel d'opposer, comme la Hongrie se plaît tant à le faire, «le projet original» à «la variante C», car le soi-disant «projet original» n'existe tout simplement plus. Il a, à vrai dire, cessé d'exister dès le jour où le traité a commencé à être mis en oeuvre, car, dès ce moment-là, il a fallu préciser progressivement, les contours d'un projet dont le traité ne fixe - mais fermement - que les très grandes lignes. Et l'instrument de cette adaptation, c'est, prioritairement, le plan contractuel conjoint, que la Hongrie a rendu inapplicable dès la première suspension des travaux en mai 1989, en évidente contradiction avec ses obligations internationales.

La Hongrie, je viens de le rappeler (*supra*, n° 4 et 6) ne disait pas autre chose dans son mémoire. Aujourd'hui, elle ne le dit plus du tout. On le comprend : entre temps, elle s'est aperçue que, ce faisant, elle se privait de toute possibilité de caricaturer la position de la Slovaquie : pour cette caricature, l'artifice du «projet original» lui était indispensable.

M. l'agent de la Hongrie a cru pouvoir, vendredi dernier, accuser la Slovaquie de vouloir ressusciter un dinosaure (CR 97/13, p. 84). Avec tout le respect dû à nos contradicteurs, c'est la Hongrie qui joue à se faire peur ou à tenter d'effrayer la Cour en réinventant «Jurassic Park»; c'est elle qui a «fossilisé» le «projet original» pour les seuls besoins de sa démonstration. C'est elle, et c'est elle seule, qui ne veut pas voir que, mis à part, bien sûr ce qui était prévu dans le traité-cadre, le projet de 1989 n'avait plus grand chose de commun avec celui de 1977; et qu'il n'était pas figé; et qu'il ne l'est toujours pas.

9. M. Nagy évoquait, le 4 mars, les 74 amendements apportés au plan contractuel conjoint (CR 97/3, p. 22 - voir aussi CMH, par. 2.22, p. 105-106). Je lui laisse la responsabilité du chiffre; mais il est certain que les aménagements et les améliorations apportés au «projet original» ont été nombreux et significatifs, que ce soit en matière d'irrigation, de sécurité des constructions ou de facilitation des migrations de poisson par exemple. Et, bien sûr, des améliorations de ce type étaient toujours en cours de discussion en 1989 lorsque la Hongrie a, brutalement, arrêté le processus. Et pas sur des points secondaires ou anodins : les Parties, par exemple, débattaient, à cette époque, du meilleur moyen d'améliorer l'alimentation en eau des branches du Danube ou du Moson; elles étudiaient aussi un régime satisfaisant de production

d'électricité de pointe, question qu'elles étaient, d'un commun accord, convenues de laisser en suspens et sur laquelle, comme le professeur McCaffrey le rappellera, la Slovaquie a toujours fait preuve d'une totale disponibilité, n'excluant nullement l'éventuelle limitation de la production d'électricité de pointe, voire son abandon pur et simple, *SI* les études conjointes des experts des deux Parties (avec, le cas échéant, l'aide de tiers) établissaient l'existence de risques réels pour l'environnement.

Où est le «projet original», agité comme un épouvantail par la Hongrie? Ce n'est pas de «projet original» qu'il faut parler, mais de la recherche, toujours en cours en 1989, des meilleures solutions possibles, par des discussions ouvertes et sans idées préconçues, dans le cadre du processus mis en place par le traité de 1977. Mais ce processus, la Hongrie y a mis fin brusquement, pour s'arc-bouter sur l'idée, inexacte à tous points de vue, d'un «projet original» qui n'existe que par la grâce de sa stratégie judiciaire et qui l'oblige, contre toute raison, et en contradiction avec ses premières affirmations, à nier la flexibilité du traité de 1977 et à vider de toute substance juridique le plan contractuel conjoint.

b) *Les relations du traité avec les autres instruments conventionnels pertinents*

10. Monsieur le Président, les instruments «afférents au traité» de 1977, qui en sont partie intégrante aux termes du compromis, plan contractuel conjoint compris, ne constituent pas les seuls instruments pertinents au titre de la présente affaire. Sur cela aussi, les Parties sont, me semble-t-il, d'accord (voir les références données *supra*, n° 2). Elles ne le sont pas du tout, en revanche, en ce qui concerne les relations qu'entretiennent ces autres instruments conventionnels pertinents avec le traité lui-même.

Les principes applicables sont pourtant simples et connus de tout étudiant en droit raisonnablement doué. Ils sont universellement admis comme s'appliquant en droit international et on les exprime par des adages latins :

1° *lex posterior priori derogat*; et

2° *specialia generalibus derogant*.

Les règles postérieures dérogent aux règles antérieures, sous réserve qu'elles soient plus précises; faute de quoi les normes antérieures continuent à prévaloir. Ce n'est pas très compliqué et le goût du paradoxe que cultivent parfois nos contradicteurs ne va pas jusqu'à mettre en doute l'existence ou la pertinence de ces principes très généraux de droit (cf. MH, par. 10.93, p. 318, CR 97/12, p. 64, M. Sands).

11. Mais, ici encore, c'est au niveau de l'application que «rien ne va plus»...

Je ne rappelle que pour mémoire l'extraordinaire thèse hongroise selon laquelle vous devriez appliquer, Messieurs les Juges, des conventions très générales dont certaines ne sont pas en vigueur ou ne lient pas les Parties (voir MH, par. 7.51, p. 221-222, 7.59-7.62, p. 225-226, par. 7.76, p. 230-231; CMH, par. 4.28-4.39, p. 197-200; etc., ou CR 97/2, p. 49-50, M. Kiss, p. 95-96, M. Crawford ; CR 97/4, p. 55, M. Kern ; CR 97/5, p. 24, M. Kiss, p. 71, M. Sands ou CR 97/12, p. 25, M. Kiss, p. 16, M. Crawford, p. 66, M. Sands, CR 97/13, p. 80 et 82, M. Szenasi), pour ne rien dire du projet sur l'utilisation des fleuves internationaux à des fins autres que la navigation, qui doit être soumis à la prochaine session de l'Assemblée générale (cf. CR 97/2, p. 49, M. Kiss, CR 97/12, p. 67, M. Sands ; CR 97/13, p. 30, M. Dupuy), mais dans lequel j'avoue éprouver quelque difficulté à voir une convention en vigueur liant les Parties qui se substituerait aux règles précises du traité de 1977.

Je sais bien, Monsieur le Président, que la Hongrie part du postulat selon lequel ce traité ne serait plus en vigueur. Admettons-le un instant : quand bien même le traité de 1977 ne serait plus en vigueur - *quod non*, est-il besoin de le dire ? -, ces conventions auraient-elles un effet rétroactif ? pourraient-elles justifier rétrospectivement, les dires de la Hongrie en 1989 ou 1991 ou 1992 ? Evidemment pas ! Et s'appliqueraient-elles à la chimère que poursuit la Hongrie d'une situation d'«avant le pêché» - je veux dire de l'avant variante C ? Bien sûr que non ! Elles ne pourraient s'appliquer qu'à la situation concrète, existant aujourd'hui, et elles ne peuvent être d'aucune utilité à la Hongrie pour établir l'illicéité des comportements passés qu'elle impute à la Tchécoslovaquie.

12. Mais nos amis hongrois ne s'arrêtent pas en si bon chemin. Si, nous disent-ils, le traité de 1977 n'est plus en vigueur, il faut appliquer non seulement toutes ces conventions très récentes, dont plusieurs ne relèvent pas du droit positif, mais il faut aussi ressusciter les dispositions des traités antérieurs à 1977 auxquelles celui-ci avait substitué des règles spéciales, et d'abord la convention de 1976 entre la Hongrie et la Tchécoslovaquie concernant la réglementation des eaux frontières (cf. CR 97/2, p. 43, M. Kiss, p. 91-92, M. Crawford; CR 97/3, p. 19, M. Nagy; CR 97/5, p. 14-15, M. Kiss; CR 97/6, p. 33, M. Crawford; CR 97/12, p. 13, M. Crawford; CR 97/13, p. 80, agent). Comment combiner les unes et l'autre ? *Lex posterior* ou *lex specialis* ? la Hongrie se garde de nous le dire, mais ce n'est pas l'essentiel, même s'il ne me paraît faire aucun doute que, dans un cas de ce genre, c'est, bien entendu, la règle spéciale qui s'applique.

Certes, la convention de 1976 est applicable. Mais pas «en l'air», «dans l'abstrait», comme si le traité de 1977 n'avait jamais existé ! Même s'il n'était plus en vigueur, ce que j'admets un instant encore pour les besoins de la discussion, il l'a été; la Hongrie elle-même le reconnaît pour toute la période antérieure au 25 mai 1992. Il a créé, dans le chef de chacune des Parties, des droits et des obligations; il a dérogé aux règles générales du droit des cours d'eau internationaux; il a autorisé la Tchécoslovaquie à détourner vers un canal construit sur son territoire, l'eau du Danube et nul ne peut raisonnablement prétendre qu'il y ait eu une quelconque atteinte à la souveraineté territoriale ou à la souveraineté sur les ressources naturelles de l'un des Etats; c'est le genre d'arrangements auxquels tout Etat, dans l'exercice de sa souveraineté (cf. *C.P.J.I. série A n° 1*, p. 25, arrêt du 17 août 1923, affaire du *Vapeur*

Wimbledon), peut consentir : c'est vrai de la Tchécoslovaquie qui pouvait accepter la lourde tâche d'accueillir sur son territoire un canal et un lac de retenue couvrant une étendue considérable; c'est vrai aussi de la Hongrie qui pouvait tout aussi bien consentir à cette dérivation de la ressource partagée que constituent les eaux du Danube.

C'est fortes de ce consentement que la Tchécoslovaquie puis la Slovaquie ont procédé à la mise en œuvre du traité de 1977 et à ce que la Hongrie appelle maintenant le «détournement» des eaux du Danube. Est-elle fondée à s'en plaindre ? La réponse est évidemment négative; et, indépendamment même de toutes les raisons qui plaident pour le maintien en vigueur du traité, cette réponse négative est négative en outre pour au moins deux motifs distincts et complémentaires :

1° le traité a créé des droits réels dans le chef de la Slovaquie, et je vais y revenir dans un instant; et

2° par la conclusion du traité, par sa mise en œuvre durant douze ans (ou quinze ans s'il faut l'en croire), par son insistance à obtenir de son partenaire l'accélération des travaux, la Hongrie a conduit la Tchécoslovaquie à consentir des efforts énormes pour réaliser le projet commun; elle ne peut pas, en mai 1989 (ou en mai 1992 - les mois de mai ne valent rien à la Hongrie), dire «pouce ! je ne joue plus ! je me retire du projet et j'exige que l'on fasse comme si le traité de 1977 (que je reconnais, au demeurant, comme parfaitement valide jusqu'à aujourd'hui) n'avait jamais existé et j'impose d'autres règles, celles de la convention de 1976 par exemple».

Monsieur le Président, on ne peut jouer ainsi avec des engagements conventionnels librement consentis. Et cela constitue par excellence un cas de préclusion ou, si l'on préfère le vocabulaire de la *common law*, d'*estoppel by conduct*. Comme la Chambre de la Cour l'a clairement expliqué dans l'affaire du *Différend frontalier, terrestre insulaire et maritime* : «une déclaration qu'une partie a faite à une autre partie ou une position qu'elle a prise envers elle et le fait que cette autre partie s'appuie sur cette déclaration ou position à son détriment» constitue un exemple caractéristique d'une telle situation d'*estoppel* (arrêt du 13 septembre 1990, intervention du Nicaragua, *C.I.J. Recueil 1990*, p. 118). Dès lors, de toutes manières, la Hongrie ne peut reprocher à la Tchécoslovaquie d'avoir pris sa parole au sérieux et d'avoir réalisé, du mieux qu'elle l'a pu, ce qui était prévu.

Non seulement, ceci constitue une justification supplémentaire de la variante C, mais encore, ceci interdit absolument à la Hongrie d'exiger l'application des traités bilatéraux antérieurs, et d'abord de la convention sur les eaux frontières, exactement comme si rien ne s'était passé.

13. Il y a d'ailleurs autre chose : je me demande avec étonnement et perplexité comment la Hongrie justifie le maintien en vigueur de la convention de 1976 sur les eaux frontières entre elle-même et la Slovaquie alors qu'elle nie farouchement que le traité de 1977, qui doit bien avoir la même nature puisque les deux textes seraient interchangeables et superposables, que le traite de 1977 donc, aie jamais été en vigueur entre les deux pays, au prétexte que la République slovaque n'y a pas succédé... Si la Hongrie avait raison sur le traité de 1977, son raisonnement s'appliquerait également à la convention de 1976; en invoquant celle-ci avec tant d'insistance, la Hongrie montre qu'elle ne croit pas une minute à son argumentation fondée sur la succession d'Etats.

Je la comprends. Cette thèse, que je me propose d'aborder tout de même, très brièvement maintenant, en même temps que celle de la nature du traité de 1977, est vraiment déraisonnable.

II. LA NATURE DU TRAITÉ DE 1977 ET LE FAUX PROBLÈME DE LA SUCCESSION D'ÉTATS

14. Pourquoi est-elle déraisonnable, Monsieur le Président ?

- D'abord parce que l'interprétation hongroise du compromis n'est pas raisonnable à cet égard : il faut tout de même une bonne dose d'imagination juridique pour voir dans le deuxième alinéa du préambule autre chose que la reconnaissance expresse par la Hongrie, du fait que la Slovaquie a succédé à la Tchécoslovaquie comme partie au traité.

