CR 97/15

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1997

Public sitting

held on Tuesday 15 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 mardi 15 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

M. Skubiszewski, juge *ad hoc*

M. Valencia-Ospina, Greffier

The Republic of Hungary is represented by:

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

as Agent and Counsel;

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

as Co-Agent;

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

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

Mr. Alexandre Kiss, Director of Research, Centre National de la recherche Scientifique (ret.),

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

Mr. Boldizsár Nagy, Associate Professor of International Law, Eötvös Loránd University, Budapest,

Mr. Philippe Sands, Reader in International Law, University of London, School of Oriental and African Studies, and Global Professor of Law, New York University,

Ms Katherine Gorove, consulting Attorney,

as Counsel and Advocates;

Dr. Howard Wheater, Professor of Hydrology, Imperial College, London,

Dr. Gábor Vida, Professor of Biology, Eötvös Loránd University, Budapest, Member of the Hungarian Academy of Sciences,

Dr. Roland Carbiener, Professor emeritus of the University of Strasbourg,

Dr. Klaus Kern, consulting Engineer, Karlsruhe,

as Advocates;

Mr. Edward Helgeson,

Mr. Stuart Oldham,

Mr. Péter Molnár,

as Advisers;

La République de Hongrie est représentée par :

S. Exc. M. György Szénási, ambassadeur, directeur du département du droit international au ministère des affaires étrangères,

comme agent et conseil;

S. Exc. M. Dénes Tomaj, ambassadeur de la République de Hongrie aux Pays-Bas,

comme coagent;

M. James R. Crawford, professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge,

M. Pierre-Marie Dupuy, professeur à l'Université Panthéon-Assas (Paris II) et directeur de l'Institut des hautes études internationales de Paris,

M. Alexandre Kiss, directeur de recherches au Centre national de la recherche scientifique (en retraite),

M. László Valki, professeur de droit international à l'Université Eötvös Lorand de Budapest,

M. Boldizsár Nagy, professeur associé de droit international à l'Université Eötvös Lorand de Budapest,

M. Philippe Sands, chargé de cours en droit international à l'Université de Londres, School of Oriental and African Studies, et *Global Professor of Law* à l'Université de New York,

Mme Katherine Gorove, juriste-conseil,

comme conseils et avocats;

M. Howard Wheater, professeur d'hydrologie à l'Imperial College de Londres,

M. Gábor Vida, professeur de biologie à l'Université Eötvös Lorand de Budapest, membre de l'Académie des sciences de Hongrie,

M. Roland Carbiener, professeur émérite de l'Université de Strasbourg,

M. Klaus Kern, ingénieur-conseil à Karlsruhe,

comme avocats;

M. Edward Helgeson,

M. Stuart Oldham,

M. Péter Molnár,

comme conseillers;

Dr. György Kovács,

Mr. Timothy Walsh,

Mr. Zoltán Kovács,

as Technical Advisers;

Dr. Attila Nyikos,

as Assistant;

Mr. Axel Gosseries, LL.M.,

as Translator;

Ms Éva Kocsis,

Ms Katinka Tompa,

as Secretaries.

The Slovak Republic is represented by:

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

as Agent;

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

as Co-Agent, Counsel and Advocate;

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

as Counsel;

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, Former Member of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris X — Nanterre and at the Institute of Political Studies, Paris, Member of the International Law Commission,

Mr. W. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Colombia,

Sir Arthur Watts, K.C.M.G., Q.C., Barrister, Member of the Bar of England and Wales,

M. György Kovács,

M. Timothy Walsh,

M. Zoltán Kovács,

comme conseillers techniques;

M. Attila Nyikos,

comme assistant;

M. Axel Gosseries, LL.M.,

comme traducteur;

Mme Éva Kocsis,

Mme Katinka Tompa,

comme secrétaires.

La République slovaque est representée par :

S. Exc. M. Peter Tomka, ambassadeur, conseiller juridique du ministère des affaires étrangères,

comme agent;

M. Václav Mikulka, membre de la Commission du droit international,

comme coagent, conseil et avocat;

M. Derek W. Bowett, C.B.E., Q.C., F.B.A., professeur émérite, ancien titulaire de la chaire Whewell à l'Université de Cambridge, ancien membre de la Commission du droit international,

comme conseil;

M. Stephen C. McCaffrey, professeur de droit international à la faculté de droit McGeorge de l'Université du Pacifique, Sacramento (Etats-Unis d'Amérique), ancien membre de la Commission du droit international,

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre et à l'Institut d'études politiques de Paris, membre de la Commission du

M. Walter D. Sohier, membre des barreaux de l'Etat de New York et du district de Columbia,

Sir Arthur Watts, K.C.M.G., Q.C., avocat au barreau d'Angleterre et du pays de Galles,

Mr. Samuel S. Wordsworth, *avocat à la Cour au barreau de* Paris, Solicitor England and Wales, Frere Cholmeley, Paris,

as Counsel and Advocates;

Mr. Igor Mucha, Professor of Hydrogeology and Former Head of the Groundwater Department at the Faculty of Natural Sciences of Comenius University in Bratislava,

Mr. Karra Venkateswara Rao, Director of Water Resources Engineering,

Department of Civil Engineering, City University, London,

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

as Counsel and Experts;

Dr. Cecília Kandrá_ová, Director of Department, Ministry of Foreign Affairs,

Mr. Lud_k Krajhanzl, Attorney at Law, Vyroubal Krajhanzl Skácel and Partners Law Firm, Prague,

Mr. Miroslav Liška, Head of the Division for Public Relations and Expertise, Water Resources Development State Enterprise, Bratislava,

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

as Counsellors;

Ms Anouche Beaudouin, *allocataire de recherche* at the University of Paris X — Nanterre,

Ms Cheryl Dunn, Frere Cholmeley, Paris,

Ms Nikoleta Glindová, *attachée*, Ministry of Foreign Affairs,

Mr. Drahoslav Štefánek, *attaché*, Ministry of Foreign Affairs,

as Legal Assistants;

Ms Alexandra James,

as Secretary.

M. Samuel S. Wordsworth, avocat à la Cour, Frere Cholmeley, Paris, *Solicitor* auprès de la Cour suprême d'Angleterre et du pays de Galles,

comme conseils et avocats;

M. Igor Mucha, professeur d'hydrogéologie et ancien directeur du département des eaux souterraines à la faculté des sciences naturelles de l'Université Comenius de Bratislava,

M. Karra Venkateswara Rao, directeur du Génie, section des ressources hydrologiques, département du Génie civil, Université de la ville de Londres,

M. Jens Christian Refsgaard, directeur de la recherche et du développement à l'Institut danois d'hydraulique,

comme conseils et experts;

Mme Cecília Kandrá_ová, directeur de département, ministère des affaires étrangères,

M. Lud_k Krajhanzl, avocat, membre du cabinet Vyroubal Krajhanzl Skácel et associés, Prague,

M. Miroslav Liška, directeur de la division des relations publiques et de l'expertise, entreprise d'Etat pour le développement des ressources hydrauliques, Bratislava,

M. Peter Vršanský, ministre-conseiller, chargé d'affaires a.i. à l'ambassade de la République slovaque, La Haye,

comme conseillers;

Mlle Anouche Beaudouin, allocataire de recherche à l'Université de Paris X-Nanterre,

Mme Cheryl Dunn, Frere Cholmeley, Paris,

Mme Nikoleta Glindová, attachée, ministère des affaires étrangères,

M. Drahoslav Štefánek, attaché, ministère des affaires étrangères,

comme assistants juridiques;

Mme Alexandra James,

comme secrétaire.

The PRESIDENT: Please be seated. The oral presentation of the Slovak Republic resumes this morning and I call on Professor Mucha.

Mr. MUCHA:

Monitoring and Environmental Impacts of the Gabcíkovo Section of the Project

Mr. President, Members of the Court, my presentation today will be brief. Its purpose is to complete main conclusions made by Mr. Mikulka yesterday concerning Hungary's allegations as to adverse impacts of the Gabcíkovo section of the Project by a few examples of how Hungary's counsel have distorted the evidence to give an impression of adverse impacts, in particular to water quality.

But first, in terms of the alleged **ground**water level changes, I wish to **take a closer look** on the *Hungarian* side of the Danube – in the Szigetköz – comparing the pre-damming year 1992 with 1993, 1994, 1995, and 1996 (after construction of the underwater weir). All the data on which I shall base my conclusions are taken from Hungary's data submitted as part of the agreed Joint Monitoring Programme. The map of the wells in Hungarian territory appears now on the screen (*Judge's Folder* No. 45). The Court can see cross-sections 1 through 5 on this map on the Hungarian side.

The Court can now see on the screen graphs of each of these cross-sections covering the years from 1992 through 1996. Copies of these graphs are also in the *Judges Folder*. They show the **ground**water levels in the wells in the cross-sections I have just shown you (Nos. 46 to 48 *in Judge's Folder*). What do the graphs **tell us** ? Cross-section No. 3 **indicates** slight increases of **almost** no differences in groundwater levels when comparing the pre-dam year of 1992 and 1996 (**that is the situation** after **the** construction of the under-water weir near Dunakiliti). In the period in between – for the years 1993 and 1994 – a decrease of groundwater level occurred. This, of course, was because no measures in the old riverbed had been carried out to allow water to flow into the Hungarian side arms.

Cross-section No. 4 shows the **extent of** draining effect of the Danube **in the section** without under-water weirs. These data directly refute Hungary's claim of dramatic groundwater decreases throughout the

area following the damming of the Danube in October 1992, and also show how underwater weirs can remedy decreased groundwater levels.

Mr. President, I would like now to give a few examples showing how the arguments of Dr. Kern and Professor Wheater relied on a misleading use of scientific reports.

Professor Wheater made some **specific points concerning the content of mercury. He said that:** (CR 97/12, p. 93): "Concentrations of mercury in suspended sediment exceed limit values at all monitoring locations". This gives a misleading impression. For the Joint Monitoring Report states:

> "Concentrations of mercury, the most toxic heavy metal, in the suspended solids have reached the Lowest Effect Level (LEL) at all stations, during the investigated period. In certain stations the concentration of mercury reached the Severe Effect Level (SEL). The mercury content of the bottom sediments is lower than that of the suspended solids. Mean concentrations were of the order of a few tenths of mg/l; while even the maximal have not reached the severe effect level." (Tendency and dynamics of Water Quality Changes of the Danube River and its Tributaries (1989-1995), Extensive monitoring, Water Quality Protection Working Group of the Transboundary Water Commission, BRATISLAVA-BUDAPEST, December 1996, p. 13.)

Further along in the report, in Annex 4/1, the data are tabulated for the period 1989-1995. Minimal, mean and maximal values at Bratislava (upstream of the reservoir) are 0.2, 1.4, 7.4 mg/kg, respectively, and at Komarno (downstream of the reservoir) are nearly the same (0.2, 1.5, 6.1, respectively). This means that the reservoir has no impact on the content of mercury in suspended sediments.

In terms of mercury content in water there has been an increase in the maximal values in the Danube water at Bratislava, from 0.4 — pre-dam period — to 0.8 ug/l (microgram per litre), — after the damming. The same pattern is visible downstream of the reservoir at Medvedov for the same periods. The scientific evaluation of these measured facts cannot be used to show an impact of the Gabcíkovo structures. The data do not indicate any significant influence of the reservoir and the source of mercury is

evidently upstream of the reservoir, because the increase has been recorded already in Bratislava.

Professor Wheater also claims that the PHARE Report has identified a previously overlooked problem "the occurrence of high nitrite concentration (NO2) which is highly toxic". He concludes on the basis of this assertion: “In sum, the PHARE Report confirms Hungary's concerns for groundwater" (CR 97/12, p. 91). This could not be further from the truth. Professor Wheater has merely created a "problem" by taking a theoretical statement from the introduction to the relevant section and presenting this entirely out of context as a conclusion (PHARE/EC/WAT/1 Report, December 1995, Vol. 2, pp. 7-3, Chap. 7.3 Identification of the Reactive Processes). But Professor Wheater should have read further to see what the PHARE Report’s conclusions would be as to whether this problem would arise.

As the PHARE Report notes, the nitrite concentration measured in April 1993 in 72 groundwater samples were all below drinking water limits (0.1 mg/l).

I will now give one final example of a doubtful reference to scientific reports by Hungarian counsel: During the site visit, Hungary presented the groundwater level decrease as a negative impact of Variant C, comparing the weekly girth growth of selected individual trees in pre-dam and post-dam conditions (Illus. Hungarian posters No. 2.6). Reference was made to the Joint Monitoring (National Annual Report of Environmental Monitoring in the Szigetköz, 1997). However, the data presented by Hungary as data from the Joint Monitoring were neither given to Slovakia, nor included in the Hungarian national report. They were *not* part of the Joint Monitoring.

And, in terms of Hungary's floodplain forest, I would like just to recall an important question posed by the Court during the site visit: "How much of the floodplain forest in the flooplain is *cultivated*?" The

answer must be simple, but Hungary declined to give it. I do know, however, that at least 65% of this forest is hybrid poplar (HR, Vol. 2, plate 6.1). I know from the Slovak side that the vast majority of the remainder is cultivated forest also.

Mr. President, Members of the Court, this has been a somewhat random selection of points. What it shows is how misleading some of Hungary's oral presentations have been.

I thank you very much for your attention and ask you to call on Sir Arthur Watts.

The PRESIDENT: Thank you so much, Professor Mucha. I call now on Sir Arthur Watts.

Sir Arthur WATTS:

Legal Justification of Variant C

Mr. President, Members of the Court, I should like now to respond to various points made by counsel for Hungary regarding the legality of Variant C.

The Court will recall the background (see CR 97/10, pp. 52-61). Hungary's abrupt suspension, and then abandonment, of work in 1989 and 1990 left Czechoslovakia with a massive but now useless investment, with virtually completed structures having to stand idle, and with the original environmental and navigational problems which had given rise to the 1977 Treaty unresolved.

Czechoslovakia sought to resolve matters through bilateral negotiation, and through the involvement of third parties. Hungary was not interested. But this left Czechoslovakia facing an impossible situation on the ground. As a last resort, when all other alternatives for joint operation had been shown to be unworkable because of Hungary's unco-operative attitude, Czechoslovakia turned to Variant C. It was not Czechoslovakia's preferred solution, but it was the only available

solution; and in keeping as closely as was possible in the circumstances to the original Treaty Project, Czechoslovakia was able to continue to apply the 1977 Treaty in all its essentials. That, Mr. President, was the gist of the situation.

The adoption of Variant C

Professor Dupuy devoted much time again last week to the question of chronology. He sought to show that Variant C had been Czechoslovakia's choice since 1989 (CR 97/13, p. 21).

He concentrated on just three points.

