INTERNATIONAL COURT OF JUSTICE

GABČÍKOVO-NAGYMAROS PROJECT

(HUNGARY/SLOVAKIA)

REPLY

SUBMITTED BY THE

SLOVAK REPUBLIC

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CHAPTER I. INTRODUCTION

1.01 This Reply is submitted in conformity with the Court's Order of 20 December 1994 and responds to the Counter-Memorial of Hungary of 5 December 1994. It is appropriate to begin this Reply by informing the Court of two developments that have importance for this case.

1.02 The first is that, on 17 March 1995, Hungary demolished the coffer dam, that is the temporary, protecting wall surrounding the construction site at Nagymaros. The site is now inundated by the waters of the Danube.

1.03 The second is that, on 19 April 1995, the two Parties concluded an Agreement concerning certain temporary technical measures and discharges in the Danube and Mosoni branch of the Danube[1]. Under this Agreement, Slovakia will increase the discharge into the Mosoni branch of the Danube to 43 m^3/s (subject to the hydrological and technical conditions in Annex 1 to the Agreement). And the discharge into the main riverbed will be increased to an annual average of 400 m^3/s, in accordance with rules (in Annex 2 thereto).

1.04 Further, Hungary will construct an underwater weir at rkm 1843 (construction to be completed in 50 days). Monitoring of the effects of these improvements will be subject to joint assessment, and any disputes over performance will be resolved through the good offices of the experts of the Commission of the European Union.

1.05 The Agreement is of a temporary character pending the judgment of the Court, and is without prejudice to the Parties' legal positions. It entered into force on signature. A Declaration by Hungary of 19 April 1995, and a Note Verbale in reply from Slovakia dated 3 May 1995, make it clear that the Parties are not agreed on whether this Agreement fulfils the obligations of the Parties under Article 4 of the Special Agreement under

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1 Agreement between the Government of the Republic of Hungary and the Government of the Slovak Republic concerning Certain Temporary Technical Measures and Discharges in the Danube and the Mosoni Branch of the Danube. Annex 1.

which the present dispute is before the Court[2]. For the reasons explained in its Note, Slovakia takes the view that the Agreement of 19 April 1995 is an agreement for a temporary water management regime (TWMR), and accordingly does fulfil the commitment in Article 4; Slovakia regards the subject matter of the 19 April 1995 Agreement as identical with the subject-matter of the TWMR contemplated in Article 4.

SECTION 1. A Brief Summary of Slovakia's Case

1.06 It is necessary, yet again, to restate what this case is about and what the essential issues in dispute are[3]. This necessity stems from the fact that, in its written pleadings to date, Hungary has attempted to transform the case into a debate over ecological or environmental issues, and to obscure the real issues, which are those put to the Court in the Special Agreement.

1.07 The essential issues in this case all depend upon the 1977 Treaty, freely concluded between Hungary and Czechoslovakia. This is reflected in Article 2 of the Special Agreement, which gives primacy to the Treaty in requiring the Court to decide "on the basis of the Treaty and rules and principles of general international law ...". And on that basis the core issues requiring decision are: (i) whether Hungary was entitled to suspend and subsequently abandon the works; and (ii) whether, in the face of Hungary's conduct, Czechoslovakia was entitled to proceed with the "provisional solution" (Variant "C"). All the other issues are subordinate to, or consequential upon, those two core issues. Hungary cannot, and does not, evade the fact that its conduct was prima facie in breach of the 1977 Treaty. As the Special Agreement makes clear, the crucial question is whether Hungary's suspension and later abandonment of works, followed by unilateral notification of termination of the Treaty - patent breaches prima facie - could be justified in law. The evidence in this case has to be related to that precise question, and not treated as part of a general debate over the environment. Thus, the case is fundamentally a case about the 1977 Treaty, interpreted and applied in accordance with the law of treaties.

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2 Both the Note Verbale and the Declaration form part of Annex 1.

3 A fuller summary of Slovakia's case is given in Slovakia's Counter-Memorial, paras. 1.03-1.22.

1.08 Hungary would have the Court believe otherwise. The 1977 Treaty becomes entirely peripheral in Hungary's pleadings - whether because it was terminated by Hungary[4], or because it confers no rights on Slovakia (as opposed to the now defunct Czechoslovakia)[5], or because contemporary principles of "environmental law" predominate over the clear Treaty provisions[6]. Consequently, for Hungary, the issues in this case arise, not under the law of treaties, but under the general law of State responsibility, or more accurately, Hungary's version of that law, thus affording a complete defence to Hungary by virtue of a plea of "ecological necessity", or if that fails, Hungary may be liable in damages, but can have no obligation to perform the Treaty.