- Ensuite, je n'arrive pas à comprendre comment mon ami James Crawford peut à la fois admettre qu'il y a «a presumption of succession in relation to treaties outside the colonial context» (CR 97/13, p. 53 - voir aussi CR 97/6, p. 47) et en nier la pertinence en l'espèce, au prétexte que les Parties pourraient l'écarter : certes, il ne s'agit pas d'une présomption irréfragable -, mais, justement, elles ne l'ont *pas* écartée...

- En troisième lieu, il me semble que le savant conseil de la Hongrie a dû avoir un moment - un assez long moment, à vrai dire...- d'inattention lorsqu'il se plaint de ce que M. Mikulka n'a pas répondu à son argument fondé sur la position de la Cour dans l'affaire du *Plateau continental de la mer du Nord* (CR 97/13, p. 52), qui consistait à affirmer que la règle posée à l'article 34 de la convention sur la succession d'Etats en matière de traités, n'avait pu, faute de l'écoulement d'un délai suffisant depuis la conclusion de la convention, en 1978, se consolider en une règle coutumière (cf. CR 97/6, p. 41-42). Or, il me semble que le coagent de la Slovaquie, par ailleurs rapporteur spécial de la CDI sur la succession d'Etats, a consacré près de 15 minutes, lors de son intervention du 25 mars dernier, à démontrer que la règle de l'article 34 relevait en cas de dissolution d'Etat, seule hypothèse qui nous intéresse ici (CR 97/9, p. 10-14), non du développement progressif mais de la codification la plus traditionnelle, si bien que la jurisprudence de 1969 ne présente aucune espèce de pertinence dans la présente espèce.

15. Mais la thèse hongroise est déraisonnable aussi en ce sens qu'elle fait totalement fi de la seconde série d'arguments de la Slovaquie qui, dans ses écritures, avait clairement montré que le traité de 1977 avait une portée éminemment territoriale et avait conféré des droits réels (*in rem*) aux Parties (cf. surtout CMS, par. 2.35-2.2.56, p. 30-37), ce que M. Mikulka a à nouveau démontré lors de sa plaidoirie du 25 mars (CR 97/9, p. 14-17) même si, ici encore, le professeur Crawford, qui devait décidément avoir l'esprit ailleurs ce jour-là, ne paraît pas non plus l'avoir entendu (cf. CR 97/13, p. 53-54).

Comme, Messieurs les Juges, je suis sûr que vous avez suivi sa démonstration avec attention, je ne vais pas répéter ce qu'a dit M. Mikulka, ni citer à nouveau les autorités auxquelles il s'est référé. Je me permets seulement de vous renvoyer respectueusement aux pages 53 et 54 du CR 97/9 et de vous faire part d'une remarque qui me paraît relever de l'évidence : que peut-il y avoir de «plus territorial» qu'un traité qui prévoit la construction d'un très gros ensemble d'ouvrages sur une partie, bien déterminée et localisée, des territoires respectivement slovaque et hongrois (pour le plus grand bénéfice *des deux* Parties), qui établit le régime de la navigation sur la portion du fleuve international et le canal de dérivation qu'il concerne et qui confirme - il confirme, il ne modifie pas (cf. l'article 22, par. 1, du traité de 1977) - l'emplacement d'une frontière ? Or, et c'est M. Crawford qui le dit, «the category of

territorial régime» «*is* [souligné dans le texte du compte-rendu] relevant in the Vienna convention and ... *does* [*id.*] have support in State practice» pour ce qui est de la succession automatique (CR 97/13, p. 54 - voir aussi la récente opinion individuelle de M. Weeramantry, jointe à l'arrêt du 11 juillet 1996 dans l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide*, n° 10, p. 9 [dact.]). Du même coup, bien sûr, il crée des droits réels, qui, de toutes manières, survivent à son éventuelle extinction (cf. CMS, par. 2.35 et suiv., p. 24 et suiv.). D'ailleurs, si, comme on nous l'a assez longuement expliqué, la convention de 1976, qui présente un caractère «objectif» nous dit-on, a créé des droits *in rem* (cf. CR 97/5, p. 14, M. Kiss ou CR 97/6, p. 32-34, M. Crawford) et si les deux traités - celui de 1977 et la convention de 1976 - «overlapped» (*ibid.*, p. 34), au point que la seconde s'appliquerait maintenant à la place du premier, c'est bien qu'ils ont le même caractère : celui d'instruments «territoriaux», créant, l'un et l'autre, des droits réels.

Les conseils de la Hongrie ont redécouvert, en fin de plaidoiries, que le traité portait sur un investissement conjoint (cf. CR 97/2, p. 12, M. Crawford; CR 97/6, p. 46, M. Crawford, CR 97/13, p. 10 et 14 et suiv., M. Nagy, p. 40 et 54, M. Crawford). Certes ! mais ceci n'exclut, en aucune manière, qu'il soit «*in rem*»; les deux aspects se situent à des niveaux très différents : si l'investissement avait porté sur des valeurs mobilières par exemple, il n'aurait pas eu ce caractère; mais il porte, en l'espèce, sur l'aménagement de portions *de territoires* des deux Parties. L'investissement est *le moyen* de réaliser cet aménagement, qui constitue, lui, l'objet - territorial - du traité.

16. J'ajoute - car je ne veux pas laisser le monopole de la lecture des bons auteurs au professeur Dupuy (cf. CR 97/5, p. 39 et CR 97/ 13, p. 27) - que la neuvième édition d'Oppenheim précise en outre, dans la partie introductive aux développements sur la succession d'Etats : «Where the contract can be said to have a local character, such as a scheme for irrigation or for the building of locks on a river, the case for continued survival is stronger than in the case of other contracts.» (Sir Robert Jennings and sir Arthur Watts eds., *Oppenheim's International Law*, Longman, London, 1992, vol. I, p. 217.)

Ceci pourrait présenter une certaine importance, au moins aux yeux des conseils de la Hongrie, puisque ces derniers se sont également ingéniés à ramener le traité de 1977 au rang d'un simple contrat de construction. Mais j'avoue ne me placer sur ce terrain, sur lequel

sir Arthur reviendra, que pour surplus de droit : il est clair qu'il est beaucoup plus que cela, et qu'il s'agit bien d'un traité à portée territoriale, qui a créé des droits et des obligations réels dans le chef des Parties. Il est clair aussi, et par voie de conséquence, que la Slovaquie y a succédé à la Tchécoslovaquie en tant que Partie.

III. QUELQUES REMARQUES INTRODUCTIVES SUR LA CONCEPTION HONGROISE DE LA «NÉCESSITÉ»

17. Monsieur le Président, je dois dire que c'est avec un peu d'ahurissement que j'ai entendu, jeudi dernier, M. Sands, affirmer, apparemment le plus sérieusement du monde, «Hungary treated the 1977 Treaty as having full legal effects right up to May 1992» (CR 97/12, p. 71). Est-ce lui reconnaître «full legal effect» que de suspendre l'exécution des obligations de construction d'une partie essentielle de ce projet «indivisible et intégré» ? et d'étendre cette suspension à *toutes* les obligations incombant à la Hongrie en vertu du traité ? «Full legal effect» lorsque la Hongrie décrète unilatéralement qu'elle abandonne purement et simplement la construction de Nagymaros ? et «full legal effect» encore lorsqu'elle fait de même à Gabcíkovo ? Non, Messieurs les Juges, il s'agit de violations pures et simples, des «clear breaches, indeed!» plus que cela : une répudiation (illicite s'il faut le préciser) du traité.

D'ailleurs, décidément, Monsieur le Président, la Hongrie l'admet bel et bien puisqu'elle invoque, pour s'en excuser, la plus incertaine des «circonstances excluant l'illicéité», la très discutable excuse de nécessité, qui, comme toutes les circonstances de ce type, implique, d'abord qu'un fait internationalement illicite a été commis, ensuite que, pour une raison spécifiquement définie par le droit, celui-ci perd son caractère illicite (ou, plus exactement sans doute, qu'il ne l'acquiert pas).

18. Ceci, il est vrai, n'émeut guère nos confrères hongrois : pour eux, il est clair que l'état de nécessité n'est pas une institution juridique, c'est une situation de fait, aux contours vagues et incertains, qui peut être utilisée à des fins indéterminées et, en tout cas, illimitées. J'en veux pour preuve la réponse, assez étonnante tout de même, que le professeur Sands a apportée à la remarque que j'avais cru pouvoir faire (CR 97/8, p. 46) quant à la contradiction qu'il y a à affirmer d'une part, que seuls les motifs limitativement énumérés par la convention de Vienne de 1969 permettent de suspendre l'application d'un traité ou d'y mettre fin (ce qu'admettait

M. Dupuy - cf. CR 97/3, p. 89-91), et, d'autre part, que - et c'est, cette fois, M. Sands qui parle - «[t]he first ground invoked by Hungary [to terminate the Treaty is] necessity» (CR 97/5, p. 69; voir aussi CR 97/12, p. 77). La conciliation, Messieurs les Juges, tiendrait à ceci : les faits étant les mêmes, la justification vaudrait, indifféremment, pour les violations initiales et pour la «terminaison» du traité; je cite à nouveau M. Sands : «The circumstances of necessity which applied in May 1989 were all the more applicable in May 1992. ... There is no contradiction: necessity may be invoked in respect of suspension of works and termination of Treaty.» (*Ibid.*) J'ai presqu'envie de dire : «no comment!»

Mais, Monsieur le Président, si, assurément, un fait est un fait, il n'est pas moins vrai qu'un concept est un concept. Et un même fait ne répond pas forcément aux exigences juridiques distinctes découlant de concepts juridiques différents ! Je le répète : la nécessité n'est pas un fait, c'est un concept juridique, auquel certains faits peuvent correspondre; l'impossibilité d'exécution est un autre concept juridique, auquel il peut-être recouru à d'autres fins, si les faits (qui peuvent être les mêmes ou différents) remplissent les conditions, différentes, qui sont requises; et c'est vrai aussi du changement fondamental de circonstances; ou encore de la force majeure.

Les conseils de la Hongrie font la même confusion, lorsqu'ils affirment que la Slovaquie se fonderait, elle aussi, sur la nécessité pour justifier la variante C (cf. CR 97/13, p. 26-27 - M. Dupuy). Sir Arthur Watts y reviendra demain.

19. Je me bornerai donc, pour terminer, à trois remarques de caractère très général :

1° En premier lieu, il me paraît à peine nécessaire de rappeler que la nécessité n'est, décidément, pas une cause licite d'extinction des traités.

2° En deuxième lieu, je relève que, pour soutenir le contraire, le professeur Crawford affirme que «[t]here is no difficulty in recognizing that a case of necessity could last for an indefinite period» (CR 97/13, p. 44). Dans ce cas, affirme-t-il, «il est évident («the position must be») que le traité prend fin. Oui, peut-être, si l'on entend le mot «nécessité» comme désignant *un fait* - mais à condition que ce fait réponde aux conditions juridiques imposées par l'article 61 de la convention de Vienne pour justifier une «impossibilité d'exécution» au sens du droit des traités. Mais, en tant que concept juridique, la nécessité n'est qu'une circonstance

excluant l'illicéité, pertinente dans le cadre du droit de la responsabilité; elle peut effacer l'illicéité; elle ne peut, en tant que telle, avoir aucun effet sur l'existence de l'instrument violé.

3° En troisième lieu et enfin, la Slovaquie entend insister à nouveau sur un point, essentiel à ses yeux : l'état de nécessité n'est pas la notion vague et floue autour de laquelle tourne toute la thèse hongroise. Elle ne peut jouer, est-il besoin de le dire à nouveau, que si la mesure en cause est «*le seul moyen* de sauvegarder *un intérêt essentiel*» de l'Etat qui l'invoque, et à la condition de ne pas porter atteinte à un intérêt tout aussi essentiel de l'Etat victime (article 33 du projet d'articles de la CDI sur la responsabilité des Etats).

Il s'en déduit que les choses doivent être claires, évidentes, manifestes. Je suis certain, Messieurs de la Cour qu'en écoutant les explications si compliquées, si hypothétiques aussi, de la Partie hongroise sur les risques prétendument encourus par elle, que l'idée d'évidence qui imprègne le concept juridique d'état de nécessité ne vous est jamais venue à l'esprit, à l'esprit d'aucun d'entre vous ! C'est un test qui, je crois, ne trompe pas.

Je vous remercie, Messieurs les Juges, et je vous prie, Monsieur le Président, de bien vouloir donner la parole à M[e] Samuel Wordsworth.

The PRESIDENT: Thank you so much, Professor Pellet. I call now on Mr. Wordsworth.

Mr. WORDSWORTH:

The Factual Basis for Hungary's Claims that a State of Necessity existed in 1989-1990

Mr. President, Members of the Court, in this presentation, I shall examine the factual basis for Hungary's claims that a state of necessity existed in 1989 and 1990, justifying its suspension and abandonment of Nagymaros and Gabcíkovo.

1. The Awareness of Impacts Prior to 1977

I wish to start by turning the clock back to 1977. For, during the site visit of 10 days ago, the following question was posed on at least one occasion: "Which of the harmful impacts of the Project - that Hungary now invokes - were known to the Treaty parties in 1977 when they signed the G/N Project Treaty?"

This is a very important question. If the Parties knew what the impacts would be in 1977, a state of necessity could not arise 12 years later, in 1989, on the basis of exactly those same impacts - and certainly not according to the ILC Draft Articles on State Responsibility, on which Hungary has built its legal case (see, Draft Art. 33 (2) *(b)* - *contra* Ms Gorove, CR 97/12, p. 32). Again, if the Parties knew what the impacts would be in 1977, there could be no fundamental change of circumstances at the time of Hungary's purported Treaty termination in 1992 - at least not on environmental grounds. The extent -and effect - of the obligations still to be performed under the Treaty would have been known 15 years earlier (Art. 62 (1) *(b)* of the Vienna Convention on the Law of Treaties).

