SEPARATE OPINION OF JUDGE BEDJAOUI

[Translation]

1. In my view, the majority of the Court has not sufficiently clarified two questions, i.e., the *applicable law* and the *nature* of the 1977 Treaty. In no way do I disagree with the analysis of the majority of the Court on these two points which will necessitate just a little finer shading and clarification from me at a later stage.

2. However on two other questions I do have distinct reservations about the position taken by the majority. These are first the *legal characterization of Variant C*, considered by the majority to be unlawful only in its final phase, i.e., the diversion of the Danube, and which I personally consider to be an offence, whose unlawfulness in the final phase has a retroactive effect upon each of the acts — from first to last — in the construction of Variant C. Then there is the comprehensive analysis of the conduct of the two Parties, that I see as constituting *intersecting violations,* nurturing and nurtured by each other in turn in a tangle of causalities hard to unravel, and generating *two effectivités* mutually acknowledged by the Parties.

However, my reservations with regard to the position of the majority of the Court on these various points did not prevent me from voting for the operative part as a whole, since I agree with the tenor of the Judgment overall.

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3. I agree with the majority of the Court on its general approach to the question of the *applicable law*. I shall refer to only one aspect of this question that I consider to be fundamental and that touches upon the applicability in this case of the conventions and other instruments *subsequent* to the 1977 Treaty, and concerning the environment and the law of international watercourses.

4. Hungary asks the Court to interpret the 1977 Treaty in the light of the new, more developed and more exacting law of the environment, and of the law of international watercourses. In support of its argument, it principally relies upon the Advisory Opinion rendered by the Court in 1971 in the *Namibia* case (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16). In that case, the Court stated that a treaty should be interpreted "within the framework of the entire legal system prevailing at the time of the interpretation" (*ibid.*, p. 31).

5. Taken literally and in isolation, there is no telling where this statement may lead. The following precautions must be taken:

— an *"evolutionary interpretation"* can only apply *in the observation of the general rule of interpretation* laid down in Article 31 of the Vienna Convention on the Law of Treaties;
— the *"definition"* of a concept must not be confused with the *"law"* applicable to that concept;
— the *"interpretation"* of a treaty must not be confused with its *"revision"*.

A. The "Evolutionary Interpretation" Can Only Be Applied If the General Rule of Interpretation in Article 31 of the Vienna Convention on the Law of Treaties Is Respected

(a) *Respect for the Principle* Pacta Sunt Servanda *Unless There Is Incompatibility with a Peremptory Norm Appertaining to* Jus Cogens

6. (i) It may be useful first to restate the obvious: *pacta sunt servanda.* Inasmuch as the 1997 Treaty is regarded as being in force for the purposes of a judicial interpretation, it is necessarily binding upon the parties. They are under an obligation to perform it in *good faith* (Article 26 of the 1969 Vienna Convention).

(ii) Moreover the parties cannot, in principle, evade a traditional interpretation based on Article 31 of the Vienna Convention unless the Treaty which they concluded in the past has become incompatible with a norm of *jus cogens*. Both Hungary and Slovakia appear to agree that this is not the case of the 1977 Treaty.

(b) *The Interpretation of the Treaty Must Comply with the Intentions of the Parties Expressed at the Time of Its Conclusion*

7. (i) The Court's dictum, seized upon by Hungary in order to justify its *"evolutionary interpretation"*, needs to be put back into its proper context. Before settling on this dictum, the Court had been at pains, in the same 1971 Opinion and on the same page, to emphasize "*the primary necessity* of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion" (*I.C.J. Reports 1971*, p. 31; emphasis added).

(ii) The intentions of the parties are presumed to have been influenced by *the law in force at the time the Treaty was concluded*, the law which they were supposed to know, and not by future law, as yet unknown. As Ambassador Mustapha Kamil Yasseen, quoted by Hungary (Counter-Memorial of Hungary, para. 6.13), put it, only international law existing

when the Treaty was concluded "could influence the intention of the Contracting States . . ., as the law which did not yet exist at that time could not logically have any influence on this intention"[1].

(iii) Moreover, Hungary espouses this very classical approach by stating: "the 1977 Treaty must *in the first place* be interpreted in the light of the international law prevailing at the time of its conclusion" (Counter-Memorial of Hungary, para. 6.28; emphasis added).

(c) *Primacy of the Principle of the* "Fixed Reference" (Renvoi Fixe) *over the Principle of the* "Mobile Reference" (Renvoi Mobile)

8. Hence, the essential basis for the interpretation of a treaty remains the *"fixed reference"* to contemporary international law at the time of its conclusion. The *"mobile reference"* to the law which will subsequently have developed can be recommended only in exceptional cases of the sort we shall be looking at.

B. *"Definition"* of a Concept Not To Be Confused with the *"Law"* Applicable to That Concept

9. In the *Namibia* case, the Court had to interpret a very special situation. Among the obligations of the Mandatory Power, the treaty instituting a "C" Mandate over South West Africa referred to that of a *"sacred trust"*. It was then for the Court to interpret that phrase. It could only do so by observing the reality, which shows that this notion of a *"sacred trust"*, fashioned in 1920 in the era of colonization, was not comparable to the idea people had of it half a century later in the period of successive decolonizations. The Court thus considered that the matters to be interpreted, such as the "sacred trust", "were not static, but were by definition evolutionary" (*I.C.J. Reports 1971*, p. 31). This being so, *the method of the mobile reference*, in other words the reference to new contemporary law, was wholly suitable for an interpretation seeking to avoid archaic elements, was in tune with modern times and was useful as regards the action of the Applicant, which in this case was the Security Council.

10. But the Court patently knew that it was pursuing this approach because the situation was special. Nowhere did it state that its method of the mobile reference was subsequently to become mandatory and extend to all cases of interpretation. The *definition* of the *"sacred trust"* is evolutionary. It is *the law* corresponding to the period when this concept is

[1] M. K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 151 (1976), p. 64.

being interpreted which must be applied to the concept. On the other hand, the *environment* remains the environment. It is water, air, earth, vegetation, etc. As a basic *definition*, the environment is not evolutionary. Its components remain the same. On the other hand, its *"status"* may change, deteriorate or improve, but this is different from a definition by its components.