1.09 In reality this novel plea accords with neither the law nor the facts. The law knows no such plea and, in fact, such environmental or ecological problems as Hungary now envisages were essentially foreseen and studied prior to the 1977 Treaty. Certainly, the Treaty parties in 1977 did not assume they had identified and solved each and every environmental problem. They recognised that in securing major benefits in terms of flood protection, navigational improvement, and clean energy production, there would be some drawbacks. Virtually no major development scheme is without some disadvantage. For example, Czechoslovakia had to accept that the reservoir upstream of Gabčíkovo could only be built if Czechoslovakia sacrificed a large area of its territory for this purpose. Parties invariably accept some drawbacks as the price of other, substantial benefits.

1.10 But the Treaty parties were satisfied in 1977, after long and intensive study, that there were no major environmental hazards that might call the whole Project into question; and they were satisfied that such environmental drawbacks as might emerge during construction and operation could be minimised by appropriate remedial measures. Hungary re-affirmed the Project after its EIA in 1985, again in its Parliamentary Resolution of October 1988, and again in February 1989 by signature of the Protocol accelerating Project performance (at its own request).

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4 Hungarian Memorial, Chapter 9; Hungarian Counter-Memorial, paras. 5.23-5.48.

5 Hungarian Memorial, Submissions, p. 339.

6 Ibid., paras. 7.44-7.87; Hungarian Counter-Memorial, paras. 4.10-4.38. In fact, the role of "environmental law" is largely to stress the importance of such agreements, not to override them. See, Chapter III, below.

1.11 Thus, Czechoslovakia (and now Slovakia) have never accepted that Hungary's plea of ecological necessity had any real foundation in fact. Nothing has changed their original view that Hungary's initial suspension, and later abandonment, of works under the Treaty was motivated for economic and political reasons, which the law did not permit and which Czechoslovakia could not accept because of the enormous damage such acceptance would cause to the Czechoslovak people. It is one of the ironies of the case that, in essentials, the present position - i.e., the reservoir, the bypass canal, Gabčíkovo, but no Nagymaros - was proposed by Hungary itself in October 1989[7]. The environmental risks, such as they are, would have been essentially the same under that Hungarian proposal as they now are. These risks are vastly inflated in Hungary's pleadings and scientifically unproven. As suggested in the section that follows, they are based upon speculation rather than hard evidence. No State could be expected to abandon years of work, and investments of hundreds of millions of dollars, on such a basis.

SECTION 2. Brief Analysis of the "Scientific Case" Now Presented in the Hungarian Counter-Memorial

1.12 One of the striking features of the original Hungarian Memorial was that, although the Hungarian case rested essentially on a plea of "ecological necessity", the scientific evidence for such a plea was not presented in that Memorial. Part II of that Memorial gave only a "provisional"[8] account of the risks and admitted the task of proving those risks to be "a difficult task, with many uncertainties"[9]. Belatedly, Hungary's Counter-Memorial now attempts to provide the evidence or proof which, properly speaking, should have been contained in the Declaration of 16 May 1992 and in its Memorial. In fact, two-thirds of the Counter-Memorial is a demonstration of Hungary's "scientific case"[10], a case on

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7 Certainly there are some differences. Under Variant "C" the reservoir is smaller and the Danube is dammed at Čunovo rather than at Dunakiliti. In fact the present flow into the old Danube bed is greater under Variant "C" than under the 1977 Treaty scheme. In addition, as part of its proposal in October 1989, Hungary envisaged an agreement on environmental guarantees, and this Czechoslovakia was prepared to accept. See, para. 8.13, et seq., below.

8 Hungarian Memorial, para. 5.08.

9 Ibid., para. 5.04.

10 I.e., Hungarian Counter-Memorial, Chapters 1 and 3; Vol. 2, passim; and Volume 4 (Parts 1 and 2).

which Hungary did not and could not rely at the time of termination, since it depends on evidence dating from 1994.

1.13 Yet as a demonstration it fails, and it does so principally because it is purely hypothetical. This is because the scientific papers utilised by Hungary take hypotheses based on the "Original Project" and portrays risks of damage which might occur on the basis of such speculation. They do not prove that the hypothesis is valid for this Project, which was much modified as compared with the "Original Project"[11], and they do not prove that any actual damage - or even real risk - has in fact materialised. It is quite remarkable that not one of the papers supporting Hungary's "Scientific Case" is able to demonstrate the reality of either risk or damage by reference to actual, empirical data produced by scientific investigation of this actual Project. For Hungary there always remains "a great deal of uncertainty over the extent to which the environment will be affected in the short and long term by the Project ..."[12].

1.14 The reasons why Hungary has chosen to base its scientific assessment on "predictions" rather than actual scientific testing or measurements are for Hungary to explain. Clearly, it has been possible for the last three years for actual measurements to be taken so that scientific conclusions could rest on hard evidence rather than pure "prediction"[13]. It is on such real data that Volume III hereto, which evaluates the actual environmental impact of the Gabčíkovo section through Variant "C", is based.