First, he noted Slovakia's acceptance that consideration had been given to Variant C before November 1991, or even before July 1991 when the decision had been taken to approve the initial financing and planning of Variant C. Is that really so surprising, Mr. President? Complex decisions cannot be taken without first considering the possibilities. There is a world of difference between saying, on the one hand, "What are the options and their implications?", and saying, on the other hand, "Start drawing up detailed plans for that particular option, and here is the money with which to do so"; and — if, Mr. President, you will allow me three hands — saying, on yet a further hand, "We have seen the plans, and we now go ahead with a particular option covered by those plans." Mr. President, I believe that anyone remotely familiar with the way in which government ministries work will recognize those three quite distinct stages. Translated to our present concerns, they correspond to the kind of work being done before July 1991; the decision to finance detailed planning — but still only *planning* — on 25 July 1991; and finally, actually proceeding with Variant C in November 1991. To say, as Professor Dupuy did, that all acts of a government are attributable to the State irrespective of the organ concerned does not, with great respect, advance matters at all: one must still analyse the acts in

question accurately — and if they were merely discussion, or consideration, or planning, they do not suddenly become decisions or decisive actions by saying that they were performed by some State organ. Czechoslovakia did not actually proceed with Variant C until November 1991.

Professor Dupuy's second point concerned Slovakia's acceptance of the authenticity of certain documents. He mentioned three items.

(a) First, we have two newspaper reports. The first reports, on 2 November 1989, an interview with Mr. Oblozinsky (HR, Vol. 3, Ann. 60). He was interviewed in his capacity as "representative of the investment company" engaged in construction work on the Project: his views are not attributable to Czechoslovakia. In any event, he was speaking only in the context of being "prepared for every eventuality", and he ended by saying, "should the government decide on" the construction alternative he had outlined — thereby he was clearly showing that no such decision had yet been taken. The second newspaper report was of a statement made on behalf of the Czechoslovak Government and published in a newspaper on 31 October 1989 (HR, Vol. 3, Ann. 60). It says little: *if* Hungary reneges on its treaty obligations, Czechoslovakia will be compelled to implement a provisional technical solution exclusively on Czechoslovak territory. So it is just a statement of a likely response to what Czechoslovakia even then hoped might still be only a hypothetical situation, setting out the *principle* which Czechoslovakia would, inevitably, have to apply: it is far from evidence that any specific application of that principle, such as Variant C, had already been decided upon.

(b) Then there is the "International Law Analysis" of 29 October 1990 (HR, Vol. 3, Ann. 64). This was an annex to an opinion of 29 November 1990 (HR, Vol. 3, Ann. 65). The two documents clearly have to be read together. The second demonstrates that the Czechoslovak

authorities were looking at a whole range of options — it lists 7, Variants A to G (SM, paras. 5.14-5.23). Not surprisingly it was the "C" variant which merited study from an international law point of view, since it was the only option which did not involve joint — and therefore agreed — action with Hungary. So accordingly, the legal analysis was put in hand and the result annexed to the main paper. But what does all this show, Mr. President? Certainly not that any *decision* in favour of Variant C had by then been taken: rather, it shows the very opposite — that, as late as 29 November 1990 all seven options were still being considered and that no decision in favour of Variant C had yet been taken. Professor Dupuy tries to get round this by saying that I would well know, from my personal experience, that a document like this "Legal Analysis" would only be produced by a legal service when the political authorities were on the point of taking a decision. But, Mr. President, it is *not* my experience that such a paper is prepared only when a decision is imminent: in my experience, such papers are prepared well in advance of any likely decision, and it would be exceptional to leave such a paper to the last minute.

(c) Professor Dupuy's third point concerns yet another press report. This time of what Mr. Meciar said in August 1990 (HR, Vol. 3, Ann. 62). But all that *Mr. Meciar* is reported as doing is to urge "the completion of the Gabcíkovo barrage": what is so terrible about that? — after all, it was what the 1977 Treaty required! The rest — the "substitute solution", what would "probably" be done "should [something] not happen", and so on — is pure journalistic comment: as evidence it is worthless.

So, Mr. President, the three items relied upon by Professor Dupuy simply do not bear scrutiny as evidence for Hungary's view as to the true date when a decision to adopt Variant C was taken.

Where Hungary *does* have evidence, however, the problem is that counsel for Hungary do not read it! Last week Professor Crawford complained that the Court had never been allowed to see the building permit which allowed Variant C to be proceeded with in November 1991. Not only has the Court had a copy for nearly two years, it was submitted by Hungary! (HR, Ann. 81).

It is, of course, easy to see why Hungary tries so hard to establish, against all the evidence, that Variant C was decided upon and implemented much earlier than mid- or late-1991 — unless that can be established, Hungary's argument that Czechoslovakia had repudiated the Treaty by virtue of such earlier acts, and Hungary's argument for a case of necessity, fall completely away. The facts just do not support Hungary's case. Czechoslovakia did not proceed with Variant C until November 1991, and Hungary has produced no credible evidence or argument to suggest otherwise. That point has already been decided by agreement between the Parties, in the Special Agreement. That really ought to be an end of the matter.

There is another point. Professor Nagy contends that there were alternatives to Variant C, which Czechoslovakia could have adopted (CR 97/12, pp. 84-85). Let us look at them, Mr. President.

When Variant C was being considered it was one amongst seven variants — Variant A, B, and so on, through to G (SM, paras. 5.14-5.5.23). But all those other options involved, in one form or another, joint action with Hungary — and Hungary had by mid-1991 made it abundantly clear that it was simply not interested in *any* form of joint operation of the Treaty Project or of any variation of it: Hungary's *sole* interest lay in negotiating the termination of the whole Treaty. So those other variants had to be ruled out as realistic options — thanks to Hungary, it must be said. What other options did Professor Nagy offer? — "drop the whole Project" was one. Well, yes, Mr. President,

Hungary would no doubt have been happy with that option: but what about the Treaty which Hungary had entered into, committing it to the Project? What about the real ecological disaster which would have been the result of doing nothing more — acres of bare concrete; massive structures standing idle, unused, and deteriorating; all the original problems of flood control and so on left unresolved? Mr. President, not remotely a realistic option.

Anything else? — yes, Mr. President, Professor Nagy suggested that Czechoslovakia should have taken up Hungary's unilateral Application to this Court (HM, Vol. 4, Ann. 102). But Professor Nagy omitted to mention three points about that Application. **First**, it was filed on 23 October 1992, so was not in the least relevant to proceeding with Variant C taken in November 19*91*; and, in practical terms, it was scarcely any more relevant to the decision in October 1992 to put Variant C into operation. **Second**, Hungary's Application was in substance only concerned with the legality of Variant C, and did not cover the legality of Hungary's own conduct under the 1977 Treaty: Czechoslovakia could only have regarded that Application as unacceptably limited. **Third**, on 28 October 1992 — that is, only five days after Hungary's Application was lodged — the Parties agreed, at the London meeting (SM, Vol. IV, Ann. 128), to refer the dispute to binding judicial settlement. Czechoslovakia followed this up eight days later, on 5 November, when the Czechoslovak Ministry for Foreign Affairs took the initiative by sending a Note Verbale to the Hungarian Embassy in Prague proposing negotiations on a *compromis* to refer the matter by agreement to this Court (HM, Vol. 4, Ann. 104). And, as we know, those negotiations were duly successful.

So, Mr. President, I come back to where I started: Variant C *was*, in the circumstances created by Hungary's conduct, the only effective option open to Czechoslovakia.

Hungary, however, pretends to see in Slovakia's position a hidden plea of necessity by Slovakia — hidden, because the open admission of a plea of necessity would, so it is said, leave Slovakia having to pay compensation for the damage caused by the conduct dictated by the necessity (CR 97/13, p. 26 (Dupuy)). Slovakia, Mr. President, has made no plea of necessity *in the legal sense*, hidden or otherwise. Apart from anything else, the plea of necessity, in the legal sense, would have to start from the premise that Czechoslovakia's conduct had been *prima facie* unlawful, and that is something which Czechoslovakia did not, and Slovakia does not, accept. Czechoslovakia was indeed, as I have explained, put in an impossible position by Hungary's unlawful actions. Czechoslovakia *had* to do something, and it embarked upon what was in effect the *only* lawful course open to it, namely the implementation of Variant C. In a general, every day, sense, it was "necessary" for Czechoslovakia to do so; but that is not the same as invoking the technical legal doctrine of necessity as a justification for Variant C. Slovakia has not done so, and does not do so now.

As to the suggestion that Slovakia was avoiding a plea of necessity so as to avoid having to pay compensation, this flies in the face of the facts — it is Czechoslovakia, and now Slovakia, which have suffered enormous losses, and it is consequently Hungary, and not Czechoslovakia, which needs to be looking for ways of avoiding having to pay compensation.

What Variant C involved

Three weeks ago, Mr. President, I outlined what Variant C involved (CR 97/11, p .15). I displayed a map showing at a glance how basically similar Variant C and the Treaty Project were. That map is again on screen behind me: a copy is No. 50 in the *Judge's Folder*. Put briefly, Variant C involved the building of a dividing dyke along the left bank of

the old river to retain the waters of the new, reduced reservoir, the building of a complex of structures at _unovo to replace the functions envisaged for Dunakiliti, and an associated small dyke to complete the retention of the waters of the new reservoir.

Let me now put on the screen another map: a copy is No. 51 in the *Judge's Folder.* This shows how much of the present system in the Gabcíkovo section is identical with what was planned for the Treaty Project: everything shown by the yellow line was agreed in the 1977 Treaty. It will again be readily apparent — given the omission of the Nagymaros part of the Project — that what is now operating under the label of "Variant C" is substantially what was agreed in the 1977 Treaty, with those few modifications necessitated by Hungary's refusal to honour its treaty obligations. The maps show clearly that Hungary's attempt to portray Variant C as something totally new and different from the Treaty Project has no substance.

Variant C has, of course, evolved over time, just as the Treaty Project itself, as my colleague Professor Pellet has explained, was an on-going process, adapted from time to time and it is in this context that the references to a Phase I and a Phase II of Variant C have to be understood: Professor Nagy, in particular, drew attention to this aspect of the matter on 10 April (CR 97/12, p. 82). This Phase II is usually taken to refer to structural developments to the system after the initial structures were put in place. Strictly speaking these later developments occurring after October 1992 are outside the scope of the questions put to the Court, but let me nevertheless make four short points.

(1) The decision of the Czechoslovak Government authorized the planning of "Variant C" full stop: nothing called Phase I or Phase II formed part of the relevant policy decision.

(2) The initial structures comprising Variant C were constructed in the belief that Hungary might resume compliance with its treaty

obligations within a few years. As it became clear that this was not going to happen, up-grading of construction standards became necessary.

(3) This was particularly the case after Hungary took the decision, on 7 July 1993, to destroy the coffer dam at Nagymaros, so irrevocably ruling out the eventual construction of the planned barrage at Nagymaros.

(4) "Phase II" has come to be used as a matter of convenience to refer to those miscellaneous and essentially *ad hoc* adaptations, spread over a number of years, and consequential upon the growing long-term character of the system resulting from Hungary's refusal to return to the Treaty.

Nor, Mr. President, do the so-called Phase II adaptations transform the provisionally-conceived Variant C into something unalterable. Those subsequent adaptations have no necessary implication for the permanent or temporary nature of earlier measures. They are, indeed, entirely consistent with Czechoslovakia's conception of Variant C as essentially provisional — the "provisional solution", as the Special Agreement has it. Of course, once Variant C was put into operation, it had to be adequately constructed — makeshift structures which would be washed away in the first flood would make no sense. But Czechoslovakia's purpose all along was to get Hungary back to compliance with its obligations under the 1977 Treaty, or at least some agreed variation of the joint enterprise provided for in that Treaty. I must pause here, Mr. President, to emphasize that point, since Hungary has categorically denied it. The record is perfectly clear: all Czechoslovakia's initiatives from mid-1989 onwards were directed towards some agreed form of joint Project within the Treaty framework, and it is wholly wrong for Hungary to assert — with emphasis — "that Czechoslovakia never accepted that the 1977 Treaty be amended in any form" (CR 97/13, p. 51 (Crawford)). Czechoslovakia repeatedly put forward suggestions for joint

schemes which differed from the Joint Project — that is, they would have involved amendments to the Treaty Project — and it was Hungary's total lack of interest in *any* form of continued joint participation in the Project, and determination instead to negotiate only for its termination, that prevented those initiatives from prospering. Professor McCaffrey yesterday gave one clear example of this when he referred to the offer contained in Czechoslovakia's Note Verbale of 30 October 1989 (CR 97/14, p. 62). Let me add some others.

(a) In July 1991 Czechoslovakia proposed that there should be a trilateral commission to study variants to be proposed by the Parties, and Czechoslovakia submitted for consideration by the commission *four* alternatives, any one of which would have made Variant C unnecessary (SC-M, paras. 5.75 ff.; SR, paras. 9.12-9.22, and Ann. 96; CR 97/10, pp. 54, 58-59).

(b) Let me move on to 1992 — i.e. after Czechoslovakia proceeded with Variant C in November 1991. In January 1992 Czechoslovakia urged Hungary to seek a settlement through a tripartite commission of experts: Czechoslovakia undertook to be guided by the commission's findings, and even offered to suspend work on Variant C if Hungary would agree to resume the Treaty Project on a jointly agreed basis (HR, para. 9.34).

(c) Even in April 1992, in responding to Mr. Andriessen's offer of EC involvement through the establishment of a tripartite commission, Czechoslovakia was not excluding modification of the Treaty (SM, Ann. 109; SR, paras. 9.36-9.43, especially 9.40). Professor Valki said otherwise (CR 97/13, p. 38). But in quoting one sentence from the reply which Czechoslovakia proposed that the Parties should jointly send, he omitted to quote also the very next sentence; and the one sentence which he did quote, he misunderstood — Czechoslovakia's concern was with the possible significance of the assessments of the committee "*as such*", i.e., the committee itself should not decide on modifications of the

Treaty: this was for the Parties, in negotiations and this is made clear in the sentence which Professor Valki did not quote: Czechoslovakia "is prepared to use the conclusions drawn and recommendations made by the committee as the starting point for any decisions made in relation to the Project" — in no way can this be read as an *a priori* refusal to consider modification of the Treaty.

Clearly, all those Czechoslovak initiatives were not just limited to "the Treaty Project and nothing but the Treaty Project", as Hungary would have the Court believe: it was, rather, Hungary's blunt and total refusal to contemplate anything other than the termination of the Treaty which ensured that no realistic Treaty amendment could be negotiated. Had Hungary responded to any of the various proposals which Czechoslovakia had put forward — proposals which, Mr. President, I would remind the Court, included the readiness to postpone Variant C itself — then Variant C could have been put off, and amendments to the Treaty could have been negotiated, and if Hungary had shown any interest in returning to the framework of the 1977 Treaty, Variant C would not have excluded a return to some agreed joint variation of the Treaty Project — albeit at a cost (and now, a very considerable cost as a result of Hungary's unlawful conduct). But as Hungary causes time to pass without any move on its part to resume its Treaty obligations, Hungary ensures that what Czechoslovakia conceived as a provisional and reversible variation of the Treaty Project increasingly assumes longer-term features than Czechoslovakia envisaged.