11. I would add that what evolved in the case of the Mandate was the *object of the treaty* which created it. This *object* was the sacred trust. Yet this object has not evolved at all in the *Gabčíkovo-Nagymaros* case. The point here was to consent to a joint investment and to build a number of structures. This object, or objective, remains, even if the actual *means* of achieving it may evolve or become more streamlined.

C. *"Interpretation"* of a Treaty Not To Be Confused with Its *"Revision"*

12. An interpretation of a treaty which would amount to substituting a completely different law to the one governing it at the time of its conclusion would be a *distorted revision*. The *"interpretation"* is not the same as the *"substitution"*, for a negotiated and approved text, of a completely different text, which has neither been negotiated nor agreed. Although there is no need to abandon the *"evolutionary interpretation"*, which may be useful, not to say necessary in very limited situations, it must be said that it cannot automatically be applied to any case.

13. In general, it is noteworthy that the classical rules of interpretation do not require a treaty to be interpreted *in all circumstances* in the context of the entire legal system prevailing at the time of the interpretation, in other words, in the present case, that the 1977 Treaty should be interpreted *"in the context"* and in the light of the new contemporary law of the environment or of international watercourses. Indeed, it is quite the opposite that these rules of interpretation prescribe, seeking as they do to recommend an interpretation consonant with the intentions of the parties at the time the Treaty was concluded.

14. In general, in a treaty, a State incurs specific obligations contained in a body of law as it existed on the conclusion of the treaty and *in no wise incurs evolutionary and indeterminate duties*. A State cannot incur unknown obligations whether for the future or even the present.

15. In this case, the new law of the environment or of international watercourses could have been incorporated into the 1977 Treaty with the consent of the parties and by means of the *"procedural mechanisms"* laid down in the Treaty. That would be a *"revision"* of the Treaty accepted within the limits of that Treaty. Similarly, the new law might have played a role in the context of a *"reinterpretation"* of the Treaty but provided it did so *with the consent* of the other party.

D. Cautiously Take Subsequent Law into Account as an Element of Interpretation or Modification in Very Special Situations

16. It is true that one cannot be excessively rigid without failing to allow for the movement of life. The new law might, in principle, be relevant in two ways: as an element of the *interpretation* of the content of the 1977 Treaty and as an element of the *modification* of that content.

17. *The former case,* that of interpretation, is the simpler of the two. *In general,* there is certainly good reason to protect the autonomy of the will. But *in our case,* Articles 15, 19, and 20 of the 1977 Treaty are fortunately drafted in extremely vague terms (in them, reference is made to *"protection"* — without any further qualification — of water, nature or fishing). In the absence of any other specification, respecting the autonomy of the will implies precisely that provisions of this kind are interpreted in an evolutionary manner, in other words, taking account of the criteria adopted by *the general law* prevailing in each period considered. If this is the case, should it not be acknowledged that these criteria have evolved appreciably over the past 20 years? The new law, both the law of the environment and the law of international watercourses, may therefore advisedly be applied on the basis of Articles 15, 19 and 20 of the 1977 Treaty, for an "evolutionary interpretation" of the Treaty.

18. This is the first major case brought before the Court in which there is such a sensitive ecological background that it has moved to centre stage, threatening to divert attention from treaty law. International public opinion would not have understood had the Court disregarded the new law, whose application was called for by Hungary. Fortunately the Court has been able to graft the new law onto the stock of Articles 15, 19 and 20 of the 1977 Treaty. And Slovakia, it must be said, was not opposed to taking this law into consideration. However in applying the so-called principle of *the evolutionary interpretation* of a treaty in the present case, the Court should have clarified the issue more and should have recalled that the general rule governing the interpretation of a treaty remains that set out in Article 31 of the 1969 Vienna Convention.

19. Concluding this consideration of the issue of the applicable law, let me say that considerable progress has been made over the last 20 or 30 years in mankind's knowledge of the environment. What has actually progressed however, all that could progress, is on the one hand the scientific explanation of ecological damage and on the other the technical means for limiting or eliminating such damage. The phenomenon of damage, as such, has existed since the dawn of time, each time that mankind has opposed the forces of nature. This means that damage was a known factor, before and after the 1977 Treaty, and this was the meaning behind my question to the Parties.

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20. It seems to me that the issue of the *nature* of the 1977 Treaty and its related instruments warranted more attention from the majority of the Court. Actually, it is a crucial question. The nature of the Treaty largely conditions the succession of Slovakia to this instrument, which constitutes the substance of the applicable law, and which remains in force despite *intersecting violations* by both Parties.

21. The 1977 Treaty (including its related instruments) has the threefold characteristic

— of being a *territorial treaty*;
— of being a treaty to which Slovakia validly *succeeded*; and
— of being a treaty which is still *in force today*.

22. The Treaty in question is a *territorial* treaty:

— *because it "marries" the territories of two States;* it creates obligations between the States relating either to the use of a part of the territory of each of the two States or to restrictions as to its use. It creates a sort of *territorial "dependency"* of one State in relation to the other; it institutes a *"territorial link"* between them in respecting the established frontiers. The operation of the Gabčíkovo hydroelectric power plant on Slovak territory is conditioned by the Dunakiliti dam on Hungarian territory. And the operation of that plant in "peak power" mode is subordinate to the creation of the dam at Nagymaros on Hungarian territory;
— *because it creates a specific regional area between two neighbouring countries*; it concerns the joint construction and use of major structures, all constructed on the Danube, itself a frontier river, or around and for the river. Such regulation by treaty of a watercourse in a frontier zone affects navigation on this stretch of the river as well as the use and apportionment of the frontier waters and makes the two States partners in the benefits of an industrial activity producing energy. All this creates *a specific regional area and frontier régime*, undeniably giving the Treaty instituting this space and this régime the character of a "territorial treaty";
— *lastly because it has a dual function, both confirming and slightly modifying the frontier between the two States*; the frontier had already been determined by other, previous instruments. However the 1977 Treaty concerns the regulation of a river which determines the State frontier between the two parties as the median line of its main channel. Moreover, the Treaty nonetheless contains a provision on the demarcation of the State boundary line, making it a boundary Treaty confirming the frontier. In addition it provides for a minor modification of the boundary line once the construction of the system of dams is completed. For this purpose it announces a limited exchange of territory on the basis of a separate treaty. Lastly, the 1977 Treaty thus affects not only the boundary *line*, but even its nature, since the frontier is no longer constituted *de facto* by the actual thalweg.

