DISSENTING OPINION OF JUDGE SKUBISZEWSKI

1. While agreeing with the Court in all its other holdings, I am unable to concur in the broad finding that Czechoslovakia was not entitled to put Variant C into operation from October 1992 (Judgment, para. 155, point 1 C). The finding is too general. In my view the Court should have distinguished between, on the one hand, Czechoslovakia's right to take steps to execute and operate certain works on its territory and, on the other, its responsibility towards Hungary resulting from the diversion of most of the waters of the Danube into Czechoslovak territory, especially in the period preceding the conclusion of the 1995 Agreement (Judgment, para. 25).

I

2. In proposing to Czechoslovakia the revision of the Treaty, Hungary, for some time, did not exclude the possibility of an arrangement that would maintain, in one form or another, the System of Locks (Article 1 of the Treaty). But the subsequent abandonment of the works was a clear indication of where Hungary was heading. Even when it first proposed a postponement of the works it was aiming at abolishing the Project. That was the heart of the matter. On 22 May 1990, the Prime Minister of the newly democratic Hungary put it in a nutshell by describing the whole Project as "a mistake" (Memorial of Hungary, Vol. 1, p. 64, para. 3.110). Hungary wanted to extricate itself from that "mistake". This is the basic fact of the case. The mass of scientific and technological information that has been submitted to the Court and the maze of legal argumentation should not cause that basic fact to be lost: it was Hungary, and Hungary alone, which, from a certain moment on, followed a policy of freeing itself from the bonds of the Treaty. Czechoslovakia, on its part, insisted on the implementation of the Treaty, though it was ready to adopt a flexible attitude with regard to some aspects of the operation of the System of Locks, for example with regard to the limitation or exclusion of the peak power operation mode or the objectively verified environmental needs.

3. This difference in the stance and the actions of the two Parties with regard to the Treaty should not be blurred. To simply say that, in fact, the two contracting States (and not only one of them, i.e., Hungary) conformed to rules other than those laid down by the Treaty does not cor-

respond to legal reality. In particular, chronology cannot be dismissed as irrelevant. Hungarian doubts and reservations about and, finally, Hungary's withdrawal from the Project have not only preceded Variant C, but constituted its cause. Without an earlier suspension and abandonment of the works by Hungary there would have been no Variant C. Nor can it be said that Variant C excluded Hungary from the Project. The fact is that Hungary excluded itself, having lost all interest in the maintenance of the Project. Also, Czechoslovakia and subsequently Slovakia were prepared to co-operate with Hungary in respect of Variant C which they regarded as a provisional solution.

4. The documentation submitted in these proceedings does not support the view that the two States actually displayed the same intention of withdrawing from the Treaty. Prior to and also after the Hungarian declaration of termination, Czechoslovakia did not express any such intention. Variant C maintained some important aims of the joint investment: production of energy, flood prevention, and improvement of navigation. Where it deviated from the Project, it did not put any definitive bar to a return to the original concept of the Treaty. There was no tacit consent to the extinction of the Treaty on the part of Czechoslovakia. That country no longer exists, but Slovakia (as its successor) still postulates the implementation of the Treaty (Judgment, para. 14).

5. When Czechoslovakia and Hungary were negotiating and concluding their Treaty, they knew very well what they were doing. They made a conscious choice. A joint investment of such proportions inevitably entails some changes in the territories of the countries involved, including an impact on the environment. In particular, the two States were facing the dichotomy of socio-economic development and preservation of nature. Articles 15, 19 and 20 show that the two States paid attention to environmental risks and were willing to meet them. In the 1970s, when the Treaty was being negotiated, the state of knowledge was sufficient to permit the two partners to assess the impact their Project would have on the various areas of life, one of them being the environment. The number of studies was impressive indeed. The progress of science and knowledge is constant; thus, with regard to such a project, that progress becomes a reason for adaptation and, consequently, for entering into negotiations, no matter how long and difficult.

6. By its unilateral rejection of the Project, Hungary has precluded itself from asserting that the utilization of the hydraulic force of the Danube was dependent on the condition of a prior agreement between it and Czechoslovakia (and subsequently Slovakia). For this is what the Treaty was and is about: mutual regulation of the national competence of each riparian State, in particular, to use the hydraulic force of the river. Mutual rights and obligations have been created under the Treaty, but

during the period 1989 to 1992 Hungary progressively repudiated them. It thus created an estoppel situation for itself.