Variant C as an approximate application of the Treaty

Three weeks ago I explained why Slovakia regards Variant C as being as close an approximation to the 1977 Treaty as it was possible for Czechoslovakia to get. And I have again shown just a few moments ago how similar Variant C and the Treaty Project are. It is difficult to

imagine, Mr. President, in what way Czechoslovakia alone could have got any closer to full performance of its obligations under the 1977 Treaty. To use the language of this Court in its Advisory Opinion on the *South West Africa* case (see CR 97/11, p. 11), Czechoslovakia "conform[ed] as far as possible" to the agreed Treaty Project. Czechoslovakia did all it could; that it could do no more was because Hungary would not let it.

Part of Hungary's complaint is that Variant C was adopted by Czechoslovakia as a unilateral act. But the adoption of Variant C cannot be looked at in isolation from the circumstances giving rise to it. Those circumstances involved the 1977 Treaty, and Hungary's fundamental breach of it. One could not, therefore, expect there to be agreement on the approximate application of the Treaty to which Hungary's breach had itself given rise.

The failure to appreciate the central importance of the fact that a Treaty was concluded in 1977 is typical of much of Hungary's argumentation. Hungary at times seeks to examine Variant C in the light of general international law, as if the Treaty did not exist. This is an absurd way of addressing the problem, and inevitably leads Hungary to absurd conclusions. The analysis has to be the other way round. The fact is that there was a Treaty; and even Hungary admits that it was in force until May 1992 (CR 97/12, p. 76 (Sands)). In any legal analysis, the Treaty must be in the forefront, and any relevant general rules of international law fall to be considered in the light of the *lex posterior* and *lex specialis* principles.

Mr. President, a State finding itself in the position in which Czechoslovakia unfortunately found itself has the right to apply a treaty as best it can: this is so even if, necessarily, that performance can only be approximate. This right is well-founded on principle and in law, and is reflected in State practice (see esp. SM, paras. 7.11-7.40; SR, paras. 6.0 -6.45; CR 97/10, pp. 62-65; CR 97/11, pp. 10-16).

Nevertheless, Hungary seeks to deny this. Its arguments are unconvincing. The right of approximate application flows from the principle that parties to a treaty must apply it in good faith. Hungary does not — and indeed, cannot - deny that principle.

Slovakia also invokes the duty resting on States to mitigate damage. Professor Dupuy sought to argue that this was not a primary rule of conduct. But on the contrary, Mr. President, the obligation on a State to mitigate is precisely a rule of conduct — it requires a State to act, i.e., to *conduct itself*, in such a way as to minimize the loss for which the other party, when it comes to the assessment of reparation — and that may indeed be a secondary stage — will have to pay damages.

Professor Dupuy also denied that the principle was part of international law; he dismissed the relevance of two decisions of the United Nations Compensation Commission to which I had referred (CR 97/11, p. 14). He said (CR 97/13, p. 29) that they only concerned private claims, not claims *by* States, and were therefore nothing to do with international law. Mr. President, most decisions of international claims tribunals concern the claims of private individuals: and yet they are part of the general corpus of international law. In the particular cases which I cited, the United Nations Compensation Commission was absolutely clear that it was referring to the principle of mitigation of damages *as a principle of international law*: and I refer the Court to the passages which I quoted (CR 97/11, p. 14). And of course, this is consistent with the establishment by the Security Council of that Compensation Commission to resolve disputed claims in respect of Iraq's liability "under international law" for damages suffered by foreign governments, nationals and corporations (Security Council resolution 687 (1991), paras. 16 and 19). Finally on mitigation of damage, Mr. President, I note that Hungary itself thought sufficiently highly of the principle that, in its Reply, it invoked it against Slovakia (HR, para. 3.163).

As for the principle of approximate application itself, Slovakia has shown that States, when faced with unco-operative conduct by a treaty partner, have done their best to continue with the essentials of the treaty, even if that has meant departing to some extent from the literal application of the treaty's terms. Hungary seeks to distinguish the various precedents to which Slovakia has drawn attention. These attempts carry no conviction, Mr. President.

Thus, regarding this Court's practice when faced with a non-appearing defendant State, Professor Dupuy pointed out that Article 53 of the Statute authorizes the Court nevertheless to decide the case (CR 97/13, p. 28). Mr. President, Professor Dupuy invoked the spirit of Molière's M. Jourdain; let me call up the spirit of Don Quixote — for Professor Dupuy is tilting at windmills. I was not referring to the Court's ability to decide the case — for Article 53 indeed gives it the power to do so — but rather to Article 62 (2) *of the Rules*. This requires a State objecting to the Court's jurisdiction to set out its objections: here is indeed a case where the non-appearance of the State prevents that provision being complied with. The point is that the Court has not let itself be paralysed, but has found a way round the problem by applying the Rules in such a way that their obvious essential purposes — even if not their letter — can be met.

Looking more closely at the Court's practice, Mr. President, I would draw attention to the *Free Zones* case *(Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A/B, No. 46)*. In that case the Permanent Court had held hearings in 1929. Further hearings were held in October 1930. The Statute required the composition of the Court to be the same as it had been in 1929. But — the number of Judges still available from the 1929 hearings had fallen below the quorum required by Article 25 of the Statute. So what did the Court do, Mr. President? Give up? Of course not: it could not apply the Statute literally, but it

kept as closely as possible to its provisions. The Court decided "that it had become necessary to reconstitute the Court, in *conformity with the principles of that Article*" (at p. 106; emphasis added). Clearly, Mr. President, an example of approximate application.

A second limb of Professor Dupuy's attack on any principle of approximate application was to argue that one cannot compare the continued functioning of a permanent international institution with the operation of an ordinary bilateral treaty (CR 97/13, pp. 27-28). This prompts two remarks, Mr. President. **First**, if a principle finds expression in the way in which the institution functions, that same principle can still be applied in other contexts: and indeed, a number of principles upheld by this Court in relation to international organizations are regularly regarded as being applicable — including by Hungary in this case — in other contexts.

Second, the characterization of the 1977 Treaty as an ordinary treaty is far from accurate. It is not just a "joint investment treaty" — the point is not whether there was a joint investment, but what the end result of that investment involved: and what it involved was a quasi-permanent operational system of very considerable magnitude, dealing with and related solely to a very specific territorial area straddling the boundary between two States. Nor is it right to treat the 1977 Treaty as a building contract — nor, as Professor Crawford alleged (CR 97/13, p. 40), did I ever say it was. On the contrary, I was at pains to explain that the Treaty was "a rather special treaty" (CR 97/10, p. 62); and I went on to explain why. Any attempt, whether for the purposes of approximate application or for any other purposes, to treat that Treaty as just an ordinary treaty is wide of the mark.

Further, Mr. President, the principle of approximation is not just an aspect of international law relating to the law of treaties: it finds its place in other fields as well. Thus in relation to the assessment of

reparation, a return to the *status quo ante* cannot always be complete: in the words of the Permanent Court in the *Factory at Chorzów* case, the "essential principle contained in the notion of an illegal act ... is that reparation must, as far as possible, wipe out all consequences of the illegal act" (*P.C.I.J., Series A, No. 17*, p. 47). "As far as possible", Mr. President: the notion of "close approximation" is inherent in the Court's statement of the "essential principle" which it applied. And so too, in relation to counter-measures, the Arbitral Tribunal in the case concerning the *Air Services Agreement of 27 March 1946* noted "that judging the proportionality of counter-measures is not an easy task and can at best be accomplished by approximation" (*International Law Reports*, Vol. 54, at p. 338). So the notion of approximation, Mr. President, is not only supported by principle and practice in the immediate field of treaty application, but is consistent with the approach of international law across a broader spectrum.

That reference to the *Air Services* arbitration serves to remind me, Mr. President, that there was an assumption in Hungary's arguments at the end of last week that the principle of approximate application was Slovakia's sole legal argument (CR 97/13, p. 27 (Dupuy)), and that so long as Hungary could undermine that principle, that would be the end of Slovakia's attempts to provide a legal justification for Variant C. As I have sought to demonstrate, Variant C *is* justified in law. But even if this view does not commend itself to the Court, Slovakia would not wish it to be forgotten that Slovakia has available an argument in the alternative based on counter-measures. As I showed on 27 March (CR 97/11, pp. 17-18), if it were necessary to rely on that argument, all the conditions for its application would be met. And I note, Mr. President, that in its oral arguments last week Hungary did not seek to refute that conclusion.

Hungary, of course, as is only to be expected, nevertheless takes the position that Variant C was unlawful. And presumably, therefore, Hungary in effect contends that Czechoslovakia should never have adopted Variant C. Mr. President, that apparently simple proposition is worth looking at a little more closely.

The Treaty was concluded in 1977. Work started. For a dozen years work continued. Hungary did some work; so did Czechoslovakia, especially at Gabcíkovo. Hungary watched Czechoslovakia carry on with this work for ten years or so, saw the structure taking shape — virtually to completion — and the agreed Project making good progress. Hungary gave no hint of difficulties to come. In October 1988 the Hungarian Parliament had unambiguously approved the continuation of the Project (SR, paras. 7.13-7.17). As late as 6 February 1989 no less a figure than the Deputy Chairman of the Hungarian Council of Ministers signed a Protocol by which he reaffirmed Hungary's commitment to the 1977 Treaty Project (SM, Ann. 9; SC-M, para. 5.14). And here, Mr. President, let me interject the observation that we heard yet again last week, from Ms Gorove (CR 97/12, p. 39; see also CR 97/4, p. 17 (Crawford)), that this Protocol was agreed in 1988 and should therefore not be regarded as representing Hungary's position in February 1989: what nonsense! — when a very senior Government member signs a treaty, that treaty represents his Government's position at the time when he puts his signature to it. I therefore repeat — in February 1989 Hungary reaffirmed, at a very high level, its commitment to the Treaty.

And then, within a few months — with no warning, no discussion, and no justification — Hungary said "stop!". Mr. President, it was not lawful for Hungary at that stage to call a halt to the Project, and turn its back on it.

But that is what Hungary did. It left Czechoslovakia with massive structures on its hands — virtually complete after expenditure of some

2 billion US dollars, but now rendered useless by Hungary. So if Hungary believes that Variant C should not have been adopted, what *does* Hungary think should have happened? Just let all that investment stand idle and go to waste? — with the environmental disaster which that really would have represented? But, Mr. President, one thing is clear. Having agreed to the Project by signing and ratifying a treaty, having for a decade allowed the work to which it had agreed to proceed and having participated in some of it, having stood by and watched Czechoslovakia nearly complete the Gabcíkovo part of the Project, and having by a formal treaty instrument and oral statements confirmed, up to the last moment, its commitment to the Treaty Project, Hungary cannot be permitted suddenly to bring the Project to a halt. Nor can Hungary be heard to deny Czechoslovakia the right to make use of the structures in which Czechoslovakia had invested so much — all the more so since the use Czechoslovakia made of the structures was not some totally different use from that originally envisaged, but was in fact simply the best variation of that original plan which was possible for Czechoslovakia given the circumstances of Hungary's default.

Variant C is neither a material breach nor a repudiation of the Treaty nor a fundamental change of circumstances

Let me turn, finally, Mr. President, to questions of breach, repudiation, and fundamental change of circumstances.

Variant C is, as Slovakia has consistently maintained, an *application* of the 1977 Treaty — a limited but approximate and best possible application because that was all that Hungary's conduct allowed for. An *application* of the Treaty cannot be a breach of the Treaty.

Of course, as the very nature of a best possible, "approximate" application implies, Variant C was bound to be different from the literal terms of the Treaty. But the differences were *all* differences which were solely consequential upon Hungary's refusal to perform the Treaty. I

have explained this earlier, and the map behind me will remind the Court of the points I then made. Hungary, Mr. President, cannot now be heard to complain that Czechoslovakia was acting in breach of the Treaty, when what Czechoslovakia was doing was to apply the Treaty subject to changes necessitated by Hungary's breaches of its obligations under that same Treaty.

Equally, Mr. President, an application of the Treaty cannot be a repudiation. Hungary's assertion that by adopting Variant C Czechoslovakia repudiated the 1977 Treaty is unconvincing. Let me first make one general observation. Hungary *de facto* completely abandoned the Treaty Project by mid-1990. Hungary is thus ill-placed to argue that Czechoslovakia repudiated the Treaty when, over two years later, it put into operation a variant which, far from matching Hungary's *abandonment* of the Treaty Project, was designed, consistently with the Treaty's essential aims, to be the closest possible application of it in the circumstances caused by Hungary's unlawful abandonment — *that* was the only repudiation of the 1977 Treaty, Mr. President, not Czechoslovakia's good faith attempt to salvage what it could of the Project.

The "repudiation" of a treaty is not a term which is defined by the Vienna Convention of 1969. But, although it will of course be a breach of the treaty, in its normal meaning it clearly means something more than a breach. I am ready to take Professor Crawford's comment as conveying the right flavour — repudiation, he said, "is really more a turning away from the treaty — a disposition . . . that the State has definitively rejected the treaty as the basis for regulating its future conduct" (CR 97/13, p. 47). I too have used similar language, referring to a State "turning its back on", or "walking away from" the Treaty.

As Hungary recognizes, at no time did Czechoslovakia expressly repudiate the 1977 Treaty. But Hungary alleges instead that the adoption

of Variant C amounted to an implicit repudiation of the Treaty by conduct.

Variant C was certainly different in certain respects from the Project as agreed under the 1977 Treaty. But, as I have already shown, those differences were limited to those made indispensable by Hungary's refusal to co-operate, they involved continued use of the structures built as agreed under the Treaty for essentially those same purposes, and they involved the closest possible good faith application of the Treaty in the circumstances created by Hungary's default. It is difficult to see how in these circumstances the adoption of Variant C could be regarded as a repudiation of that Treaty.

Nevertheless, Mr. President, Hungary regards Czechoslovakia's actions in December 1990, January 1991, 2 April 1991, 25 July 1991 and November 1991 — dates chosen by Professor Crawford (CR 97/13, p. 48) — as successive repudiations of the Treaty. And repudiation is a most serious matter — as Professor Crawford says, it is "a more fundamental step vis-à-vis a treaty than . . . even a material breach" (*ibid.*, p. 47). Where, then, was Hungary's reaction against such serious acts? Repudiation, Mr. President, was never a charge made against Czechoslovakia: and that being so, it is scarcely possible now to take seriously Hungary's arguments that those actions amounted to repudiations. Especially when none of those dates selected by Professor Crawford corresponds with action by Czechoslovakia from which its repudiation of the 1977 Treaty might plausibly be implied.

But really, Mr. President, all this scratching around for "evidence" raises a more basic point. If Czechoslovakia had been putting Variant C into effect earlier than November 1991, Hungary had only to look across the river to see what was being done. This is, after all, a boundary river, Mr. President: a riparian State can see quite well what is going on on the opposite bank, or a short way upstream or downstream.

Obviously Hungary saw nothing — at least, that must be the presumption from the total lack of any evidence to the contrary.