23. The Treaty is an instrument to which undeniably *Slovakia succeeded*:

— because it is a territorial treaty, the principle in such cases being automatic succession;
— because the type of succession concerned here (the dissolution of a State) is governed by the rule of continuity of succession;
— because Slovakia itself, prior to the dissolution of Czechoslovakia, participated in the conclusion of the Treaty; and lastly
— because, on its emergence, Slovakia declared that it was bound by all treaties concluded by the predecessor State, without ever excluding the 1977 Treaty.

24. The Special Agreement concluded by the Parties in 1993 cannot have been easy to draw up. The text appears to have been *inspired* by the desire to reconcile elements which remain contradictory. One of the Parties — Hungary — acknowledges that the 1977 Treaty applies to itself, Hungary, until its termination on 19 May 1992, but does not apply to the other Party. According to Hungary, that Party — Slovakia — did not inherit *the formal instrument* itself, but *its material content* made up of *"the rights and obligations"* which Slovakia allegedly derived from this — according to Hungary — now defunct Treaty.

25. With this convoluted structure as backdrop, the Court apparently has to judge not two States on the basis of one and the same treaty but to judge

(i) on the basis of one and the same treaty, one party to the dispute, Hungary, and a State now dissolved, Czechoslovakia, which is not a party to the dispute, and
(ii) at the same time, on another basis which is not *directly* the Treaty, two States, Hungary and Slovakia, the latter of which is not recognized to have the status of successor State to the Treaty concerned.

26. Slovakia did indeed succeed to the 1977 Treaty, which *is still in force* today between the two Parties in contention, despite the intersecting violations of it by the Parties. I concur with the reasoning and conclusions of the majority of the Court in adjudging and declaring on the one hand that both Hungary and Slovakia violated the Treaty, and on the other that the Treaty remains in force. However, I shall shortly go a little further than the majority of the Court on this question of the infringements of the Treaty, which I hold to be *intersecting violations*, resulting in *effectivités* which must be reconciled with the *survival* of the Treaty.

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27. As for the breaches of the Treaty, I entirely share the views of the majority of the Court in declaring that Hungary was manifestly in breach of its contractual obligations in suspending then abandoning work and

later in declaring the Treaty terminated. None of Hungary's attempted justifications, relating either to the suspension then the abandonment of work or to the termination of the Treaty, convince me. I have nothing to add to the analysis of the majority of the Court regarding breaches by Hungary, save that the Hungarian act of "termination" was directed against a treaty creating an objective frontier régime and regulating a territorial space; that it concerned the shared resources of a river, and that it caused damage which was all the greater in that it threatened to leave unfinished works and structures *which by their very nature were difficult to redeploy*.

28. As for the breaches of the Treaty by (Czecho)Slovakia, I regret to dissent from the majority of the Court. We all recognize that (Czecho) Slovakia breached the 1977 Treaty, but my view differs as to the extent and scope of the (Czecho)Slovak breach. The salient question is how to judge the substitute solution, "Variant C", a solution chosen and applied by Czechoslovakia. According to the majority of the Court,

> "Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992." (Para. 88.)

This presentation by the Court then became the subject-matter of the operative part, subparagraphs 1 B and 1 C.

I take a different view.

29. Slovakia has no hesitation in acknowledging that Variant C differs in its physical characteristics from the structure which could have been obtained under the original Project. Variant C in fact created an *autonomous system*, no longer dependent on Hungary in any way. The idea of a *joint project* recedes, with legal consequences for the mode of operation of the works, for which Slovakia now bears sole responsibility. Slovakia has, unilaterally, appropriated a joint investment and waters of the Danube, a shared resource, over a stretch of the river 40 or so kilometres long. The Parties' joint operation of research and profit-sharing has been abandoned.

30. The theory of *"approximate application"* or *"close approximation"* relied on by Slovakia in order to justify the construction and commissioning of Variant C is unconvincing. There is no such theory in international law. The "precedents" advanced in favour of this theory are worthless. At least because of its dangers, this theory deserved wholehearted censure, which I find lacking in the Judgment.

31. Were this theory to be accepted, it would be to the detriment of *legal certainty* in relations between States and in particular of the certainty of treaties and of *the integrity of the obligations* properly entered into. The consolidation of this theory would virtually signal the end of the cardinal principle *pacta sunt servanda*, since a State which undertakes

a specific obligation is left free to fulfil another, which it would be quite cunning to present as being very close to the first obligation. The State would only have to observe that its *"approximate application"* was allowed since, according to it, the conduct of the other party placed it in the impossibility of performing its obligations under the treaty and since it had no other remedy. All breaches of the obligations of the State would thus run the risk of being presented as an *"approximate application"*.

The danger is all the greater in that this theory provides *no reliable criterion for measuring the tolerable degree of "proximity"* or *"approximation"*. The *"distance"* — or the *"difference"* — which a State would be authorized to take in relation to the purpose of a treaty when performing the obligation remains dangerously undefined and is still left to the subjective evaluation of the State.

But this is not all.

32. What the theory of "approximate application" lacks in order to be a valid *"reinterpretation"* of the treaty is quite obviously the basic condition of the consent of the other State. Indeed Slovakia is not wrong in stating that deviations from treaty norms in the application of the Treaty may be considered a *"reinterpretation"* of that Treaty. Yet this species of *"mutation"* or *"novation"* of the obligation in its performance is subject to the existence of an essential condition which has not been fulfilled in the present case at all. The *"approximate application"* may only be recognized as valid and may only constitute a *"reinterpretation"* if the other party to the Treaty has *given its consent.* The weakness of Slovakia's case is only too apparent.