Hungary is therefore very sensitive to this issue of what was, or was not, known in 1977. Ms Gorove claimed: "It cannot be said that Hungary acquiesced in 1977 to the significant risks which the Project is now known to pose." (CR 97/12, p. 32.) "Acquiesced." That is a strange choice of words to describe the signature and formal ratification of a treaty after a decade or more of extensive research. For, Ms Gorove did not contest the evidentiary value of the 1973 joint list of 364 pre-Project studies, and she did not contest the existence of 176 pre-1977 environment related studies listed in the 1994 Bibliography of the Hungarian Academy of Sciences (Annotated Bibliography of the Hungarian Academy of Sciences, Budapest, 1994). Ms Gorove merely focused on two studies: the 1975-1976 Bioproject and the UNDP/WHO Report of 1976.

First, the Bioproject and the related procedural issue. Once again, Slovakia's position here is that the existence of the Bioproject, in its entirety, is further evidence that Project impacts were extensively studied by Czechoslovakia prior to 1977. Once again, Hungary has never contested the existence of the Bioproject - or, at least, not until a few days ago. Now, Ms Gorove and my literate friend, Professor Sands, have expressed their doubts as to whether Slovak counsel have ever even seen the Bioproject (CR, 97/12, pp. 29 and 68). Well, seeing *is* believing and here, on the table behind me, are just the closing reports of the famous Bioproject. I hope the Court will understand why Slovakia did not see fit to annex this to its pleadings - particularly given the fact that most of the Bioproject has already been published.

What of the more serious point? Hungary claims that it has no copy of the Bioproject and that the 1984 Protocol, which Slovakia has submitted as evidence to the contrary, refers to something quite different. According to Ms Gorove, this 1984 Protocol refers only to the handing over of the "plan" of a Bioproject update, not the Bioproject itself (CR 97/12, p. 29). There are three points to make here.

First, the Hungarian version of the 1984 Protocol does use the word "plan", but this is not so surprising. The 1975-1976 Bioproject was part of Czechoslovakia's so-called Territorial Plan for the Gabcíkovo-Nagymaros area, completed in 1977. A mere "plan" for the 1986 Bioproject update would clearly not have been handed over through the formal channels of the Joint Operating Group.

Second, the Slovak version of the 1984 Protocol, which is a jointly signed original version, uses the word "documentation", not "plan" (Meeting of Plenipotentiaries of 28-29 November 1984 and Annex 2 thereof signed by the Heads of the Joint Operating Group on 23 November 1984 - accepted into evidence by the Court on 26 February 1997 and, see, the letter of the Slovak Agent to the Registrar dated 28 February 1997).

Third, according to Ms Gorove, those involved for the Hungarian side have confirmed that only a plan was handed over (CR, 97/12, p. 29). It now transpires that the support for this contention - which, no doubt, the Court took seriously - is, "oral discussions" with a Hungarian representative involved with the Project back at the time. "Oral discussions." That means a conversation, a conversation which apparently took place on 9th April 1997, that is, the day before Ms Gorove's pleading. I need hardly refer to Articles 50 and 56 of the Rules of Court to say that these "oral discussions" are evidence of nothing — save possibly for desperation on Hungary's part.

I turn, now, to the 1976 UNDP/WHO Report. According to Ms Gorove, the G/N Project was *not* studied by the UNDP/WHO team of experts (CR, 97/12, p. 30). But, in the 1989 Report of the Hungarian Academy of Sciences, which Hungary continues to rely on, it is stated quite clearly that "the most important water quality problems" concerning the G/N Project were considered in the UNDP/WHO final Report (HM, Vol. 5, Ann. 7, at p. 134).

With all due respect, the Hungarian Academy of Sciences is surely best placed to comment on these sorts of issues. Ms Gorove was also critical of my calling the 1976 UNDP/WHO Report "comprehensive" (CR 97/12, p. 30). But this was not an invention. I was merely quoting Dr. Laszlo Somlyody in his 1989 study, where he refers again and again to this important joint report (e.g. HC-M, Vol. 4, Ann. 13, at pp. 530, 541, 548, 555, 567 and 575).

This brings me to my next point. Counsel for Hungary contends that during the UNDP/WHO five-year programme, Hungary could not get data from Czechoslovakia and that Czechoslovakia refused to take part in the joint program. This is a serious allegation which, again, the Court will have treated seriously in assessing Hungary's presentation. So what is the evidence for this contention? It is, once again, "oral discussions" - this time with Dr. Laszlo Somlyody (CR 97/11, p. 31). Another conversation, who knows, by telephone? In a meeting room? Certainly, no written record was made and no attempt whatsoever to comply with the Rules of Court, and this time we do not even have a specific date. The conversation apparently took place some time in April 1997.

This is *not* serious. It *is* a sign of desperation. For, the fact is that the UNDP/WHO Report *is* an important document and it *is* damaging to Hungary's case. Otherwise, we may be sure that Hungary would not have totally ignored - until last Thursday - a five-year programme, costing five million dollars, and considering the "most important water quality problems" of the G/N Project.

That is enough background. I wish, now, to return to the question as to which impacts were known to the Treaty parties prior to 1977 and to look at the *kinds* of impact which Hungary alleges it perceived for the first time in 1989.

Turning to Nagymaros, during the site visit, Hungary placed a subtle but continual emphasis on the beauty and national importance of the Danube Bend, where the Nagymaros barrage was to be built. The construction of this barrage in 1989, the Court was given to understand, would have despoiled this famous landscape. I need hardly point out that it was as evident in 1977, as it is today, that the Nagymaros barrage would not be invisible. If threat there was, it was scarcely a new threat in 1989.

Similarly, Dr. Kern now claims as an adverse impact the submerging of various small islands and areas of riverbank behind the Nagymaros barrage (CR 97/12, p. 55). But this, again, was a known and accepted Project impact: where water is impounded behind a dam, certain areas of land will be submerged. That is self-evident now, just as it was self-evident in 1977.

What, then, of Hungary's key argument on Nagymaros - that the bank-filtered wells supplying Budapest would suffer once the barrage was constructed, particularly due to the dredging downstream of the barrage that the Project allegedly called for. There are several important points to make here.

First, Hungary itself studied this issue prior to 1977. This is evidenced by the 1973 joint list of studies compiled by Czechoslovakia and Hungary (SM, Vol. 3, Ann. 23, e.g., at p. 29) and, also, by the 1976 UNDP/WHO Report. This concluded that precisely those impacts in terms of changing sedimentation and flow conditions that Hungary now invokes would *not* occur (UNDP/WHO Report No. Hungary/71/505 - Hun/PIPOO1, p. III-22). This has not been contested. Clearly, then, the potential impacts *were* considered.

Second, the Parties' awareness of potential impacts from dredging on the Budapest wells is clear from the 1976 Joint Contractual Plan Agreement. Hungary, I repeat, Hungary is obliged to carry out *further* research in this respect (HM, Vol. 3, Ann. 18, at p. 226).

Third, in response to one of the questions from the Court during the site visit, it was claimed that possible impacts to the Budapest wells only became known when the five-year research and development programme of the Budapest Waterworks Company was completed in 1985. Dr. Kern came back to this point during his presentation (CR 97/12, p. 53). He referred to the "comprehensive" 1985 study then completed (*ibid.*).

But, if Hungary only became aware of impacts in 1985, why was special mention made of the very same impacts in the *1976* Joint Contractual Plan Agreement (HM, Vol. 3, Ann. 18, at p. 226)? If Hungary only became aware of impacts in 1985, why was the industrial dredging stopped in *1980* because of adverse impacts to the Budapest wells (HM, p. 428)? If the "comprehensive study" of the Budapest waterworks did indeed express concerns as to the

impacts of Nagymaros, why has Hungary never put this document into evidence? The little we do know of this study does *not* suggest that the Nagymaros barrage would have had adverse impacts (HM, App. 3, p. 428). Finally, why, if Hungary became aware of potential adverse impacts to the Budapest wells in 1985, why did it formally reaffirm its commitment to the Project in August 1985, commence construction of the Nagymaros barrage in May 1986 (HM, para. 3.56) and push for an *acceleration* of Project construction thereafter? Hungary's version of events simply does not make sense.

I turn to Gabcíkovo. Was Hungary aware of potential impacts here in 1977? Of course it was. Ms Gorove felt obliged to play down the findings of the 1976 UNDP/WHO Report. But this provides ample evidence that the potentially adverse impacts on water quality in the Gabcíkovo section of the "Original Project" were known 20 years ago (*op. cit.*, pp. II 20-21).

The sequence of events is as follows: in 1976, the UNDP/WHO Report warned of certain adverse impacts that would be caused if there was little or no discharge in the old Danube stretch and an extreme peak operation mode. Hungary was *fully advised* of the worst possible impacts. Then, in 1977, Hungary signed a carefully worded Treaty which left open precisely these issues. The amount of water to be discharged into the old Danube was left to be decided by the experts at a later date (Art. 16). Absolutely no mention was made in the Treaty of any peak operation mode, extreme or otherwise. Provisions for the protection of water quality and the environment were included (Arts. 15 and 19). Then, by 1989, the Project had been substantially modified - as Hungary accepts and as Professor Pellet has just demonstrated (CR 94/4, p. 32). The risks to water *quality* had been addressed.

What of water *quantity* and the decrease in the water level of the old Danube? Once again, this impact of the Project was *known* prior to 1977. The Parties were concerned about this problem back in the 1950s (e.g. HM, Vol. 4, Ann. 3; HR, Vol. 3, Ann. 36). According to the Hungarian Reply, prior to 1977, Hungary was studying two alternative designs for underwater weirs which would raise surface and groundwater levels in the old Danube stretch (HR, para. 1.142). And, as the Joint Contractual Plan Summary shows, at the time of Treaty signature, the Parties had agreed on a means of remedying this impact.

> "In the event of need, bottom sills can be constructed in the old Danube bed. By means of this solution ... such water levels can be produced equal to the low waters prior to the construction." (HM, Vol. 3, Ann. 24, at p. 326.)

Dr. Kern contends that "bottom sills" are not underwater weirs (CR 97/12, at p. 50). But, the issue of what these structures are called is totally irrelevant. What *is* relevant is that, in 1977, the Treaty parties were fully aware of the problem of reduced water levels and had agreed on a possible solution.

That, then, was the situation in 1977. The Parties were not merely *fully aware* of all the issues that Hungary treats as if they were revelations in 1989, but they had also ensured sufficient flexibility in the 1977 Treaty to enable potential environmental impacts to be addressed and minimized.

2. The Awareness of Impacts Prior to May 1989

I fear the Court may be tiring now even of the very word "studies". But, I would like to consider briefly the period from 1977 up to May 1989. Ms Gorove tried to convince the Court that the studies carried out prior to 1989 - just like those prior to 1977 - were not comprehensive, were not adequate, were not reliable. At the same time - and this was rather a difficult balancing act - she gallantly tried to show that the studies available to Hungary in 1989, although apparently not comprehensive, not adequate and not reliable, provided a sufficient basis for Hungary's suspension and abandonment of Treaty performance.

The inherent contradiction in these two contentions is now shown on the screen. On page 33 of the transcript of Ms Gorove's speech, the contention is made that only a "few, occasional studies" were made, while on pages 34 and 35 the most extraordinary series of footnotes purports to show how many studies supported Hungary's actions in May 1989. I will deal with these contentions one by one.

The evidence that only a few studies were made is contained in a letter of 6 April 1997 from Professor Laszlo Somlyody to His Excellency Dr. Szenasi. This letter was in the Judge's Folder supplied by Hungary. Extracts were even shown up on the screen by Ms Gorove.

Hungary's senior counsel appears to have allowed this procedure on the grounds that this letter was part of Hungary's written response to the PHARE Report (CR 97/12, p. 18). Well, it is not just that the text of this letter does not say a single word about the PHARE Report. It is not just that this is another evident breach of the Rules of Court by Hungary. The problem is that both this Court, and Slovakia, were presented with a *fait accompli*. The Court had no choice but to see this letter and, it follows, Slovakia had no possibility of making a meaningful procedural objection. In terms of its evidentiary value, this letter is improperly introduced and clearly worthless. And in terms of its content, I can only say that the 1994 Bibliography of the Hungarian Academy of Sciences listed more than a "few" studies carried out in the 1977-1988 period; it listed 277 studies.

I turn to Ms Gorove's footnotes, which are copied directly from Hungary's Reply (HR, pp. 39-41). Here, seeing is *not* believing.

First, there is an enormous amount of repetition in these footnotes (HR, pp. 39-41). The same studies are repeated seven or eight times.

Second, the footnotes even contain an amount of written pleading.

Third, many of the studies relied upon in these footnotes, as I showed during my presentation of three weeks ago, did *not* call into question the Project's environmental sustainability (CR 97/8, pp. 12-15). I refer, for example, to the Hungarian Academy of Sciences' papers of October 1981 and December 1983, and its Opinion of June 1985.

Fourth, the majority of the studies referred to here became redundant when the Project was modified in the mid-1980s. Hungary admits this. Professor Nagy specifically stated that "as a consequence of criticism" the Project was *modified* in 1986 and remedial measures were incorporated (CR 97/4, p. 32).

Finally, the great majority of the studies referred to have neither been published nor annexed to Hungary's written pleadings. The closest the Court will ever get to seeing these studies is the "summaries" contained in a specially prepared annex to Hungary's Reply (HR, Vol. 3, Ann. 10). There is another obvious procedural problem here. A summary

of a document, which is neither published nor annexed, in a specially prepared exhibit, does *not* qualify as evidence of what the document actually said.

