DISSENTING OPINION OF JUDGE FLEISCHHAUER

I have voted in favour of paragraph 1 A of the *dispositif* of the Court's Judgment as I am in agreement with the Court's finding therein

> "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 Treaty of 16 September 1977 and related instruments attributed responsibility to it" (para. 155).

I am also in agreement with the reasons that led the Court to this finding (paras. 27-59).

I have, moreover, voted in favour of paragraph 1 C of the *dispositif*, according to which "Czechoslovakia was not entitled to put into operation, from October 1992, this 'provisional solution' " (para. 155). I share the view of the majority that

> "Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act" (para. 78).

As to the reasoning which led the Court to its findings in this respect (paras. 72-88), I note, in particular, that the Court has not endorsed justification of Czechoslovakia's recourse to Variant C by an alleged principle of "approximate application" (para. 76) and that "[t]he Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate" (para. 87). I am in agreement with these positions of the Court.

I cannot agree, however, with most of the rest of the Judgment, and in particular not with its central finding that

> "the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them" (conclusion 1 D, para. 155).

I am of the view that Hungary has validly terminated that Treaty by its notification of termination of 19 May 1992, with effect from 25 May 1992, or — alternatively — as from 23 October 1992, i.e., the date of the actual damming. Accordingly, I regard the consequences, which the majority of the Court draws in the five conclusions in part 2 of paragraph 155 as legally flawed, inasmuch as they are based on the concept of

the continuing validity of the 1977 Treaty. I have therefore voted against four of them (i.e., conclusions 2 A, 2 B, 2 C and 2 E); my vote in favour of conclusion 2 D has to be seen in the light of my considerations on the legal consequences of the Judgment set forth in Part II below.

My reasoning is as follows.

I. The Legal Fate of the 1977 Treaty

1. *As to the date of the unlawfulness of the recourse by Czechoslovakia to Variant C*, the Judgment points only to the date when the actual damming of the Danube at Čunovo occurred, i.e., to 23 October 1992:

> "Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully." (Para. 108.)

> "The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied." (Para. 79.)

Based on these findings the majority of the Court has concluded that:

> "the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did." (Para. 108.)

These considerations are erroneous for two reasons:

Firstly, Czechoslovakia, when it "proceeded" to Variant C, as the expression used in Article 2, paragraph 1 *(b)*, of the Special Agreement reads, was not free to engage in this way of proceeding. It follows from the Special Agreement that the time in question is November 1991. What happened in November 1991 is that work on Variant C began that month (para. 23). It is uncontested between the Parties that at that time, in spite of Hungary's violation of the 1977 Treaty, the Treaty was in force between Czechoslovakia and Hungary.

The 1977 Treaty being in force in November 1991, both Czechoslovakia and Hungary were under the obligation to perform it in good faith.

That is the basic rule underlying the whole fabric of the international law of treaties. It is reflected in Article 26 of the Vienna Convention on the Law of Treaties ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith"). Good faith in performing a treaty does not only concern the manner in which the treaty is applied and implemented by the parties to it; good faith performance means also that the parties must not defeat the object and purpose of the treaty. Under the Vienna Convention, the obligation not to defeat the object and purpose of a treaty exists already before its entry into force. According to Article 18 of the Convention:

> "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> *(a)* it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> *(b)* it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

I do not want to go into the question as to whether the whole of Article 18 corresponds actually to general international law. However, as the International Law Commission remarked in its Commentary on Article 15 (which became Article 18 in the text of the Convention as adopted) — with a reference to the Permanent Court's decision in the case concerning *Certain German Interests in Polish Upper Silesia* (*Merits, Judgment No. 7, P.C.I.J, Series A, No. 7*, p. 30):

> "That an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attaches to a State which has signed a treaty subject to ratification appears to be generally accepted." (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 202.)

A fortiori does that obligation apply to a treaty after its entry into force. It follows from there that a State party to a treaty in force is not free to engage in — even on its own territory as Czechoslovakia did as from November 1991— construction works which are designed to frustrate the treaty's very object, i.e., in the present case the creation and the operation of the Joint Project. The question of a justification of Czechoslovakia's construction work as countermeasure does not arise, as the Court has — rightly — found that the diversion of the Danube carried out by Czechoslovakia — which is the central part of Variant C — was not a lawful countermeasure because it was not proportionate (para. 87).