Moreover Hungary's position is a most distinctive one since not only did it not give its consent to the *"reinterpretation"* of the *Treaty*, it also considers that there was neither an *original* interpretation nor a *re*-interpretation of the Treaty since for Hungary it ceased to exist even before the advent of Slovakia.

33. I now come to quite another aspect concerning Variant C, one which fully warrants my adding a nuance to what I have already said. It is no secret that when States undertake negotiations, they often envisage, in a spirit of caution and realism, other solutions should the negotiations fail. A prudent State always approaches the negotiating table with one or more substitute solutions up its sleeve in case of failure. *It may therefore be said that envisaging a unilateral substitute solution must necessarily be part of the customary strategy and tactics of negotiation, sometimes in order to put more pressure on the negotiating partner.* "Substitute solutions" are therefore an elementary precaution in any negotiation.

34. The contrary can only be asserted if the State has *shown bad faith* and if it has been demonstrated beyond doubt that it only pretended to negotiate, whereas *its firm intention was to sabotage the seeming negotiations in order to impose at all costs a unilateral solution already decided on.*

This then raises the problem as to *whether Czechoslovakia respected*

the principle of good faith. I shall not venture to examine this question since, in my view, both Czechoslovakia and Hungary showed good faith, whilst each presenting the image of their own anxiety to the other. On either side, good faith was eroded by the "drip" effect of anxiety and distrust vis-à-vis the other Party.

35. In any event, in determining the legal validity of Variant C, the majority of the Court made a distinction between *the actual construction* of this "substitute solution", held to be lawful, and *the actual diversion of the river*, the final phase of Variant C, held to be unlawful. The various operations which make up Variant C are thus dissected as it were into so many *slices of legal salami*.

I cannot agree with this approach. In my opinion the construction of Variant C falls into one of the categories of breaches termed *"continuing", "composite"* or *"complex", depending on their characteristics*, each phase or each element of which is unlawful.

36. The majority of the Court considers that only the diversion of the river genuinely breaches (Czecho)Slovakia's treaty obligations as well as customary international law, which prohibits the unilateral appropriation of a shared resource. Each of the other phases prior to the diversion is allegedly lawful, on the ground that a sovereign State is entitled to erect any edifice it wishes on its territory, providing it does not prejudice the rights and interests of another State.

37. However, it is precisely on this last count that the reasoning is untenable. For the reasoning to be unassailable, it has to be shown that no phase of the construction of Variant C, apart from the diversion of the river, prejudiced Hungary's rights and interests. This has not been shown and appears to have been considered self-evident by the Court, after the fashion of a postulate.

38. It is true that a State is sovereign on its own territory, on which it may erect any construction it wishes. However, once that State is bound by a commitment, concerning the regulation of a river basin for instance, it may no longer construct *as and when it wishes* a structure *relating to* this river basin, or which has *a link* with this basin, or *an effect* on it. Within the scope of the Treaty, this leaves room for nothing else but the application of this instrument (excepting of course all the operations regarding the administration of this territory). In other words, in its conduct the State, sovereign of course but bound by a given treaty obligation, must necessarily act with such caution and discernment that it need not fear potentially compromising the performance of its treaty obligation, at any time and in relation to any of its operations. In the field henceforth governed by a treaty, the contracting State can no longer carry out any operation it wishes, which would be lawful only if it were *totally neutral* in relation to the general structure of such a treaty.

39. At this point I must recall what I said above on the subject of the territorial nature of 1977 Treaty, which lays various mutual obligations

on the two contracting States relating either to the use of a part of the territory of each of the two States, *or to restrictions on its use*. The Treaty creates a "territorial dependency" of one State in relation to the other. This being so how can it be asserted that the State is free to act as it wishes?

40. It is important to ascertain exactly what Variant C is. Paragraph 66 of the Judgment gives a detailed description of it and the Working Group of Independent Experts presents it in the following terms:

> "Variant C consists of a complex of structures, located in Czecho-Slovakia . . . The structures include . . .:
>
> (2) By-pass weir controlling the flow into the river Danube.
>
> (3) Dam closing the Danubian river bed.
> (4) Floodplain weir (weir in the inundation).
> (5) Intake structure for the Mosoni Danube.
> (6) Intake structure in the power canal.
> (7) Earth barrages/dykes connecting structures.
> (8) Ship lock for smaller ships . . .
> (9) Spillway weir.
> (10) Hydropower station." (Memorial of Slovakia, Vol. II, Ann. 12.)

This description of Variant C shows to what extent the planned structures are *numerous, "heavy", and not at all neutral*, and *interfere with* the initial Project, or to be more specific *change its nature*.

41. In these slices of "legal salami" which supposedly constitute Variant C, the first phase itself cannot be considered as being *immaterial* to the 1977 Treaty. (Czecho)Slovakia's first act, the construction of the Čunovo dam, occurred in a river basin which was indeed on Czechoslovak territory but this had immediate repercussions on the apportionment of water belonging to both States, since the river was enlarged at that point into a large reservoir two-thirds the size of the Dunakiliti reservoir. This first operation was not the kind of *neutral* measure that might freely be taken by a State which was moreover bound by a commitment relating to a certain way of regulating the river. On the contrary, it creates a situation having a direct, immediate bearing on the provisions of the 1977 Treaty, which provisions it substantially alters. Nowhere does the Treaty in question formally forbid Czechoslovakia to erect a dam at Čunovo, on its own territory. However, in deciding that the dam was to be located at Dunakiliti, the Treaty undeniably imposes on Czechoslovakia an *"obligation to abstain"* from erecting this dam at Čunovo. In short, even the first operation at Čunovo could not be left to Czechoslovakia's sole, sovereign initiative. Did not the first "diversion" of the waters of the Danube in fact take place at Čunovo when the river, dammed at that point, broadened into a vast "reservoir" — so to speak — to the detriment of Hungary?