1.15 Nevertheless, the "Scientific Evaluation of the Gabčíkovo-Nagymaros Barrage System and Variant C", offered as Volume 2 of Hungary's Counter-Memorial, and clearly designed to provide the scientific basis for Hungary's plea of "ecological necessity", abounds with prediction rather than proof, with guesswork rather than certainty. As its introduction stresses, the study is designed to assess not actual but simply "potential" consequences or impacts, and the uncertainty is explained away, disarmingly, in these terms:

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11 As to the Project modifications and Hungary's use of the concept of the "Original Project", see, para. 11.10, below.

12 Hungarian Counter-Memorial, Vol. 2, p. 3.

13 Slovakia, for its part, has attempted to provide the Court with hard evidence derived from actual empirical studies. Aside from Volume III, hereto, see, for example, "Impact of Waterworks on Soil and Agriculture", Slovak Counter-Memorial, Annex 23 - an actual study of soils at Žitný Ostrov between 1990-1994 (with results which must be equally applicable to the Hungarian Szigetköz). Also "Gabčíkovo-WWF: the Pros and Cons" by Professor Mucha, ibid., Annex 24, utilising data from 1993.

> "The abundance of issues and data on the one hand and the lack of knowledge and information in certain fields on the other leaves a great deal of uncertainty over the extent to which the environment will be affected in the short and long term by the Project, and whether or not these changes can be considered acceptable[14]."

Thus, to give but a few examples, "scouring and sediment accumulation could be expected to a certain extent, probably affecting bank filtered water wells..."[15]. "Groundwater quality ... is expected to decay ... [but] predictions are highly uncertain ..."[16]." As to the impact of damming on surface water quality:

> "Most of these impacts seem to lead to negative changes, although their order of magnitudes are hard to quantify (given the present level of knowledge and studies performed). There can also be positive water quality changes ..."[17]."

The uncertainty is portrayed as inherent in the very subject matter for "the evaluation of these systems is highly complex, and even with a current state of the art capability ... a high level of prediction uncertainty is inevitable[18]." But, as Part III of this Reply shows, this "uncertainty" is greatly exaggerated by Hungary. For in relation to matters like water quality, or effects on flora and fauna, once a detailed monitoring system is in place, impacts will be detected as and when they occur. And, if no minute changes are detected, the catastrophic consequences will simply not occur in the future. The kind of "uncertainty" evoked by Hungary does not exist.

1.16 Moreover, whilst such uncertainty is alleged to be inherent in the whole Treaty Project (which was never fully completed), it seems to be equally present in its partial implementation in Variant "C", which has been built and operational for three years. Nor is

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14 Hungarian Counter-Memorial, Vol. 2, p. 3.

15 Ibid., p. 5.

16 Ibid., p. 47.

17 Ibid., p. 66.

18 Ibid., p. 87. And, see, in relation to possible clogging of the bed of the Dunakiliti Reservoir: "... the physical effects of consolidation and clogging, and chemical degradation ... can only be predicted ... with a high level of uncertainty." (p. 97). The impact on bank-filtered wells is equally uncertain: "The processes of sediment transport are complex, and predictions are inevitably uncertain" (p. 115). Hungary's refusal to participate in the Phare project could only add to this uncertainty: see, Slovak Memorial, paras. 4.63-4.68. See, also, para. 11.03, et seq., below.

Hungary any more confident about the predictions concerning its own water supply to Budapest from bank-filtered wells:

> "It is therefore evident that, although uncertain, predictions indicate a potentially serious threat to the Budapest water supply ..."[19]."

In virtually every area uncertainty persists. The chemical and structural changes to soils cannot be demonstrated but only "expected"[20]. In relation to the production of wheat "it is evident that a simple interpretation of observed data is not possible"[21]. The assessment of the risk of earthquakes is subject to the qualification: "A full study of risk would normally be required .... Such a study would be extremely complex and is beyond the scope of this report[22]." And, again, "there is, however, little data to sensibly assess maximum credible events on the basis of other than a probabilistic approach"[23].

1.17 The Hungarian emphasis on "risk" is no doubt due to the fact that Hungary can prove no actual damage. An attempt to prove damage can be assessed by any Court on the basis of hard evidence - or lack of it. Once in the realm of "risk", Hungary clearly hopes to persuade the Court that reasonable conjecture will suffice. As will be demonstrated later, the law does not allow the non-performance of a treaty on the basis of "predictions" or "hunches".

1.18 Perhaps the most striking feature of all is the failure by Hungary to utilise the evidence which is available of the effects of Variant "C" on matters such as water quality and ground water levels. That, at least, would have removed some of the uncertainty.

1.19 It is common ground that the effects of Variant "C" are not markedly

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19 Hungarian Counter-Memorial, Vol. 2, p. 117.