Secondly, I do not regard — as the majority of the Court does — the putting into operation of Variant C as a wrongful act which consisted

only in the actual damming of the Danube in October 1992. In my view, the putting into operation of Variant C constituted a continuing wrongful act in the meaning of Article 25 of the ILC Draft on State Responsibility (Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 133), which extended from the passing from mere studies and planning to construction in November 1991 and lasted to the actual damming of the Danube in October of the following year. This is so because Czechoslovakia, in November 1991, entered into the construction phase in the certainty that Hungary would not, and could not, in view of the position taken not only by its Government but also by its Parliament, return to the implementation of the 1977 Treaty. At the same time, Czechoslovakia was firmly determined to start production at the Gabčíkovo hydroelectric power plant as soon as it was technically possible and to that end to dam the Danube at Čunovo at the next occasion when that would be feasible, i.e., during the low-water season in October 1992. How firmly both sides were locked in their respective positions is illustrated by their diplomatic exchanges. In April 1991, the Hungarian Parliament had recommitted the Government to negotiate with the Czechoslovak Government "regarding the dissolution by joint agreement of the Treaty concluded on 16 September 1977" (Parliamentary resolution 26/1991 (IV.23) Regarding the Government's Responsibility in Connection with the Gabčíkovo-Nagymaros Barrage System, Memorial of Slovakia, Vol. IV, Ann. 88, p. 215) and instructed the Government to

> "concurrently initiate the conclusion of a new international treaty to settle the issue of the consequences of the non-construction (abandonment) of the barrage system and associated main projects" *(ibid.)*.

Consequently, Hungary not only constantly protested the unilateral measures initiated by Czechoslovakia in order to put Variant C into operation, but it continued to ask for the abrogation of the 1977 Treaty and its replacement by a new agreement:

> "the mandate of the Hungarian Governmental Delegation was determined by the Resolution of Parliament, . . . Freed from the politics of the past, we can re-evaluate the disputed problem from a professional/scientific viewpoint, namely, the ecological effects, flood protection, navigation, energy, economic, technical/security and other questions of the Barrage System related to the 1977 Interstate Treaty or any other solution." (Hungarian Minister without Portfolio to Slovak Prime Minister, 7 November 1991, Memorial of Hungary, Vol. 4, Ann. 67, p. 122.)

"the Hungarian Party has repeatedly (beginning in summer of 1989) offered the Czech and Slovak Party the chance to co-operate and to amend the 1977 Interstate Treaty, and to conclude a new treaty, . . . the Czech and Slovak Party should not undertake any work which would be aimed at unilateral solutions (which may, perhaps, mean the diversion of the Danube in contravention of international law)" (Letter from the Hungarian Minister for Environmental Protection and Territorial Development and the Minister without Portfolio to the Czechoslovak Minister of Environmental Protection of 6 December 1991, Memorial of Hungary, Vol. 4, Ann. 68, p. 124).

"In light of this the Hungarian Government deems the decision brought about on 12 December 1991 by the Czech and Slovak Federal Republic unlawful and unacceptable and calls upon the Czech and Slovak Federal Republic to discontinue work on the diversion of the Danube." (Note Verbale from the Ministry of Foreign Affairs of the Republic of Hungary to the Embassy of the Czech and Slovak Federal Republic, 14 February 1992, *ibid.*, Ann. 74, p. 135.)

Czechoslovakia on the other hand, in the critical period between the autumn of 1991 and May 1992, when Hungary came through with its notification of termination of the 1977 Treaty, consistently gave this message to Hungary:

"I would once again emphasise, however, that Czechoslovakia will only find acceptable a variant which would make the operation of the Gabčíkovo Barrage possible." (Slovak Prime Minister to Hungarian Minister without Portfolio, 19 September 1991, *ibid.*, Ann. 62, p. 113.)

"Work on the temporary measures will also cease if the Hungarian Party discontinues its unilateral breach of the 1977 Treaty and recommences the obligations provided for it therein or if an agreement is concluded between the Republic of Hungary and the Czech and Slovak Federal Republic as to some other solution regarding the fate of the Project.

. . . . . .

The Government of the Czech and Slovak Federal Republic is prepared to continue negotiations with the Hungarian Government on all levels regarding the situation which has developed. At the same time, it cannot agree to the cessation of work on the provisional solution." (Note Verbale from the Ministry of Foreign Affairs of the Czech and Slovak Federal Republic to the Ministry of Foreign Affairs of the Republic of Hungary, 17 March 1992, *ibid.*, Ann. 76, p. 139.)

"Czechoslovak[ia] has shown enough good intentions and a readiness to negotiate, but it can no longer give consideration to the time-wasting and delays which are being used by Hungary, and thus, it

> cannot suspend work related to the provisional solution. In my view, until the Danube is closed (31 October 1992) there is still an opportunity to resolve the debated question by way of an agreement between the two States." (Czechoslovak Prime Minister to Hungarian Prime Minister, 23 April 1992, Memorial of Hungary, Vol. 4, Ann. 79, p. 147.)

Czechoslovakia did not reject the formation of a joint committee of experts, including "foreign experts nominated by the European Community based on the needs of both Parties" (Slovak Prime Minister to Hungarian Minister without Portfolio, 18 December 1991, *ibid.*, Ann. 69, p. 126). But the Slovak Prime Minister added:

> "I am repeatedly stressing that, because of the high state of readiness of the Gabčíkovo plant, the only solution that is acceptable for us is one which takes into account the putting into operation of the Gabčíkovo plant." *(Ibid.)*

And on 8 January 1992 the Slovak Prime Minister repeated this position:

> "We repeatedly emphasized at joint negotiations undertaken by the Governmental Delegations of the CSFR and the Republic of Hungary that we can only accept a solution which is aimed at the commencement of operations of the Gabčíkovo Barrage. This demand is justified by the advanced stage of the construction at Gabčíkovo and the amount of material resources invested.
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> . . . . . .
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> The Czechoslovak Party is willing to take into consideration the conclusions of the work done by such a committee of experts in any further procedures regarding the Gabčíkovo-Nagymaros Barrage System. It is also known that the Government of the CSFR is willing to suspend the provisional solution on its own sovereign territory insofar as the Government of the Republic of Hungary is able to find an opportunity to enter into a joint solution." (*Ibid.*, Ann. 72, p. 132.)

In the light of these circumstances, when the construction work for Variant C got under way, on both sides the point of no return was passed. There was a *continuum* and the Czechoslovak action of November 1991 and its action undertaken in October 1992 share the same legal deficiency. The putting into operation of Variant C was an internationally wrongful act extended over time between November 1991 and October 1992.

Since I am thus — contrary to the opinion expressed in the Court's Judgment — of the view that Czechoslovakia was not entitled to proceed, in November 1991, to Variant C, I am also in disagreement with the conclusion in paragraph 1 B of the *dispositif* of the Judgment: "that Czecho-

slovakia was entitled to proceed, in November 1991, to the 'provisional solution'" (para. 155). Nor can I agree with paragraph 1 D of the *dispositif*:

> "that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them" *(ibid.)*

in so far as it is based on the allegedly premature giving of the notification of termination by Hungary (para. 108).

2. *I would disagree with the conclusion drawn by the majority based on the point in time at which Hungary made its notification of termination even if I shared* — quod non — *the view that Czechoslovakia violated the 1977 Treaty only in October 1992.* What that view means is that the notification of termination was not warranted in May, as no breach of the Treaty had yet occurred (para. 108), but that when the damming of the Danube happened, in October, the event occurred too late as far as the Hungarian notification is concerned. This view amounts, in its practical consequence, to an extraordinary formalism: a unilateral legal act, the notification, is discounted because a certain event, although expected and foreseen, had not yet happened. The event happens, nothing else changes, but still legal effects of the earlier act are said not to arise as it had been premature. This approach to a matter of international law does not correspond to the requirements of good faith. As the Court has said:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46.)

If one regards — as the majority of the Court does — Hungary's notification of termination as premature, then one must also admit that it would have been possible for Hungary to withdraw this act and to substitute it later by a new notification of termination based on the events of October 1992. The principle of good faith requires that under such circumstances the defect of Hungary's original act, the, in the view of the Court, premature giving of its notification of termination of the 1977 Treaty, has to be regarded as remedied once the missing factual event has occurred. That the occurrence of a subsequent event can be an adequate ground for remedying a defective unilateral act has been confirmed by the Permanent Court when it stated in the case concerning the *Mavrommatis Palestine Concessions*:

> "Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an

> adequate reason for the dismissal of the Applicant's suit. . . . Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*1924, P.C.I.J., Series A, No. 2*, p. 34.)

And in the case concerning *Certain German Interests in Polish Upper Silesia* the Permanent Court said:

> "Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned." (*1925, P.C.I.J., Series A, No. 6*, p. 14.)

Even if, therefore, the date of 19 May 1992 is not regarded as a suitable date for Hungary's notification of termination, this defect is to be regarded as being remedied as from 23 October 1992, date of the actual damming of the Danube.

3. In its finding that

> "the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them" (para. 155 (1) D, see also para. 108),

the majority of the Court did not base itself alone on the ground that Hungary's notification had been premature. *Two more grounds are given, neither of which I can agree with.*

The first of these additional reasons is

> "*that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior, wrongful conduct.* As was stated by the Permanent Court of International Justice:
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> > 'It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question . . .' (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31).
>
> Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty." (Para. 110; emphasis added.)

I do not want to put into doubt this general rule; however, I do not think that the principle applies in the circumstances of the present case.

My objection to the Judgment in this respect is twofold: firstly, the Court overlooks that recourse to Variant C was neither automatic nor the only possible reaction of Czechoslovakia to Hungary's violations of the 1977 Treaty. Czechoslovakia would have been entitled to terminate the Treaty. If it did not want to do this, it could, for example, have provided unilaterally for participation of Hungary in the realization of Variant C, possibly in combination with a third party dispute settlement clause. Secondly, the Court, in basing its negation of a right of Hungary to terminate the 1977 Treaty in response to the realization by Czechoslovakia of Variant C, on the fact that Hungary itself had violated the Treaty first, does not take account of its own conclusion that:

> "Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law" (para. 85),

and that the derivation of the Danube "was not a lawful countermeasure because it was not proportionate" (para. 87).

What applies in the present case is this: Hungary, by its prior violation of the 1977 Treaty, had not become a legal outlaw which must endure every measure with which Czechoslovakia could come up in response. The principle that no State may profit from its own violation of a legal obligation does not condone excessive retaliation. The principle, as stated by the Permanent Court and applied to the present case, means that one Party, Hungary, would not be entitled to avail itself of the fact that the other Party, Czechoslovakia, has not fulfilled an obligation if the first Party, Hungary, has by an illegal act prevented the other, Czechoslovakia, from fulfilling the obligation in question. This, however, is not the case here. The obligation not fulfilled by Czechoslovakia is the duty to respect Hungary's entitlement to an equitable and reasonable share in the waters of the Danube. Hungary has not made it impossible for Czechoslovakia to respect that right; as I have pointed out above, the unilateral realization of Variant C by Czechoslovakia was neither automatic nor the only possible reaction to Hungary's breaches of the Treaty. A broader interpretation of the principle in question which would disregard the requirement of proportionality, would mean that the right to countermeasures would go further, in respect to disproportionate intersecting violations of a treaty, as it goes under general international law. It is therefore wrong to apply the principle quite schematically to cases where there are intersecting ("reciprocal") violations of a treaty as the Court does where it states

> "that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination" (para. 114).

Rather, the recourse by Czechoslovakia to Variant C constituted a new breach of the 1977 Treaty, this time by Czechoslovakia. This new breach of the Treaty, by exceeding in proportionality Hungary's earlier breaches, set in motion a new chain of causality and entitled Hungary to defend itself by taking recourse to its right under Article 60 of the Vienna Convention on the Law of Treaties, i.e., to terminate the Treaty. The requirements of Article 60, paragraph 3 *(b)*, are met as

> "the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river" (para. 78)

and thus Variant C infringed upon basic rights of Hungary, essential in the accomplishment of the 1977 Treaty. In a situation of disproportionate intersecting violations of an international treaty, such as the one in which Hungary and Czechoslovakia found themselves after the latter's recourse to Variant C, the corrective element does not lie in the loss by the first offending State of the right to defend itself against the second offence by way of termination, but in a limitation of the first offender's — here Hungary's — right to claim redress for the second offence.

I therefore come to the conclusion that — contrary to the view of the majority of the Court — the fact that Hungary violated the 1977 Treaty first did not deprive it of its right to terminate the same Treaty in reaction to its later violation by Czechoslovakia.

4. The other of the additional reasons invoked by the Court's majority in support of the alleged invalidity of Hungary's notification of termination is

> "that, according to Hungary's Declaration of 19 May 1992, *the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later*. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith." (Para. 109; emphasis added.)

I do not contest that Articles 65 to 67 may reflect certain procedural principles pertaining to customary law, but I do not think that Hungary's

notification of termination contradicts these principles. In this respect, the delay of only six days provided for by Hungary for its notification to become effective should not be seen in isolation. In fact, Hungary transmitted its notification of termination a full six months after Czechoslovakia had proceeded to Variant C in November 1991. During that period Hungary — as shown above in the quotations from the diplomatic exchanges between the two Parties — did not cease to protest against the unilateral measures taken by Czechoslovakia and to ask that they be stopped. Hungary also pointed out that a continuation of these measures might put the fate of the 1977 Treaty into question:

> "I am hopeful that the representatives of the Government and the Parliament of the Czech and Slovak Republic having regard to their historic responsibility will find an opportunity to take the above reasonable points of view into consideration. If this expectation proves to be futile, the Government of the Republic of Hungary would be compelled to review the consequences of the discontinuation of the negotiations, the fate of the 1977 interstate Treaty and the necessary counter-measures." (Hungarian Prime Minister to the Czechoslovak Prime Minister, 19 December 1991, Memorial of Hungary, Vol. 4, Ann. 70, p. 129.)
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> "If the Government of the Czech and Slovak Federal Republic were to reject our proposals anyway and continue the work aimed at the diversion of the Danube, which is a serious breach of international law, then it will create a very difficult situation. . . . The Government of the Czech and Slovak Republic would thus be placing the Hungarian Government into a state of necessity forcing it to terminate the Treaty." (Hungarian Prime Minister to Czechoslovak Prime Minister, 26 February 1992, *ibid.*, Ann. 75, p. 138.)

In these circumstances the fact that Hungary, in May 1992, gave only six days' notice cannot be regarded as contravening the requirements of good faith in the application of international law.

These are the reasons which lead me to the conclusion that Hungary has validly terminated the 1977 Treaty as from 25 May 1992 or — alternatively — as from 23 October 1992.

II. The Legal Consequences of the Judgment

From my considerations set forth above it follows that the determination of the legal consequences arising from the answers to the first three questions asked of the Court by the Special Agreement has to start from the finding that Hungary has validly terminated the 1977 Treaty as from 25 May — or alternatively 23 October — 1992. From there it follows that up to that date the legal situation concerning the G/N Project was primarily governed by the 1977 Treaty and related instruments; after that

date the situation is governed by general international law and by those treaties which remain in force independently of Hungary's termination of the 1977 Treaty, such as, *inter alia*, the 1948 Danube Convention, the 1976 Boundary Water Convention, the agreements relating to Danube fishery, as well as by conventions of a general character such as the Vienna Convention on the Law of Treaties.

This means that as from 25 May to 23 October 1992 Hungary is no longer obliged to construct at Nagymaros. The constructions at Dunakiliti do not have to be revived and completed. For Slovakia, the termination of the 1977 Treaty means that it is no longer under an obligation to arrange for the joint operation, together with Hungary, of the Gabčíkovo hydroelectric power plant or to share with Hungary the electricity generated there.

A second starting point is that the termination of the 1977 Treaty — whether one accepts 25 May 1992 or 23 October of the same year as the decisive date — means that Slovakia, which came into existence as an independent State only as from 1 January 1993, has never become a party to the 1977 Treaty. The fact that Slovakia has never succeeded to Czechoslovakia as a party to the 1977 Treaty does not mean, however, that Slovakia has become separated from this case. Slovakia has inherited the works produced under the G/N Project on its territory, in particular the Čunovo reservoir, the bypass canal, the Gabčíkovo lock and the Gabčíkovo power station. It is operating these installations. It has thus endorsed and continued the Czechoslovak action regarding Variant C. Slovakia therefore must be held accountable for Czechoslovakia's acts regarding the G/N Project.

A third starting point for the determination of the legal consequences should be the *ex nunc* effect of the termination of international treaties. As laid down in Article 70 of the Vienna Convention on the Law of Treaties, which is another provision reflecting a customary rule, the termination of a treaty releases the parties from any obligation to further perform the treaty but "does not affect any right of the parties created through the execution of the treaty prior to its termination" (Art. 70, para. 1 *(b)*).

This means, *inter alia,* that the ownership of constructions which existed on 25 May to 23 October 1992 remains as provided for in Article 8 of the 1977 Treaty. If that creates problems, it is for the Parties to sort them out by agreement between themselves.

A fourth starting point for the determination of the legal consequences of the Judgment is the conclusion that Czechoslovakia was not entitled to put Variant C into operation from October 1992 (paragraph 1 C of the *dispositif*) as

> "Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its

express provisions, and, in so doing, committed an internationally wrongful act" (para. 78).

As I have pointed out above, I agree with the Judgment in these findings. However, it does not follow from them that with the falling away of the 1977 Treaty all legal obstacles against the continued operation of Variant C by Slovakia, as the successor to Czechoslovakia, were removed. This is so because the appropriation by Czechoslovakia/Slovakia of the major part of Hungary's share in the waters of the Danube for the full length of the bypass canal violated not only the 1977 Treaty but, as the Judgment recognizes, the basic right of Hungary to an equitable and reasonable sharing of the resources of an international watercourse (para. 78). This is a right that existed not only under the Treaty but which exists under general international law.

This means that there is no obligation for Slovakia to dismantle the constructions which Czechoslovakia had built in order to make Variant C operational. These constructions are all situated in what is now Slovak territory and their mere presence there does not contravene any international legal obligation of Slovakia. After the 1977 Treaty had fallen away, there was, and still is, no legal obligation for Slovakia any more to provide for a joint running of the Gabčíkovo hydroelectric power plant or for a sharing of profits. There continues to be, however, a legal obstacle against the unilateral running of Variant C by Slovakia, and that is the unilateral appropriation of, as the Judgment confirms (para. 78) between 80 and 90 per cent of Hungary's share in the waters of the Danube without Hungary's consent on a stretch of about 30 km in length. Hungary has requested the Court:

"*to adjudge and declare further*

. . . . . .

(5) that the Slovak Republic is under the following obligations:

(a) to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;

(b) to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution" (para. 13).

The Court cannot uphold these requests. While the 1977 Treaty was in force, it had been breached by both Parties, albeit in different ways and at different times. As has been explained above, Hungary as the first offender did not lose its right to defend itself against Czechoslovakia's later violation of the Treaty. However, as regards the kind of restitution Hungary can claim for the diversion of the waters of the Danube, the fact that Hungary first adhered to the 1977 Treaty and endorsed it, in 1983 asked for a slowing down, but by no means the abandonment of its

execution, in 1989 again pressed for an acceleration and then, still in the same year, suspended and subsequently abandoned its share in the works at Nagymaros and Dunakiliti, cannot be overlooked. By reason of its own previous behaviour Hungary cannot in good faith be considered to be entitled to full restitution by return of the full flow of water to the old Danube and the full restoration of the situation in which the Danube was prior to the operation of Variant C. A water management régime must be established that takes into account Hungary's ecological needs, as well as the fact that the quantity of water going to the Slovak side and the rentability of the Gabčíkovo hydroelectric power plant are interrelated. It would certainly be desirable that such a régime, which would be restricted to water management, but — as the Treaty does not exist any more — must not make provision for the joint running of the Gabčíkovo hydroelectric power plant, should be agreed between the Parties themselves. Should the Parties fail, they would have to return to the Court under Article 5, paragraph 3, of the Special Agreement.

The fifth starting point for the determination of the legal consequences of the Court's Judgment must be the fact that as a consequence of the Judgment the flow of water in the old bed of the Danube will be increased again. Irrespective of whether and to what extent navigation will use the old Danube again, there will be a discernible principal channel. There will therefore be no necessity for new or additional boundary arrangements. However, Slovakia, as a riparian State of the Danube and a party to the 1948 Danube Convention, will be under the legal obligation to make binding arrangements with the other States parties to the Danube Convention in order to secure for their navigation through the bypass canal, the Gabčíkovo locks and the Čunovo reservoir, conditions corresponding to those provided for in the Danube Convention. On the same line, Slovakia will also be under a legal obligation to provide for the application, in the bypass canal and in the reservoir, of the provisions concerning fisheries of the 1956 Treaty concerning the Régime of State Boundaries as well as of the 1958 Convention concerning Fishing in the Waters of the Danube.

The sixth point to be taken into consideration in this context is that, as both Parties have committed internationally illegal acts against each other, each Party owes the other compensation. Hungary owes compensation to Slovakia for the damages arising out of the delays in construction caused by its suspension and subsequent abandonment of its share in the works at Nagymaros and Gabčíkovo between 13 May 1989 and 25 May to 23 October 1992. Slovakia in turn owes compensation to Hungary for losses and damages sustained by Hungary and its nationals out of the unilateral derivation by Czechoslovakia and Slovakia of waters of the Danube between the actual damming of the river in October 1992 and

the entry into force of the water management agreement, to be brought about in pursuance of the Judgment of the Court. The amounts of compensation have to be fixed in accordance with Article 5 of the Special Agreement.

(Signed) Carl-August FLEISCHHAUER.