42. *On a totally different plane*, I cannot conceive how an action by

the State, forming a link in a chain, should not take on an unlawful hue when completed by a final link, itself acknowledged to be unlawful, since, once the Danube had been diverted, this unlawful act was "retroactively" to serve as a "chemical indicator" casting an unlawful hue on all the operations composing Variant C. However, in persisting in setting the construction work, said to be *definitively* lawful, against the diversion of the river, apparently not unlawful, the majority of the Court does not at all recognize the unlawfulness of Variant C as a whole.

43. That, for the majority of the Court, is a way of denying the existence of the "continuing", "composite" or "complex wrong". It seems to me that all the effort expended in the literature and in the case-law are compromised by this stand, as is the attempt at codification by the International Law Commission. The unlawful nature of the "continuing wrong" is indeed determined once the last piece of the jigsaw is in place. Yet in the literature and in the case-law the declaration of the unlawfulness of the final link results, in most categories of wrongs, in the unlawfulness of the entire chain. It therefore seems wrong to me to set the allegedly lawful construction of Variant C against its allegedly unlawful final commissioning.

44. The Judgment of the Court refers to the proceedings of the International Law Commission on State Responsibility. However, one of the paragraphs in the commentaries of the Commission to which the Court specially refers reads:

> "unlike wrongful acts of national law, the internationally wrongful act of a State is quite often — and probably in most cases — the result of a concatenation of a number of individual actions or omissions which, however legally distinct in terms of municipal law, *constitutes one compact whole so to speak from the point of view of international law*" (*Yearbook of the International Law Commission*, 1993, Vol. II, Part 2, p. 57, para. 14; emphasis added).

45. Moreover it is not so much Article 41 of the Draft Articles of the International Law Commission on State Responsibility, cited in the Judgment of the Court, which is relevant here, but rather Article 25. Its title ("*moment* and *duration* of the breach of an international obligation by an act of the State extending in time") is in itself significant for the present case. It clearly states:

> "1. The breach of an international obligation by an act of the State having a continuing character *occurs at the moment when that act begins* . . .
>
> 2. The breach of an international obligation by an act of a State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act . . .

> 3. The breach of an international obligation by a complex act of the State consisting of a succession of actions or omissions . . . occurs at the moment when the last constituent element of that complex act is accomplished . . ." (Emphasis added.)

In addition, however, and in all cases, the International Law Commission stated, with regard to each of these scenarios (continuing, composite or complex act), that "Nevertheless, the time of commission of the breach extends over the entire period." In other words, however Variant C is classified among the above three types of wrong, the unlawfulness of the final phase, the diversion of the river, extends to all the operations which preceded it, even supposing it not to be a continuing offence unlawful from the outset.

46. Indeed, the unlawful nature of Variant C, from the commencement of its construction to the diversion of the river, can only be *indivisible*, in view of the very nature of this "substitute solution". As the Judgment of the Court puts it so appositely, "the main structures of the System of Locks . . . will take the form of a co-ordinated single unit" (para. 144) or a "single and indivisible operational system of works" (para. 77). Similarly, Variant C, which replaced this system, is not made up of a series of unrelated operations. They depend on each other, combining to produce the final result. The *"integrated"* nature of these operations results from the fact that none of them can stand alone, nor have *any meaning* in itself. None of them is neutral and is meaningful only when related to the final result. What would be the purpose of the construction of the dam closing the bed of the Danube unless to divert the river? For a sovereign State, which is entitled to construct whatever it wants on its own territory, building such a dam, *in isolation and on its own*, would be pointless and without interest for that State, which would not embark upon such a venture at all. The point and interest become evident only when the operation in question is related to the final diversion of the river. The very nature of the bypass canal built in the context of Variant C was quite obviously to divert the waters of the main channel to the Gabčíkovo power plant. Such a construction could be neither innocent nor neutral; it bore the stamp of the end purpose of Variant C, which was the diversion of the waters of the river. In short, *it is not possible to separate the construction on the one hand and the diversion on the other.*

47. It is true that any internationally unlawful act initially begins with *"preparations"*. I agree with the majority of the Court in considering that such preparations *stricto sensu* are not unlawful. Even the extremely advanced preparation of a "substitute solution" as leverage on negotiations with the partner is not in itself in any way unlawful. However, once the order to construct was given and once construction began, in November 1991, we leave the field of preparations for that of construction. At that time, November 1991, Czechoslovakia was fully aware that Hungary

had no intention of performing the 1977 Treaty, and had then taken the decision to divert the waters of the river. The chain of operations designed to achieve this aim was unbroken, with no missing links, from the commencement of construction to the commissioning of Variant C by the actual diversion of the waters in October 1992. Nevertheless the majority of the Court held that the work concerned might "have been abandoned [by Czechoslovakia] if an agreement had been reached between the parties" (para. 79). I do not think one can engage in speculation of this sort with impunity. When construction began in November 1991 and throughout this phase of the works, it was clearly apparent, particularly from the diplomatic exchanges between the Parties, that each Party had adopted an entrenched position. That being so, the idea mooted by the Court of an abandonment of the works could be only hypothetical and unrealistic.

48. Thus paragraph 1 of the operative part of the Judgment is drafted in such a way that the Court states on the one hand that Czechoslovakia acted legally in proceeding to Variant C in November 1991 (subpara. A), but on the other that it was not entitled to put it into operation in October 1992 (subpara. B). I am somewhat bemused, I must admit, by this twofold affirmation. It is as if I were allowed to buy fruit from the market, but prevented from eating it. It is as if the housewife had cooked a meal but were forbidden to eat it. It is as if a State were free to purchase weapons or have them manufactured, but were not permitted to use them if attacked. Paragraph 1 of the operative part thus reflects, in a nutshell, an analysis which ends in stalemate.

In the final analysis, the decision of the Court concerning Variant C is, in my view, neither correct in legal terms, nor good in practical terms, nor actually useful. It has no value, neither in law nor in fact, nor for future bipartite negotiations.