20 Ibid., p. 176.

21 Ibid., p. 179.

22 Ibid., p. 202.

23 Ibid., p. 207.

dissimilar to the effects of the Gabčíkovo section of the original G/N Project[24]. Given that Variant "C" is approximate performance, the comparability between its effects and the effects anticipated under the Treaty Project is not surprising. Indeed, Variant "C" is portrayed by Hungary as less environmentally damaging in several aspects[25]. But why, it may be asked, are data on water quality and supply now used by Hungary confined to the Hungarian side of the old Danube, and the evidence or data of the impact of Variant "C" on the Slovak side ignored? Chapter 3 of the Hungarian Scientific Study, entitled "Surface and Groundwater", is essentially confined to the Szigetköz and adjacent areas on the Hungarian side[26]. The Colour Plates[27] show the hypothetical differences in groundwater levels, before and after the implementation of Variant "C" on the Hungarian side[28].

1.20 The answer lies in the fact that, on the Hungarian side, the remedial measures planned for the Project, and even the remedial measures recommended by EC Experts - the implementation of a recharge system and the construction of underwater weirs - have been totally neglected (until the Agreement of 19 April 1995). The underwater weirs recommended by the EC Experts would require the cooperation of both Parties, since they would straddle the boundary in the middle of the riverbed of the old Danube. On its part, Slovakia has undertaken measures that have dramatically improved the side arms on the Slovak side, which had deteriorated over many years prior to the Treaty Project. These measures involve putting into operation an intake canal at Dobrohošť (taking water from the bypass canal) and the construction of hydraulic structures in the side arms. It is this difference, between actively taking measures to improve the side arms and water levels, as Slovakia has done, and doing virtually nothing, as Hungary has chosen to do, which explains the stark contrast between conditions on the two sides. Thus, the Hungarian policy has been quite

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24 Ibid., p. 5: "Almost the same effects can be expected with the operation of Variant C." And: "There is not much difference in hydro-morphological impacts between the Original Project design and Variant C" (p. 30).

25 See, ibid., p. 74: "... from the viewpoint of eutrophication, Variant C should be considered less unfavourable than Variant A." Also at p. 75: "Bacteriological quality for 1993 suggests an improvement." See, also, ibid., p. 45.

26 Ibid., pp. 30-31. Hungary had all the data given to the EC Experts.

27 Ibid., Vol. 5, Plates 3.13 and 3.14.

28 The EC Working Experts in their report of 2 November 1993 (Slovak Memorial, Annex 19) had no difficulty in evaluating both sides.

deliberately to perpetuate the evidence of damage. It is the more remarkable that those responsible for the "Scientific Evaluation" which forms the core of the Hungarian Counter-Memorial should have felt able to contribute to this presentation of a half-truth.

1.21 This explains why the Hungarian "Scientific Evaluation" is at such pains to insist that underwater weirs do not work[29]. Yet this conclusion is reached on the basis of "experiences from the upper Rhine at the barrage of Rhinau", although in fact, the Rhine barrages are quite different, for they are surface weirs, not underwater weirs and deal with a quite different flowrate (15 m^3/s instead of 200 m^3/s or more). The impression Hungary seeks to create is that underwater weirs are an irrelevant, unsound distraction introduced by Slovakia. But in fact the Plenipotentiaries of the two Parties, meeting in Bratislava on 8-9 June 1989, agreed to build these structures on the bed of the old Danube according to a Hungarian design[30]. And the EC Experts, in approving their construction, had no doubt that they would be beneficial. The Hungarian thesis is in any event now discredited by Hungary's own conduct. Pursuant to the Agreement with Slovakia of 19 April 1995, Hungary is now constructing an underwater weir at rkm 1843.

1.22 Indeed this refusal to look at the facts of the actual situation typifies what can only be described as a "perversity" of approach in the Hungarian "Scientific Evaluation". It is not simply the recommendations of the EC Experts on recharge systems and underwater weirs that are rejected as counterproductive. We learn that, as far as flood protection is concerned, "there was and is no need for the G/N Project"[31]. This is entirely contrary to the experience and considered decision of both Governments in agreeing the Project in 1977. It is entirely contrary to the conclusions of the HQI report insofar as that report notes the marked improvement as compared with the position in 1965[32]. But, most importantly, the Parties have not asked the Court in the Special Agreement to decide whether

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29 See, Hungarian Counter-Memorial, Vol. 2, pp. 35-37; see, also, ibid., pp. 153-154. But, see, the admission that underwater weirs do raise water levels (ibid., Vol. 1, para. 3.27) and that they do prevent riverbed degradation (ibid., Vol. 2, p. 5).

30 Slovak Memorial, Annex 58.

31 Hungarian Counter-Memorial, Vol. 2, p. 5.

32 Slovak Memorial, Annex 28 (at p. 77).

the flood control scheme contemplated by the Treaty parties was good or bad. The whole line of argument is essentially irrelevant.