Then, Mr. President, we have Hungary's clear assertion last week (CR 97/12, p. 76 (Sands)) that "At all times prior to May 1992 Hungary accepted the Treaty was in force." What, then, about the repudiation of that Treaty which Hungary now says took place as a result of Czechoslovakia's conduct in 1990 and 1991? Clearly, Hungary's position is totally inconsistent.

Even less can the adoption of Variant C be regarded as a repudiation of the Treaty given that Czechoslovakia made it clear all along — as Slovakia still does — that it regarded the 1977 Treaty as still valid. And Variant C was conceived as provisional and reversible precisely so as to allow for the eventuality that Hungary might be willing to resume the implementation of its treaty obligations; and further, even after adopting Variant C, Czechoslovakia continued to seek to reach agreement with Hungary on ways of agreeing to some form of joint operation of some variation of the Treaty Project which could meet the original objectives of the Treaty. None of this is consistent with an implication that Czechoslovakia was repudiating the 1977 Treaty: none of it meets Professor Crawford's test of a "turning away from the treaty", or a "disposition . . . definitively [to reject] the treaty as a basis for regulating its future conduct". On the contrary it clearly shows that, by word and deed, Czechoslovakia maintained the very opposite, namely that the Treaty remained in force, that Variant C was adopted and continues to operate within that framework, and that Hungary's return to the Treaty framework was Czechoslovakia's objective.

Finally, Mr. President, I come to Hungary's argument that Variant C constituted a fundamental change of circumstances (CR 97/13, pp. 49-51 (Crawford)). Professor Crawford spoke about political changes in Europe, and economic changes of various kinds. Professor Crawford's eloquence

did not, however, extend to any examination of the relevant law, such as Article 62 of the Vienna Convention on the Law of Treaties. There the basic rule is that a fundamental change of circumstances may *not* be invoked as a ground for terminating or withdrawing from a treaty, or suspending its operation. To that basic rule there is an exception — but being an exception, it must be strictly construed. The exception requires that the change must relate to circumstances which constituted an essential basis of the consent of the Parties — "the Part*ies*", I would note, that is both of them — to be bound by the treaty, and that the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty. The changes to which Professor Crawford refers do not meet either of those conditions: the circumstances to which he referred did not constitute for *both* Parties an essential condition for their consent; nor did the changes transform radically — or even at all — the "extent" of the obligations still to be performed. As for Professor Crawford's reliance on the economic and political changes which lay behind the 1994 modification to Part XI of the Convention on the Law of the Sea, all it shows is that such changes may lead the parties to *agree* to changes to a treaty by which they are bound: it has absolutely nothing to do with the doctrine of *rebus sic stantibus* — on which Hungary's arguments are without any substance whatsoever.

Conclusion

Mr. President, that concludes my response to Hungary's further arguments on the legality of Variant C. I thank you, Mr. President, Members of the Court, for the attention which you have accorded my statement. I should be grateful if you would now call upon Mr. Jens Refsgaard.

The PRESIDENT: Thank you so much, Sir Arthur. I call now on Mr. Refsgaard.

Mr. REFSGAARD:

Version C and the PHARE Project

Mr. President, Members of the Court

I have been asked to comment on what Professor Wheater had to say about the PHARE project last week[1], as well as on Annexes 9, 12 and 13 to Hungary's oral pleadings during the second round. Apparently, Professor Wheater and Dr. Kern asked both Hungary's Professor Somlyody and Professor van Rijn, formerly employed at the Dutch company, Delft Hydraulics, the largest international competitor of my own firm, the Danish Hydraulic Institute, to comment on my presentation of the Final Report of the PHARE project. Their brief, two-page comments are set out in these annexes.

Professor Somlyody points out that the PHARE study was prepared by a "capable international consortium" and that "Well-known models of the Danish Hydraulic Institute were applied in an integrated manner". He notes the strong Slovak participation in the project, adding "it is a pity that there was no Hungarian involvement".

Professor van Rijn refers to the PHARE models as "state of the art" and suggests that the results produced may be reasonable in the light of how much they have been calibrated. He is complimentary about the attempt of the project to undertake the difficult task of modelling the transport processes of graded sediments.

The criticism of both experts relate largely to omissions from the report that they have seen. The equations and documentation that Professor Somlyody found missing are of course all available. The project files are so extensive that I would not be able to carry them all into

[1] CR 97/13, pp. 13 *et seq.*

this room. As illustration, I have brought just a small selection of the more than 1,500 pages model documentation, which are full of equations.

I am concerned over Professor Somlyody's reaction that my presentation of the PHARE Report went well beyond its conclusions. It is too bad he was not here for my presentation, since I certainly do not, as he suggests, consider that everything can be quantified and managed, and I certainly did not avoid discussing possibly harmful impacts of Variant C. Professor van Rijn criticizes us for not having done sensitivity analyses, but apparently he has overlooked the description of assessments of model uncertainties contained in Volume 3 of the PHARE Report[2], since he confined his observations to Chapter 10 of Volume 2.

I should point out here that the PHARE project had external reviews in connection with two workshops with participation of the following international experts:

1Professor Wolfgang Kinzelbach, Kassel University;

2Dr. C.A.J. (Tony) Appelo, Free University Amsterdam;

3Dr. Hans-Peter Nachtnebel, Universität für Bodenkultur, Wien;

4Professor Ludwig Luckner, Institut für Bodenkultur und Wasserwirtschaft, Dresden;

5Dr. Stefan Bruk, Unesco, Paris;

6Professor Johann Schreiner, Norddeutche Naturschutz Akademi, Schneverdingen.

I wish today to direct my principal remarks to Professor Wheater's presentation, where he pretended "to present a balanced picture"[3], and to the misleading way in which the extracts have been assembled in Hungary's Annex 13 to the *Judges' folder*.

Let me first turn to this Annex 13. Here, Hungary has picked out single sentences and half paragraphs from the PHARE Report and presented

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[2] PHARE Report, Final Report, December 1995, Vol. 3, pp. 6-35, pp. 7-31, pp. 8-25.

[3] CR 97/13, p. 13 (Wheater).

them out of context. The result is that the balance of the report disappears. Let me show you two examples. The first of these texts is now shown on the screen and they are also included in the Slovak *Judges' folder:*

(Overhead transparencies # 1-2 - Comparison between Appendix 13 in Hungarian material and original text in PHARE Report)

I. Regarding old sediments in the area now covered by the reservoir Hungary quoted: "Some samples . . . showed relatively high contents of some PAH's"[4]. Obviously, this sounds bad. However, read in its full context the conclusion is completely different: "From the existing data no general pollution has been detected. However, some samples from the flood plain along the Danube river showed relatively high contents of some PAH's, which can be attributed to local pollution."[5] Local pollution is related to the pollution of the surface water in the past decades, not to the Gabcíkovo project.

II. Hungary quotes one sentence from the PHARE Report on the data availability in the river branch system: "Only very scarce and not very reliable data on flow and water levels in the river branch system was available"[6], with the intention of showing that reliable models can not be established. The reason for this lack of data is that the hydraulics of the river branch system was basically changed in May 1993, when the direct recharge commenced. This is not mentioned by Hungary, who also deliberately omits the next sentence, reading: "Therefore, a programme comprising measurements of discharges and water levels at a number of locations was carried out under this project during the summer 1994."[7]

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[4] Hungarian material to *Judges' folder*, Ann. 13-2.

[5] PHARE Project, Final Report, December 1995, Vol. 1, pp. 4-10.

[6] Hungarian material to *Judges' folder*, Ann. 13-2.

[7] PHARE Project, Final Report , December 1995, Vol. 1, pp. 4-18.

I could continue with more examples for the next hour. I should only like to mention here that many of the sentences from the PHARE Report which Hungary claims support its concerns are taken from the problem identification sections, while the corresponding text from the concluding sections are most often omitted.

As already highlighted in my presentation three weeks ago, and as also confirmed by Professor Wheater, the PHARE Report does not speak of only positive impacts. The Hungarian approach has been to select the particular sentences which favour its case and say that only these sentences are credible and then claim that the rest is not reliable.

Is this what Professor Wheater calls a "balanced picture"? It is clearly a misleading selection.

I shall now turn to the key point in Professor Wheater's pleading, namely "that the conclusions of the PHARE simulations . . . are simply unreliable"[8]. I shall concentrate on the aspects relating to the reservoir and the groundwater quality, which Professor Wheater considers most serious. In his series of arguments leading to this conclusion, he makes four claims, which I shall address one by one.

The first claim is that our calculations of reservoir sedimentations are "clearly flawed"[9]. The PHARE project does not conceal the fact that the data we had available on reservoir sediments were limited. Of course they were — for the simple reason that the reservoir is new. But some data were collected during the course of the PHARE project.

(Overhead transparency # 3 — Figure with comparison of measured and model predicted flow velocities in the reservoir)

The first thing to check is whether the flow velocities are simulated correctly. On the screen behind me the Court can now see results from

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[8] CR 97/13, p. 19 (Wheater).

[9] CR 97/13, p. 17 (Wheater).

velocity distributions along two cross-sections in the reservoir[10]. As can be seen there is a very good agreement between model output and observations.

(Overhead transparency # 4 — Table with comparison of observed and simulated sediment grain sizes in the reservoir)

The next thing to check is the sedimentation. If the Court looks at the screen a table with a comparison of measured and predicted sediment grain sizes is shown[11]. As can be seen there is also a reasonably good agreement between model output and measured sediment data. To claim that the results are only "computer simulations, and not reality"[12] is misleading.

Let me now examine Professor Wheater's second claim, namely that "It is assumed that most of the groundwater recharge comes from a small part of the reservoir"[13]. As the Court may recall from my last presentation this is not an assumption, but a result of model calculations[14].

(Overhead transparency # 5 — Figure with simulated reservoir sedimentation)

The model calculates the thickness and grain sizes of the sedimentation at *all* points in the reservoir as indicated on this figure[15], which the Court also saw three weeks ago.

(Overhead transparency # 6 — Figure with calculated leakage coefficients in the reservoir)

On this basis, the so-called leakage coefficients are calculated with results as shown on the screen now[16]. For this calculation the well-known

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[10] PHARE Project, Final Report, December 1995, Vol. 2, Figs. 9.25 and 9.26.

[11] PHARE Project, Final Report, December 1995, Vol. 2, Table 10.5.

[12] CR 97/13, p. 14 (Wheater).

[13] CR 97/13, p. 17 (Wheater).

[14] CR 97/10, p. 45.

[15] PHARE Project, Final Report, December 1995, Vol. 3, Fig. 8.7.

[16] PHARE Report, Final Report, December 1995, Vol. 3, Fig. 8.11.

Carman-Kozeny theoretical formula is used, including a calibration factor, which has to be assessed through comparison of model output and field data, in this case groundwater level observations from a few wells near the reservoir. Professor Wheater's third claim is that this calibration factor is an error indicating clogging[17]. It is not. We are using the same formula also for converting all texture data from aquifer sediment samples to model parameters. Also for the aquifer we used a calibration factor of about 10. This is theoretically justified by the fact that the sediments are stratified or layered due to variations in flow velocities during the sedimentation process. This has nothing whatsoever to do with clogging!

Now, how can we then be sure that our model calculations are reliable? We have used the groundwater level observations from a few wells to assess the leakage calibration factor, so although we checked the model output against data from more than 100 wells, and most often in similar studies no more data are available, it may be argued that this in itself is not sufficient for a true model validation. Let me instead show the Court results from just one of the other model tests we made, namely against measured discharges in the seepage canals.

(Overhead transparency # 7 – Table with measured and simulated discharge in seepage canals)

The Court saw these seepage canals during the field trip. The discharge in these canals originates from the flow of water through the bottom of the reservoir. On the table on the screen[18] you can see that model predictions match measured data quite well at different locations along the seepage canals. I must emphasize that this is a very powerful test, because the discharge data have not been used at all in the

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[17] CR 97/13, p. 17 (Wheater).

[18] PHARE Project, Final Report, December 1995, Vol 2, Fig. 5.19.

calibration process, and because it integrates the effects of reservoir sedimentation, calculation of leakage factors and geological parameters.

Altogether, we have been able to check the model output against many different types of data: groundwater level dynamics, discharges in seepage canals and oxygen isotopes in groundwater. The model tests confirm that the model predictions of the interaction between the reservoir and the aquifer are quite accurate.

Professor Wheater's fourth claim that calculations of the effects of sediments on the chemical status of the infiltrating water have not been carried out[19], is simply *not true*. Let me in this respect just refer the Court to Chapter 5 in Volume 3 of the PHARE Final Report.

Consequently, I have to conclude that none of Professor Wheater's claims are founded on facts. They lack scientific integrity.

Professor Wheater also makes a great effort to link Variant C, high manganese concentrations and groundwater pollution[20]. Let me just put this issue into the right perspective by mentioning a few facts:

1. The manganese concentrations in the order of 1 mg/l are found near the reservoir[21] as shown by the special field investigations carried out by the PHARE Project. The bio-geochemical model was able to simulate the observed manganese concentrations quite well[22].
2. Manganese concentrations of the same order of magnitude have existed for decades close to the Danube[23]. Take as examples the two waterworks, Rusovce in Slovakia and Vac in Hungary, both of which the Court saw during the field trip. At both places manganese has always had to be removed as part of the water treatment.

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[19] CR 97/13, p. 17 (Wheater).

[20] CR 97/12, p. 94 (Wheater).

[21] PHARE Project, Final Report, December 1995, Vol. 2, Fig. 7.2f.

[22] PHARE Project, Final Report, December 1995, Vol. 2, Fig. 7.28.

[23] See e.g., data on manganeese concentrations from the Surany Bank Filtered Well, HC-M, Fig. 3.2.2.

3. Manganese occurs naturally and originates from the geological sediments in the aquifer.
4. Manganese concentrations are easy to remove in water works. In my home country, Denmark, the majority of water works have removed manganese and iron for decades. In these years the Danish Government is spending hundreds of millions of US dollars in preventing and remediating groundwater pollution, but manganese is not an issue in this context.

Mr. President, Members of the Court, Variant C has not resulted in a general increase in manganese concentrations, and manganese is not a serious pollutant for groundwater. To indicate that the manganese concentrations shown in the PHARE Report are signs of a beginning of "degradation of groundwater quality"[24] is a major distortion. I should like to repeat the conclusion from my last presentation that the reservoir does *not* constitute a threat to groundwater quality.

Let me also stress two of my other specific conclusions, which appear to be important for this case:

1. PHARE model calculations supported by monitoring show that there are no eutrophication or other water quality problems in the reservoir, due to the short retention time.
2. The only critical situation for water quality in the Old Danube is the summer season. The PHARE model calculations confirm that for days with discharges at 400 m^3/s or more, no water quality problems will occur, even in a situation with underwater weirs.

Let me now re-emphasize what I feel are the other important points with regard to the PHARE Project and Variant C.