II

7. The withdrawal of Hungary from the Project left Czechoslovakia with the possibility of doing on its territory what it was allowed to do by general law. In the circumstances of the dispute submitted to the Court action based on general law does not derogate from the binding force of the Treaty. The shift onto the plane of general law results from the Hungarian rejection of the Project. There was, actually, no "single and indivisible operational system of works" (Art. 1, para. 1, of the 1977 Treaty) in which first Czechoslovakia and subsequently Slovakia could participate. The conduct of Hungary led to a factual situation which, as long as it lasted, prevented the implementation of binding agreements. A full application of the Treaty required bilateral action. Thus, for the time being, the treaty relationship of the two States found itself in a state of abeyance or inactivity. As the objectives of the Treaty did not disappear, a temporary solution would be based on general law and equity, until there was a return to the bilateral enforcement of the Treaty. That is the essence of the concept of the Czechoslovak "provisional solution", maintained by Slovakia.

8. In the present case one should draw a distinction between, on the one hand, the "provisional solution" which, as a whole, is lawful, especially under the existing circumstances (i.e., the advanced stage of completion of the works on Czechoslovak territory at the beginning of the 1990s), and, on the other, one element of the implementation of that solution that calls for redress and remedy; that element is the sharing of the waters of the Danube. It is not enough to dismiss the Slovak arguments (that is, the principle of approximate application; the duty to mitigate damages; and, as a possibility, the plea of countermeasures, Judgment, paras. 75-87). The situation is more complex. A legal evaluation of Variant C cannot be limited to the Treaty alone. As a result of Hungarian action, the implementation of the Treaty became paralysed. Czechoslovakia responded by putting into effect its "provisional solution". In the proceedings before the Court Slovakia's emphasis was on what I would term as the Treaty approach. But Slovakia has also referred, though in a somewhat subsidiary manner, to general law. Under that law, as applied by the Court, Slovakia bears responsibility for withholding from Hungary that part of the Danube's waters to which the latter was entitled. By saying that Hungary did not forfeit "its basic right to an equitable and reasonable sharing of the resources of an international watercourse" the Court applies general law (Judgment, para. 78). The Court likewise applies general law (cf. para. 85) when, in particular, it refers to the concept of the "community of interest in a navigable river", as explained by the Permanent Court in the case relating to the *Territo-*

rial Jurisdiction of the International Commission of the River Oder, (Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27). The canon of an equitable and reasonable utilization figures prominently in the recent United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, especially in its general principles (Arts. 5-10).

9. The Award in the case of *Lake Lanoux* between Spain and France states the law which is relevant to the evaluation of Variant C, though for various reasons that case must be distinguished from the case before the Court. In the *Lake Lanoux* case, the Arbitral Tribunal considered the question whether the French development scheme for Lake Lanoux (involving the diversion of waters) required, for its execution, a prior agreement between the two Governments, in the absence of which the country proposing the scheme would not have freedom of action to undertake the works (*Reports of International Arbitral Awards (RIAA)*, Vol. XII, p. 306, para. 10; *International Law Reports (ILR)*, Vol. 24, 1957, p. 127, para. 10).

10. The Tribunal said:

> "In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a 'right of assent', a 'right of veto', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.
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> That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of such an agreement. Thus, one speaks, although often inaccurately, of the 'obligation of negotiating an agreement'. In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith (*Tacna-Arica Arbitration: Reports of International Arbitral Awards*, Vol. II, pp. 921 *et seq.*; *Case of Railway Traffic between Lithuania and Poland: Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, pp. 108 *et seq.*)." (*RIAA*, Vol. XII, p. 306, para. 11; *ILR*, Vol. 24, 1957, p. 128, para. 11; footnotes omitted.)

Czechoslovakia has fulfilled its obligation to negotiate a revision of the Treaty. But a revision is something different from the refusal to implement that Treaty. Faced with such a refusal on the part of Hungary Czechoslovakia could act alone, without any prior consent by Hungary, while respecting the latter's right to an equitable and reasonable share of the Danube's waters. But in evaluating whether Czechoslovakia has respected that right one must not forget that the said share has increased in 1995, and that the water appropriated by Czechoslovakia and subsequently used by Slovakia does not serve Slovakia's interests alone, but also Hungary's. The operation of Variant C improved navigation on the Danube and enhanced flood protection.

11. In the *Lake Lanoux* case the Tribunal expressed its position on the right of each riparian State to act unilaterally in the following terms:

> "In fact, States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements: there would thus appear to be an obligation to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements. . . .
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> But international practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a *prior* agreement between the interested States cannot be established as a custom, even less as a general principle of law. The history of the formulation of the multilateral Convention signed at Geneva on December 9, 1923, relative to the Development of Hydraulic Power Affecting More than One State, is very characteristic in this connection. The initial project was based on the obligatory and paramount character of agreements whose purpose was to harness the hydraulic forces of international watercourses. But this formulation was rejected, and the Convention, in its final form, provides (Article I) that '[it] in no way alters the freedom of each State, within the framework of international law, to carry out on its territory all operations for the development of hydraulic power which it desires'; there is provided only an obligation upon the interested signatory States to join in a common study of a development programme; the execution of this programme is obligatory only for those States which have formally subscribed to it." (*RIAA*, Vol. XII, p. 308, para. 13; *ILR*, Vol. 24, 1957, p. 129, para. 13; footnote omitted.)

I think that the Court would agree that this is an exact statement of general law. That law is applicable in the present case. Czechoslovakia had the right to put the Gabčíkovo complex into operation. It also had the duty to respect Hungary's right to an equitable and reasonable share of the waters of the Danube.

12. In rejecting, in the *Lake Lanoux* case, the necessity of a prior agreement between the interested States on the utilization of the hydraulic power of international watercourses the Tribunal referred to the "most general principles of international law" according to which:

> "It is for each State to evaluate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies; its evaluation may be in contradiction with that of another State; in that case, should a dispute arise the Parties normally seek to resolve it by negotiation or, alternatively, by submitting to the authority of a third party; but one of them is never obliged to suspend the exercise of its jurisdiction because of the dispute except when it assumes an obligation to do so; by exercising its jurisdiction it takes the risk of seeing its international responsibility called into question, if it is established that it did not act within the limits of its rights." (*RIAA*, Vol. XII, p. 310, para. 16; *ILR*, Vol. 24, 1957, p. 132, para. 16.)

13. This seemed to be, *mutatis mutandis*, the position of Czechoslovakia. It could act, but it had to respect certain rights of Hungary. In the *Lake Lanoux* case, the Tribunal said that, carrying matters to extremes, the requirement of prior agreement

> "would imply either the general paralysis of the exercise of State jurisdiction whenever there is a dispute, or the submission of all disputes, of whatever nature, to the authority of a third party; international practice does not support either the one or the other of these consequences" *(loc. cit.)*.

14. Concerning the said possibility of a unilateral suspension of works the Tribunal added:

> "Further, in order for negotiations to proceed in a favourable climate, the Parties must consent to suspend the full exercise of their rights during the negotiations. It is normal that they should enter into engagements to this effect. If these engagements were to bind them unconditionally until the conclusion of an agreement, they would, by signing them, lose the very right to negotiate; this cannot be presumed.
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> It is important to keep these considerations in mind when drawing legal conclusions from diplomatic correspondence." (*RIAA*, Vol. XII, p. 311, para. 18; *ILR*, Vol. 24, 1957, p. 134, para. 18.)

15. Finally, it is worthwhile to note the following statement of the Tribunal:

> "France is entitled to exercise her rights; she cannot ignore Spanish interests.
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> Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.
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> As a matter of form, the upstream State has, procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its schemes. If, in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the downstream State." (*RIAA*, Vol. XII, p. 316, para. 23; *ILR*, Vol. 24, 1957, p. 140, para. 23.)

III

16. In paragraph 72 of its Judgment the Court makes clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's action. That is another reason for distinguishing between various elements of Variant C. Having said what it did the Court should have made a step further and applied equity as part of international law. It would then have arrived at a holding that would have given more nuance to its decision.

17. In the case relating to the *Diversion of Water from the Meuse* Judge Hudson observed:

> "It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.
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> . . . . . .
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> The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness." (*P.C.I.J., Series A/B, No. 70, Judgment, 1937*, p. 77.)

18. The foregoing quotation does not mean that one may close one's eyes to the differences between the *Diversion of Water from the Meuse* case and the present case. According to Judge Hudson the two locks (i.e., the one operated by the Netherlands and the one operated by Belgium)

were in law and in fact in the same position. "This seems to call for an application of the principle of equity stated above" (*P.C.I.J., Series A/B, No. 70, Judgment, 1937*, p. 78). But the more complex facts in the present case do not by themselves eliminate the relevance of the learned judge's opinion.

19. The impossible situation in which Hungarian action put Czechoslovakia speaks strongly in favour of the application of equitable principles by the Court in evaluating Variant C. For "[e]quity as a legal concept is a direct emanation of the idea of justice. . . . [T]he legal concept of equity is a general principle directly applicable as law" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 60, para. 71). The Court's "decisions must by definition be just, and therefore in that sense equitable" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 48-49, para. 88). "[A]n equitable solution derive[s] from the applicable law" (*Fisheries Jurisdiction, Merits, Judgment, I.C.J. Reports 1974*, p. 33, para. 78; p. 202, para. 69). Both "the result to be achieved and the means to be applied to reach the result" must be equitable. "It is, however, the result which is predominant; the principles are subordinate to the goal" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 59, para. 70).

20. In its resolution of 1961 on the utilization of non-maritime international waters the Institute of International Law has stated (Art. 3):

> "If the States are in disagreement over the scope of their rights of utilization [of the said waters], settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances." (*Annuaire de l'Institut de droit international*, 1961, Vol. II, p. 382.)

21. The degree to which Czechoslovakia has implemented the Treaty has reached such proportions that it would be both unreasonable and harmful to stop the completion of certain works and to postpone indefinitely the operation of the bypass canal, the Gabčíkovo hydroelectric power plant, navigation locks and appurtenances thereto, in so far as that operation was possible without Hungarian co-operation or participation. To find, as the Court does, that such operation is unlawful overlooks the considerations of equity. At the same time Hungary's right under general international law to an equitable and reasonable sharing of the waters of the Danube had to be preserved notwithstanding its repudiation of the Project and the Treaty.

IV

22. A State that concluded a treaty with another State providing for the execution of a project like Gabčíkovo-Nagymaros cannot, when that project is near completion, simply say that all should be cancelled and the

only remaining problem is compensation. This is a situation where, especially under equitable principles, the solution must go beyond mere pecuniary compensation. The Court has found that the refusal by Hungary to implement the Treaty was unlawful. By breaching the Treaty, Hungary could not deprive Czechoslovakia and subsequently Slovakia of all the benefits of the Treaty and reduce their rights to that of compensation. The advanced stage of the work on the Project made some performance imperative in order to avoid harm: Czechoslovakia and Slovakia had the right to expect that certain parts of the Project would become operational.

23. Thus, pecuniary compensation could not, in the present case, wipe out even some, not to speak of all, of the consequences of the abandonment of the Project by Hungary. How could an indemnity compensate for the absence of flood protection, improvement of navigation and production of electricity? The attainment of these objectives of the 1977 Treaty was legitimate not only under the Treaty but also under general law and equity. The benefits could in no way be replaced and compensated by the payment of a sum of money. Certain works had to be established and it was vital that they be made operational. For the question here is not one of damages for loss sustained, but the creation of a new system of use and utilization of the water.

24. Once a court, whether international or municipal, has found that a duty established by a rule of international law has been breached, the subject to which the act is imputable must make adequate reparation. The finding in point 2 D of the operative paragraph is the consequence of the holdings in point 1. Absence of congruence between the vote on one or more of the findings in point 1 and the vote on point 2 D should be explained in order that any implication of an uncertainty regarding the foregoing principle on reparation may be eliminated.

25. The formulation of the finding in point 1 C of the operative paragraph does not correspond to the possibility of different evaluations concerning the various elements of the "provisional solution". There is equally no reflection of that possibility in the formulation of the finding in point 2 D. Indeed, the terms of that point made the position of those judges who voted against point 1 C quite difficult. The same applies to point 2 D when a judge does not agree with *all* the findings in point 1, though I think that there is a way out of this difficulty.

26. It is on the basis of the position taken in this dissenting opinion that I have voted in favour of the finding in point 2 D. However, there is a further reason which made it possible for me to accept that finding. That reason is linked to the task of the Court under Article 2, paragraph 2, of the Special Agreement and the ensuing negotiations of the

Parties on the modalities of the execution of the Judgment (Art. 5, para. 2). My understanding of point 2 D of the operative paragraph is that the enforcement of responsibility and the obligation to compensate, though elaborated upon by the Court in the part of the Judgment devoted to Article 2, paragraph 2, of the Special Agreement (paras. 148-151) need not be a primary factor in the negotiations on the future of the Gabčíkovo-Nagymaros Project. It should be noted that the said finding refers to the issue of compensation in rather general terms. At the same time the Court gives its support to what I would describe as the "zero option" (para. 153 of the Judgment). In my view the underlying message of point 2 D to the negotiating Governments is that, notwithstanding their legal claims and counterclaims for compensation, they should seek — and find — a common solution.

(Signed) Krzysztof SKUBISZEWSKI.