1.23 The very temporary damage to the fishery in the main channel[33] - anticipated by both Treaty Parties - is presented without even a hint that, possibly, the Governments were prepared to face this temporary loss in return for the major benefits from long term improvements to fisheries, from power production, flood protection and improvements to navigation. The value of fish allegedly lost due to Variant "C" is in the order of $65-93,000 for 1992-93[34]. The production of electricity at Gabčíkovo in 1992-93 of 1900 GWh has a value of 3,410 million SK - or approximately 113 million U.S. dollars. Even for purposes of improving navigation, the barrage system and the navigation canal are said to be quite unnecessary: apparently "traditional river training methods" would have sufficed[35]. This is directly contrary to experience (and, again, strictly irrelevant to Hungary's case). The Danube Commission had characterised the Bratislava-Budapest stretch as the worst along the whole course of the Danube, with full navigation possible at Bratislava for about one-sixth of the year[36]. It is comments such as these Hungarian comments, bordering on the quixotic, which put into question the whole value of this "Scientific Evaluation"[37].

1.24 The other remarkable feature of Hungary's "Scientific Evaluation" is its insistence on the need for an Environmental Impact Assessment (EIA). Chapter 7 thereof illustrates the development of the concept of an EIA, but as its Table 7.1 (at page 239) illustrates, the period 1970-1975 showed the introduction of the concept in the USA, with systematic procedures being introduced in Canada only in 1984. The first EC Directive requiring its use in the European Community came in 1985, and the World Bank introduced an Operational Directive only in 1989. On these facts alone the lack of justification for accusing

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33 Hungarian Counter-Memorial, Vol. 2, Chapter 5.4.

34 Such losses are strongly contested. See, para. 12.46, et seq., below and Vol. II, Comments to pp. 191-194 of Hungary's "Scientific Evaluation".

35 Hungarian Counter-Memorial, Vol. 2, p. 40.

36 See, Slovak Memorial, para. 1.47, et seq., and para. 6.145, et seq.

37 This scepticism is reinforced by the seeming irrelevance of much of the material. For example, biodiversity is illustrated by reference to the Ain River (France), the Missouri and Mississippi Rivers (U.S.A) , and the Volga (Russia). Are these relevant "models" for the stretch of the Danube? This is a question neither posed nor answered.

the Parties to the G/N Project of not having undertaken an EIA prior to 1977 is self-evident. As explained in Slovakia's Memorial[38] and Counter-Memorial[39], the pre-1977 studies were thorough and extensive. The important issue is whether the studies which could reasonably be expected prior to 1977 were done, not what they were called.

1.25 Hungary essentially argues that the legal requirement of an EIA was mandatory in 1989, with the result that in the absence of an EIA either Treaty party could terminate the 1977 Treaty. It is a novel argument, not to be found in Hungary's 1992 Declaration. The purpose of Hungary's new emphasis appears to be threefold: first, and foremost, it marks a shift in Hungary's former argument contained in its 1992 Declaration and Memorial that "fundamental research and investigations were neglected and not carried out"[40]. Because this has been shown to be manifestly untrue, Hungary now seeks to show that no studies *of the right kind* have ever been carried out. Second, it is used to justify Hungary's suspension of works in 1989, which is now categorised as a refusal to proceed "without a proper EIA"[41]. The Hungarian Counter-Memorial neglects to mention that in 1989 the Hungarian Government in fact repealed its existing EIA legislation, which it did not replace until four years later, in June 1993[42]. Third, it is used to deny (implicitly) the future possibility

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38 Slovak Memorial, para. 2.10, et seq. The Bioproject was completed by URBION (Bratislava) only in 1976.

39 Slovak Counter-Memorial, para. 4.02, et seq.

40 Hungary's 1992 Declaration, Slovak Memorial, Annex 17 (at p. 292). It is noted that Hungary devotes several paragraphs of its Counter-Memorial to criticising Slovakia's response to this contention which, in the Slovak Memorial, was simply to show that a vast number of studies were indeed "carried out". According to Hungary, "[t]his suggests that somehow the *number* of studies is sufficient ...", regardless of their quality and findings. See, Hungarian Counter-Memorial, para. 1.26. But Slovakia suggests nothing of the sort. See, Slovak Counter-Memorial, para. 4.04. If Hungary considers the Slovak response simplistic this can only reflect a criticism onto Hungary's original contention, which was indeed so simple as to relate to the quantum of research, not its quality.

41 Hungarian Counter-Memorial, para. 1.38. In its attempts to sustain this approach, Hungary is faced by the obstacles that, at the relevant time, the carrying out of an EIA was not established international practice and also that Hungary did not in fact require an EIA.

42 See, Annex 2, hereto.

of any operation of the Project until the alleged international practice of completing an EIA is met[43].

1.26 Obviously, this new emphasis is meaningless without compelling evidence that the past studies of the Project and, in particular, Hungary's own 1985 EIA did not constitute a sufficient assessment[44]. To this end, the Hungarian Counter-Memorial relies on Chapter 7 of its "Scientific Evaluation" and Annex 23 of Volume 4, which deal in great detail with the need for EIAs for large dams and contain a critique of the 1985 EIA on the basis of certain large dam criteria[45]. But , according to the technical assessment contained in Hungary's Annex 23, the G/N Project is not a large dam project: "the G/N Project is more like a medium scale project[46]." And, as Hungary's Annex continues:

> "The social and environmental effects of large-scale projects are much greater than those of small and medium sized projects ... Small and medium scale projects are the best for sustainable resource use and for reduction of disastrous effects[47]."

1.27 Two comments must be made. First, Hungary has always sought to present the G/N Project as a unique and uniquely large project. In Annex 23 to Hungary's Counter-Memorial it is even stated: "there are many similar controversial ongoing projects in planning and construction phases all over the world ... Narmada Project (India), G/N Project, Tucurui (Brazil) and Mahaweli Ganga (Sri Lanka) are some of the examples from this category." Thus, a confusion is created between the G/N Project's impacts and those of other

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43 As to the question of established international practice, Hungary presents EC directive 1985/337 as the basis of a mandatory EIA system in all the Member States of the EC. But EC practice is not international practice and the directive in any event requires EIAs only for those projects - such as oil refineries and nuclear plants - listed in its annex 1. There is no mention of hydroelectric projects in annex 1. In any event, the directive, even six years after adoption, had still not been fully implemented in all the EC Member States. See, Annex 2, hereto.

44 Hungary sidesteps a consideration of previous studies by claiming that these are not available to it for evaluation. This is completely false. See, para. 11.21, below.

45 These two pieces are produced by the same team from a Brussels university and contain substantially the same information, save that Hungarian Counter-Memorial, Vol. 2 (Chapter 7), is a reduced and sanitised version of ibid., Vol. 4 (Part 2), Annex 23.

46 Hungarian Counter-Memorial, Vol. 4 (Part 2), Annex 23 (at p. 893). Variant "C" is, of course, even less a large dam project for the Variant "C" reservoir is two-thirds the size of the Dunakiliti reservoir and there is no Nagymaros section.

47 Ibid. (at p. 916).

truly large barrage schemes (especially as the Annex proceeds to examine such projects in considerable detail, dwelling on the alleged environmental damage they have caused). But it is more than misleading to create such a confusion, as is now explained.

1.28 The Narmada project involves the construction of 30 major dams, 135 medium size dams, and 3,000 small dams. It involves the relocation of more than one million people and an overall reservoir size of 350,000 hectares. Tucurui is built in a tropical rain forest and has flooded 17 small towns and villages under its reservoir of 216,000 hectares. Mahaweli Ganga requires the resettlement of 25,000 people, and the destruction of large numbers of animals and plants, many of which are only found in Sri Lanka. By contrast, the Dunakiliti reservoir was to cover only 6,000 hectares. The G/N Project involved no resettlement whatsoever. And it has an environmental impact which does not even approach the same scale as the other projects.

1.29 Second, as mentioned above, Hungary proceeds in its "Scientific Evaluation" (and its Annex 23) to analyse the past impact studies of the G/N Project, and in particular the 1985 EIA, on the basis of large dam EIA criteria, i.e., G/N is judged as if it were a mega-project, when clearly it is not. But even applying this inappropriate criteria, the conclusion is that the 1985 EIA is a "well attempted" document and that it "can be called an EIS" (environmental impact statement)[48]. Further, according to the critique contained in Hungary's Annex 23, the examination in Hungary's 1985 EIA of Project impacts on "human beings, flora and fauna, soil, water, air, climate, landscape, material assets, cultural heritage" can be classed as "A", that is "generally well performed, no important tasks left incomplete"[49]. In sum, the 1985 EIA was a document, ahead of its time in terms of EIA outside North America[50], which ten years later cannot be criticised to a material extent and which showed the Project to be sustainable. There is simply no justification and no meaning to Hungary's claim that no EIA on the Project was ever carried out[51]. It is disproved by its own "Scientific

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48 Ibid., Vol. 2, p. 248, and Vol. 4 (Part 2), Annex 23 (at pp. 890-891). There are adverse criticisms in these pieces, but they are very unconvincing and seem to be of a procedural, not a substantive nature.

49 Ibid. (at pp. 903 and 907-908 - emphasis added).

50 It is recalled that as to the Czechoslovak studies, including the "Bioproject", the HQI report found these were comparable with those carried out in North America. See, para. 11.23, below.

51 Hungarian Counter-Memorial, para. 1.41.

Evaluation" and its own annexes. It would be truer to say that no EIA was ever carried out that said what Hungary wanted it to say.

1.30 But perhaps the most surprising aspect of Hungary's emphasis on the need for an EIA is that Hungary itself made proposals relating to the G/N Project with far reaching environmental consequences in 1989-1991 without attempting any environmental impact assessment of its own proposals. Hungary's decision in May 1989 to suspend work at Nagymaros had serious environmental repercussions on what Hungary recognised to be a single, integrated scheme[52]. Hungary's decision to extend the suspension to the entire G/N Project in July 1989 had even greater implications for the environment, as did Hungary's decision to terminate the Treaty in 1992, and then to begin actual demolition of the works already completed at Nagymaros[53]. Yet at no stage did Hungary undertake an EIA to demonstrate that its proposals were environmentally acceptable. The record of Hungary's own conduct thus makes it difficult to believe in the sincerity of Hungary's criticism of the G/N Project, on the ground that it was conceived without an adequate EIA. Apparently, Hungary produced a report in 1993 - a report not so far produced in this case - which Hungary's own independent experts have said does "not satisfy the basic requirements and should not be given the name EIS" (Environmental Impact Statement)[54].

SECTION 3. The Relevance of Hungary's "Scientific Evaluation" to its Thesis of "Ecological Necessity" in Hungary's Legal Arguments

1.31 The further question arises of whether Hungary's "Scientific Evaluation" would assist its legal arguments even if that evaluation was sound and objective. Slovakia submits it would not, for three quite separate reasons.

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52 The letter of the Czechoslovak Prime Minister of 23 April 1992 detailed some of the harmful environmental effects caused by this suspension. Slovak Memorial, Annex 108.

53 The Czechoslovak Government did itself commission a study of the environmental and cost implications of demolishing all the Treaty structures built on Slovak territory: the conclusion was that such a step was environmentally unsupportable. See, Annex 3, hereto.

54 See, Hungarian Counter-Memorial, Vol. 4 (Part 2), Annex 23 (p. 847).

A. The Grounds Upon Which a State Justifies the Suspension or Termination of a Treaty Must Have Existed at the Time of Such Suspension/Termination and Must Be Shown to Have Motivated the State in Making its Decision

1.32 It is obvious that this new "Scientific Evaluation" of 1994 could not have been the basis of Hungary's decision to suspend the Project - and the performance of its Treaty obligations - in 1989, or to terminate the Treaty in 1992. Decisions to suspend or terminate treaties must be bona fide, that is to say based on an honest belief in the facts which lie at the basis of the ground invoked to justify the decision: and that cannot be the case if, at the time of decision, those facts are not known.

1.33 The scientific basis for Hungary's decisions would have to rest on Hungary's 1985 EIA, on OVIBER's comments of 29 March 1989 on the Ecologia report, on the Bechtel report of February 1990, and on the HQI report of December 1990[55]. As explained in the Slovak Memorial[56], none of these afforded any basis for a plea of "ecological necessity".

B. To Support Any Decision to Terminate a Treaty a State Must Prove that the Grounds for its Decision Existed in Fact; It Is Not Sufficient to Show the State Had a "Reasonable Belief" that the Ground Existed

1.34 In Hungary's Counter-Memorial there is the repeated assertion that Hungary reasonably believed a situation of ecological necessity existed. Indeed, Hungary suggests that the issue for the Court is whether Hungary "was reasonable in believing ... that there was a substantial likelihood of major risks and damages ..."[57].

1.35 This cannot be right. Where termination is justified by reference to a prior event or condition - i.e., material breach, impossibility of performance, fundamental change of circumstances, emergence of a new peremptory norm - the party terminating must show that the event or condition has occurred in fact. It has never been the law that a party

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55 Hungarian Memorial, Vol. 5 (Part I), Annex 4; Slovak Counter-Memorial, Annex 15; Slovak Memorial, Annexes 27 and 28.

56 Slovak Memorial, para. 8.28; and, see, generally, ibid., Chapter 2.

57 Hungarian Counter-Memorial, para. 1.47. See, also, ibid., para. 1.51.

had only to show that it had a "reasonable belief" that there was, for example, a prior material breach, or an impossibility of performance, or a fundamental change of circumstances. Still less did Hungary have a "reasonable belief" that it was substantially likely that these events would occur.

1.36 So, too, in this case, what Hungary believed - whether reasonably or unreasonably - is entirely irrelevant. Even if "ecological necessity" were a valid plea, Hungary would have to provide that such necessity existed as a fact.

C. In Law, however, "Ecological Necessity" Is Not Recognised as a Valid Plea in Justification of the Suspension/Termination of a Treaty

1.37 In any event, the law recognises no such plea. As demonstrated in Slovakia's Memorial[58], the ground of "necessity" is not recognised as a ground for suspension/termination in the law of treaties. Nor is it possible for Hungary to invoke "necessity" as a "circumstance precluding wrongfulness" under the law of State responsibility[59]. Not only does the law of treaties not recognise such a plea in relation to treaty obligations, because of the overriding need to protect the fundamental norm pacta sunt servanda, but even in terms of Article 33 of the ILC Draft on State Responsibility, Hungary could not meet the stringent requirements of that Article. Suspension/termination was not the "only means" of safeguarding Hungary - Article 33(1)(a); it necessarily impaired an "essential interest" of Czechoslovakia - (1)(b); it was implicitly excluded by the 1977 Treaty - (2)(b); and Hungary clearly "contributed to the occurrence of the state of necessity" - (2)(c).