The PHARE Report frequently pointed at lack of further data as a constraint for more accurate model calibration and validation. You never see a scientist who states that he cannot benefit from more data. If the

[24] CR 97/13, p. 19 (Wheater).

data amount had been doubled, we would have said the same, the assessed uncertainty would just have been less in certain fields. However, it is important to put these comments in the PHARE Report in the right perspective, namely that a *very large* amount of relevant data from the project area exists[25]. I have never seen so much data in my professional life as I did on this Project.

Nobody has questioned one of the key conclusions from my presentation three weeks ago, namely that both the EC Working Group Data Report from November 1993[26] and the PHARE project confirmed that *no irreversible general ecological impacts* have occurred since October 1992.

This important conclusion should not be thought to imply that I claim that Variant C only has positive impacts, nor that the PHARE project is "dismissing long-term concerns"[27]. As stated also in my previous presentation I did emphasize in my conclusions that the present operation of Variant C has resulted in less dynamics of groundwater fluctuations as well as changed flow conditions in the river branch system, which some people consider positive and others negative. There is still plenty of time to decide on the objectives for this area. And the Variant C barrage system does not in itself pose constraints, on the contrary, it provides a wide range of management possibilities.

Let me finally dwell briefly on the question of a water management régime for the Danube. My background for this is, in addition to the PHARE Project, my participation in the EC working groups which produced

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[25] PHARE Project, Final Report, December 1995, Vol. 1, pp. 3-4.

[26] Commission of the European Communities, Republic of Hungary, Slovak Republic, Working Group of Monitoring and Water Management Experts for the Gabcíkovo System of Locks, Data Report - Assessment of Impacts of Gabcíkovo Project and Recommendations for Strengthening of Monitoring System, Budapest, 2 November 1993.

[27] CR 97/13, p. 19 (Wheater).

the Working Group Report in November 1992[28] and the Report on Temporary Water Management Régime in December 1993[29]. I should like to emphasize two aspects:

1. It is not possible on a scientific basis to give exact figures on how to share the water without previous agreement on ecological objectives. As stated earlier, this is far from trivial, due to the fact that there are competing interests – even this is true among differing ecological objectives such as forestry, fishery, recreation and natural conservation, which are often not compatible with each other.
2. No matter how much water the two Parties agree, in average, to put into the Old Danube, into the river branch systems, etc., it will under all circumstances be beneficial to adopt a more sophisticated operation policy than the one presently applied. In particular, it will be possible to get more "ecological value" for the same average amount of water by ensuring better dynamics in the Old Danube, in the river branch system, in the seepage canals and by the introduction of carefully tested remedial measures.

Let me conclude by stating that the ambition of the PHARE team was, by use of a genuine scientific approach, to move our understanding significantly forward and to develop a useful tool. In my opinion we succeeded in this. We had a free hand to adopt our methodology and to present our conclusions, whether they were mostly black or mostly white. We have not been subject to any influence censorship, and I can assure you that we would not have accepted it either. Both personally and for my

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[28] Commission of the European Communities, Czech and Slovak Federative Republic, Republic of Hungary, Working Group of Independent Experts on Variant C of the Gabcíkovo-Nagymaros Project, Working Group Report, Budapest, 23 November 1992.

[29] Commission of the European Communities, Republic of Hungary, Slovak Republic, Working Group of Monitoring and Water Management Experts for the Gabcíkovo System of Locks, Report on Temporary Water Management Regime, Bratislava, 1 December 1993.

organization there is too much at risk if our credibility and objectivity in approach can be questioned on acceptable scientific grounds.

Mr. President, Members of the Court, thank you very much for your attention. I shall now ask you, maybe after the break, to call upon Professor Alain Pellet.

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

The Court adjourned from 11.30 to 11.55 a.m.

The PRESIDENT: Please be seated. I call now on Professor Pellet.

M. PELLET : Thank you Mr. President.

6. LA TÂCHE DE LA COUR LES CONSÉQUENCES DE LA RESPONSABILITÉ DE LA HONGRIE

Monsieur le Président, Messieurs les Juges,

1. En cette phase ultime des plaidoiries orales, il m'incombe de préciser la position de la Slovaquie en ce qui concerne la tâche de la Cour dans la présente affaire et les conséquences qu'il convient de tirer de la responsabilité de la Hongrie.

Comme l'a relevé le professeur Dupuy, les conclusions des Parties, tout en étant «diamétralement opposées», suivent le même schéma (CR 97/13, p. 57) et s'attachent

— dans un premier temps, à indiquer les réponses que les deux Etats attendent de la Cour aux trois questions posées au paragraphe 1er de l'article 2 du compromis;

— dans un deuxième temps, à déterminer les conséquences juridiques qui découlent de ces réponses, comme le prévoit le paragraphe 2 de cette disposition;

— puis, dans un troisième temps, à préciser, je dirais même à nuancer, ces conséquences, dans la perspective de l'article 5.

C'est ce schéma que je me propose également de suivre.

I. LES QUESTIONS POSÉES ÀLA COUR

(article 2, paragraphe 1, du compromis)

2. Monsieur le Président, dans son intervention finale, M. l'agent de la Hongrie a souligné avec force le caractère crucial («*crucial character*») de la troisième question posée à

l'article 2 du compromis (CR 97/13, p. 78). La Slovaquie partage cette opinion. Si, en effet, la notification hongroise du 19 mai 1992 n'a eu aucun effet sur le traité, celui-ci demeure en vigueur entre les Parties et les réponses apportées aux deux autres questions en découlent avec la clarté de l'évidence :

— la Hongrie n'a pu suspendre ni, à fortiori, abandonner les travaux lui incombant en vertu de ce traité, comportements qui le violent manifestement, et

— la Tchécoslovaquie était fondée à recourir à la variante C et à la mettre en service, seul moyen qu'elle avait de s'acquitter de ses propres obligations conventionnelles; au pire, on peut y voir une contre-mesure légitime.

Il convient toutefois de s'arrêter un instant sur la rédaction de l'alinéa *c)* de l'article 2, paragraphe 1, du compromis. Il y est demandé à la Cour de se prononcer sur les effets juridiques d'un comportement précis de la République de Hongrie à l'égard du traité : la notification de sa prétendue «terminaison». Il s'en déduit d'abord et avant tout, que la validité du traité n'est pas, et ne peut pas être remise en cause; et, ensuite, que celui-ci demeure pleinement valide aujourd'hui sauf

— si une nouvelle norme impérative du droit international général était survenue, mais ce n'est pas le cas et, visiblement à regret, la Hongrie ne le prétend pas (cf. CR 97/6, p. 21 et suiv. (M. Sands) ou CR 97/12, p. 67-68 (M. Sands), p. 95 et suiv. (M. Crawford)), ou bien

— si la notification hongroise du 19 mai 1992 avait pu y mettre fin.

La rédaction de cette disposition qui exclut tout autre motif d'extinction du traité disqualifie ainsi, si besoin était, la thèse soutenue par le professeur Crawford tant le 7 mars que le 11 avril (CR 97/6, p. 25 et suiv. et CR 97/13, p. 46 et suiv.), et qui se traduit par l'équation : «répudiation + répudiation = extinction du traité». C'est simple et cela a l'air logique. Mais ce ne l'est pas. Il y manque un paramètre fondamental : celui de la licéité; et, en réalité, ceci ne nous mène nulle part : pour qu'une répudiation (que mon contradicteur a définie comme un simple fait, licite ou non — voir *ibid.*, p. 46; voir aussi CR 97/6, p. 29) puisse mettre fin au traité, il faut qu'elle soit licite, sinon, comme je l'ai montré le 25 mars, le traité ne s'éteint pas, il est tout simplement violé (cf. CR 97/8, p. 43). Et je vois mal comment non-extinction + non-

extinction pourrait être = terminaison. En revanche, si on est en présence de ce que M. Crawford a appellé une «répudiation licite», peu importe que l'autre Partie soit d'accord ou non : de toutes manières, le traité prend fin, en tout cas s'il est bilatéral. On est donc, après un long et inutile détour, ramené «à la case départ» : la Hongrie était-elle en droit de mettre fin au traité ? La Slovaquie a montré que la réponse est négative.

3. Le traité est donc en vigueur. Et, s'il est en vigueur, les Parties doivent l'appliquer. Je l'avais dit le 27 mars (cf. CR 97/11, p. 41-43 et 46); je le maintiens.

Je ne pensais d'ailleurs pas que cette affirmation, d'une extrême banalité, susciterait un tel concert de louanges de la part de mes contradicteurs de l'autre côté de la barre ! Pourtant ils ont rivalisé d'ardeur pour m'en féliciter : M. Kiss a relevé la clarté de mes propos (CR 97/12, p. 21), James Crawford a loué my «customary clarity» (qu'il a, il est vrai nuancé par une allusion à ma «véhémence» ...) (CR 97/13, p. 39), et Pierre-Marie Dupuy lui même m'a donné raison (*ibid.*, p. 57). Monsieur le Président, ma modestie en aurait souffert si ces louanges n'avaient pas été quelque peu intéressées. Elles l'étaient : leurs auteurs se sont en effet servis de cette très banale constatation juridique de bon sens comme d'un véritable épouvantail. Et le concert de louanges débouche sur un véritable chœur de pleureuses... L'objet de ces lamentations ? : l'obligation où se trouverait la Hongrie de devoir appliquer un traité qu'elle a librement conclu, dont elle a exécuté une partie, insuffisante mais non négligeable, et dont la mise en œuvre soulagerait sa balance commerciale en lui permettant de bénéficier pleinement d'une source d'énergie renouvelable et écologiquement recommandable et d'un projet qui améliore considérablement l'environnement humain.

«Construire ou démolir» dit M. Kiss, comme si «construire» était la pire des choses (CR 97/12, p. 21). «There is no escape. If the Treaty is in force, Nagymaros must be built», se lamente M. Crawford (CR 97/13, p. 40). «[T]out le traité et l'intégralité du projet» surenchérit M. Dupuy, qui s'emploie à brosser un tableau proprement apocalyptique de cette éventualité. Et, en point d'orgue, M. l'ambassadeur Szénási conclut : «If the Treaty is somehow, some way, despite of everything that has happened, still in force, the Parties are plunged back into the midst of the problems that have bedeviled their relations for so long.» (*Ibid.*, p. 79.)

Et nos contradicteurs d'opposer «l'intransigeance de la Slovaquie» (CR 97/13, p. 57 (M. Dupuy)) à la souplesse de la Hongrie, qui veut bien tout sauf construire à Nagymaros (et cela que le traité soit ou non en vigueur — cf. CR 97/5, p. 67 (M. Sands)), sauf faire fonctionner Gabcíkovo, sauf conserver le système de barrage actuel (M. Dupuy parle de «l'interruption définitive du fonctionnement de la variante C» — CR 97/13, p. 62 — mais ne propose aucun système de remplacement). Tout ... à condition que ce ne soit rien !

4. C'est cela, Monsieur le Président, le plus inquiétant dans la position de la Hongrie : on voit assez bien ce qu'elle ne veut pas — c'est ce qui existe et que vous avez vu lors de votre visite sur les lieux il y a quinze jours —; mais ce qu'elle veut demeure une énigme.

N'en déplaise à la Hongrie, ce n'est pas si le traité est toujours en vigueur que les deux Etats sont renvoyés aux problèmes qui ont empoisonné leurs relations depuis dix-huit ans (cf. CR 97/13, p. 79, agent, préc. n° 11), mais bien s'il ne l'est pas; car la source de ces problèmes, ce n'est pas que le traité ait été et demeure en vigueur, mais bien que la Hongrie se soit comportée comme si il ne l'était pas. Sur la base de votre arrêt, qui fermera définitivement la longue parenthèse ouverte par la Hongrie en 1989, les deux Parties doivent se remettre ensemble au travail dans le cadre du traité et chercher ensemble des solutions de bonne foi aux problèmes qui peuvent surgir et dont la procédure devant votre Haute Juridiction a eu au moins le mérite de montrer qu'ils étaient très loin d'être insurmontables. Car aucune catastrophe écologique n'est en vue, Messieurs les Juges; la qualité des eaux souterraines n'a jamais été aussi bonne; celle des eaux de surface est constante et pourrait encore s'améliorer si la Hongrie s'en donnait les moyens; et les branches du Danube sont régénérées. Enfin, et ce n'est pas l'aspect le moins important, le traité permet, par sa souplesse et sa flexibilité, l'amélioration continue du projet et organise à cette fin un processus de coopération constante entre les Parties.

5. En disant cela, Messieurs les Juges, je n'ai pas le sentiment de parler au nom d'un pays «intransigeant», je décris une réalité qui ne suscite ni effroi, ni même inquiétude.

Mais la Slovaquie est prête à aller plus loin. Je l'avais déjà dit à la fin du premier tour des plaidoiries orales : il n'est nullement impossible de revenir à l'application du traité, mais

avais-je précisé, que «la Slovaquie ne se refuse pas à priori à des aménagements du traité» (CR 97/11, p. 53). C'est dire que, tout en pensant que le traité de 1977 doit nécessairement constituer la base des négociations prévues à l'article 5 du compromis, la Slovaquie n'exclut pas de procéder à la revision du traité, à la condition toujours que la Hongrie établisse qu'il en est besoin.

L'importance de la première conclusion de la République slovaque tient aussi à d'autres raisons. Si vous ne déclarez pas, Messieurs de la Cour, que le traité de 1977 lie les parties et les a toujours liées, *toutes* les installations existantes se trouveront dépourvues de base légale; et les parties ne pourront que négocier «dans le vide», sans autre directive réelle qu'une bonne volonté d'autant plus hypothétique que les pressions pour que les négociations échouent risquent d'être fortes — des deux côtés, mais surtout en Hongrie semble-t-il, au moins à en juger par certaines déclarations récentes du premier ministre hongrois, qui a tenté de répondre à une opposition aveuglée par son hostilité intransigeante à un projet qu'elle combat, en le caricaturant (voir *infra*, les conclusions de l'agent de la Slovaquie).

Le traité, lui, offre aux parties un guide solide; étant entendu qu'elles peuvent, d'un commun accord, dans l'exercice de leur sagesse souveraine, lui apporter les modifications qui paraîtraient utiles.

II. LES CONSÉQUENCES JURIDIQUES DES RÉPONSES DE LA COUR AUX QUESTIONS POSÉES

(article 2, paragraphe 2, du compromis)

6. Monsieur le Président, le traité de 1977 est en vigueur; la Hongrie l'a violé; la question se pose de savoir quelles conséquences découlent de ces constatations.

Dans son principe, la réponse est simple :

1° la Hongrie doit mettre un terme à son comportement illicite et cesser de faire obstacle à l'application du traité, compte bien sûr tenu de sa flexibilité — je veux dire de la flexibilité de cet instrument — et des importantes possibilités d'évolution qu'il ménage, voire des modifications qui pourraient lui être apportées par accord entre les parties à la suite de négociations futures;

2° la Hongrie doit réparer les conséquences dommageables de ses manquements, qu'il s'agisse de ses suspensions et abandons illicites de travaux ou de sa répudiation formelle du traité à partir de mai 1992; et

3° la Hongrie doit donner des garanties appropriées de s'abstenir d'empêcher l'application du traité et le fonctionnement continu du système.