49. So with the construction of Variant C, international waters belonging to two States and flowing in the bed of a frontier river suddenly, over a distance of 40 kilometres from Čunovo to Sap, become exclusively national, Slovak waters. A bilateral project, under construction on the territory of both States as a result of a joint investment, suddenly becomes a unilateral, purely national project. Whose fault is this? Certainly and primarily the fault of Hungary. For the time being however this aspect does not concern me. What does deserve consideration here is a substantial physical reality: over a distance of 40 kilometres, waters hitherto shared become purely national waters and a bilateral project suddenly undergoes profound modifications, fundamentally altering it into a purely national project.

50. It is clear that (Czecho)Slovakia, in so doing, applied something quite different from the 1977 Treaty. Either Variant C constitutes the application of the Treaty or it does not. In my view there can be no intermediate situation. There is no place, *in law*, for an "approximate" application of the Treaty. There are only two categories of conduct in inter-

national law: lawful and unlawful. It does not recognize any intermediate situation. Such a situation may exist but is and will be nothing more than a fact. In relation to the Treaty, this fact may be considered only as a non-application of the Treaty, being unlawful in nature.

51. I have therefore reached the conclusion that Variant C as a whole is unlawful. Can it however be regarded as a countermeasure? I do not think so, and I concur with the majority of the Court on this point. I am however tempted to qualify this. It is impossible to regard (Czecho)Slovakia's conduct *with utter certainty* as no more than a reaction to Hungary's unlawful acts. Another perhaps slightly more realistic view might discern in Czechoslovakia's conduct both a *premeditation* and a *response*, creating a situation which is more complex than a countermeasure. *A premeditation to begin with.* Without accepting the Hungarian view that since 1920 Czechoslovakia had always dreamt of constructing all the works within Slovak territory, I note that Czechoslovakia drew up different variants early in 1989, including Variant C, as a "substitute solution". *Then a response.* There is no doubt that Slovakia is well served by the chronology of events. The suspension of work by Hungary on 13 May 1989 followed by the definitive abandonment of work and finally by its decision to terminate the Treaty on 19 May 1992 are the mechanics of the final implementation of Variant C on 23 October 1992 as a countermeasure to the Hungarian conduct.

52. In any event, and here I concur with the majority of the Court, Variant C is not a countermeasure capable of excusing its unlawfulness. Nor indeed is it proportionate, since from the outset it deprives Hungary of the waters of the Danube as a shared resource and also of any control over a joint investment laid down in the 1977 Treaty. Moreover Variant C is neither provisional nor deterrent, as a countermeasure should be. It constitutes a definitive, irreversible breach of the 1977 Treaty.

* * *

53. Both parties, Hungary just as much as Slovakia, have therefore breached the 1977 Treaty. The situation created by the parties is characterized by *intersecting violations* countering each other. However it is not easy to pinpoint the links between cause and effect in each case with certainty. The acts and conduct of the parties sometimes intercut. The chronology of events appears to answer the question as to which of the two parties triggered the cycle of these intersecting violations. Naturally this chronology must be taken into account; however it must be borne in mind that it is just like the tip of an iceberg, something only to be relied upon with caution. Alas, deep mutual distrust has characterized relations between the parties for many years.

In holding the wrongs committed by both Parties to be *"intersecting violations"* the Court could have seized this opportunity to describe a reality more complex than it appears, one within which the links between cause and effect intercut. In so doing, it might perhaps have been justified in *suggesting that the Parties renegotiate their Treaty on the basis of a "zero option" under which each Party waived its right to compensation from the other.* The Parties might then have redefined their treaty relations more readily within the framework of the renewed 1977 Treaty.

* * *

54. On the ground, these *intersecting violations* gave rise to a reality which the majority of the Court did not deem it appropriate to characterize. For my part, it seems necessary and important to note that these intersecting violations created *two effectivités* which will continue to mark the landscape of the region in question.

55. The jurist is not fond of *effectivités*. They violate his taste for the legal ordering of things. On the other hand, he is aware that the realities of life are complex and that a substantial portion of these realities inevitably escapes the rule of law. So he is sometimes realistic enough to take account of some of these situations — when they persist — and to regard these *effectivités* as an "action of the fact" against the legal title. This attitude is not only dictated by realism but is nourished by the desire to reincorporate these *effectivités* into the legal processes.

56. (Czecho)Slovakia implemented Variant C. The construction of the Gabčíkovo system laid down in the Treaty was thus effected by the substitution of Čunovo for Dunakiliti, with its technical and physical consequences. This Variant C is illegal *but it exists*. Slovakia places all the greater reliance on its *effectivité* because it "approximates" to the law. It was certainly keen to assert its readiness to destroy this *effectivité*. But it seems clear that any questioning of Variant C, by destruction or in any other way, would be contrary to sound economics and ecology, and would ultimately be absurd and unacceptable to Slovakia. This is the inescapable reality the Court has no option but to deal with in the effort to reconcile it with the law which it is its task to state.

57. The Slovak *effectivité* has a twofold singularity.

Firstly, until recently it was what Charles De Visscher calls an "*effectivité* in action"[2] and became consolidated when the case was *"sub judice"*. Gabčíkovo was to be constructed in two phases. The former phase was to be completed on 23 October 1992, the date of the diversion of the river. The second phase is now almost complete; it was constructed

[2] Charles De Visscher, *Théories et réalités en droit international public*, 4th ed., 1970, p. 319.

while the case was before the Court. Today it is an almost complete structural *effectivité*.

The second singularity of the Slovak *effectivité* is that it draws *its strength from the facts but also,* in part, *from the law*. This is a striking characteristic of this *effectivité*, which is constructed, like any *effectivité, against* the law (in this case treaty law), but which is nevertheless reinforced by a partial application of the Treaty, enabling Slovakia to contend that its Variant C was nothing more than an "approximate application" of the Treaty.