SECTION 4. The Interpretation of the Special Agreement

1.38 The Hungarian Counter-Memorial continues to maintain an interpretation of the Special Agreement which is at variance with the terms of that Agreement, and which Slovakia cannot accept. The issues centre on two provisions: Article 4 and Article 2.

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58 Slovak Memorial, para. 8.61, et seq.

59 See, Slovak Counter-Memorial, para. 10.36, et seq.

A. Article 4: The Issue of a Temporary Water Management Regime

1.39 As will be recalled, Article 4 provides as follows:

> "(1) the Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management regime for the Danube."

And, of course, this paragraph does not stand alone. Paragraph 2 makes it clear that, pending the establishment of a TWMR, if either Party believes "its rights are endangered" recourse may be had to consultation, to the expertise of the European Community, but not to the Court.

1.40 This position makes eminently good sense. The elaboration and implementation of a TWMR is a highly technical problem and in no sense a legal problem appropriate for reference to a court of law. It was for precisely this reason that this was a matter to be resolved by the Parties, with the assistance of the technical experts appointed by the EC. Indeed, it was inherently unlikely that the Parties would have sought to involve the International Court in a technical problem of this kind.

1.41 From this it follows - and, as will be seen, the terms of Article 2 confirm this - that it was never contemplated by the Parties that the Court would be confronted by an allegation of "breach" of Article 4. Being in the nature of a pactum de contrahendo[60], it would be difficult in any event to see how failure to agree a TWMR could be a "breach" attributable to one party.

1.42 It is the view of Slovakia that the Agreement of 19 April 1995 is, in fact, an agreement on a TWMR because it embodies all those elements which the Parties have had under discussion since the signature of the Special Agreement. The issues of the discharge into the old riverbed of the Danube, the technical measures needed to ensure supply to the right (Hungarian) side arms, and the rate of discharge into the Mosoni branch of the Danube - these were the issues discussed in the context of a TWMR under Article 4, and these are precisely the issues settled by the Agreement of 19 April 1995. Moreover the role of the experts from

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[60] Note the terms of the Preamble: "commitment to apply ... such a temporary water management regime ... as shall be agreed between the Parties."

the European Commission in Article 5 of the new Agreement is essentially the same as in Article 4(2) of the Special Agreement. Finally, since in its own declaration Hungary envisages termination of the 19 April 1995 Agreement as the result of a successive agreement under Article 4 of the Special Agreement, this confirms that they have the same subject matter.

B. Article 2: The Definition of the Issues to be Put to the Court

1.43 Article 2 of the Special Agreement defines the issues to be decided by the Court exclusively in paragraph 1(a), (b) and (c)[61]. Those issues do not include anything arising from the TWMR, or from a failure to agree or implement a TWMR. The Special Agreement must be construed as a whole. The Hungarian interpretation seeks to construe Article 2 in a way which is totally inconsistent with Article 4, because for Hungary the answer to the question put to the Court in Article 2 (1) (b) is that Variant "C" - the "provisional solution" - was unlawfully constructed, and from that Hungary concludes that the status quo ante must be restored[62].

1.44 Hungary notes that, although Article 2(1) of the Special Agreement identifies the three substantive questions put to the Court, this is followed by Article 2(2) which requests the Court "to determine what are the legal consequences ... including the rights and obligations for the Parties [arising from its Judgment] ..."[63]. Hungary suggests that this differentiation is because the questions in Article 2(1) did not arise between the present Parties, but rather between Hungary and Czechoslovakia, whereas Article 2(2) deals with consequences for the present Parties. This suggestion is unacceptable. The Court would be disinclined to adjudicate the legal issues concerning a Party not before it. Moreover the travaux préparatoires clearly show that, in the early Hungarian drafts, Hungary always saw the question of the consequences arising from the Court's answer to the main, substantive issues as a separate question. But at this stage Hungary was negotiating with Czechoslovakia, so identifying this as a separate question could not possibly have implied that the three substantive questions concerned Czechoslovakia, but the "consequential" question concerned Slovakia.

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61 The specific questions raised in Article 2(1) of the Special Agreement are addressed in Part II, below.

62 Hungarian Memorial, para. 11.20.

63 Ibid., paras. 2.03-2.04.

Slovakia, as a sovereign State, did not then exist: there was but one party, and that was Czechoslovakia.

1.45 Then there is a further issue relating to Article 2. This arises from Hungary's attempt to use what Hungary regards as legal principles relating to the protection of the environment to overturn the express provisions of the 1977 Treaty. