DISSENTING OPINION OF JUDGE ODA

INTRODUCTION

1. I have voted against operative paragraph 1 C of the Judgment (para. 155) as I am totally unable to endorse the conclusions that, on the one hand, "Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" and, on the other hand, that "Czechoslovakia was not entitled to put into operation, from October 1992, this 'provisional solution'" and I cannot subscribe to the reasons given in the Judgment in support of those conclusions.

I have also voted against operative paragraph 2 D (para. 155). I have done so because the request made by myself and other judges to separate this paragraph into two so that it could be voted on as two separate issues was simply rejected for a reason which I do not understand. I have therefore had to vote against this paragraph as a whole, although I had wanted to support the first part of it.

I am in agreement with the conclusions that the Court has reached on the other points of the operative paragraph of the Judgment. However, even with regard to some of the points which I support, my reasoning differs from that given in the Judgment. I would like to indicate several points on which I differ from the Judgment through a brief presentation of my overall views concerning the present case.

I. THE 1977 TREATY AND THE JOINT CONTRACTUAL PLAN (JCP) FOR THE GABČÍKOVO-NAGYMAROS SYSTEM OF LOCKS

2. *(The Project.)* The dispute referred to the Court relates to a Project concerning the management of the river Danube between Bratislava and Budapest, which a number of specialists serving the Governments of Czechoslovakia and Hungary, as well as those employed in corporations of those two States (which were governed in accordance with the East European socialist régime), had been planning since the end of the Second World War under the guidance of the Soviet Union.

It is said that Hungary had, even before the rise of the communist régime, proposed the building of a power plant at Nagymaros on Hungarian territory. However, with the co-operation of the socialist countries and under the leadership of the Soviet Union, the initiative for the management of the river Danube between Bratislava and Budapest was taken over by Czechoslovakia, and the operational planning was undertaken by technical staff working for COMECON.

The Project would have entailed the construction of (i) a bypass canal to receive water diverted at the Dunakiliti dam (to be constructed on Hungarian territory) and (ii) two power plants (one at Gabčíkovo on the bypass canal on Czechoslovak territory and one at Nagymaros on Hungarian territory). It may well have been the case that the bypass canal was also required for the future management of the river Danube with respect to flood prevention and the improvement of international navigation facilities between Bratislava and Budapest. However, the bypass canal was aimed principally at the operation of the Gabčíkovo power plant on Czechoslovak territory and the Dunakiliti dam, mostly on Hungarian territory, was seen as essential for the filling and operation of that canal, while the Nagymaros System of Locks on Hungarian territory was to have been built for the express purpose of generating electric power at Nagymaros and partially for the purpose of supporting the peak-mode operation of the Gabčíkovo power plant.

The whole Project would have been implemented by means of "joint investment" aimed at the achievement of "a single and indivisible operational system of works" (1977 Treaty, Art. 1, para. 1).

3. *(The 1977 Treaty.)* The Project design for the Gabčíkovo-Nagymaros System of Locks had been developed by administrative and technical personnel in both countries and its realization led to the conclusion, on 16 September 1977, of the Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks. I shall refer to this Treaty as the 1977 Treaty.

The 1977 Treaty was signed by the Heads of each Government (for Czechoslovakia, the Prime Minister; for Hungary, the Chairman of the Council of Ministers), and registered with the United Nations Secretariat (*UNTS*, Vol. 236, p. 241). It gave, on the one hand, an overall and general picture (as well as some details of the construction plan) of the Project for the Gabčíkovo-Nagymaros System of Locks (which would, however, have in essence constituted a "partnership" according to the concept of municipal law) (see 1977 Treaty, Chaps. I-IV), while, on the other hand, it aimed, as an ordinary international treaty, to serve as an instrument providing for the rights and duties of both parties in relation to the future management of the river Danube (see 1977 Treaty, Chaps. V-XI).

Under the plan described in the 1977 Treaty, the cost of the "joint investment" in the system of locks was to have been borne by the respective parties and the execution of the plan, including labour and supply, was to have been apportioned between them (1977 Treaty, Art. 5). The Dunakiliti dam, the bypass canal, the Gabčíkovo series of locks and the Nagymaros series of locks were to have been owned jointly (1977 Treaty, Art. 8) and the parties assumed joint responsibility for the construction of those structures. More concretely, the project for the diversion of the waters of the river Danube at Dunakiliti (on Hungarian territory) into

the bypass canal (on the territory of Czechoslovakia), and the construction of the dams together with the power stations at Gabčíkovo and Nagymaros were to have been funded jointly by the parties. The electric power generated by those two power stations was to have been available to them in an equal measure (1977 Treaty, Art. 9).

It must be noted, however, that the 1977 Treaty does not seem to have been intended to prescribe in detail the content of the construction plan, that being left to the Joint Construction Plan to be drafted by the parties — which, for the sake of convenience, I shall refer to as the JCP. While some detailed provisions in Chapters I-IV of the 1977 Treaty concerning the completion of the Project did in fact, as stated above, correspond to provisions subsequently incorporated into the JCP, the Preamble to the 1977 Treaty confines itself to stating that "[Hungary and Czechoslovakia] decided to conclude an Agreement concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks". The 1977 Treaty lacks the form of words usually present in any international treaty which generally indicates that the parties have *thus agreed the following text* (which text usually constitutes the main body of the treaty). This fact further reinforces the view that the 1977 Treaty is intended only to indicate the basic construction plan of the Project and to leave the details of planning to a separate instrument in the form of the JCP.

4. *(The Joint Contractual Plan.)* The drafting of the JCP was already anticipated in the Agreement regarding the Drafting of the Joint Contractual Plan concerning the Gabčíkovo-Nagymaros Barrage System of 6 May 1976 (hereinafter referred to as the 1976 Agreement[1]), signed by plenipotentiaries at the level of Deputy Minister. The Hungarian translation states in its Preamble that

> "[the parties] have decided on the basis of a mutual understanding with regard to the joint implementation of the Hungary-Czechoslovakia Gabčíkovo-Nagymaros Barrage System . . . to conclude an Agreement for the purpose of drafting a Joint Contractual Plan for the barrage system".

As stated above, the 1976 Agreement was concluded in order to facilitate the future planning of the Project and the 1977 Treaty provided some guidelines for the detailed provisions to be included in the JCP, which was to be developed jointly by the representatives of both States as well as by the enterprises involved in the Project. The time-schedule for the implementation of the construction plan was subsequently set out in the Agreement on Mutual Assistance in the Course of Building the Gab-

[1] This Agreement is not to be found, even in the *World Treaty Index*, 1983. The English text is to be found in the documents presented by both Parties but they are not identical (Memorial of Slovakia, Vol. 2, p. 25; Memorial of Hungary, Vol. 3, p. 219).

číkovo-Nagymaros Dam of 16 September 1977 (hereinafter referred to as the 1977 Agreement[2]), the same date on which the 1977 Treaty was signed[3]. It was not made clear whether those two Agreements of 1976 and 1977 themselves constituted the JCP or whether the JCP would be further elaborated on the basis of these Agreements.

In fact, the text of the JCP seems to have existed as a separate instrument but neither Party has submitted it to the Court in its concrete and complete form. A "summary description" of the JCP, dated 1977, was presented by Hungary (Memorial of Hungary, Vol. 3, p. 298) while Slovakia presented a "summary report" as a part of the "JCP Summary Documentation" (Memorial of Slovakia, Vol. 2, p. 33). Neither of those documents gave a complete text but they were merely compilations of excerpts. Neither document gave a precise indication of the date of drafting. What is more, one cannot be certain that those two documents as presented by the two Parties are in fact identical. The Judgment apparently relies on the document presented by Hungary and received in the Registry on 28 April 1997 in reply to a question posed by a Judge on 15 April 1997 during the course of the oral arguments. This document, the Joint Contractual Plan's Preliminary Operating Rules and Maintenance Mode, contains only extremely fragmentary provisions. I submit that the Court did not, at any stage, have sufficient knowledge of the JCP in its complete form.

5. *(Amendment of the Joint Contractual Plan.)* I would like to repeat that the JCP is a large-scale plan involving a number of corporations of one or the other party, as well as foreign enterprises, and that the JCP, as a detailed construction plan for the whole Project, should not be considered as being on the same level as the 1977 Treaty itself which, however, also laid down certain guidelines for the detailed planning of the Project. As in the case of any construction plan of a "partnership" extending over a long period of time, the JCP would in general have been, and has been in fact, subject to amendments and modifications discussed between the parties at working level and those negotiations would have been undertaken in a relatively flexible manner where necessary, in the course of the construction, without resort to the procedures relating to amendment of the 1977 Treaty. In other words, the detailed provisions of the construction plan of the JCP to implement the Project concerning the Gabčíkovo-Nagymaros System of Locks as defined in the 1977 Treaty should be considered as separate from the 1977 Treaty itself.

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[2] This Agreement is not to be found, even in the *World Treaty Index*, 1983. The English text is to be found in the documents presented by both Parties but they are not identical (Memorial of Slovakia, Vol. 2, p. 71; Memorial of Hungary, Vol. 3, p. 293).

[3] The time-limit for the construction plan was revised in the Protocol concerning the Amendment of the [1977] Treaty signed on 10 October 1983; see also the Protocol concerning the Amendment of the 1977 Agreement signed on 10 October 1983 and the Protocol concerning the Amendment of the 1977 Agreement signed on 6 February 1989.

6. *(The lack of provision in the JCP for dispute settlement.)* One may well ask how the parties should have settled any differences of views which might have occurred between the two States with regard to the design and planning of the construction or the amendment of that design. The designing or the amendment of the design should have been effected with complete agreement between the two parties but the 1976 Agreement, which was the first document providing for the future design of the JCP, scarcely contemplated the possibility of the two sides being unable to reach an agreement in this respect. The 1976 Agreement states that, if the investment and planning organs cannot reach a mutual understanding on the issues which are disputed within the co-operation team, the investors shall report to the Joint Committee for a solution. There was no provision for a situation in which the Joint Committee might prove unable to settle such differences between the parties. It was assumed that there was no authority above the Joint Committee which would be competent to determine the various merits of the plan or of proposed amendments to it.

In view of the fact that this Project was to be developed by COMECON under Soviet leadership, it may have been tacitly considered that no dispute would ever get to that stage. In the event that no settlement could be reached by the Joint Committee, one or the other party would inevitably have had to proceed to a unilateral amendment. However, such an amendment could not have been approved unconditionally but would have had to have been followed by a statement of the legitimate reasons underlying its proposal.

7. *(The 1977 Treaty and the Joint Contractual Plan.)* It is therefore my conclusion that, on the one hand, the 1977 Treaty between Czechoslovakia and Hungary not only provided for a generalized régime of rights and duties accepted by each of them in their mutual relations with regard to the management of the river Danube (1977 Treaty, Chaps. V-XI), but also bound the parties to proceed jointly with the construction of the Gabčíkovo-Nagymaros System of Locks (the construction of (i) the Dunakiliti dam which would permit the operation of the bypass canal, (ii) the Gabčíkovo dam with its power plant and (iii) the Nagymaros dam with its power plant). The construction of the Gabčíkovo-Nagymaros System of Locks might have constituted a type of "partnership" which would have been implemented through the JCP (1977 Treaty, Chaps. I-IV).

On the other hand, the JCP was designed to incorporate detailed items of technical planning as well as provisions for their amendment or revision and did not necessarily have the same legal effect as the 1977 Treaty, an international treaty.

Those two instruments, that is, the 1977 Treaty and the JCP (which was designed and modified after 1977), should be considered as separate instruments of differing natures from a legal point of view.

II. The Suspension and Subsequent Abandonment of the Works by Hungary in 1989

(Special Agreement, Art. 2, para. 1 *(a)*; Art. 2, para. 2)

1. Special Agreement, Article 2, Paragraph 1 (a)

8. Under the terms of the Special Agreement, the Court is requested to answer the question

> "whether [Hungary] was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to [Hungary]" (Art. 2, para. 1 *(a)*).

9. *(Actual situation in the late 1980s.)* This question put in the Special Agreement should, in my view, have been more precisely worded to reflect the actual situation in 1989. The work on the Gabčíkovo Project had by that time already been completed; the work at Nagymaros was still at a preliminary stage, that is, the work on that particular barrage system had, to all intents and purposes, not even started.

Hungary's actions in 1989 may be summed up as follows: firstly, on 13 May 1989, Hungary decided to suspend work at Nagymaros pending the completion of various environmental studies. Secondly, Hungary decided, on the one hand, on 27 October 1989, to abandon the Nagymaros Project and, on the other, to maintain the status quo at Dunakiliti, thus rendering impossible the diversion of waters to the bypass canal at that location. Hungary had, however, made it clear at a meeting of the plenipotentiaries in June 1989 that it would continue the work related to the Gabčíkovo sector itself, so the matter of the construction of the Gabčíkovo Barrage System itself was not an issue for Hungary in 1989. The chronology of Hungary's actions is traced in detail in the Judgment.

10. *(Violation of the 1977 Treaty.)* Whatever the situation was in 1989 regarding the works to be carried out by Hungary, and in the light of the fact that the failure to complete the Dunakiliti dam and the auxiliary structures (the sole purpose of which was to divert water into the bypass canal) would have made it impossible to operate the whole Gabčíkovo-Nagymaros System of Locks as "a single and indivisible operational system of works" (1977 Treaty, Art. 1, para. 1), Hungary should have been seen to have incurred international responsibility for its failure to carry out the relevant works, thus being in breach of the 1977 Treaty. It is to be noted that, at that stage, Hungary did not raise the matter of the termination of the 1977 Treaty but simply suspended or abandoned the works for which it was responsible.

In the light of the actions taken by Hungary with regard to the Gabčíkovo-Nagymaros System of Locks, there can be no doubt that in 1989 Hungary violated the 1977 Treaty. The question remains, however, whether Hungary was justified in violating its treaty obligations. I fully share the view of the Court when it concludes that

> "Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the [1977] Treaty . . . attributed responsibility to it" (Judgment, operative paragraph 155, point 1 A)

and that Hungary's wrongful act could not have been justified in any way.

Let me examine the situation in more detail. Hungary relies, in connection with the Dunakiliti dam and the diversion of waters into the bypass canal at Dunakiliti, upon the deterioration of the environment in the Szigetköz region owing to the reduced quantity of available water in the old Danube river bed. In my view, however, the decrease in the amount of water flowing into the old bed of the Danube as a result of the operation of the bypass canal would have been an inevitable outcome of the whole Project as provided for in the 1977 Treaty.

11. *(Hungary's ill-founded claim of ecological necessity.)* Certain effects upon the environment of the Szigetköz region were clearly anticipated by and known to Hungary at the initial stage of the planning of the whole Project. Furthermore, there was no reason for Hungary to believe that an environmental assessment made in the 1980s would give quite different results from those obtained in 1977, and require the total abandonment of the whole Project.

I have no doubt that the Gabčíkovo-Nagymaros System of Locks was, in the 1970s, prepared and designed with full consideration of its potential impact on the environment of the region, as clearly indicated by the fact that the 1977 Treaty itself incorporated this concept as its Article 19 (entitled Protection of Nature), and I cannot believe that this assessment made in the 1970s would have been significantly different from an ecological assessment 10 years later, in other words, in the late 1980s. It is a fact that the ecological assessment made in the 1980s did not convince scientists in Czechoslovakia.

I particularly endorse the view taken by the Court when rejecting the argument of Hungary, that ecological necessity cannot be deemed to justify its failure to complete the construction of the Nagymaros dam, and that Hungary cannot show adequate grounds for that failure by claiming that the Nagymaros dam would have adversely affected the downstream water which is drawn to the bank-filtered wells constructed on Szentendre Island and used as drinking water for Budapest (Judgment, para. 40).

12. *(Environment of the river Danube.)* The 1977 Treaty itself spoke of the importance of the protection of water quality, maintenance of the bed of the Danube and the protection of nature (Arts. 15, 16, 19), and the whole structure of the Gabčíkovo-Nagymaros System of Locks was certainly founded on an awareness of the importance of environmental protection. It cannot be said that the drafters of either the Treaty itself or of

the JCP failed to take due account of the environment. There were, in addition, no particular circumstances in 1989 that required any of the research or studies which Hungary claimed to be necessary, and which would have required several years to be implemented. If no campaign had been launched by environmentalist groups, then it is my firm conviction that the Project would have gone ahead as planned.

What is more, Hungary had, at least in the 1980s, no intention of withdrawing from the work on the Gabčíkovo power plant. One is at a loss to understand how Hungary could have thought that the operation of the bypass canal and of the Gabčíkovo power plant, to which Hungary had not objected at the time, would have been possible without the completion of the works at Dunakiliti dam.

13. *(Ecological necessity and State responsibility.)* I would like to make one more point relating to the matter of environmental protection under the 1977 Treaty. The performance of the obligations under that Treaty was certainly the joint responsibility of both Hungary and Czechoslovakia. If the principles which were taken as the basis of the 1977 Treaty or of the JCP had been contrary to the general rules of international law — environmental law in particular — the two States, which had reached agreement on their joint investment in the whole Project, would have been held *jointly* responsible for that state of affairs and *jointly* responsible to the international community. This fact does not imply that the *one party* (Czechoslovakia, and later Slovakia) bears responsibility *towards the other* (Hungary).

What is more, if a somewhat more rigorous consideration of environmental protection had been needed, this could certainly have been given by means of remedies of a technical nature to those parts of the JCP — not the 1977 Treaty itself — that concern the concrete planning or operation of the whole System of Locks. In this respect, I do not see how any of the grounds advanced by Hungary for its failure to perform its Treaty obligations (and hence for its violation of the Treaty by abandoning the construction of the Dunakiliti dam) could have been upheld as relating to a state of "ecological necessity".

14. *(General comments on the preservation of the environment.)* If I may give my views on the environment, I am fully aware that concern for the preservation of the environment has rapidly entered the realm of international law and that a number of treaties and conventions have been concluded on either a multilateral or bilateral basis, particularly since the Declaration on the Human Environment was adopted in 1972 at Stockholm and reinforced by the Rio de Janeiro Declaration in 1992, drafted 20 years after the Stockholm Declaration.

It is a great problem for the whole of mankind to strike a satisfactory balance between more or less contradictory issues of economic develop-

ment on the one hand and preservation of the environment on the other, with a view to maintaining sustainable development. Any construction work relating to economic development would be bound to affect the existing environment to some extent but modern technology would, I am sure, be able to provide some acceptable ways of balancing the two conflicting interests.

2. Special Agreement, Article 2, Paragraph 2

15. The Court is asked, under Article 2, paragraph 2, of the Special Agreement, to

> "determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article".

16. *(Responsibility of Hungary.)* In principle, Hungary must compensate Slovakia for "the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible". I was, however, in favour of the first part of operative paragraph 155, point 2 D, of the Judgment. As I stated at the outset, I had to vote against the whole of paragraph 155, point 2 D, as that first part of the paragraph was not put to the vote as a separate issue.

17. *(Difference between the Gabčíkovo Project and the Nagymaros Project.)* When one is considering the legal consequences of the responsibility incurred by Hungary on account of its violation of its obligations to Czechoslovakia under the 1977 Treaty and the JCP, it seems to me that there is a need to draw a further distinction between (i) Hungary's suspension of the work on the Dunakiliti dam for the diversion of water into the bypass canal, which rendered impossible the operation of the Gabčíkovo power plant, and (ii) its complete abandonment of the work on the Nagymaros System of Locks, each of which can be seen as having a completely different character.

18. *(The Dunakiliti dam and the Gabčíkovo plant.)* The construction of the Dunakiliti dam and of the bypass canal, which could have been filled only by the diversion of the Danube waters at that point, form the cornerstone of the whole Project. Without the Dunakiliti dam the whole Project could not have existed in its original form. The abandonment of work on the Dunakiliti dam meant that the bypass canal would be unusable and the operation of the Gabčíkovo power plant impossible. Hungary must assume full responsibility for its suspension of the works at Dunakiliti in violation of the 1977 Treaty.

The reparation to be paid by Hungary to Slovakia for its failure in this respect, as prescribed in the 1977 Treaty, will be considered in the fol-

lowing part of this opinion, together with the matter of the construction of the Čunovo dam by Czechoslovakia, which took over the function of the Dunakiliti dam for the diversion of water into the bypass canal (see para. 34 below).

19. *(The Nagymaros dam — I.)* With regard to the Nagymaros dam, Hungary cannot escape from its responsibility for having abandoned an integral part of the whole Project. However, this matter is very different from the situation concerning the Gabčíkovo Project. In fact, the site where the Nagymaros power plant was to have been built is located completely on Hungarian territory. Although the plant would also have supplied electric power to Czechoslovakia just as the Gabčíkovo power plant would likewise have provided a part of its electric power to Hungary, the amount of power to be produced by the Gabčíkovo power plant was far greater than that predicted for the Nagymaros power plant.

In 1989, Hungary seems to have found that the Nagymaros power plant was no longer necessary to its own interests. If the Nagymaros dam was initially considered to be a part of the whole Project, it was because an equal share of the power output of the Nagymaros power plant was to have been guaranteed to Czechoslovakia in exchange for an equal share for Hungary of the electric power generated by the Gabčíkovo power plant. The anticipated supply of electric power from the Nagymaros plant could have been negotiated taking into account the agreed supply to Hungary of electric power from the Gabčíkovo plant. The Nagymaros dam would also have been required essentially in order to enable the operation of the Gabčíkovo power plant in peak mode and it might therefore have been seen as not really essential to the Project as a whole.

20. *(The Nagymaros dam — II.)* The matter of the equal shares of the electric power from the Nagymaros power plant to be guaranteed to Czechoslovakia and the feasibility of the operation of the Gabčíkovo power plant in peak mode could have been settled as modalities for the execution of the JCP, even in the event of the abandonment of the Nagymaros power plant, as technical questions could be dealt with in the framework of the JCP without any need to raise the issue of reparations to be paid by Hungary to Czechoslovakia in connection with the abandonment of the Nagymaros dam.

There can be no doubt that the construction of the Nagymaros System of Locks was seen as a major link in the chain of the whole Project in connection with the construction of the Gabčíkovo System of Locks on Czechoslovak territory. The construction of the Nagymaros System of Locks was, however, essentially a matter that fell within Hungary's exclusive competence on its own territory. In the late 1980s, Hungary found it no longer necessary to produce electricity from the Nagymaros power plant on its own territory, and the abandonment of the Nagymaros dam did not, in fact, cause any significant damage to Czechoslovakia and

did not have any adverse affect on interests that Czechoslovakia would otherwise have secured.

In this connection, I must add that Czechoslovakia would have been permitted under international law as prescribed in the Vienna Convention on the Law of Treaties to terminate the 1977 Treaty on the ground of Hungary's failure to perform the obligations of that Treaty. In fact, however, Czechoslovakia did not do so but chose to implement the 1977 Treaty without Hungary's co-operation because the completion of the Project, as envisaged in the 1977 Treaty, would be greatly to its benefit.

Thus, although Hungary has to bear the responsibility for its abandonment of the Nagymaros dam as a part of the joint project of the Gabčíkovo-Nagymaros System of Locks, the reparations that Hungary should pay to the present-day Slovakia as a result are minimal (see para. 34 below).

III. The Implementation of Variant C (Damming of the Waters at Čunovo) by Czechoslovakia

(Special Agreement, Art. 2, para. 1 *(b)*; Art. 2, para. 2)

1. Special Agreement, Article 2, Paragraph 1 (b)

21. The Court is requested under the terms of the Special Agreement to decide

> "whether [Czechoslovakia] was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system" (Art. 2, para. 1 *(b)*).

22. *(Provisional solution = Variant C.)* As Hungary had suspended work on part of the Gabčíkovo Project, more particularly the work at Dunakiliti, thus preventing the diversion of the water into the bypass canal, the finalization of the whole Project, which was already nearly 70 per cent complete, was rendered impossible.

In order to accomplish the purpose of the 1977 Treaty, Czechoslovakia, one of the parties to that Treaty, was forced to start work on the diversion of the waters into a bypass canal that lay within its own territory. That was the commencement of the so-called "provisional solution" — in other words, Variant C — in November 1991. Czechoslovakia had previously made it clear to Hungary that, if Hungary were to abandon unilaterally the works at Dunakiliti (which constituted the basis of the whole Project between the two States), it would have to consider an alternative plan to accomplish the agreed original Project. Variant C was designed by Czechoslovakia because it had no other option in order to give life to the whole Project.

Since the agreed basic concept of the whole Project under the 1977

Treaty had been jeopardized by Hungary, and since the benefit which Czechoslovakia would have enjoyed as a result of the power plant at Gabčíkovo and all the benefits which would have been available to both States with regard to international navigation as well as water management (including flood prevention) of the river Danube had thereby been threatened, it was permissible and not unlawful for Czechoslovakia to start work on Variant C (the construction of the Čunovo dam). This would have an effect similar to the original plan contemplated in the 1977 Treaty, that is, the diversion of water into the bypass canal. Hungary, for its part, had from the outset given its full agreement to the diversion of the Danube waters into a bypass canal at Dunakiliti on its own territory.

23. *(The lawfulness of the construction and operation of Variant C.)* The Court has found that "Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" (Judgment, para. 155, point 1 B) under the 1977 Treaty, which provided for a "partnership" for the construction of a magnificent Project, but "was not entitled to put into operation, from October 1992, this 'provisional solution'" (Judgment, para. 155, point 1 C), that is, diverting the waters at Čunovo. The "provisional solution" was effected in order that Czechoslovakia might secure its rights and fulfil its obligations under the 1977 Treaty. Its action implied nothing other than the accomplishment of the original Project. Czechoslovakia claimed that the construction of the Čunovo dam could have been justified as a countermeasure taken in response to the wrongful act of Hungary (that is, the abandonment of the works at Dunakiliti) but I believe that the construction of the Čunovo dam was no more than the implementation of an alternative means for Czechoslovakia to carry out the Project in the context of the JCP.

I would like to repeat that I cannot agree with the Judgment when it states, as I pointed out in paragraph 1 above, that "Czechoslovakia was entitled to proceed . . . to the 'provisional solution'" but it "was not entitled to put into operation . . . this 'provisional solution'" (see also Judgment, para. 79). I wonder if the Court is really of the view that construction work on a project is permissible if the project ultimately, however, may never be used? The plan to divert the waters of the Danube river into the bypass canal where the Gabčíkovo power plant was to be constructed was the essence of the whole Project with which Hungary was in full agreement.

The Judgment states that the diverting of the Danube waters into the bypass canal was not proportionate to the injury suffered by Czechoslovakia as a result of Hungary's wrongful act (Judgment, para. 85). However, I hold the firm view that since Hungary did nothing to divert the waters at Dunakiliti, thus failing to execute its Treaty obligations, Czechoslovakia inevitably had to proceed with Variant C, that is, the construction of the Čunovo dam and the diversion of the waters of the Danube at that point, in execution of the JCP, although this was not explicitly authorized in the 1977 Treaty. This would have been a good reason to

revise the JCP in order to implement the 1977 Treaty, although the consent of Hungary to that solution was not obtained. Czechoslovakia had the right to take that action.

24. *(Volume of diverted waters.)* In this respect it should be added that the construction and operation of the Čunovo dam was simply undertaken in order to replace the Dunakiliti dam — while control of the Danube waters, as covered by Chapters V-XI of the 1977 Treaty, is another matter entirely as I have already stated (see para. 3). The Judgment seems to indicate that Czechoslovakia acted wrongfully by unilaterally diverting an undue proportion of the Danube waters into the bypass canal, but the distribution or sharing of those waters does not fall squarely within the framework of the construction and operation of Variant C. (I wonder whether control over the sharing of the water would have fallen under the exclusive competence of Hungary if the Dunakiliti dam had been built.)

The Čunovo dam, which replaced the Dunakiliti dam, is said to have diverted 90 per cent of the available water into the bypass canal on Czechoslovak territory. This figure for the division of the water might not reflect the original intention of the parties, each of which wanted to have an equitable share of the waters, with a reasonable amount of the water going into the old Danube river bed and a similar reasonable amount going into the bypass canal. However, the way in which the waters are actually divided does not result simply from the *construction* of a dam at either Dunakiliti or at Čunovo but, the diversion of waters at Čunovo has, in fact, been operated by Czechoslovakia itself under its own responsibility.

The matter of the sharing of the waters between the bypass canal and the old Danube river bed is but one aspect of the *operation* of the system and could have been negotiated between the two States in an effort to carry on applying the JCP. A minimal share of the river waters as currently discharged into the old Danube river bed might have been contradictory to the original Project, and for this, Czechoslovakia is fully responsible.

This matter, however, might well have been rectified by some mutually acceptable arrangement. It may well be possible to control the distribution of the water at Čunovo by the use of sluice-gates or by a modification to the design of the dyke separating the waters in the Čunovo reservoir. The control of the water was *not* the essence of the Variant C project and could still be dealt with in a more flexible manner through a revision or redrafting of the relevant texts of the JCP.

2. Special Agreement, Article 2, Paragraph 2

25. The Court is requested under Article 2, paragraph 2, of the Special Agreement

"to determine the legal consequences, including the rights and obligations of the Parties, arising from its Judgment on the questions in paragraph 1 of this Article".

26. *(The lawfulness of Variant C.)* The *construction* of Variant C was not unlawful and Slovakia did not incur any responsibility to Hungary, except that the way in which the Čunovo dam was controlled by Czechoslovakia seems to have led to an unfair division of the waters between the old Danube river bed and the bypass canal. Slovakia is entitled to reparation in the form of monetary compensation from Hungary for some portion of the cost of the construction work on the Čunovo dam met by Czechoslovakia alone as a result of Hungary's failure to execute its Treaty obligations concerning the completion of the Gabčíkovo-Nagymaros System of Locks. The cost of the construction of the Čunovo dam and the related works should in part be borne by Hungary but, in exchange, it should be offered co-ownership of it. On the other hand, if the operation of the Čunovo dam diverting waters into the old Danube river bed has caused any tangible damage to Hungary, Slovakia should bear the responsibility for this mishandling of the division of waters. It must be noted, however, that, as a result of the planning of this whole Project (especially the bypass canal), the volume of water flowing into the old river bed could not be as great as before the Project was put into operation.

IV. Termination of the 1977 Treaty by Hungary (Special Agreement, Art. 2, para. 1 *(c)*; Art. 2, para. 2)

1. Special Agreement, Article 2, Paragraph 1 (c)

27. The Court is requested under the terms of the Special Agreement to decide "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by [Hungary]" (Art. 2, para. 1 *(c)*).

28. *(Hungary's notification of termination of the 1977 Treaty.)* This question concerns nothing other than the interpretation of the law of treaties, as the Judgment properly suggests. The termination of the 1977 Treaty is essentially different from an amendment of the JCP. Hungary claims that, as Variant C was in contradiction of the Plan and thus constituted a wrongful act, the 1977 Treaty could be terminated because of that alleged violation of the Treaty by Czechoslovakia.

I am in agreement with the Judgment when it states that the termination of the 1977 Treaty by Hungary does not meet any of the criteria for the termination of a treaty as set out in the Vienna Convention on the Law of Treaties, which is considered as having the status of customary international law. I share the view of the Court that the 1977 Treaty has

remained in force, as the notification of termination made by Hungary in 1992 could not have any legal effect (Judgment, para. 155, point 1 D).

2. Special Agreement, Article 2, Paragraph 2

29. No legal consequences will result from the Court's Judgment in this respect, since the notification of termination of the 1977 Treaty by Hungary must be seen as having had no legal effect.

V. The Final Settlement
(Special Agreement, Article 5)

30. Hungary and Slovakia have agreed under Article 5 of the Special Agreement, that: "Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution."

31. *(Negotiations under Article 5 of the Special Agreement.)* As I have already said, my views differ from those set out in the Judgment in that I believe that Czechoslovakia was entitled to proceed to the provisional solution, namely, not only the construction of the Čunovo dam but also the operation of that dam at Čunovo in November 1992 for diversion of water into the bypass canal. As I see it, Czechoslovakia did not violate the 1977 Treaty. It is my opinion that the "negotiations" between Hungary and Slovakia under Article 5 of the Special Agreement should be based on this understanding and not on the finding stated in the Judgment in its operative paragraph 155, points 1 C and 2 D.

32. *(The amendment of the Joint Contractual Plan.)* The implementation by Czechoslovakia of Variant C — the construction of the Čunovo dam and the damming of the waters for diversion into the bypass canal — was a means of executing the plan for the Gabčíkovo-Nagymaros System of Locks which had originally been agreed by the Parties. The implementation of Variant C will *not* remain a "provisional" solution but will, in future, form a part of the JCP.

The mode of operation at the Gabčíkovo power plant should be expressly defined in the amended JCP so as to avoid the need for operation in peak mode, as this has already been voluntarily abandoned by the Parties and does not need to be considered here.

The way in which the waters are divided at Čunovo should be negotiated in order to maintain the original plan, that is, an equitable share of the waters — and this should be spelt out in any revision or amendment of the JCP. The equitable sharing of the water must both meet Hungary's concern for the environment in the Szigetköz region and allow satisfactory operation of the Gabčíkovo power plant by Slovakia, as well as the

maintenance of the bypass canal for flood prevention and the improvement of navigation facilities. I would suggest that the JCP should be revised or some new version drafted during the negotiations under Article 5 of the Special Agreement in order to comply with the modalities which I have set out above.

33. *(Reassessment of the environmental effect).* Whilst the whole Project of the Gabčíkovo-Nagymaros System of Locks is now in operation, in its modified form (that is, with the Čunovo dam instead of the Dunakiliti dam diverting the water to the bypass canal and with the abandonment of the work on the Nagymaros dam/power plant), the Parties are under an obligation in their mutual relations, under Articles 15, 16 and 19 of the 1977 Treaty, and, perhaps in relations with third parties, under an obligation in general law concerning environmental protection, to preserve the environment in the region of the river Danube.

The Parties should continue the environmental assessment of the whole region and search out remedies of a technical nature that could prevent the environmental damage which might be caused by the new Project.

34. *(Reparation.)* The issues on which the Parties should negotiate in accordance with Article 5 of the Special Agreement are only related to the details of the reparation to be made by Hungary to Slovakia on account of its having breached the 1977 Treaty and its failure to execute the Gabčíkovo Project and the Nagymaros Project. The legal consequences of these treaty violations are different in nature, depending on whether they relate to one or other separate part of the original Project. Hungary incurred responsibility to Czechoslovakia (later, Slovakia) on account of its suspension of the Gabčíkovo Project and for the work carried out solely by Czechoslovakia to construct the Čunovo dam. In addition, Czechoslovakia is entitled to claim from Hungary the costs which it incurred during the construction of the Dunakiliti dam, which subsequently became redundant (see paras. 17 and 18 above).

With regard to the abandonment by Hungary of the Nagymaros dam, Hungary is not, in principle, required to pay any reparation to Slovakia as its action did not affect any essential interest of Slovakia (see para. 19 above). There is one point which should not be overlooked, that is, as the Nagymaros dam and power plant are, as Slovakia admits, no longer a part of the whole Project, the construction of the bypass canal from Čunovo would be mostly for the benefit of Slovakia and would provide no benefit to Hungary.

The main benefits of the whole Project now accrue to Slovakia, with the exception of the flood prevention measures and the improved facilities for international navigation, which are enjoyed by both States. This should be taken into account when assessing the reparation to be paid as a whole by Hungary to Slovakia.

In view of the statements I have made above, it is my firm belief that the modalities of the reparation to be paid by Hungary to Slovakia should be determined during the course of the negotiations to be held between the two States.

(Signed) Shigeru ODA.