In fact:

(i) the dam and hydroelectric power plant at Gabčíkovo, now constructed, were provided for in the Treaty;
(ii) the diversion of the Danube was provided for in the Treaty (the major difference being that the river was closed at Čunovo instead of Dunakiliti); and
(iii) the Danube still flows along its original bed (with the twofold difference that it has been closed at Čunovo and above all that Slovakia releases an insufficient volume of water daily into the Danube, a situation which Slovakia considers might be improved).

58. As for Hungary, it has abandoned work on all fronts and has decided not to build the Nagymaros dam. The nature of the Hungarian *effectivités* is rather curious.

Firstly, an *effectivité* may express a *certain order* established by the act. This is not the case here. The Hungarian *effectivités* express, quite the contrary, a kind of *"disorder"* arising from the abandonment of the works. They are *effectivités* not "in action" but in a state of prolonged "malformation".

As for the Nagymaros site, it presents a picture of a kind of "negative" *effectivité* through the abandonment of the construction of the dam. This means that the "negative" *effectivité* of Nagymaros has created a definitive situation, for Hungary's will appears irrevocable.

The other Hungarian *effectivités* have generated a state of affairs unsatisfactory for all. This situation is waiting to be taken in hand or "recycled" by another law, whether treaty law (a renegotiated 1977 Treaty), or domestic law (a Hungarian decision to destroy or redeploy the uncompleted shells).

59. Both the Slovak and Hungarian *effectivités* share the characteristic of enjoying a significant degree of *mutual recognition* by the Parties. Despite the difficulties there are in grasping all the nuances of the Hungarian position from one written pleading to another and from one oral argument to another, I think that Hungary is not calling for the dismantling of Variant C. As for Slovakia, it seems on the one hand to be seeking to adjust to the fact that the Nagymaros dam does not exist by, among other things, modifying the way Gabčíkovo operates and on the other hand avoiding calling for the completion of the "large reservoir" at Dunakiliti, which is very costly and heavily polluting, but above all duplicates the Čunovo reservoir.

These were valuable pointers for the Court, "signals" one might say in the attempt to find appropriate solutions, *bearing in mind the law* and the facts.

* * *

60. *What is the law? What are the facts?* First, the facts. They are constituted by the reality on the ground, which I have just analysed as *effectivités*. Second, the law. The law is constituted by the 1977 Treaty and its related instruments, which the intersecting violations of both parties have been powerless to terminate. Consequently, there is no point in concealing the extremely delicate nature of the task conferred upon the Court in this case where the facts clash head on with the law, which ought, however, to have the final say. The situation may be analysed as follows: on the one hand the 1977 Treaty has largely been stripped of its *material content*, but remains a *formal instrument*, a receptacle or shell ready to accommodate new commitments by the Parties; on the other hand, in parallel, *effectivités* have come into being which are mutually recognized by the Parties. So it was for the Court to declare that both Parties were under an obligation to negotiate in good faith a new content to their Treaty, taking account of what remained of the Treaty and also the *effectivités* on the ground. However it was important to emphasize above all that in taking these *effectivités* into account the Court clearly had no intention *whatsoever* of *legitimizing the unlawful facts established.* All it had to do, in a spirit of legal realism, was to take note (together with the Parties themselves to some extent) *of the effects* resulting from a wholly singular succession of intersecting violations, each of which remained *reprehensible as such.*

61. In order to do so, we must first examine the consideration given to the maintenance in force of the 1977 Treaty and its significance, then the consideration of the *effectivités* and its significance, before attempting to make these two elements "co-exist" within the framework of a renewed treaty.

62. The maintenance in force of the Treaty does not mean the enforced performance of the obligations it imposed on Hungary, obligations which to date had not been fulfilled. It is neither necessary nor justified to infer all the logical consequences from the maintenance in force of the Treaty. There is no question of obliging Hungary to construct the Nagymaros dam, to complete the works at Dunakiliti, to put the diversion dam at Dunakiliti into operation and to flood the Čunovo installations, nor to complete, upstream of Gabčíkovo, that part of the work it was to carry out under the Treaty, provided Slovakia had not already done so.

At the same time, however, any idea of legitimizing the abandonment by Hungary of its treaty obligations must be totally excluded. Whilst accepting the *effectivités* as inescapable acts, their nature as internationally unlawful acts must nonetheless be noted, acts for which Hungary

must answer by assuming its responsibility. The same holds true for the consideration of the Slovak *effectivités*, whose unlawful nature has also not been eradicated.

63. The survival of the Treaty in the face of all the violations shows well enough that there is no question of legalizing the infringements of the principle *pacta sunt servanda*. Although it is prudently realistic to take account of the *effectivités* and not to "run headlong into" an inescapable reality, it seems even more essential, especially for a world judicial organ concerned to ensure that international law is respected, to show *urbi et orbi* that treaties are not *"scraps of paper"* and that they cannot be destroyed by violating them. Save by mutual consent, States cannot and may not rid themselves of their treaty obligations so easily. It is vital to reinforce the legal certainty of international commitments.

64. *The survival of the Treaty also makes it possible to salvage its Articles 15, 19 and 20*, relating respectively to the protection of water quality, the protection of nature and fishing interests. They are of course extremely general, unsatisfactory articles. However they concern essential matters which lie at the root of the current dispute between the two States. It will therefore be for the two States to settle these vital matters of the environment, water quality and fishing, by negotiation. In Articles 15, 19 and 20 they will find the basis for that renegotiation.

65. *Lastly, the survival of the Treaty provides a context, and even more a specific framework, for the wishes of the two States in negotiation.* It is not only Articles 15, 19 and 20 which the survival of the Treaty will salvage. More than that, the 1977 Treaty will make it possible to *conserve the general philosophy and the major principles* which have inspired this association between two States with a view to a joint investment, from which they could expect mutual benefits. The Treaty will serve as a framework, and the wishes of the two States will thus be channelled in order to avoid undesirable excesses, or, conversely, any reluctance, by either Party. The Treaty which survives already contains a number of accepted guidelines and useful principles to point the way for future negotiation. In particular, apart from Articles 15, 19 and 20, the following points need to be further developed and adjusted, but in principle are already accepted. These are:

(a) "the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties" (Preamble to the Treaty);

(b) *"improved old bed of the Danube . . ."* (Art. 1, para. 2 *(e)*);

(c) *"deepened and regulated bed of the Danube"* (Art. 1 para. 2 *(f)*);

(d) *"flood-control works"* (Art. 1, para. 3 *(a)*, and Art. 13);

(e) *"deepened and regulated bed of the Danube, in both its branches . . ."* (Art. 1, para. 3 *(c)*);

(f) the principles which have presided over the *distinction between joint investment and national investment* (Art. 2);

(g) the *"responsibility for the costs of the joint investment"* (Art. 5), which will enable the future negotiators to assess the costs and to calculate how much of these costs each Party has already paid and for how much it still remains responsible;

(h) the determination *of the joint and separate ownership* of each State with respect to each of the structures already built (Article 8 of the Treaty). The bypass canal constructed by Czechoslovakia alone is regarded as joint property by Article 8 *(b)*, which is normal in this system of joint investment and operation, but Hungary, which must legitimately accede to this joint property, will have to pay its part of the construction of that canal;

(i) the method for the *joint operation* of the works (Arts. 9 and 10) and the *principle of participation "in the use and in the benefits of the system . . . in equal measure"* (Art. 9, para. 1);

(j) the *withdrawal of water* from the Danube and the rules and guarantees which apply to the Parties;

(k) *the protection of water quality* (Art. 15, cited above), the *maintenance of the bed* of the Danube (Art. 16); the rules for *navigation* (Art. 18); the protection of *the environment* (Arts. 19 and 20, cited above);

(l) the determination of the *State boundary line* between the two Parties (Art. 22); and lastly

(m) *joint liability and separate liability* in the event of damage (Arts. 25 and 26).

So much for the survival of the 1977 Treaty and its significance. Let us now examine the consideration of the *effectivités* and then its significance.

66. *The significance to be attached to taking account of the effectivités* must be indicated, which is a way of highlighting the conditions placed upon their ultimate harmonization with the law. In the traditional scenarios, the State invokes an *effectivité against* a title, in other words *against the law itself*. In this case on the other hand, taking account of the *effectivités* is not tantamount to a negation of the title. The title does not disappear; it merely adapts and does so, moreover, through involving the responsibility of the authors of these *effectivités*, who will be liable for all the necessary compensation. The law, trampled by the *effectivités*, is thus "avenged" by the price paid by the Parties in the form of compensation for the *effectivités* created. It is on this condition, in particular, that co-existence will develop between these *effectivités* which have been "paid for" and the law which has been "avenged".

67. With this in mind, we shall first see how the Parties could *adapt* these *effectivités* in their negotiations to incorporate them into the new

Treaty. The starting point to be borne in mind is that these *effectivités* are recognized by both Parties.

For its part, Hungary only requests the dismantling of Variant C, which it knows is unlikely, if the new agreement to be concluded prevents it from benefiting from this variant.

Slovakia has only requested that Hungary be obliged to build the Nagymaros dam if the two Parties cannot manage to modify the Treaty by an agreement taking account of the fact that the dam has not been built. According to its written pleadings and oral arguments, Slovakia does indeed appear to accept the *autonomous* operation of the Gabčíkovo hydroelectric plant, in other words its operation *independently* of the Nagymaros dam. And instead of the peak-mode operation of Gabčíkovo, which was only possible with a dam at Nagymaros, it agrees to the run-of-the-river operation of Gabčíkovo, thus appearing to be resigned to this situation, which, moreover, is only too evident to the observer.

Lastly, Hungary and Slovakia do apparently fully accept the closure at Čunovo and the abandonment of Dunakiliti respectively.

68. While these *effectivités*, adapted as they have been or will be to fit the mould of a new treaty, may have breached and exceeded the existing law, the law reins them in and governs them again in three ways:

— these *effectivités* do not kill the Treaty, which survives them;
— these *effectivités* do not go unpunished and entail sanctions and compensation;
— and above all, these *effectivités* will be "recast", or inserted into the Treaty, whose new content to be negotiated will serve as a *legitimizing text* for them.

69. This brings me to the necessity for the Parties *to negotiate again and to do so in good faith.* The renegotiation must be seen as a strict obligation, exactly like the good faith conduct it implies. This obligation flows not only from the Treaty itself, but also from general international law as it has developed in the fields of international watercourses and the environment.

70. In this context of a reconstituted negotiation, the Parties will have to find, unless they agree otherwise, the appropriate solutions for a number of questions and, in particular, but not exclusively, the following ones:

— the necessity to wipe the slate of the past clean and for each to pay the price for their wrongful conduct and their *effectivité*; the *"zero option"*, moreover, would not be incompatible with this necessity;
— the necessity to reconstitute or remodel the material content of the Treaty by achieving a *"comprehensive balance"* between them, in their rights and obligations;
— lastly, the necessity to rectify the operation of certain elements in order to avoid ecological dangers and harm.

71. In the search for new "comprehensive balances" in the Treaty, unless they agree otherwise, the Parties will have to negotiate the conditions for *restoring Hungary to its status as a partner in the use of the water*, restoring its rights over the water downstream of Čunovo as far as Sap downstream of the confluence between the canal and the original course of the river, involving that country, with equal responsibilities, in the operation and management of Variant C, which thus passes from the status of an *effectivité* to that of a novation jointly agreed in the context of a renovated treaty; and lastly enabling Hungary to enjoy, on an equal footing, the benefits achieved by the implementation of this "provisional solution" (Variant C) which, in the renewed Treaty, has become a "definitive and irreversible solution".

Lastly, unless they agree otherwise, the Parties will also have to negotiate the conditions for *restoring Hungary to its status as co-owner* of the works supposed to have been built jointly, given that the Parties will have to reconsider the matter of co-ownership, taking due account of the amounts paid by each of them as part of the joint investment, of the compensation paid and weighing up these and any other elements which each of them considers relevant.

(Signed) Mohammed BEDJAOUI.