7. Quelques mots d'abord sur ce dernier point, les garanties.

Le professeur Dupuy s'est borné à ironiser sur le fait «que la Slovaquie entendait se prémunir contre un contrôle exclusif du cours du Danube ... par la ... Hongrie» (CR 97/13, p. 57), laissant entendre par là qu'après tout c'est aujourd'hui la Slovaquie qui exerce ce contrôle grâce au barrage de _unovo. Certes, mais, compte tenu des errements passés de la Hongrie, la Slovaquie est légitimement soucieuse d'obtenir l'assurance durable que son partenaire n'empêchera plus le fonctionnement du projet.

C'est dans cette perspective que la Slovaquie a suggéré que cette garantie pourrait être que la fermeture du barrage demeure à _unovo et j'avais indiqué qu'en le déclarant, qu'en le décidant, la Cour ne remettrait pas en question l'idée d'exécution intégrale du traité, puisqu'il s'agit de tirer, sur le plan des règles secondaires, les conséquences de la situation actuelle qui résultent des faits internationalement illicites de la Hongrie (CR 97/11, p. 47). Bien que la Partie hongroise n'ait pas contesté ce point, il demande peut-être quelques mots d'explications complémentaires.

Selon la République slovaque, le maintien de la fermeture du Danube à _unovo serait justifié non seulement en fait, mais aussi en droit.

En fait, la chose est assez évidente : le démantèlement des installations existantes de la variante C — que vous avez pu observer sur les lieux —, même s'il est techniquement possible, serait fort coûteux et il n'en résulterait aucun avantage ni pour la protection de l'environnement, ni au plan économique. Je relève d'ailleurs que la Partie hongroise s'est montrée préoccupée de l'extension du bassin de retenue qui en résulterait (cf. CR 97/13, p. 39 (M. Crawford) ou p. 59 (M. Dupuy)). Il va de soi que la Slovaquie, pour sa part, n'envisage pas un instant d'exiger cette extension, inutile et onéreuse.

Le maintien du barrage du Danube à _unovo se justifie également au point de vue juridique. On peut y voir la conséquence normale de la licéité de la variante C : et si, pour toutes les raisons que vient d'exposer mon savant ami sir Arthur Watts, celle-ci est licite, on ne voit pas très bien quel motif justifierait son démantèlement qui créerait une injustice à l'égard de la Slovaquie. Au surplus, ce maintien constituerait sans aucun doute l'assurance la plus crédible contre le renouvellement des faits internationalement illicites qui sont à l'origine de l'affaire qui nous occupe.

Ce raisonnement paraît d'autant plus légitime que les garanties ou assurances de non-répétition, telles que les envisage l'article 46 du projet de la CDI, ne sont pas un élément de la réparation *stricto sensu*, ils sont une autre conséquence de la responsabilité qui *s'ajoute* aux diverses formes de la réparation. Elles «remplissent, dit la CDI, une fonction distincte et autonome [...lorsqu']il existe un risque que le fait illicite se reproduise» (cf. le commentaire de l'article 46 par la CDI *in Annuaire de la Commission du droit international* 1993, vol. II, deuxième partie, p. 85). Et tel est le cas ici.

Il ne fait aucun doute que la Slovaquie est en droit d'obtenir l'assurance formelle que les faits internationalement illicites de la Hongrie ne se reproduiront pas. Le maintien de la fermeture du Danube à _unovo constitue une telle garantie. Mais il peut également être envisagé que, dans le cadre des négociations à intervenir entre les Parties, la Hongrie donne une assurance équivalente compte tenu des conditions actuelles du projet ou de celles, nouvelles, qui pourraient résulter d'accords entre les Parties, voire même, le cas échéant, de modifications qu'elles pourraient convenir d'apporter au traité. Mais ceci sort du cadre du compromis.

8. Bien entendu, cette garantie, pour importante qu'elle soit, Monsieur le Président, ne saurait tenir lieu de réparation.

J'ai dit, lors du premier tour des plaidoiries orales, que la réparation devait prendre la forme d'une *restitutio in integrum* d'abord (cf. CR 97/11, p. 44). Ceci n'a pas été contesté par la Partie hongroise qui s'emploie elle-même à obtenir de la Cour une décision de ce type ... en sens opposé cela va de soi !

Le seul point de droit qui oppose les Parties à cet égard — mais il est de taille — concerne la combinaison de la restitution en nature avec l'indemnisation. Le professeur Dupuy a fait mine de s'étonner que j'ai indiqué que la *restitutio in integrum* n'était pas de nature, en l'espèce, à effacer toutes les conséquences de l'acte illicite (CR 97/13, p. 59). Mon contradicteur et ami est trop bon juriste pour que je puisse croire à un étonnement sincère... Ce que je disais (cf. CR 97/11, p. 48) était, à vrai dire, fort simple : la *restitutio in integrum* devrait se traduire, sauf si les Parties en conviennent autrement par voie d'accord, par la *reprise* par la Hongrie, *à l'avenir*, de ses obligations conventionnelles; mais cette reprise ne dédommagera pas la Slovaquie des pertes que la Tchécoslovaquie et elle-même ont encourues du fait du comportement illicite *passé* de la Partie hongroise. Pour que la réparation soit «intégrale» (cf. l'article 42, paragraphe 1, du projet de la CDI, rapport sur les travaux de sa quarante-huitième session, A/51/10, p. 164), pour qu'elle «efface toutes les conséquences de l'acte illicite» (cf. *Usine de Chorzów, fond*, *C.P.J.I. série A n° 17*, p. 47, arrêt du 13 septembre 1928), une indemnisation doit donc *s'ajouter* à la *restitutio*, constituée par la reprise par la Hongrie de ses obligations en vertu du traité.

9. C'est pourquoi, Messieurs les Juges, la République slovaque vous prie de dire et juger qu'elle a droit à une indemnisation complète au titre des pertes et dommages, y compris le manque à gagner, occasionnés par les faits internationalement illicites de la Hongrie, le tout assorti d'intérêts jusqu'au jour du paiement. Cette demande me paraît appeler quatre remarques :

1° La Partie hongroise s'est plainte de ce que nous n'aurions pas précisé l'objet de cette demande (CR 97/13, p. 59). C'est assez plaisant lorsque l'on constate qu'à aucun moment, ni dans ses écritures, ni dans ses plaidoiries orales, la Hongrie n'a donné la moindre liste des préjudices dont elle dit demander l'indemnisation en ce qui la concerne, alors que, pour sa part, la Slovaquie a présenté une liste raisonnablement détaillée des dommages qu'elle a subis et elle prie la Cour de bien vouloir décider que ce sont les catégories de dommages énumérées au chapitre IX de son mémoire (MS, par. 9.34-9.47, p. 364-370), dont l'indemnisation est due

par la Hongrie. En outre, des intérêts doivent être versés sur ces sommes conformément aux principes généralement applicables.

2° Vous remarquerez en passant, Messieurs de la Cour, qu'il s'agit de dommages précis, quantifiables, certains. Il y a là un contraste saisissant avec les positions floues de la Partie hongroise qui vous demande de reconnaître un droit à réparation en sa faveur pour des dommages futurs, incertains et éventuels, dont elle reconnaît qu'ils ne se sont pas produits mais dont elle affirme qu'ils pourraient, peut-être, survenir à l'avenir (cf. CR 97/6, p. 69 (M. Dupuy); voir aussi MH, par. 8.26 et 8.31, p. 251 et 252 ou RH, par. 3.170-3.172, p. 178-179); M. Dupuy est allé jusqu'à vous suggérer que la Hongrie a droit à une indemnisation pour des «risques» dont elle serait menacée par la variante C (CR 97/13, p. 61 et 62). Je ne pense pas, Monsieur le Président, qu'il soit utile de m'appesantir sur l'extrême nouveauté de ces prétentions par rapport aux théories habituellement admises quant à la définition du préjudice en droit international...

3° En troisième lieu, la Slovaquie pense qu'il est nécessaire, voire indispensable, que la Cour détermine d'une manière aussi précise que possible quels sont les préjudices indemnisables, ne fût-ce que du fait du mystère que la Hongrie entretient également à cet égard. En revanche, et les deux Parties sont d'accord sur ce point (cf. CR 97/2, p. 24 (agent); CR 97/6, p. 57-58; CR 97/12, p. 21-22 (M. Kiss); CR 97/13, p. 65-66 (M. Dupuy) et p. 84 (agent)), il serait certainement prématuré de fixer le *quantum* des dommages subis par la Slovaquie du fait des comportements illicites de la Hongrie : ceux-ci ne pourront être fixés avec précision que lorsque la date de la mise en oeuvre effective du traité dans son ensemble (modifié le cas échéant) aura été sinon atteinte, du moins décidée.

4° Quatrième remarque enfin : il paraît d'autant plus impossible de fixer dès maintenant le montant des indemnités dues par la Hongrie à la Slovaquie que celui-ci dépendra et de la date à laquelle le système de barrage prévu par le projet (qui aurait dû être pleinement opérationnel en 1994) fonctionnera effectivement et des modalités de son fonctionnement.

III. LA MISE EN OEUVRE DE L'ARRÊT DE LA COUR

i)
(article 5 du compromis)

10. Monsieur le Président, ceci me conduit à aborder un troisième et dernier problème, qui concerne, à vrai dire, moins le contenu de l'arrêt lui-même, que sa mise en oeuvre. Celle-ci est envisagée et «canalisée» par l'article 5 du compromis.

En vertu du paragraphe premier de cette disposition, «[l]es Parties s'engagent à accepter l'arrêt de la Cour comme définitif et obligatoire et à l'exécuter de bonne foi». Le professeur Dupuy a cru pouvoir tirer des conclusions assez surprenantes de cette clause, qu'il présente curieusement comme vous invitant, Messieurs les Juges, à appliquer le droit de l'environnement et le «droit fluvial international», le tout en vous inspirant des règles du droit de la mer (CR 97/13, p. 63-64). Vaste programme ! Vous me permettrez d'y voir, plus classiquement, une disposition-standard, que l'on trouve dans la quasi-totalité des compromis par lesquels une affaire vous est soumise, et qui se borne à rappeler la règle posée à l'article 60 de votre Statut.

Plus particulières sont certainement les dispositions des paragraphes 2 et 3 de cet article 5 du compromis. M. l'agent de la Hongrie en a fait l'exégèse vendredi dernier et nous n'avons rien à y redire (CR 97/13, p. 83-84; voir aussi CR 97/12, p. 22 (M. Kiss) et, pour la Slovaquie, CR 97/11, p. 53-54) — du moins tant que l'on s'en tient aux généralités. C'est sur les modalités d'application de ces dispositions qu'il subsiste sans doute quelques désaccords entre les Parties; et en tout cas, quelques ambiguïtés, que je vais essayer de dissiper.

11. Les deux Etats présents devant vous s'accordent sur ce que j'appellerais le «contenu minimal» des futures négociations.

Elles doivent porter, en premier lieu, sur l'évaluation des dommages subis par la Slovaquie; mais, j'y insiste, Monsieur le Président, *sur leur évaluation*. En ce qui concerne la consistance des préjudices indemnisables, il nous paraît indispensable que celle-ci soit fixée aussi précisément que possible par l'arrêt que la Cour va rendre. La haute juridiction dispose de tous les éléments pour cela — en tous cas, la Slovaquie lui a exposé les siens et, comme je l'ai dit il y a un instant, si la Hongrie s'est abstenue de préciser la nature des dommages dont elle prétend avoir été la victime, c'est, tout simplement, parce qu'elle n'en a subi aucun. Au surplus, ces préjudices hypothétiques ne seraient, de toute manière, pas indemnisables

puisqu'aucun fait internationalement illicite ne peut être attribué à la Slovaquie. Or, le seul fondement acceptable à l'obligation de réparer — le seul — pesant sur la Hongrie est le droit de la responsabilité *pour manquement* (cf. CR 97/11, p. 49-53) et ni le traité lui-même, auquel les conseils de la Hongrie retrouvent soudainement un certain charme (cf. CR 97/12 (M. Sands)), ni l'article 35 du projet de la CDI (cf. CR 97/4, p. 25 (M. Crawford) ou CR 97/5, p. 67 (M. Sands); voir aussi CR 97/12, p. 64 (M. Nagy) ou CR 97/13, p. 26 (M. Dupuy)).

12. Le second point sur lequel les négociations doivent nécessairement porter concerne les modalités du re-démarrage du projet — pas du «projet original», du «projet» —, là où il a été brutalement interrompu par la Partie hongroise en 1989-1990. Il s'agit d'abord, c'est une évidence, de déterminer la nature des travaux restant à effectuer, ce qui suppose que les Parties se mettent d'accord sur la consistance future du projet et le calendrier de sa réalisation.

La consistance du projet ? J'ai dit, et je ne le retire pas, que la Hongrie devait s'acquitter de ses obligations, de toutes ses obligations, en vertu du traité. Cela signifie, en effet, d'abord, que Nagymaros doit être construit. Mais j'ai dit aussi que rien n'empêchait les *deux* Parties, par voie *d'accord*, de modifier le traité, *si* toutes deux y consentent. Mais, ceci, à vrai dire, dépasse le cadre de l'article 5 du compromis. Il ne paraît en effet pas juridiquement possible que la Cour décide, dans son arrêt, une modification d'un traité dont elle ne pourra que constater la validité. Ce «scénario» est donc, en quelque sorte, «hors compromis» et je l'évoque comme une possibilité ne serait-ce que parce que M. l'agent de la Hongrie l'a, lui-même, envisagé la semaine dernière (cf. CR 97/13, p. 84-85).

En revanche, de toutes manières, les deux Parties doivent négocier un nouveau calendrier pour la reprise de l'application du traité puisque celui prévu tant dans l'accord mutuelle de 1977 modifié en 1989, que dans le plan contractuel conjoint, est devenu obsolète du fait du comportement illicite de la Hongrie.

Dans le même esprit, des négociations devront porter sur les droits respectifs des Parties sur l'énergie produite, cette question n'étant sans doute pas détachable de celle de l'indemnisation, qui pourrait parfaitement être réglée en nature, par l'octroi, pendant une

période à fixer, de tout ou partie de l'électricité à la Slovaquie. Les deux Parties devront en outre préciser l'objet et les modalités de la propriété conjointe des ouvrages et installations.

13. Les Parties doivent aussi, c'est une autre évidence, régler les problèmes qui étaient en suspens au moment de la répudiation du traité par la Hongrie. Et ceux-ci, j'en ai évoqué quelques-uns hier, ne sont pas anodins, puisqu'ils incluent certaines mesures nécessaires à l'amélioration de l'ancien lit du Danube, dont l'implantation des maintenant fameux seuils subaquatiques ou la définition des modalités (et des limites) de la production d'électricité de pointe.

Il faudra bien sûr aussi, et la Slovaquie en est tout à fait consciente, la Hongrie probablement aussi, que les Parties s'accordent sur un mécanisme aussi précis que possible de gestion des eaux. Toutefois, je souhaiterais faire deux remarques à cet égard :

1. En premier lieu, il n'est possible, dans ce domaine, que d'adopter des principes généraux : cette gestion doit en effet tenir compte de toutes les circonstances hydrologiques et climatiques et des besoins de l'environnement naturel notamment, circonstances qu'il est absolument impossible de prévoir une fois pour toutes à l'avance. C'est d'ailleurs pourquoi un système de surveillance «the monitoring», dont vous avez pu apprécier la sophistication et la rigueur, a été mis en place: il est évident que si celui-ci laissait présager de quelconques menaces pour l'environnement, des mesures correctrices devraient aussitôt être mises en oeuvre; et l'on ne saurait trop répéter que c'est pour cela que le traité est souple et flexible et prévoit une coopération constante entre les Parties, coopération dont il faut faire revivre les mécanismes. En outre, la viabilité économique du projet doit être assurée.

2. En second lieu, cette question relève par excellence de l'accord des Parties. Je ne crois pas que ce soit manquer de respect à la Cour que de le rappeler.

Dans sa plaidoirie de vendredi dernier, le professeur Dupuy affirmait que la Haute Juridiction ne souhaiterait pas «se substituer aux parties pour descendre ... à l'étage des cuisines» (CR 97/13, p. 66). Il appliquait cette curieuse image au calcul de la réparation ce qui, malgré tout, peut être décidé par un tribunal, si besoin est. En revanche, il est tout à fait clair qu'il ne relève pas de la mission de la Cour, ni à vrai dire, de celle d'une juridiction quelle

qu'elle soit, d'entrer dans les considérations infiniment techniques faisant intervenir des paramètres scientifiques d'une extrême complexité et changeant, qu'implique la gestion des eaux, qui doit tenir compte du volume des débits, de leur variations selon les saisons, les besoins de la végétation, etc. D'autant moins que, comme je viens de le dire, il ne s'agit pas de poser des principes généraux et abstraits, en tout cas il ne s'agit pas seulement de poser ces principes, il s'agit aussi de procéder à une surveillance constante et de réagir aux circonstances. Ceci n'est pas là la mission d'une juridiction.

* * *

14. Monsieur le Président, en écoutant nos contradicteurs la semaine dernière, j'ai souvent eu le sentiment qu'ils s'étaient trompés de forum et confondaient le v ôtre avec un Parlement ou, en tout cas, qu'ils se croyaient devant un amiable compositeur.

Ce n'est pas, Messieurs les Juges, je crois, vous faire injure que de rappeler que vous êtes voués à l'application et à la défense du droit. C'est une noble tâche. Mais, dire le droit, ce n'est pas le faire; et cela, nos amis hongrois semblent l'avoir fâcheusement oublié.

Ainsi, j'ai été très frappé d'entendre, vendredi dernier, le professeur Carbiener —- avocat de la Hongrie, faut-il le rappeler ? et la fonction d'avocat est éminemment juridique —, plaider «pour une rationalité nouvelle, intégratrice, issue des développements scientifiques» (CR 97/13, p. 77).

L'article 38 de votre Statut, Messieurs les Juges, est pourtant clair : votre «mission est de régler *conformément au droit international* les différends qui [vous] sont soumis», pas de mettre en oeuvre une «rationalité *nouvelle*», pas de vous ériger en législateurs d'un développement durable (voir *ibid.*, p. 63-64 (M. Dupuy), p. 76 (M. Carbiener) ou p. 78 (agent)), même si cette préoccupation, que la Slovaquie partage, est éminemment respectable et ne saurait être négligée, mais seulement — et c'est important —, pour autant que, et dans la mesure où, vous ne substituez pas votre jugement *sur le droit* au jugement *en droit*, qui est

attendu de vous et pour lequel les Parties vous ont fait confiance par le biais du compromis du 7 avril 1993.

15. Malgré la caricature de ses positions qu'a tenté de faire la Hongrie, la Slovaquie, comme l'a rappelé son agent à l'issue du premier tour (CR 97/11, p. 55), est particulièrement soucieuse de la protection de l'environnement humain. Et elle est convaincue que c'est en protégeant les habitants de la région, dans les deux pays, contre les inondations dévastatrices causées par les caprices du Danube et du climat, en facilitant l'irrigation, en surveillant soigneusement la qualité des eaux, de surface et de l'aquifère, et, bien sûr, en préservant le patrimoine naturel remarquable des branches du Danube, que cette protection est le mieux, le plus durablement, le plus raisonnablement, et le plus équitablement assurée. La Slovaquie est convaincue aussi qu'une application raisonnable du traité de 1977, par les deux Parties agissant conjointement au mieux de leurs intérêts communs, est la meilleure garantie du développement durable qu'elle appelle de ses voeux autant que la Hongrie. Et elle est convaincue également que si, par impossible, l'arrêt que vous allez rendre devait priver les Parties du guide, à la fois ferme dans ses objectifs et souple dans ses modalités de mise en oeuvre, que constitue le traité, les deux Etats éprouveraient les plus grandes difficultés à trouver un terrain d'entente: il leur manquerait le secours du droit.

Monsieur le Président, Messieurs de la Cour, je vous remercie très vivement de m'avoir écouté avec patience et bienveillance tout au long de ces plaidoiries, et je vous prie, Monsieur le Président, de bien vouloir donner la parole à M. Peter Tomka, agent de la République slovaque.

The PRESIDENT: Thank you Professor Pellet. I call upon the distinguished Agent of Slovakia.

Mr. TOMKA:

Mr. President, Members of the Court, as we are now approaching the end of these pleadings, I am anxious that the positions of the Parties should not be misrepresented. It would be quite wrong to see this as a case between a State — Hungary — which is concerned

to protect the environment and a State — Slovakia — which is indifferent to the needs for environmental protection. Slovakia has an environmental record of which any State could be proud. You have seen with your own eyes the complex monitoring arrangements now in operation in and around Gabcíkovo. So the position is not that Slovakia takes refuge in technical arguments based on treaty law, ignoring the need for environmental protection. It is rather that Slovakia seeks to preserve and protect the 1977 Treaty because, in addition to providing for sustainable development of the Danube, it contains the means of preserving the environment in this stretch of the Danube.

Mr. President, Members of the Court, this is a case in which the Court must be concerned not simply to resolve this particular dispute between the two Parties, but also to clarify principles of law applicable to treaties generally. Let there be no mistake, States all over the world will take careful note of what the Court finds to be the law regarding a party's freedom to suspend, or terminate, a treaty. If the Court should uphold Hungary's claim to suspend, and then terminate, a treaty Hungary believes to be no longer in Hungary's interest, then the effects of the Court's judgement would be very damaging.

Slovakia has demonstrated that Hungary was in clear, and fundamental, breach of the 1977 Treaty. We have shown that Hungary is unable to invoke "necessity" to excuse Hungary from responsibility for that breach. Professor McCaffrey has explained that, even on the basis of Article 33 of the International Law Commission's Draft Articles, Hungary meets none of the conditions for excluding wrongfulness.

But even if Hungary did satisfy those conditions — which Slovakia emphatically denies — the effect would be to preclude wrongfulness. And that is all! It would not permit Hungary to suspend or terminate the 1977 Treaty.

However, what I want to do now is to ask the Court to consider the *consequences* of Hungary's argument justifying termination of the 1977 Treaty on the basis of a supposed ecological necessity. They are consequences which should alarm this Court. For if Hungary's arguments are upheld, then, in my submission, the very stability of treaties is seriously challenged.

The Court will see that, in essence, the Hungarian thesis is this: "a State party to a Treaty can suspend performance, or terminate the Treaty, whenever it believes its essential interests may be affected by continuing performance".

I do not need to tell you that nothing even remotely like that proposition is contained in the Vienna Convention. And for good reason. If accepted by this Court, it would reduce the binding force of treaties to an empty formula!

The Court will recall that Hungary defines its "essential interests" very broadly. For Hungary it is not simply a threat to its natural resources. It includes any threat to its economic interests (Ms Gorove, CR 97/3, p. 73; Mr. Sands, CR 97/6, pp. 10-11). Or threats to the "ensemble" of its concerns (Professor Dupuy, CR 97/3, p. 83). Or even situations where one Party alleges the treaty has been based on "outmoded science" (Mr. Sands, CR 97/6, p. 24). So you can see that the concept of "essential interests" is so broad that almost any reason will allow a State to rid itself of unwanted treaty obligations.

And not much is required by way of proof that such "essential interests" are threatened. Hungary's counsel have told us, again and again, that it is enough if Hungary reasonably believed that damage to its interests *might* occur — not *will* occur, mark you, just *might* — in the distant future. For, so we are told, ecological damage by its very nature takes many years to materialize. So the results of four years of monitoring, which show the contrary, can be ignored: four years tell us nothing!

There are at least three answers to this. *First*, the whole point of having a sophisticated monitoring system is to have an early warning that the activity carries a risk. As our scientists have shown, ecological damage, even long-term damage, does not come "out of the blue": it does not suddenly appear out of nowhere. There are bound to be signs that something is wrong, and the whole point of a monitoring system is to give an early warning that something may be wrong.

Second, the effects of the Gabcíkovo barrage, operating under Variant C, have been carefully monitored by Slovakia for the past four and a half years. And the results are

markedly reassuring. They do *not* suggest that there is any real threat to either Party. On the contrary, compared to the "pre-dam" situation, there is some evidence of steady improvement.

Third, the law cannot be such as to allow a Party to suspend or terminate a treaty on a mere suspicion that damage might occur in the distant future. Let me remind the Court of the International Law Commission's Draft Articles on the Non-Navigational Uses of International Watercourses (Report of the ILC 46th Sess. 1994: UNGAOR, 49th Sess. Suppl. No. 10, A/49/10). On 4 April 1997, on the basis of these Draft Articles, the Sixth Committee of the General Assembly adopted a draft convention on the Law of Non-Navigational Uses of International Watercourses (United Nations Doc. A/C-6/51/NUW/WG/L.3, as amended). Here we have a draft covering ecological damage. It contains the basic obligation not to cause significant harm (Art. 7). The word "significant" was carefully chosen. And "significant" cannot mean damage which has not occurred, or damage which is merely suspected as likely to occur in the distant future. Even in *emergency situations*, provided for in Article 28, the threat of serious harm must be *imminent*. And in such situations States are obliged to take measures to deal with the emergency *in co-operation* with other affected States. Nothing could be further from Hungary's idea that it was free to take *unilateral* measures, even suspending and then terminating, a treaty, simply upon an unproved fear of damage in the distant future.

So, Mr. President, if you take this most recent attempt to codify the law in relation to international watercourses — like the Danube — and you look at the risk of ecological damage, *nothing* — I repeat, *nothing* — in the Draft Articles of the ILC or the new draft convention gives any support to the Hungarian thesis.

And perhaps now, Mr. President, you will allow me to say a word about *logic*. It may well be that the law and logic are not the same thing. But where a party gives a court reasons for its conduct the law expects those reasons — if they are to be believed — to withstand logical analysis.

I would ask the Court to examine the reasons given by Hungary to justify the suspension, and later abandonment, of its performance of the Treaty — simply to see whether they stand up to logical analysis.

As we have heard, Hungary professes to have feared an ecological disaster, resulting from the Treaty-Project. Hungary says its principal concerns were two: the threat to the drinking water supplies of Budapest; and to the ecosystem of the wetlands of the Szigetköz.

Let me take the first: the supplies of drinking water to Budapest. Now, as Slovakia has made clear, and I refer the Court back to Mr. Wordsworth's statement, there is no basis in fact for this fear of contamination. Any risk to the water from the bank-filtered wells upon which Budapest relies came from Hungary's own conduct in carrying out extensive and excessive dredging of the riverbed downstream of Nagymaros prior to 1980.

Let me take the other alleged fear of Hungary: the fear of long-term damage to the ecosystem of the Szigetköz, on Hungary's right-bank, near Dunakiliti. Now there one can see a superficial link. Dunakiliti controlled the rate of flow in the old riverbed of the Danube. So, if the wetlands of the Szigetköz depended on an adequate supply of water to the old bed of the Danube, Dunakiliti was obviously important. But Hungary controlled Dunakiliti! The "tap" was to be under Hungarian control. So, if a real threat emerged, all Hungary had to do was to present that evidence to Czechoslovakia and agree to allocate more water to the old bed. And, if Czechoslovakia unreasonably objected then, in the final analysis, Hungary had a remedy, for Hungary controlled the "tap".

So, Mr. President, simply as a matter of logic, why stop building the "tap" that gave Hungary ultimate control over the flow-rate? It simply does not make sense! It lacks all logic.

Mr. President, I hope you will forgive my short *excursus* into logic. I think it may help the Court to see that Hungary's conduct was not only unsupported by the facts, and the law — it does not withstand logical scrutiny.

Mr. President, let me now turn to the two different "scenarios" painted by the Hungarian Party.

(i) <u>The 1977 Treaty is held by the Court to have been validly terminated by Hungary</u>

If I take the first hypothesis which Hungary urges the Court to adopt, namely that the 1977 Treaty was validly terminated, then the consequences would be these.

First, Variant C would be deprived of its legal basis and its continued operation would be regarded as unlawful by Hungary. So the by-pass canal would have to be emptied, navigation would be forced back into the old Danube, the Gabcíkovo barrage would be rendered useless, and all the pre-dam problems of flooding, drying-out of the side-arms, poor navigation, and so on, would re-emerge. After 20 years and billions of dollars we would be in a worse position than where we started from!

Second, Slovakia would be placed in an impossible position in negotiations with Hungary. For Hungary would realize that Slovakia would have to keep Gabcíkovo operational somehow — it could not accept that this large investment would stand idle and useless: and so Hungary could force whatever conditions it liked on Slovakia. The threat is real. Let me recall to the Court the words of the Agent for Hungary. "But what Gabcíkovo can and should become depends on what must happen to Variant C, of which it is now part . . . It cannot remain in that situation. If agreement cannot be reached as to its future, it must be dismantled." (CR 97/13, p. 85.)

So you see that the future of Gabcíkovo itself would be in jeopardy. And Gabcíkovo is part of the agreed Treaty-Project!

(ii) <u>The 1977 Treaty is held by the Court to remain valid</u>

I take, second, the scenario which Hungary bitterly opposes, namely that the 1977 Treaty is held to remain valid.

Hungary assumes that, in this case, it will be bound to complete the building of Nagymaros, and it is this consequence Hungary finds totally unacceptable. But, Mr. President, whilst formally, that may be the legal consequence of finding the Treaty remains valid, we need to bear in mind a number of factors.

First, there will have to be negotiations on the implementation of the Court's judgment. But even apart from that, provided Hungary can give real evidence that construction of

Nagymaros as originally planned will cause serious harm to Hungary, these negotiations can be extended and there is nothing to stop the Parties from agreeing to revise the Treaty. At the end of my opening statement in the first round, I pointed out how readily the dispute in this case could have been settled on the basis of proposals put forward either by Czechoslovakia or by Hungary in late 1989. Although the situation on the ground has changed since then, Slovakia is prepared to take up these negotiations where they left off before they were terminated by Hungary in early 1990, with the aim of resuming joint operations on an agreed-upon basis. The flexible attitude expressed by Czechoslovakia's new Prime Minister in his letter of 15 February 1990 following the Velvet Revolution (HM, Vol. 4, Ann. 33) still prevails.

Regrettably, Hungary's pleadings have seriously misrepresented the position at the time and portrayed Czechoslovakia as intransigent and vehemently set against any change in the Project. But Slovakia at these hearings — and in its written pleadings — has demonstrated the contrary. If Hungary will put behind it this distorted picture of the positions of the Treaty Parties in 1989, the two Parties can then sit down now and pick up the discussions where they left off, although necessarily having to address the consequences of the changed situation on the ground as well.

The fact is that negotiations have continually foundered because of rivalries within the Hungarian Parliament and misinformation given to the Hungarian public. The problem is not a new one. It is well-known that some cases are brought by the governments before the World Court because of the limits imposed on the governments by parliaments.

As is also known, the Court's proceedings in this case were accompanied by an effort to find an out-of-court settlement, particularly since the fall of 1995. While substantial progress was made, nevertheless not all aspects of a package deal were agreed on. I am not allowed even to indicate the direction in which both Parties were leaning as they had a mutual understanding that the positions of the Parties during the talks should not be disclosed for fear of prejudicing their legal position before the Court.

It is worth noting what the Prime Minister of Hungary H.E. Mr. Gyula Horn has recently said, for he explains some of the difficulties created internally in Hungary. Let me add, before quoting him, that I have a great respect for this man, a real statesman who so greatly contributed to democratic reform in Hungary. And this courageous leader when strongly criticized by the opposition in Parliament, for holding talks with Slovakia on a possible out-of-court-settlement, on 10 February 1997, said:

> "I must say that a lot of lies have emerged in the Gabcíkovo issue not only for the time being, but throughout its history. One lie is that the Prime Minister has alone entered into a secret agreement with Prime Minister Me_iar. Neither is it true that it deals with alleged construction of the downstream step at Esztergom. I want to remind the honourable public that it was asserted in the past that there would be no damage in the case of withdrawal from the investment, that the Austrian party would not claim any compensation, that Variant C is a 'paper tiger' and finally that the hydropower plant at Gabcíkovo would not be accomplished. They had been making those assertions for many years. The fact remains that these people prevented the construction of an underwater weir in 1993, which was — though temporarily — to solve the water supply of Szigetköz. The whole issue has been accompanied by lies and distortions."

And he later concluded his statement on this issue by these words:

> "I would like to emphasize: this issue needs to be resolved. This must be done because of our own interests as well as international expectations. Neither the Parliament, nor the Government can liberate themselves from responsibility relating to this issue. My aim is to reach the most convenient settlement and I hereby ask for support of all, who find this State interest important." (Statement to Parliament, 10 February 1997, reported (in Hungarian) in *Observer Budapest KFT - RTV Hírfigyelés* (trans. by Slovak Foreign Ministry).)

So, to conclude on my first point, I would say that following the Court's judgment negotiations will have to be held. Slovakia remains flexible and co-operative. But we need to address the problems frankly, and hold talks which are not hindered by the internal politics of Hungary.

Second, any decisions on Nagymaros would necessarily be taken *after* careful, expert study of the problems feared by Hungary; and any alternatives would also need to be studied. So, whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future.

Not surprisingly, this matter has already been given some consideration in negotiations for an out-of-court settlement.

Third, Slovakia — as a Party relying on "approximate application" of a treaty — can be expected to be flexible about the best means of implementing the Treaty. The idea that "approximate application" can serve in the negotiations for revising or adapting a treaty to changing situations in not new. It is expressed by the distinguished commentator Rosenne in his book on Breach of Treaty (1985, pp. 95-101) where, in a six-page discussion of the doctrine of approximate application, he says:

> "The doctrine of approximate application (in which faint echoes of cy-près can be heard!) if skilfully used may serve as a prod to the renegotiation, reinterpretation or readaptation of a treaty which in the general lines remains desirable to all parties but which in its details cannot stand up to the wear and tear of daily life. The doctrine is thus a constructive contribution to the general stability of juridical relations which are to be coupled in appropriate cases with a carefully controlled dose of peaceful change and adaptation."

As to the Gabcíkovo sector of the Treaty-Project, it can be assumed the Parties will show equal flexibility. Provided the bypass canal and the Gabcíkovo Power-station and Locks — both part of the original Treaty, and not part of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunakiliti and Cunovo, bearing Nagymaros in mind.

But I emphasize that proviso. Slovakia cannot be expected to agree to discharges into the old riverbed which would cause water quality problems in the reservoir and make the Gabcíkovo power-station uneconomic.

There is also the objection made by the counsel for Hungary (Prof. Crawford, CR 97/13, p. 55) that if the Treaty and Variant C are upheld as valid, then the project would be transformed from the *joint* scheme envisaged by the Treaty into a purely *unilateral* scheme operated and controlled by Slovakia alone. Mr. President, there is no basis for this objection. Under the Treaty many matters would remain matters for joint co-operation.

And, last, Hungarian counsel expressed the fear (Prof. Dupuy, CR 97/13, p. 58) that the Dunakiliti reservoir would be enlarged and Gabcíkovo would operate at peak mode. Mr. President, these are really "scare tactics". No one is going to extend the reservoir — a costly business — without good reason. And no one is going to switch to peak mode if the evidence of environmental damage is clear and accepted by both Parties.

Finally, Mr. President, I must comment on Hungary's views on the Court's task. As I understood the Hungarian Agent, he suggested that the Court should not attempt to establish a detailed Water Management Régime. I agree entirely. He appeared to suggest that the Court should lay down "guide-lines" for the future negotiations of the Parties, designed to help them in implementing the Court's judgment. Again, I have no difficulty in accepting that idea, but when we come down to details I may have somewhat different views from my Hungarian colleague.

The Agent of Hungary and I both agree that it would not be appropriate for the Court to attempt to lay down a Water Management Régime. I would go even further and state that figures, or percentages, of the volumes of water to be allocated to the old river, the new bypass canal, the Mosoni Danube, and so on, is a matter requiring detailed study and considerable scientific expertise as the experts for Hungary showed (Professor Wheater, CR 97/12, pp. 87-96). I mean no disrespect when I say this is not a matter for this Court.

I also formed the impression that the Agent of Hungary believed the Court should order the Parties, or recommend to the Parties, to conduct a new EIA. But, Mr. President, we do not need another vast, lengthy study of all aspects of the Project. What we do need, as I have already suggested, is for Hungary to identify the problems it genuinely fears, and for *those* problems to be jointly studied by the Parties.

I think we can both agree that there needs to be an accounting so that, guided by the Court's findings on responsibility, the Parties can try to reach a global settlement. Moreover they will need to agree on how sums due are to be paid and, given that they are likely to be large sums, the advantages of keeping Gabcíkovo productive are obvious. For Hungary's entitlements to the electricity produced will help finance its obligations of compensation to Slovakia.

Mr. President, time passes and, before reading the final submissions of Slovakia, I should like to say two things on behalf of the entire team of Slovakia. The first is by way of tribute to our colleagues on the Hungarian team, for we very much appreciate the courtesy and friendliness which has characterized their pleading.

The second is by way of thanks to you, Mr. President, and to your predecessor, M. le juge Bedjaoui, from both of whom Slovakia has received help and understanding throughout these proceedings. And also I would thank all Members of the Court and to the Registrar and his staff for their patience and careful attention to what has been a long, and often technical, pleading. We shall await your judgment with confidence.

Thank you, Mr. President.

J'en viens maintenant aux conclusions finales de la République slovaque. Elles se lisent comme suit :

Sur la base des éléments de preuve et des arguments juridiques présentés dans ses écritures et ses plaidoiries orales, la République slovaque.

Prie la Cour de bien vouloir dire et juger :

1. Que le traité, tel qu'il est défini à l'alinéa premier du préambule du compromis entre les Parties en date du 7 avril 1993, relatif à la construction et à l'exploitation du système d'écluses de Gabcíkovo-Nagymaros et les instruments s'y rapportant, conclu entre la Hongrie et la Tchécoslovaquie, à l'égard duquel la République slovaque est l'Etat successeur, n'a jamais cessé d'être en vigueur et le demeure, et que la notification, le 19 mai 1992, de la prétendue terminaison du traité par la République de Hongrie n'a eu aucun effet sur la validité de celui-ci ;
2. Que la République de Hongrie n'était pas en droit de suspendre puis d'abandonner les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabcíkovo dont la République de Hongrie est responsable aux termes du traité;

3.3. Que la République fédérative tchèque et slovaque était en droit de recourir, en novembre 1991, à la «solution provisoire» et de mettre ce système en service à partir d'octobre 1992 et que la République slovaque était et demeure en droit de continuer à mettre en oeuvre ce système ;

4. Que la République de Hongrie doit dès lors mettre immédiatement un terme à toute conduite qui empêche l'application de bonne foi du traité de 1977 et qu'elle doit prendre toutes les mesures nécessaires pour s'acquitter sans retard des obligations que lui impose

ce traité, afin de faire en sorte que le traité soit à nouveau respecté, sous réserve des modifications qui pourraient y être apportées par accord entre les Parties;

5. Que la République de Hongrie doit donner des garanties adéquates de s'abstenir d'empêcher l'application du traité et le fonctionnement continu du système;

6. Qu'en conséquence de sa violation du traité de 1977, la République de Hongrie doit, outre la reprise immédiate de l'exécution de ses obligations en vertu du traité, payer à la République slovaque une indemnisation complète au titre des pertes et dommages, y compris le manque à gagner, occasionnés par ces violations, assortis des intérêts;

7. Que les Parties doivent engager immédiatement des négociations en vue, notamment, de l'adoption d'un nouveau calendrier et de mesures appropriées pour la mise en oeuvre du traité par les deux Parties et la fixation du montant de l'indemnité due par la République de Hongrie à la République slovaque; et que si les Parties ne peuvent parvenir à un accord dans un délai de six mois, l'une ou l'autre d'entre elles pourra prier la Cour de rendre un arrêt supplémentaire pour déterminer les modalités d'exécution de son arrêt.

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

The PRESIDENT: Thank you, Dr. Tomka. The Court takes note of the final submissions presented on behalf of the Slovak Republic.

Before closing the Vice-President, Judge Bedjaoui and I have questions that we would like to put to both Parties. May I first give the floor to Vice-President Weeramantry.

The VICE-PRESIDENT: Thank you, Mr. President, I have a questions for both Parties. It is as follows.

At the visit to the site, I inquired of both Parties what the relative cost might be of purification of river water for drinking purposes, as compared with purification through the system of bank-filtered wells. At the resumption of hearings, Hungary offered the reply that the capital cost of such a venture would be two-fold, and the operational costs five- to ten-fold.

I would like to have from both Parties some clarification as to the type of installations required for this purpose, if it were to be undertaken, and an overall estimate in the broadest

terms of likely capital and operational costs, if it were on a scale sufficient to supply 85% of the drinking water of Budapest.

Thank you.

The PRESIDENT: Thank you. Judge Bedjaoui, please.

M. BEDJAOUI : Merci, Monsieur le Président. Je voudrais tout d'abord poser une question aux deux Parties. C'est la suivante.

L'expérience de l'homme montre que sa relation avec la nature n'est jamais neutre et que toute action de l'homme sur la nature comporte des réactions d'intensité variable à plus ou moins long terme.

Par ailleurs, la bibliographie publiée par l'Académie des sciences de Hongrie montre que des études sur l'environnement ont été effectuées avant la conclusion du traité de 1977.

Ces deux observations permettent-elles de penser que lors de la conclusion du traité les Parties contractantes n'étaient conscientes d'aucun impact possible (négatif ou positif) sur l'environnement ? L'incorporation des articles 15, 19 et 20 dans le traité de 1977 ne montre-t-elle pas le contraire ?

J'aurais ensuite une question à adresser à la Hongrie. La voici.

La Hongrie peut-elle fournir quelques précisions sur la résiliation des contrats de droit privé relatifs à la construction du projet Nagymaros, avec leur nombre, leurs dates de résiliation et leurs modalités d'indemnisation éventuelle ?

Et puis ensuite, m'adressant à la Slovaquie, j'aurais deux questions. La première est la suivante. Un conseil de la Slovaquie a indiqué que «*les deux Parties convenaient souvent de modifications appropriées au traité de 1977, à ses instruments connexes et au plan contractuel conjoint*».

Selon la Slovaquie, quelle est la force contraignante, à l'égard de chacune des Parties, de ces modifications au plan contractuel conjoint ou aux instruments connexes ?

Et la deuxième question que j'adresse à la Slovaquie est la suivante.

la Slovaquie a déclaré qu'elle a temporairement déjà abandonné le fonctionnement en régime de pointe sur le barrage de Gabcíkovo, en l'absence d'un second barrage nécessaire en aval prévu à Nagymaros.

La Hongrie soutient que la Slovaquie n'a pas abandonné en fait ce régime de pointe.

Par-delà cette controverse, quelles seraient les conséquences de toutes natures, si le barrage de Gabcíkovo ne fonctionne plus en régime de pointe et si la Slovaquie adopte à titre définitif un fonctionnement au fil de l'eau ?

Je vous remercie, Monsieur le Président.

The PRESIDENT: Thank you, Judge Bedjaoui. The question I should like to put to both Parties is this.

Having regard to the controversy over the usage of the term "original project", what, if any, provisions of the Joint Contractual Plan or of other agreements concluded by the Parties effectively introduced into the operative provisions of the 1977 Treaty or into the complex of the governing obligations of the Parties precise specifications as regards:

(i) the withdrawal of Danube Waters and the amount of water to be channelled into the old Danube and its branches and canals after extraction from it was effected;

(ii) the measure, if any, of peak power production to be generated when the Project was to come into operation?

(iii) the implementation of the obligations of Articles 15, 19 and 20 of the 1977 Treaty?

and when did they do so?

The written text of these questions will be made available as soon as possible. Both Parties are invited to give their answers in writing by Friday 25 April. It may be also recalled that by 25 April, Hungary is to submit any further observations on the PHARE Report. Any comments by Slovakia on Hungary's observations on the PHARE Report will be due by 2 May.

This brings us to the end of the oral hearings in this case.

I would like to thank the Agents, Counsel and Advisers of both Parties for the excellence of the pleadings of which the Court has had the benefit as well as for the spirit of courtesy that they have shown throughout these hearings.

In accordance with the usual practice, I would ask the two Agents to remain at the disposal of the Court to provide any further assistance it might need. Subject to that, I declare the oral proceedings in the case concerning the *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)* closed.

The Court will now withdraw to deliberate. The Agents of the Parties will be notified in due course of the date when the Court will give its Judgment.

The sitting is now closed.

The Court rose at 1.15 p.m.

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