One document notably absent from these footnotes is Hungary's 1985 Environmental Impact Assessment. This is not referred to because it suffers from the "defect" of undermining all Hungary's scientific contentions. I am criticized for calling this assessment "first rate in terms of its substance" (CR 97/12, p. 37). But all I did was to refer to Hungary's *own* Counter-Memorial, where its *own* expert review described the 1985 EIA's evaluation of G/N Project impacts on "flora and fauna, soil, water, air, climate, landscape, material assets" as "generally well performed, no important tasks left incomplete" (H-CM, Vol. 4, Ann. 23, at pp. 903 and 907).

It is also claimed that the 1985 EIA was only 67 pages long and the impression is given that this was a lightweight piece of work (CR 97/12, p. 36). This is misleading. In fact, as part of this EIA, some 33 new research studies were completed by Hungary (HM, Vol. 5, Ann. 4, p. 16). This fact is not contested.

Ms Gorove does, nonetheless, contend that Hungary's 1985 EIA suffered from "major constraints" in terms of gathering data (CR 97/12, p. 36); but she cites in support a 1992 Czechoslovak report to UNCED, which does *not* refer to the Project area at all and which, unsurprisingly, does not discuss data gathering in Hungary either; she cites in support the fact that at this time some 30 organizations worked on Project research in *Czechoslovakia*. How this can be evidence of *Hungary's* problems with data gathering, I simply do not know *(ibid.)*.

I wish to address five final points on this pre-May 1989 period.

First, it is still claimed - with no substantiation - that scientists could not say what they thought and that "controversial conclusions" had to be avoided (CR 97/12, p. 37). Why, then, did two Hungarian Academy of Sciences reviews recommend Project postponement or abandonment in the mid-1980s - for *economic* reasons, of course (HAS December 1983, HC-M, Vol. 3, Ann. 36; HAS Opinion, June 1985, *ibid.*, Ann. 39 and, see, CR 97/8 at pp. 12, 13 and 15)?

Second, an attempt is still made to play down the importance of the February 1989 Protocol. This is now on the basis that the environmental studies of the time "were for the most part not allowed to be published" CR 97/12, p. 39). This may or may not be true, but it can surely be assumed that, when the Hungarian Government took the formal step of signing this Protocol, it had not somehow deprived itself of seeing its *own* studies.

Third, as to the question - what happened between Hungary's formal reaffirmation and acceleration of the Project in February 1989, and its suspension of the Project in May 1989 (CR 97/12, p. 39) - the answer is, nothing. The only evidence before this Court is the Ecologia study of March 1989 which, as Professor McCaffrey explained three weeks ago, did not conclude that Project implementation would lead to a to a state of necessity (CR 97/8, pp. 20-21).

Fourth, Hungary's claim that, because of a lack of studies prior to May 1989, it called at that time for a "thorough EIA", has now disappeared (e.g., HC-M, para. 1.38). It has disappeared because it is wrong. Hungary did *not* call for a new EIA in 1989. Nor did it carry out such an EIA, either then, or subsequently.

Fifth, Professor Sands argues that the existence of an obligation to carry out an EIA from May 1989 can be based "on the practice of the two States themselves" (CR 97/12, p. 68). This can *only* mean that the practice of Czechoslovakia and Hungary, as of May 1989, was the performance of EIAs, environmental impact assessments, *not* the carrying out of a few, occasional, inadequate, unreliable studies. State practice is important. But we should not forget, as Professor Sands did, that Hungary in fact *repealed* its existing EIA legislation in 1989 and did not replace it until many years later.

3. <u>There Was No State of Necessity in 1989-1990</u>

Mr. President, in the third and final section to this pleading, I will briefly re-examine Hungary's claim that there was sufficient evidence in 1989-1990 to justify its suspension and abandonment of the Project. I shall pay particular attention to Nagymaros, as my colleague, Dr. Mikulka, will focus in the next presentation on alleged impacts in the Gabcíkovo section.

The evidence of environmental impact available to the Parties in 1989-1990 was examined in detail by Professor McCaffrey during Slovakia's first round presentation (CR 97/8, pp. 18-33). He was criticized by Hungary's counsel for ignoring "27 Hungarian studies prepared in 1989" and "45 Hungarian studies" prepared between 1990 and 1992 (CR 97/12, p. 43). No supporting reference was given by Hungary's counsel, and however closely one examines the Hungarian written pleadings, it is simply impossible to know what is being referred to. My *guess* is that the reference is to studies listed in the 1994 bibliography of the Hungarian Academy of Sciences. But, as I explained during my first presentation, Hungary has never annexed this document to its written pleadings, it has never examined the studies it refers to, and, even now, it criticizes Slovakia for holding this document up as evidence that the Project was extensively studied prior to 1989 (e.g., CR 97/12, pp. 11 and 31).

Otherwise, Hungary has barely responded to Professor McCaffrey's presentation. It has no response. The evidence available to the Parties at this crucial time did *not* point to a state of necessity as a result of Project implementation. Of course, Hungary has been able to come up with a series of quotations from the all-important, independent reports of this period - the Bechtel and HQI Reports - which point to certain impacts in certain areas. This is not surprising, and it is not relevant. For the greater part, Hungary's quotations are taken out of context or reflect nothing more than recommendations for additional studies in certain areas. Of course the Bechtel and HQI Reports contain such recommendations. They would hardly be credible otherwise. The key point is, neither report predicts or even hints at a state of ecological necessity as a result of Project implementation (CR 97/8, pp. 18-33). And, Slovakia's position has never been that the G/N Project would be the first ever barrage system to have no impacts whatsoever on the environment.

For good measure, Slovakia has prepared and placed in the *Judge's Folder* its own extracts from the Bechtel and HQI Reports, which give a more accurate impression of what these reports actually said. These show, for example, that I was not quoting the HQI Report "completely out of context" in order to show that Czechoslovak environmental impact assessment was in line with international practices (CR 97/12, p. 31). In fact I was putting

into context a quote "consistently passed over" by Hungary. And HQI examined *five* different means of evaluation adopted by Czechoslovakia to test Project impacts on groundwaters. It described these respectively as:

1. "très acceptable selon les standards internationaux"
2. "fondée dans ses principes"
3. "appropriée" pour "l'époque"
4. "valide"
5. "correct" et avec "du mérite" (HM, Vol. 5, Ann. 9, at pp. 233-235).

But there is no need for a battle of quotations on this point. I merely refer the Court to the sections in the Slovak Memorial and Counter-Memorial where these reports are considered in detail (SM, paras. 2.87-2.117; SC-M, paras. 7.16-7.20, 7.38, 7.49-7.55 and 7.72). And if the Bechtel Report really "queried many important aspects of the Project", as Ms Gorove now claims (CR 97/12, p. 43), why did Hungary wholly ignore - in its own Memorial - the conclusions of its *own* commissioned, comprehensive, independent report?

Alleged Impacts to the Budapest bank-filtered wells

Mr. President, I move now briefly on to the alleged impacts of the Nagymaros barrage on the Budapest bank-filtered wells. I can be brief, because Hungary has also been brief on this point. Why? Because it has no evidence. Dr. Kern referred merely to the allegedly "comprehensive" 1985 study of the Budapest waterworks and stated that "no other detailed investigation" took place (CR 97/12, p. 53).

As I mentioned earlier, Hungary has not put this "comprehensive" 1985 study into evidence. The only quoted extract we have shows that the principal area of concern was *not* the Project but the damage caused by dredging prior to 1980 (HM, App. 3, p. 430). In Appendix 3 to Hungary's Memorial, this was described as "industrial gravel dredging" or "commercial gravel dredging" (HM, pp. 428-429). During the site visit, both of Hungary's experts explained openly that this excessive dredging was *not* connected to the Project (Day 4, Szentendre Island). And, yet, this same dredging was described last week as "Project-related"

(CR 97/12, p. 52) - on the basis of an unsubstantiated assertion made in Hungary's Counter-Memorial.

In fact, by 1980, Hungary had dredged far more gravel from the riverbed than originally intended by the Project. This had *nothing* to do with the Project (HM, pp. 428-429). Indeed, Hungary only began work on Nagymaros in the mid-1980s (HM, para. 3.56). No further dredging was required in 1989 - as Hungary also admits (HC-M, Vol. 4, Ann. 13, at p. 576).

On what other evidence could Hungary possibly justify the abandonment of Nagymaros in October 1989 so as to avoid damage to the Budapest wells? Dr. Kern says there is none. Appendix 3 to Hungary's Memorial also records that "no detailed investigations that could have quantified" the impacts to the Budapest wells were made (HM, App. 3, p. 432).

Slovakia cannot contest this. There are, therefore, only two choices. Either Hungary has breached its Treaty obligations and is guilty of total indifference up to this date - because there are *still* no scientific studies or reports that describe the risk to the Budapest wells - *or* the risks have been exaggerated out of all proportion during the current proceedings.

In this respect, I conclude by pointing to the 1989 study of Hungary's new "homme orchestre", Professor Laszlo Somlyody. As Slovakia explained in its first round presentation, Professor Somlyody noted that there were two solutions *if* there was a problem due to erosion downstream of the Nagymaros barrage.

Two solutions. Hungarian counsel now only speak of the second solution, the construction of another barrage downstream of Budapest (CR 97/12, pp. 40 and 53l, Ms Gorove and Dr. Kern). The first of the two solutions put forward by Professor Somlyody and ignored by Hungary's counsel was "The replacement of the gravel on the riverbed" (HC-M, Ann. 13, at p. 576). This is not fanciful. Up on the screen, and in the *Judge's Folder*, the Court can now see Plate 4 of the Hungarian Counter-Memorial which shows precisely "Gravel replacement instead of barrage building in the Upper Rhine" (HC-M, opposite p. 40 and see HC-M, para. 1.68). And, if I may just read the caption below these photographs: "Sediment addition since 1978 has proven to be an effective tool to control erosion without disturbing

navigation." Thus, in the event of erosion downstream of Nagymaros, a solution was readily available - from 1978! There was absolutely *no* necessity to abandon Nagymaros.

4. Conclusions

Mr. President, my conclusions will be brief.

First, as of 1977, all the potential adverse impacts of the Project were well known to the Parties. The existence of a state of necessity in 1989 is excluded on this ground alone.

Second, between 1977 and 1989, the Treaty parties continued their detailed investigations into potential Project impacts, and the weight of evidence did *not* support Project suspension or abandonment. In this respect, it is important to recall that after the 1985 EIA, the Hungarian Government *formally reaffirmed* its commitment to the Project in August 1985 and, again, in February 1989.

Third, both Parties commissioned impartial, outside reports in 1989-1990. Both Reports - the Bechtel Report and the HQI Report - strongly support the Slovak position that there was *no* environmental state of necessity.

Fourth, there was - and is - no evidence of adverse impact to the Budapest water wells.

Finally, Hungary's attempts to fill the gaps in the evidence by "oral discussions" and last minute letters simply highlight the weakness of its case. Good Hungarian evidence exists - the 1976 UNDP/WHO Report, the 1985 EIA, the 1990 Bechtel Report, the 1994 Bibliography of the Hungarian Academy of Sciences - but this good evidence is systematically passed over by Hungary because it does not support its legal position.

Mr. President, Members of the Court, that concludes my presentation. It has been a great honour for me to appear before you and I thank you for your attention. May I ask you to call next, or possibly after the pause, on Dr. Mikulka, who will examine Hungary's allegations as to impacts in the Gabcíkovo section.

The PRESIDENT: Thank you, Mr. Wordsworth. The Court will suspend for 15 minutes.

The Court adjourned from 11.25 to 11.45 a.m.

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

Mr. MIKULKA:

Hungary's Allegations of Adverse Impacts in Relation to Gabcíkovo

Mr. President, my colleague Mr. Samuel Wordsworth has just shown how all the risks that Hungary pretends to have discovered only in 1989 had been studied long ago and were either not significant or could be mitigated successfully.

I will complete Slovakia's examination of the factual basis to Hungary's claims of necessity by focusing on Hungary´s allegations as to the negative effects of the Gabcíkovo part of the Project.

Here, unlike in the case of Nagymaros, we have - in addition to the multiple studies and models - the evidence of actual results of four year's operation. For example, we have the Environmental Impact Review published by the Slovak Faculty of Natural Sciences (Environmental Impact Review, Comenius University, Bratislava, 1995**)**. Contrary to the impression Professor Wheater would like to give, Slovakia has no problems with the content of the "Blue" book. This book was written by people with intimate knowledge of the problems of the region. If this book is in some sense remarkable, then it is because it is balanced. Science - as Professor Wheater well knows - is not a register of black and white conclusions. The "Blue" book evaluates the Project in a generally favourable way, but it does not exclude critical views on particular aspects. What is scientifically incorrect is to select isolated adverse comments and to distort the real meaning of the "Blue" book's reports. I will come to this in more detail later.

There are some major questions that I would like to address first.

SURFACE - WATER QUALITY

A lot has been said by Hungarian counsel about the threat that the reservoir allegedly poses - both in respect of the so-called "Original Project" and the reduced reservoir of Variant C - to the water quality. Slovakia dealt at length with this argument in the first round of pleadings. Dr. Kern and Professor Wheater, however, insisted again on the alleged poor surface water quality that the Gabcíkovo project might cause. Both of them, however agreed

with Slovakia´s view that Danube water quality has improved in the last 20 years (Dr. Kern, CR 97/12, para. 32, p. 57) and that "an improvement in water quality in Bratislava has been, not unexpectedly, accompanied by an improvement in some water quality indicators downstream" (Professor Wheater, CR 97/12, para. 16, p. 93). Of course, not a single word was said as to why this is so. The construction of sewage water treatment plants by Czechoslovakia and, now, Slovakia is not Hungary´s favourite theme. However, the conclusions of the Bechtel Report commissioned in 1989 by Hungary were unequivocal:

> "One of the most effective ways of improving the quality of both surface and groundwater and its attendant effects on ecological conditions is to clean up the sources of the pollution . . . some of the more critical areas of concern are the sewage discharge into the Mosoni at Györ; the leaching of bauxite red muds, and the asbestos cement plant, near Komárom; and the excessive amounts of farm fertilizers seeping into the groundwater in the Szigetköz and along the lower reaches of the project." (Bechtel Environmental Inc. Report, pp. 1-19.)

Irrespective of these conclusions Hungary stopped its programme of the construction of the sewage water treatment plants together with its works on the Project.

Mr. President, a week ago, Dr. Kern, referring to the values of chlorophyll-a in the Danube in the pre-dam conditions stated that "simulated increases due to the Hrušov reservoir were disturbing" (CR, 97/12, para. 33, p. 57). And Professor Wheater when speaking about Variant C asserted that "chlorophyll-a has doubled downstream of the reservoir" (CR 97/12, para. 16, p. 93). He quotes no source for this contention. In any event, Professor Wheater is mistaken. There is a continuing *decrease* of chlorophyll-a in all the monitored profiles of the Slovak-Hungarian reach of the Danube during last six years. It may be seen on the graphs on the screen. They show the values measured at cross-sections at Bratislava, then at Medvedow and Komárno which are downstream of the reservoir and, finally, at Budapest (source: Water Quality Protection Working Group of the Transboundary Water Commission BRATISLAVA-BUDAPEST, December 1996, Joint Report).

Professor Mucha will tomorrow point out other major mistakes and misinterpretations presented last week by counsel for Hungary concerning the quality of surface and groundwater as well as sediments.

GROUNDWATER LEVELS

During the site visit, Professor Mucha explained to the Court how groundwater levels have risen due to the filling of the reservoir. Hungary tries to belittle the importance of this beneficial impact by suggesting that the decrease in the groundwater level during the preceding decades was due to commercial dredging which coincided with the signing of the Treaty (CR 97/12, para. 36, p. 58). But Hungary ignores the fact that the dredging was largely necessary for flood protection of Bratislava and the removal of ford sections hampering navigation. It also ignores the fact that quotas for dredging on the Slovak-Hungarian reach of the Danube were jointly agreed by Czechoslovakia and Hungary and were equally shared. And Hungary nowhere explains why and for which legal argument this discussion is relevant (SR, Vol. III, p. 228).

The rise in groundwater levels on large areas of _itný Ostrov and Szigetkoz is one of the most positive impacts of the Project. This does not fit in with Hungary´s thesis of environmental disaster and, on the contrary, shows the beneficial environmental impact of the Project.

Counsel for Hungary repeated their arguments about the large-scale drop in groundwater levels that the "Original project" would allegedly cause (CR 97/12, paras. 28 and 31) and that Variant C allegedly has caused in the Szigetkoz. But the impact of the project on groundwater levels here was fully understood and accepted by the Treaty parties long prior to 1989 and important mitigation measures were envisaged, including the recharge of the branches on both sides of the Danube. Moreover, the construction of the famous underwater weirs was not only envisaged by the Joint Contractual Plan as Mr. Wordsworth has just mentioned, it was *Hungary´*s responsibility. And the use of underwater weirs was once again recommended by the EC experts (Report of the Working Group of Independent Experts on Variant "C", Budapest, November 23, 1992, p. 36, SM, Vol. II, Ann. 12, p. 127).

Dr. Kern insists on the loss of sub-irrigation in an area of more than 100 km2 in Szigetkoz due to the "Original project". Of course, he comes to this result by assuming a

minimum discharge of 50 m3/s into the old riverbed which, according to him, has "never been altered" (CR 97/12, para. 29, p. 56). Simulations presented by Hungary also ignore the plans for underwater weirs (because these, as Hungary insists, were not agreed upon) as well as the direct recharge into the side arms, the structures for which, however, were largely completed in 1989. Such an abstract form of modelling has no meaning.

> As stated in the Bechtel Report:
> "Project mitigations to minimize adverse impacts on the hydrologic regime have been incorporated into the project design, including the artificial recharge system in the Szigetköz, and interceptor channel system at Dunakiliti reservoir . . ." (Bechtel Environmental Inc. pp. 1-19 and pp. 1-13.)

The correctness of this conclusion was recently confirmed by the data provided by Hungary in the framework of the *joint* monitoring of the impacts of the Gabcíkovo project. This shows that both in the _itný Ostrov and in the major part of Szigetkoz, the groundwater level under average discharges has increased. In fact, the only territory affected by the drop of groundwater levels is the narrow strip along the old riverbed where the Danube drains the adjacent terrain - because of the absence of underwater weirs (Hungary's National Annual Report of Environmental Monitoring in the Szigetkoz, 1997).

FLOODPLAIN FORESTS

Mr. President, the Project certainly would have, and as operated under Variant C, has had some impact on the floodplain forest. The Parties were fully aware of this since the signing of the 1977 Treaty. Some changes in the composition of tree plantations were envisaged. Later, as I have already said, the system of direct discharge to the branches was incorporated into the Project to preserve conditions as close to the natural situation as possible. Even a scheme allowing for the flooding of the inundation area was developed. During the site visit the Court has been shown the relevant structures on the Slovak side. Similar measures were developed in the Hungarian branch system - prior to 1989. The Court, however, had no chance to see these. From the site visit, the Court could not possibly know

that an inlet enabling up to 200 m^3/s into the Hungarian side arms was constructed in the Dunakiliti weir - prior to 1989.

The effects of the Gabcíkovo part of the Project on forestry in general are positive (SR, Vol. III, pp. 84, 87). Professor Wheater tried to challenge this fact by highly selective quotation from the Blue book (CR 97/12, para. 26, pp. 10-11), looking only at sections in the report concerning the narrow riverbank area alongside the old Danube stretch. This narrow stretch, incidentally, was all the Court got to see of the Hungarian inundation area during the site visit and gave another very misleading impression of Project impacts.

The only important difference between the Slovak and Hungarian inundation areas consists in the fact that the system of water recharge on the Hungarian side was put into operation two years later than in Slovakia, after the April 1995 Agreement which provided for the construction of the underwater weir near to Dunakiliti. The reason why this simple and effective measure was so long postponed is well known. As stated at the meeting of the Hungarian Parliamentary Council for the Environment in February 1994, Hungarian officials were afraid that "the construction of [even] a temporary weir could unfavourably influence the decision of the ICJ in The Hague". And Mr. Lajos Zsebok was even more explicit when describing, at the same meeting, the danger in the following words: "we would confirm with this solution that it is possible to eliminate unfavourable effects of the Danube diversion through technical measures and thus we would give up . . . a decision of The Hague favourable for us" (Magyar Hírlap, 1 March 1994, SC-M, Ann. 33, p. 437).

In a certain sense Mr. Zsebok was right. The construction of a single underwater weir near Dunakiliti has finally provided a clear example of the beneficial impact of underwater weirs on the groundwater levels in the area.

With the construction of several underwater weirs along the Danube, the draining effect of the old riverbed could be eliminated and the groundwater levels in the narrow strip along the river affected by the drop, could be restored. This is accepted by counsel for Hungary even if called "illusion d'optiques" (Prof. Carbiener, CR 97/13, para. 10, p. 71). The problems

concerning water flow velocities, sedimentation behind the weirs and even the groundwater level dynamics may be resolved through the proper design of these weirs in combination with appropriate discharges into the old Danube. I will not further tire the Court with technical details. Instead I refer to the PHARE Report which will be discussed by Mr. Refsgaard tomorrow.

FISH

Professor Wheater reproaches me for "numerous errors" in my response to his assertions concerning the alleged disappearance of certain fish species as a result of the damming of the Danube. In fact there are no such errors. The famous two Russian sturgeon from 1986, referred to by Professor Wheater, have never been seen by any ichthyologist, and as the author of the article to which Professor Wheater hints they may have been wrongly identified. And also this same author, not me, does indeed say that "the last *verified* Russian sturgeons in the Slovak stretch of the Danube were [sighted] in the 1960s."

Concerning the mud minnow that Hungary also says disappeared after the damming from the Szigetkoz, Professor Wheater advises me not to believe one Hungarian Expert, Ms Keresztessy, but rather a certain Mr. Guti who says that "before 1992 Umbra krameri was a common species in the Szigetkoz floodplain". But what then about the list of fish species annexed to the Hungarian Memorial (Vol. 2, App. 2). Should the Court believe this evidence or not? This list does not mention the mud minnow in the Hungarian floodplain area. It is surely better to keep such disputes out of this Great Hall of Justice and leave them to be fought out between the Hungarian fish experts themselves.

Professor Wheater did not challenge my other remarks concerning fish species which he alleges have disappeared but whose occurrence has nevertheless been recently confirmed by official Hungarian reports ("*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). Accordingly, I suppose he admits that 3 weeks ago he was wrong.

Two more remarks:

First - Hungary continuously refers to many migratory species in the Danube. But it is evident that, after the construction of the Iron Gates downstream on the Danube, they ceased to appear in the Slovak-Hungarian stretch of the Danube.

Second - the biomonitoring of fishes in Slovakia as well as in Hungary is today done by electro-catching (Slovak National Annual Report of the Environment Monitoring in 1996, National Annual Report on Environmental Monitoring in the Szigetköz in 1996). With this method it is possible to catch fish upto the depth of maximum 1.5 m. But most of the rheophile species are living on the bottom and cannot be found by this method.

Accordingly, the categoric conclusions of Hungary´s counsel concerning the alleged impact of the Gabcíkovo project on fish are not justified.

PEAK OPERATION

I turn, now, to another issue which Hungary has blown up out of all proportion: peak operation. Dr. Kern well knows that no specific mode of peak operation, let alone an extreme one, has ever been agreed between the Parties, and that a moderate peak operation would not support his thesis of devastating effects on aquatic habitat. He nonetheless claims that "what is extreme, however, is the magnitude of peak operation underlying the Project design" namely "the number and capacity of turbines installed, the size of the power canal and of the reservoir" (CR 97/12, paras. 6 and 8, p. 50). But, Mr. President, the Project was a multipurpose project, and its dimensions were *not* defined exclusively by plans for energy production. Its dimensions are, first of all, dictated by the dimensions and properties of the river itself. The bypass canal, which may seem to large in conditions of an *average* discharge on the Danube, has the capacity to accommodate only one half of the flood discharge - still provided that all eight turbines at Gabcíkovo operate at full capacity. This division of flood

waters between the canal and the old riverbed is precisely the principle on which protection against the 10,000-year flood is achieved.

Similarly the reservoir. No doubt, its existence was indispensable for the accumulation of water for peak operation. But, again, during floods the reservoir provides the route for fast evacuation of flood waters from the narrow Bratislava reach of river. Earlier, flood waters built up below Bratislava and the backwater effect caused the flooding of Bratislava's streets.

Dr. Kern insists that "the magnitude of peak operation presented in the Hungarian pleading was not extreme, but represented a variety of peaking modes which were studied during the Project designs" (CR 97/12, para. 22, p. 55). If it is so, why then does he insists on the water level fluctuation of 4 m at the confluence near Sap and above 1 m at Kamarno, which can only mean the mode of operation based on "a complete closure of the turbines at Gabcíkovo for 18 hours and a sudden release of 4200 m3/s increasing up to 5,200 m^3/s during 6 hours per day . . . causing a considerable artificial flood wave in the Nagymaros reservoir" (HC-M, Vol. 1, 1.210; Kern Impacts. HC-M, Anns., Vol. 4, Ann. 6). Dr. Kern contradicts himself when he says in the very next sentence that "*large-scale* peaking . . . would *most likely* result in damage to aquatic habitats over the length of the Nagymaros reservoir" (CR 97/12 para. 23, p. 55). Yes Mr. President, "large-scale" peaking. But nothing like this was agreed between the parties, precisely because *no* specific mode of peak operation was agreed. Accordingly all alleged damage on aquatic habitats and even on "the roman ruins only recently discovered" (*ibid.*, para. 24, p. 55) resulting from the peak operation is purely hypothetical.

From the discussion of the alleged impacts of large scale peak-operation Hungarian counsel pass to the extraordinary allegation that the Gabcíkovo power plant is operated in a peak mode (Wheater, CR 79/12, paras. 31-33, p. 13). This is not so. The fact that the run of river operation requires from time to time a change in the number of turbines put into operation was explained in two letters of the Agent of Slovakia (letter of 24 February 1997) to the Agent of Hungary who raised this question a few weeks before the opening of oral

proceedings. But this issue has already been addressed by the technical experts of the two countries. In order to terminate this discussion, once and for all, I invite the Court to have a look at the hourly graphs for electricity production at Gabcíkovo for January 1996 - the month chosen by Hungary's experts. I want to demonstrate by these graphs that the putting of one extra turbine into operation does *not* coincide with the hours of the peak consumption. There is *no* regularity there. It depends entirely on reaching limits for the water level in the reservoir, which itself depends on the changes in the discharges in the Danube, caused both by natural phenomena as well as by changes resulting from the operation of the upstream hydropower plants in Austria.

PROJECT´S FUNCTIONS

At this stage, I would like to say a few words about Hungary's combination of the discussion of the alleged risks posed by the Project with its claims that the Project is essentially useless, particularly in terms of flood protection and navigation. Even Hungary does not challenge the use of electricity production, although Ms Gorove did claim that the consumption of electricity in Hungary since 1989 has been in decline (CR 97/3, para. 40, p. 72). Is this good or bad? Who knows. It is certainly not relevant, save for as a possible explanation for why Hungary lost interest in the Project.

FLOODS

Ms Gorove also concluded that "the flood issue is a smoke screen" and that "flood protection was neither a motivating factor nor an objective justification for the Project" (CR 97/12, p. 46). I leave it for the Court to evaluate the respective merits of this legal pleading and what the Treaty parties themselves unambiguously stated in the Treaty and in the JCP (refs.). Ms Gorove´s view according to which "had there been no Treaty, the [flood protection] work would have proceeded in accordance with the [traditional] standards" sufficient for 100-year flood is entirely irrelevant to this case, just because there *is* a Treaty. Finally her attempt to

belittle the importance of the huge additional flood protection works below Sap, that Slovakia carried out because of Hungary´s non-compliance with its Treaty obligation and the subsequent accusation that "Slovakia has ignored the state of flood control works as of 1977" is breathtaking in its audacity. Under the 1977 Treaty and the Joint Contactual Plan, the excavation works in this sector of the project were *Hungary's* responsibility..

NAVIGATION

What as to Ms Gorove´s conclusions concerning navigation, and the contention that her claim of a steep decline in navigation in the last decades has not been refuted (CR 97/12, p. 47), it is only a pity that she did not compare this trend with the worsening conditions in navigation in this stretch of the Danube. The chart indicating the decline of fully navigable days is contained in the Slovak Memorial (SM, para. 1.47, p. 33). There is an obvious parallel between declining navigation and worsening navigation conditions which supports Slovakia´s view that the Project was essential to improve navigation in this sector.

Ms Gorove also tries to obscure the fact that Czechoslovakia and Hungary *inter se* adopted the recommendations of the Danube Commission concerning the gabarits for navigation into binding standards by means of a specific provision to this end in the 1976 Boundary Waters Convention (SM,Vol. II, Ann. 4). The question therefore is not whether the Danube is still navigable, as she suggests, but whether the required parameters for navigation exist. In the Nagymaros sector they certainly are *not* assured at present. The concerns over this fact have been repeatedly voiced by the Danube Commission (SM, Vol. II, Ann.15, p. 266; SM, Vol. IV, Ann. 137, p. 421; SCM, Vol. II, Ann. 48, p. 515)**.** The traditional river-training measures that Ms Gorove recommends are *not* a long-term solution, as it is clear also from the Delft Hydraulics Report to which she refers (CR 97/12, para. 55, p. 47, ftn. 99). But again, such considerations are irrelevant, given that the parties agreed in the Treaty on a specific scheme for the improvement of navigation.

As Dr. Tomka said at the end of the first round of Slovakia´s pleadings, Hungary has not found a single positive element in the project. It has portrayed it exclusively in the most negative way. Hungary retained this approach in the second round of its pleading. All its scientific discussion of the "Original Project" as well as of the effects of the Gabcíkovo part of the Project as implemented by means of Variant C, has been a continuation of this approach.

SITE VISIT

But, I most sincerely hope, the Court will have got a different impression from the site visit. It has now had the opportunity to see the Gabcíkovo part of the project as jointly built and which, by 1989, was nearly ready for joint implementation by Czechoslovakia and Hungary. The photographs at the beginning of the *Judge's Folder* have shown how little remained to be done to put Gabcíkovo into operation in 1989 when Hungary suspended and then abandoned its work on the Project. And the Court has now seen the structures of Variant C, which made it possible to put this part of the Project into operation. It finally saw that nearly no traces remain of what Hungary built on the Nagymaros part of the project.

Again, I sincerely hope that the multi-purpose character of the Project was evident -at a glance, and that it is therefore not at all surprising that after the site visit Hungary has felt uneasy about repeating its rather absurd argument about the primarily ideological purpose of the Project. Instead Hungary now recognizes the real purposes of the Project, but finds them at best "archaic" (CR 97/13, para. 2, p. 67). Professor Carbiener's views in this respect would hardly meet with the approval of any member State of the Danube Commission, obviously except Hungary, which nevertheless is one of the biggest users of the new navigational route created by the Gabcíkovo project.

And as always expected by the parties to the 1977 Treaty, the Project has brought about many opportunities in terms of regional development. Forestry and agriculture have and will benefit from the restoration of the groundwater levels over the greater part of the region. The construction of sewage water treatment plants - at least insofar as Slovakia is concerned - has had a very positive impact on water quality in the Danube. The recharge system into the branches on both sides of the river has stopped the process of gradual drying of the floodplain and marked the beginning of its revitalization. Hungary speaks only of lost water fluctuations. It does not deny that these side arms now contain *far* more water than they did in the pre-dam era. In all these respects the Gabcíkovo part of the Project put into operation by means of

Variant C, provides the benefits it was expected to provide in the period before the completion of the Nagymaros part of the Project.

There are, however problems which still call for solution - the old riverbed where Hungary had, specifically under Article 5, paragraph 5, of the 1977 Treaty, the responsibility for the remedial measures aimed at restoring the water levels. This responsibility has been "abandoned", alongside all Hungary's other works on the Project. But the actual state of the old riverbed is not an inevitable result of the damming of the Danube, neither do the scientists lack the knowledge as to how to solve the problem.

CONCLUSIONS

Mr. President, Members of the Court, my conclusions will be brief.

First, the studies available to the Treaty parties in 1989-1990, just as for Nagymaros, did not point to an ecological state of necessity at Gabcíkovo.

Second, a wealth of evidence since 1990 has confirmed the absence of a state of necessity. I refer to the EC Expert Reports, to the Slovak Data and Monitoring Report (SR, Vol. III),the Environmental Impact Review of Comenius University, and the PHARE Report, which Mr. Refsgaard will return to tomorrow.

Third, the Court has now seen the Gabcíkovo section, the Slovak floodplain forests and the bypassed section of the old Danube with its own eyes. The simple lesson to be drawn from this historic site visit is that there is clearly no environmental catastrophe on the ground and that the Project has been well conceived with certain well-established development goals in mind.

Mr. President, may I now ask you to call on Professor McCaffrey, who will address the legal aspects of Hungary's claims of necessity.

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

Professor McCAFFREY: Thank you very much, Mr. President.

III. HUNGARY'S PLEA OF NECESSITY

C. The Legal Basis for Hungary's Plea of Necessity

Introduction

Mr. President, Members of the Court, it is my task to respond to the arguments made by Hungary's counsel last Thursday and Friday concerning Hungary's plea of necessity. My colleague Mr. Wordsworth has already dealt with the facts. I will address three main points of law: First, Hungary's "reasonableness" test; second, Hungary's argument that there was a state of necessity under Articles 15, 19 and 20 of the 1977 Treaty and evolving norms of environmental protection; and third, Hungary's application of the doctrine of necessity to its suspension and abandonment at Nagymaros and Gabcíkovo.

I. Hungary's "Reasonableness" Test

I begin, then, Mr. President, with Hungary's "reasonableness" test. Hungary claims to rely on necessity, but in fact asks the Court to say whether the course of action, the *option*, it chose was *"reasonable"*.[1] Hungary therefore treats "necessity" and "reasonableness" as one and the same thing.

The obvious problem with this line of argument is that it is based on an implicit assumption that Hungary was not bound by the Treaty to a certain course of conduct. I say this because, faced with a problem, a State may have several options, all "reasonable". But if the State adopts one option by a treaty with another State, it cannot later take a different option, unilaterally, however "reasonable". In short, as a defence to a breach of a treaty, "reasonableness" is *not* a defence.

[1] E.g., CR 97/11, p. 16 (Crawford); and pp. 26, 36, 41, 45 (Gorove).

With respect, Professor Sands seems not to understand this. He says, as Alain Pellet has already noted this morning, that "Hungary treated the 1977 Treaty as having full legal effects right up to May 1992" - ![2] Yet he defends Hungary's conduct, conduct in clear breach of the Treaty, on the ground of "reasonableness".[3]

Mr. President, Hungary cannot have it both ways. If its position is that the Treaty was in "full legal effect" in 1989-1990, then it did not have the option to ignore it by suspending and subsequently abandoning work at Nagymaros and Gabcíkovo - however "reasonable" a decision might have been to suspend work on a dam it no longer wanted in its own territory that was *not* part of a joint project being constructed pursuant to a treaty.

There is also a fatal self-contradiction in Hungary's "reasonableness" argument. It is this: by asking the Court to find that its chosen course of conduct was "reasonable", Hungary destroys its argument based on necessity: for, in a real state of necessity, there is no question of "reasonableness" of choosing one option against another; rather the course of action must be, in the ILC's words, the "*only means* of safeguarding an essential interest . . . against a grave and imminent peril".[4] I repeat, not a "reasonable" choice among a number of options, but the "*only* means" of warding off the threatened peril. As Slovakia has demonstrated,[5] and I will recall presently, there *were* a number of options to Hungary other than suspending and terminating work. But for Hungary, "necessity" does not mean being forced to adopt a course of conduct inconsistent with its legal obligations in order to avert a grave and imminent peril, but rather it means, that a course of conduct was "necessary" only in the sense of being "needed" or "desirable", to advance a *unilaterally*-determined "ensemble"[6] of policy goals -

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[2] *Ibid.*, p. 71.

[3] *Ibid.*

[4] International Law Commission, Draft Articles on State Responsibility, Part One, Article 33(1)(a), [1980] *Y.B. INT'L L. COMM'N*, Vol. 2, pt. 2, p. 34 (emphasis added).

[5] E.g., CR 97/9, p. 63; SR, para. 7.33.

[6] CR 97/3, p. 83 (transl. p. 90) (Dupuy).

including not just "ecological guarantees" but also, and revealingly, "economic costs" of a project having what Hungary saw as "questionable energy benefits".[7]

II. Hungary's Argument that there was a State of Necessity under Articles 15, 19 and 20 and Evolving Norms of Environmental Protection

Professor Sands continues Hungary's legal-smorgasbord approach to this case by arguing that the Parties' environmental obligations under the 1977 Treaty "entitled Hungary to insist upon[] further studies" and that "the failure to agree on further studies created a state of necessity under Articles 15, 19 and 20 of the Treaty . . ."[8] Mr. President, this is like saying "one plus one equals . . . ten!" It is based on a concept of the doctrine of necessity that would be totally unrecognizable to the late Judge Ago and the International Law Commission.

Specifically, Professor Sands argues that "[a]s new environmental norms emerged, whether through treaty or custom, they became applicable . . . *[inter alia]* through . . . Articles 15 and 19."[9] Professor Sands then says that "the new norms were to be operationalized into the Treaty."[10] Thus Professor Sands argues that the effect of Articles 15, 19 and 20 of the 1977 Treaty was to oblige the Parties to up-date, or revise, the Treaty-Project by reference to new, evolving norms of environmental protection; the obvious implication is that Czechoslovakia's alleged refusal to revise the Treaty was a breach of these new norms and of Articles 15, 19 and 20.[11] There are two points to address here.

First, this is a very strange sequence of argument. Let us assume for the sake of argument that Professor Sands is right about the effect of Articles 15, 19 and 20. Now in that case the onus would be on Hungary to demonstrate to Czechoslovakia by argument *and*

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[7] *Ibid.*

[8] CR 97/12, p. 62.

[9] CR 97/12, p. 69.

[10] *Ibid.*, p. 70.

[11] *Ibid.*, pp. 64-65.

evidence (1) that a new norm of environmental protection had evolved, (2) that this new norm required revision of the Treaty, because (3) the *effects* of implementing the Treaty-Project would contravene the new norm - in short, create an environmental risk contrary to the new norm.

Now the record is clear. Hungary did none of these things. It did not identify the so-called new norms; it did not identify the existing risks which contravened such norms; and it did not provide *evidence* of such risks. Its attitude was: "You must take our word for it!" Mr. President, it is hardly surprising that in this situation Czechoslovakia chose to stand by the Treaty it had signed and to refuse unsupported, unsubstantiated demands for radically revising the Treaty. As Slovakia has repeatedly demonstrated, however, Czechoslovakia did meet Hungary more than half way in response to Hungary's expression of concern[12].

The second point is that while Professor Sands strongly suggests that it was Czechoslovakia's *duty* to revise the Treaty to "operationalize"[13] these new norms, he recognizes that this would have to occur "through the procedural means provided by the 1977 Treaty"[14]. Not only does he recognize these procedural requirements, he said the following about whether new norms *had* to be made operational: "No doubt both Parties could agree otherwise, could conceivably agree not to apply a new norm which was imposing costly obligations for the protection of water or endangered species, or even new studies"[15]. So now, Hungary *agrees* with Slovakia that the substantive elements of Articles 15 and 19 were not directly applicable, but were to be implemented in the manner *agreed by the parties* - that is, in the words of Articles 15 and 19, through "the means specified in the joint contractual plan"[16].

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[12] E.g., CR 97/9, p. 63; SR, para. 7.33; and *infra*, this statement.

[13] CR 97/12, p. 70.

[14] *Ibid.*

[15] *Ibid.*

[16] 1977 Treaty, Arts. 15, paras. 1 and 19.

In conclusion on this point, Mr. President, how can Czechoslovakia be said to have breached these new norms of environmental law, when Hungary never even attempted to discharge its onus with regard to them, and when - even assuming Hungary had met its burden - the new norms would have to be "operationalized", as Mr. Sands puts it, through the procedural mechanisms of the 1977 Treaty; that is, the precise content of the new norms and the way in which they were to be implemented would have to have been agreed upon by the Parties.

III. Hungary's Application of the Doctrine of Necessity

Mr. President, I come now to Hungary's application of the doctrine of necessity to the facts of this case. Let me begin by noting the narrowing of the area of the Parties' disagreement. First, last Thursday Professor Sands allowed as how Hungary acknowledged that "it may be unlawful to take certain measures in the context of a treaty obligation unless the illegality of that fact is excluded by the operation of one of the circumstances foreseen by the law of responsibility, including necessity"[17] - a rather elliptical way of saying that by invoking necessity Hungary admits that it breached the Treaty. And second, Hungary now implicitly admits that if the requirements for invoking necessity are fulfilled, they might justify suspension, but not abandonment. Professor Sands states that "[t]he Parties agree that necessity may in principle justify suspension of works" but does not challenge Slovakia's position that necessity cannot justify abandonment of works. With that, Mr. President, I turn to the conditions for invoking what the International Law Commission has described as the "very restrictive" concept of necessity[18] - a characterization with which Hungary agrees[19].

The first requirement is that the unlawful act of the State, in respect of which it invokes necessity, must be the "only means" of avoiding a grave and imminent peril. Mr. President, it

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[17] CR 97/12, p. 77.

[18] [1980] *Y.B. INT'L L. COMM'N*, Vol. 2, pt. 2, p. 41.

[19] CR 97/5, p. 70 (Professor Sands).

is obvious that whether Hungary's suspension and abandonment really were the "only means" turns very much on the facts.

An accurate account of the events surrounding Hungary's material breaches of the Treaty in 1989 - when it unilaterally suspended and abandoned, first, Nagymaros, and then, Gabcíkovo - establishes beyond the slightest doubt that a defence of necessity is not available to exonerate Hungary. My colleague Professor Pellet and I attempted to demonstrate this during the first round of oral hearings[20].

But after listening to the same account from Hungary again last Thursday and Friday, one had the feeling that not the slightest progress had been made - even in these final days of the case - to narrow the major differences between the Parties over what the evidence actually shows. It is really quite extraordinary how fundamentally the Parties continue to differ over what happened and to disagree over the meaning of the evidence.

But I am afraid it is predictable that Hungary would continue to try to obfuscate the facts. It is predictable because Hungary obviously has to fabricate a story if it is to have a ghost of a chance of sustaining its necessity defence to its abandonment of the Project. The true story exposes the many flaws in its necessity thesis.

Professor Crawford introduced his brief but nevertheless inaccurate account by describing the standard he would have the Court apply in evaluating Hungary's conduct: only "[i]f Hungary's expressed concerns were completely fictitious, . . . if they were incredible," could Hungary's account of the diplomatic record be rejected[21]. This, of course, is the precise opposite of the standard recognized by the ILC and in State practice. For example, in the "*Neptune*" case, referred to by Professor Dupuy[22], one of the commissioners, citing Grotius,

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[20] CR 97/9, pp. 42 *et seq*; *ibid*., pp. 62 *et seq*.; and CR 97/10, pp. 10-17. See also SR, paras. 7.01-7.40, 8.01-8.26, and 9.01-9.55; and SC-M, Chaps. IV-VI.

[21] CR 97/12, pp. 16-17.

[22] CR 97/3, p. 82.

said the necessity "must be real and pressing"[23]. Another commissioner said the necessity "must be absolute and irresistible"[24]. As Judge Ago himself put it, the defense may be invoked "only in a case of truly extreme and irresistible necessity"[25], not incidentally where it would be reasonable to do so.

Against this background, Mr. President, let us look at the way in which Professor Crawford summarized Hungary's account of the evidence. His summary contained the following points:

-First, that Hungary had legitimate concerns about the Project in 1989 — as to its cost and validity as well as its environmental impact.

-Second, that for a few months, Czechoslovakia was understanding of these concerns, but this sympathy was soon overtaken by the demands of the Water Company to proceed with Variant "C". Mind you, Professor Crawford still talking about early to mid-1989.

-And third, Variant "C" promptly acquired a life of its own and by late 1990 or early 1991 the only choice open was Variant C - the "die was cast", as Professor Crawford put it[26].

And what evidence did Professor Crawford decide to support this highly incorrect summary - a newspaper article of last Month on Mr. Binder, the head of the Slovak Water Company - "the person who presently controls the Danube at Gabcíkovo", as Professor Crawford described him[27].

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[23] J.B. MOORE, *INTERNATIONAL ADJUDICATIONS*, Vol. IV, pp. 398-399 (New York, Oxford University Press 1931) (Mr. Pinkney).

[24] *Ibid*., p. 433 (Col. Trumbull).

[25] [1980] *Y.B. INT'L L. COMM'N*, Vol. 1, p. 158.

[26] CR 97/12, p. 17.

[27] *Ibid*., p. 15.

The baton was then passed to Professor Sands to further elaborate on this false account and he performed his role admirably. He opened with the remarkable statement concerning the critical events of 1989: Czechoslovakia was "intransigent" - it refused, "point blank", he said, to contemplate "any deviation whatsoever from the construction of Nagymaros, from the Original Project, or from peak power"[28].

Then Professor Sands went into more detail - again, inaccurately - claiming that between May and July 1989 Czechoslovakia had actually participated in negotiations with Hungary that recognized the legitimacy of Hungary's environmental concerns. But according to Professor Sands, when the work of the scientific expert groups was concluded on 19 July, and Hungary thereafter proposed further joint research, Czechoslovakia rejected the proposal and insisted that any problems could be dealt with only by continuing with the construction of Nagymaros. Professor Sands then said that Czechoslovakia's position required Hungary to extend the Nagymaros suspension until 31 October 1989 and to suspend works at Dunakiliti to prevent the damming of the Danube.

Mr. President, there is not the time - nor would I expect the Court to have the patience - to unravel Professor Sands' confused version of the events. I can only respectfully refer the Court to the careful account of the events leading to the abandonment of Nagymaros and Gabcíkovo set out in Chapters VII and VIII of Slovakia's Reply, where references to its earlier pleadings and to the evidence may be found. But I will briefly attempt to summarize what took place in the period between Hungary's first breach in suspending work at Nagymaros on 13 May 1989 and the end of that year, pointing out some of the more serious mistakes in Professor Sands' version of the events.

Up until 20 July 1989, there had been no promising set of negotiations as to Hungary's concerns; Czechoslovakia had had to wait 44 days even to learn what those concerns were in any detail. The three-day meeting in July 1989 was the first technical discussion between

[28] CR 97/12, p. 71.

them, and it served to bring out how far they were apart. Yet, the very next day, Hungary's Government acted to extend the suspension at Nagymaros and - contrary to all prior assurances - to stop work at Gabcíkovo, putting off for a year the possibility of damming the Danube at Dunakiliti.

But Czechoslovakia's position was anything but intransigent, in spite of Hungary's unilateral acts. At meetings of 24 May and 20 July, the Czechoslovak Prime Minister agreed to pursue joint investigations into the concerns of Hungary. As Hungary's Deputy Prime Minister made clear before the scientific meeting to examine the technical position papers that had been exchanged, the risk of proceeding with Nagymaros in Hungary's view arose from *lack of study*.

Therefore, with respect, Professor Sands was absolutely wrong when he said that by the meetings in July 1989, Czechoslovakia had adopted an inflexible, "build now - investigate later" position. On the contrary, it agreed to participate with Hungary in joint studies which were to form the basis for further discussions of Hungarian concerns. These studies were never even initiated by Hungary before it abandoned either Nagymaros or Gabcíkovo, even though it was Hungary's concerns that had given rise to the agreement to investigate further before acting.

It is not necessary to argue with Professor Sands over exactly when the different contracts for work at Nagymaros and Gabcíkovo were terminated by Hungary. But the evidence - including Hungary's own admissions in its 1992 Declaration - establishes beyond question that Nagymaros was unilaterally and irreversibly abandoned by Hungary on 27 October 1989 and all related contracts terminated at that time. Equally, it is clear that Gabcíkovo had been unilaterally abandoned by Hungary by mid-1990 and that all related construction contracts had been terminated by then. In this regard I should now like to examine with the Court the circumstances in which these abandonments occurred.

The crux of Professor Sands' analysis of events is contained in this assertion: "By the end of October the die had been cast [this is apparently a favourite phrase of Hungary's

counsel]: he continues, what was on offer was the original Project or unilateral diversion. Nothing else. Modification of the Project or prior environmental studies were not on offer"[29]. Mr. President, there could hardly be a less accurate picture of the situation as of October 1989 than this.

And here I must dwell for a moment on Hungary's continued insistence that Czechoslovakia steadfastly refused to modify the 1977 Treaty in any respect whatsoever. As Professor Crawford put it last Friday, "Czechoslovakia never accepted that the 1977 Treaty be amended in any respect."[30] It was presumably because Professor Crawford felt this point to be so important that he in fact stated it twice in a row[31]. For good measure, Professor Sands on Thursday referred to Czechoslovakia's "intransigence"[32]. He even went so far as to assert that "the *Slovak* Party has shown not the slightest inclination to deviate" from this alleged "intransigence"[33].

Mr. President, these statements lead one to wonder whether Hungary's counsel have read their own pleadings. I refer them, for example, to Annex 28 to their Memorial, which contains the Czechoslovak *Note Verbale* of 30 October 1989, confirming the offer made at the meeting of Prime Ministers on 26 October 1989[34]. I would have thought that at this late stage it would not be necessary to recall yet again that offer by Czechoslovakia, and that it had three elements - but the persistent refusal of Hungarian counsel to acknowledge any flexibility at all on the part of Czechoslovakia compels me to do so - and I apologize in advance to the Court, which must by now be weary of hearing this. The three elements of Czechoslovakia's offer

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[29] CR 97/12, p. 74.

[30] CR 97/13, p. 51.

[31] *Ibid*.

[32] CR 97/12, p. 71.

[33] *Ibid*. (emphasis added). See also *ibid*., p. 74.

[34] Also contained in SM, Vol. 4, Ann. 76. See also, e.g., the proposed compromises in HR, Vol. 3, Ann. 66.

were: (1) To "compl[y] with the wish of the Hungarian side to conclude an agreement . . . on the system of technical, operational and ecological guarantees concerning [the Gabcíkovo section of the Project]". (2) A proposal to conclude "a special agreement in which both sides would pledge to *limit or exclude peak operation* of the Gabcíkovo-Nagymaros System of Locks". This proposal "was aimed at eliminating the fears of the Hungarian side of possible ecological impacts of the peak operation". And (3) Czechoslovakia proposed "the abolition of the provisions of the February 1989 Protocol concerning the Nagymaros section and [a] return to the timetable included in the October 1983 Protocol" - in other words, delaying the Nagymaros schedule by 15 months - "to enable the Hungarian side to use this period for studying the ecological questions . . . "[35]. The Czechoslovak Prime Minister explained that these "compromise proposals", as he described them, "proceed from the [1977] Treaty . . . and fully conform to it", confirming once again that Czechoslovakia treated the Treaty as being a flexible, framework agreement. But I must repeat, Mr. President, that this package was offered by Czechoslovakia at a meeting of Prime Ministers of 26 October *1989*. If this is evidence of "intransigence", one can only conclude that for Hungary, "flexibility" must mean saying, "Yes, of course, I'll sign absolutely anything you propose."

Why do counsel for Hungary persist in refusing to acknowledge this and other clear evidence of Czechoslovak flexibility and willingness to compromise? It takes only a moment's reflection to realize what Hungary's counsel are up to here: they wish to avoid at all costs a declaration by this Court that the 1977 Treaty is in force. Therefore, their obvious, if not openly-stated, purpose is to create the impression that Hungary had no choice but to abandon the Project because of Czechoslovakia's wooden and unreasonable "intransigence". A purpose that is perhaps less obvious, but no less real, is to convince the Court that finding the Treaty to be in effect would mean forcing Hungary to endure the unendurable: to construct, and accept the operation of, every last detail - and for Hungary, every last

[35] HM, Vol. 4, Ann. 28; SM, Vol. 4, Ann. 76.

excruciating detail - of the so-called "Original Project" - and thus to capitulate to inflexible Slovak demands. In short, Hungary would have the Court believe that to find the Treaty to be in force would be to force Hungary to dig its own grave. But Mr. President, Members of the Court, this is a scenario built on a fantasy that exists only in the imagination of Hungary's counsel. I have just reviewed one example of Czechoslovak flexibility. Additional examples will be referred to by Sir Arthur Watts tomorrow. But it is abundantly clear, even from the single - yet important - example I have noted, that the Hungarian horror story bears not one iota of resemblance to reality.

Thus Mr. President, Czechoslovakia can hardly be said to have been inflexible, or "intransigent". Nor by any stretch of the imagination can Slovakia's position be so characterized - as will have been obvious to anyone who listened at all, for example, to my colleague Alain Pellet's pleading, on 27 March in this Great Hall of Justice, on remedies. He said the following ""Pour la Slovaquie, [la notion de 'réversibilité'] signifie non pas le retour au 'projet original'... mais la mise en oeuvre du traité de 1977 tel qu'il a été

progressivement adapté, précisé et complété - et peut encore l'être . . .".[36] Hungary's false characterization of Slovakia's position betrays Hungary's defensiveness as to its own intransigence: Professor Sands says "[t]he 1977 Treaty did not allow either party to impose its will on [the] other[]"[37] but he does not explain how this squares with Hungary's unilateral suspension and abandonment of the Project, on which it never showed the slightest willingness to compromise; and Hungary's counsel would like very much for the Court to forget Hungary's attitude toward negotiation with its Treaty partner in 1990-1991, which was: "Yes, please, let's negotiate - but, of course, *only* with regard to the termination of the Treaty."[38]

Mr. President, I have responded to Hungary's charges of Czechoslovak inflexibility in the specific context of Hungary's argument that there was a state of necessity. From what I have said, it is clear that there was no such state of necessity. Even if we assume that there was a "grave ... peril",[39] which Hungary did not even attempt to demonstrate, it is obvious: first, that any peril cannot have been "imminent" in view of the offer of the 15-month delay; and second, that suspension and abandonment were not the "only means" of avoiding that peril - the Czechoslovak Prime Minister had offered to conclude new agreements on both ecological guarantees and the limitation or exclusion of peak operation. But, Mr. President, while I have demonstrated Czechoslovak flexibility in this particular context, the flexibility and willingness to compromise of both Czechoslovakia and Slovakia is central to this dispute

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[36] CR 97/11, e.g., pp. 45 ("Pour la Slovaquie, [la notion de 'réversibilité'] signifie non pas le retour au 'projet original'... mais la mise en oeuvre du traité de 1977 tel qu'il a été progressivement adapté, précisé et complété - et peut encore l'être ...."); and 53 ("la Slovaquie ne se refuse pas à priori à des aménagements du traité .... [I]l s'agit d'apurer le passé et d'organiser la transition").

[37] CR 97/12, p. 70.

[38] Hungarian Government Resolution 3507/1990, 20 December 1990, HM, Vol. 4, Ann. 153; Hungarian Parliamentary Resolution 26/1991 (IV.23.), 16 April 1991, HC-M, Vol. 3, Ann. 51.

[39] International Law Commission, Draft Articles on State Responsibility, Part One, Art. 33 (1) *(a)*, [1980] *Y.B. INT'L L. COMM'N*, Vol. 2, pt. 2, p. 34.

as a whole. For it shows that to find that 1977 Treaty is in full force and effect is a long way indeed from forcing Hungary to lie in a Procrustean Bed. Suspension and abandonment were, quite clearly, *not* the only means available to Hungary of averting the alleged peril.

Mr. President, Hungarian counsel have professed to be "surpris[ed]"[40], and even "astonish[ed]"[41] at the argument that the availability to Hungary of the dispute settlement procedures under Article 27, coupled with ample time in which to have recourse to them, meant that suspending and abandoning were not the "only means" of avoiding the alleged peril. But what does Hungary argue? Hungary argues that its suspension of Nagymaros was "necessary" because while any effect of Nagymaros on Budapest's water supply would, in Professor Crawford's words, "[n]o doubt take some time to follow", the fact that the Nagymaros barrage was under construction in 1989 made the situation "imminent".[42] But in fact, under the Protocol of 6 February 1989 that was in force at the time, Nagymaros was not scheduled to begin coming on line until 19*92* - several *years* later! This is a strange notion of "imminence" indeed. But it also bears upon the availability of other means of avoiding the problem - such as raising it through the procedures of Article 27. Of course, Hungarian counsel's disdain for Article 27 might be understandable if the procedures under that article were completely meaningless. Professor Valki suggests that no real dispute could be settled by the lowly Plenipotentiaries. The trouble with this argument is that the parties to the 1977 Treaty themselves obviously thought that real disputes *could* be settled by the Plenipotentiaries, or they would not have bothered to include this means of dispute settlement within Article 27. (I might mention in passing that this is not at all uncommon; the famous agreement concerning another of the world's major rivers, the Indus, contains exactly the same

[40] CR 97/13, p. 37 (Prof. Valki).

[41] CR 97/12, p. 15 (Prof. Crawford).

[42] CR 97/4, p. 14.

kind of provision.[43] It calls for disputes to be settled by the Permanent Indus Commission, which consists of one commissioner from each of the two parties[44] - just as in the case of the Plenipotentiaries.)

As part of his attempt to belittle Article 27, Professor Valki asserts that "Czechoslovakia never once complained about the Hungarian failure to invoke the Article 27 procedure".[45] Mr. President, the documentary evidence submitted by the Parties speaks for itself: taking for this purpose only the first major Hungarian breach, the *very first response* of the Czechoslovak Government to Hungary's decision to suspend work at Nagymaros, a response handed to the Hungarian Ambassador in Prague on 15 May 1989, stated in part: "This step infringed the provision of the Treaty concerning the solution of points at issue"[46] - an unmistakable reference to Article 27. This protest confirms the proposition that this means of avoiding the alleged peril *was* worth bothering with, contrary to the argument of Hungary's counsel.

The final point as to the first requirement concerns Professor Sands' argument that Hungary's suspension of work in May 1989 was the only means of protecting its essential interests because "[i]t was the only way to stop construction of Nagymaros and guarantee Budapest's water."[47] It will be clear from what I have already said, in particular from the language of the Czechoslovak *Note Verbale* of 30 October 1989, that suspension was *not* the "only way" to accomplish these objectives. In fact, it was not even necessary to "stop construction of Nagymaros" - because Czechoslovakia had already offered to put it off for 15 months. This is like saying you have to slam on the brakes of a car that is already in the

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[43] Indus Waters Treaty, 19 September 1960 (India and Pakistan), Article 9, United Nations, Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation, Treaty No. 98, p. 300, Sales No. 63.V.4.

[44] *Ibid.*, Art. 8.

[45] CR 97/13, p. 35; also p. 38.

[46] SC-M, Vol. 2, Ann. 10.

[47] CR 97/12, p. 78.

garage with its emergency brake on. That there was no need to suspend Nagymaros given the extra time available, in that there was no need also goes to the imminence requirement, which I will come to in a moment. But all of these circumstances leave no doubt that the first requirement was far from having been satisfied. As Judge Anzilotti put it in his individual opinion in the *Oscar Chinn* case, decided by the Permanent Court in 1934: "the plea of necessity ... implies the impossibility of proceeding by any other method than the one contrary to law."[48]

The second condition for the invocation of necessity is that the otherwise unlawful conduct must be necessary to safeguard an "essential interest". There is really no significant disagreement between the parties on this point: they both accept that safeguarding a country's "ecological balance" has come to be considered an "essential interest". The problem is, rather, whether Hungary's "ecological balance" was under a "grave and imminent peril" in 1989-1990. This is the third condition for invoking necessity, to which I now turn.

On this condition, Professor Sands says the following: "Why environmental necessity cannot be invoked to justify further studies to reduce uncertainty is unclear to me"[49]. It was also, evidently, "unclear" to Hungary. Mr. President, with apologies to my Francophone friends, all one can say to that expression of puzzlement is, "Nous y voilà"! Hungary simply does not understand the "very restrictive" conditions for invoking a state of necessity. But on a purely factual level, Mr. President, this argument entirely misses the target. There simply was no need to invoke necessity to justify the further studies that Hungary deemed necessary - Czechoslovakia had already agreed to them! Otherwise on this condition, Professor Sands recycles the argument that suspension was necessary to prevent completion of Nagymaros, adding that what he refers to as the "preventive and precautionary approach" made the peril imminent[50]. Aside from the fact that the precautionary approach had barely begun to be

[48] Judgment of 12 December 1934, *P.C.I.J., Series A/B, No. 63*, p. 65, at p. 114.

[49] *Ibid.*

[50] *Ibid.*, pp. 78-79.

formulated in 1989, Hungary's problem here is, yet again, with the facts. As I have already noted, Hungary never provided any evidence of the kind of "grave peril" required to establish a state of necessity. It did assert a risk to Budapest's drinking water supplies - but there was nothing new in this: as my colleague Mr. Wordsworth explained earlier, all Hungary now claims is that this risk became known thanks to a study by the Budapest Waterworks in "the early 1980s"[51]! And what did that study recommend? It recommended this: "The channel regulation downstream of Nagymaros must be planned with due concern for the [risk to the Budapest water supply]." Mr. President, planning to avoid an identified risk, whether a high risk or a low one, is certainly reasonable. However, *that* kind of risk - one that can be planned for and avoided - is most certainly *not* what Judge Ago or the ILC had in mind in formulating its rules on a state of necessity.

Mr. President, I have about eight to ten more minutes. Should I go on? Thank you, Mr. President.

The fourth requirement is that even where the conditions for invoking a state of necessity are otherwise satisfied, a State may not invoke this ground for precluding wrongfulness if it "has contributed to the occurrence of the state of necessity"[52]. In this connection Professor Willem Riphagen, a former special Rapporteur of the International Law Commission on State Responsibility, had this to say during the Commission's plenary debate on Judge Ago's proposed draft of what became Article 33 on state of necessity:

> "Often, a situation in which a State's essential interest was threatened by a grave and imminent peril could have been foreseen and avoided. . . . Inevitably, that implied assessing the internal policy measures that a State had taken, or failed to take, and that had brought about, or contributed to, the situation of peril"[53].

In the present case, Hungary admittedly knew about the possible risk to Budapest's water supply at least since the early 1980s, as we have just seen, yet did not do anything about it.

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[51] CR 97/12, p. 53.

[52] Draft Articles on State Responsibility, Article 33(2)(c).

[53] [1980] *Y.B. INT'L L. COMM'N*, Vol. 1, p. 161.

We do not know why. It may have concluded that adequate precautions had been taken, that since the possibility was of *remote* damage it would deal with it later - we simply do not know. But what we do know is that having decided not to take preventive measures with regard to this situation for the better part of a decade, Hungary could not claim in 1989 that there was suddenly a state of necessity. And even if there was, Hungary would be precluded from invoking it because its failure to take the necessary preventive measures had clearly "contributed to this situation of peril."

Mr. President, the fifth and final condition for invoking a state of necessity is that the breaches whose wrongfulness Hungary wishes to preclude must not have seriously impaired an essential interest of Czechoslovakia[54]. Here, in five lines, Professor Sands simply characterizes the 1977 Treaty as a "building contract" and implies that, by definition, that cannot be something in which a State has an essential interest - certainly not one that compares with Hungary's "essential and vital interest in safeguarding drinking water supplies"[55]. Mr. President, this caricature of the interests of Slovakia and Czechoslovakia does not begin to do them justice. Briefly: Did Czechoslovakia, and does Slovakia, not have an essential interest in protecting its population from devastating floods? Is there not an essential interest in providing the 10 per cent of the country's energy that Gabcíkovo supplies? Did Czechoslovakia not have an essential interest in seeing that its costly investment of billions of dollars in the Treaty-Project should be utilized - and not left to decay and stand idle? And - a most surprising omission, given Hungary's strategy - did Czechoslovakia not have an essential interest in re-vitalizing the river branch system and protecting the water quality of the Bratislava region - both clear aims of the 1977 Treaty? Hungary presumably chose not to address these questions because it realized the answers to them are obvious: Hungary's actions *did* seriously impair essential interests of Czechoslovakia - and now, of Slovakia.

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[54] Draft Articles on State Responsibility, Article 33(1)(b).

[55] CR 97/12, p. 79.

Mr. President, Hungary's defence of necessity for its suspension and abandonment of works in the Gabcíkovo section is dealt with in one brief paragraph by Professor Sands. He says that the imminence of the diversion at Dunakiliti, coupled with the emergence of concerns about the impacts on the Szigetköz, created a situation of necessity with regard to suspension[56]. And as to abandonment, he says that, "these factors when combined with the refusal of Czechoslovakia even to discuss the future of the downstream sector or peak power operation, continue to give rise to an enhanced state of necessity"[57].

Let us first take the so-called "imminence of the diversion . . . at Dunakiliti". This assertion is astonishing. It was Hungary's own Prime Minister who advanced a proposal on 20 July 1989 for *proceeding* with Gabcíkovo subject to a guarantees agreement. This proposal was renewed in early October and, at the famous meeting of Prime Ministers on 26 October, accepted in principle by Czechoslovakia[58]. It is true that also on 20 July Hungary had effectively postponed the damming of the Danube at Dunakiliti for a whole year by unilaterally suspending work at Gabcíkovo. But the point, Mr. President, is that Hungary actually proposed proceeding with Gabcíkovo subject to an agreement on ecological guarantees - that is, an agreement to safeguard Hungary against the *precise* peril it professed to fear - and Czechoslovakia accepted in principle. How, then, Mr. President, Members of the Court, how then, can Hungary claim that there *was* a peril, let alone that it was imminent?

So it was the expectation of both Parties that Gabcíkovo would proceed on the basis of environmental guarantees - albeit a year behind schedule. In the meantime, on 27 October, Hungary explicitly abandoned Nagymaros and terminated the related construction contracts; from that moment on, Nagymaros was non-negotiable. But the fact remains that Hungary itself had proposed to go ahead with the Project upstream, at Gabcíkovo.

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[56] CR 97/12, p. 79.

[57] *Ibid*., pp. 79-80.

[58] See Czechoslovak *Note Verbale* of 30 October 1989, HM, Vol. 4, Ann. 28; SM, Vol. 4, Ann. 76.

What, then, of the claim that abandonment of Gabcíkovo was justified by Czechoslovakia's refusal, in Professor Sands' words, "even to discuss . . . the future of the downstream sector or a peak power operation"? Again, Mr. President, one wonders whether we are talking about the same case. I have already shown that Czechoslovakia *did* offer to discuss precisely these matters, at the 26 October meeting of the Prime Ministers. So Hungary's factual basis for abandonment on the ground of necessity likewise disappears.

Getting back to the chronology, by the end of October 1989, Hungary had abandoned Nagymaros, but there was still on the table the offer of the Hungarian Prime Minister to proceed with Gabcíkovo subject to an ecological guarantees agreement. But then, Mr. President, the roof fell in. In January 1990, Hungary's Prime Minister reneged on his offer. By mid-1990, all Project contracts had been terminated. But Hungary does not even attempt to show how "necessity" suddenly entered the picture to bring about this *volte face*. Finally, in its Resolution of 20 December 1990, the Hungarian Government formally decided to proceed with negotiations to terminate the Treaty. And Hungary speaks of *Czechoslovak* "intransigence".

Mr. President, there is no doubt that under these circumstances, circumstances fairly bristling with opportunities for Hungary to avoid any perceived peril, there can have been no state of necessity at Gabcíkovo, especially in the very restrictive sense intended by the International Law Commission.

Mr. President, Members of the Court, that concludes my presentation. It has been a great honour and privilege to appear before you and I thank you very much for your kind attention.

The PRESIDENT: Thank you Professor McCaffrey. The Court will suspend and resume tomorrow morning at 10 o'clock.

The Court rose at 1.00 p.m.
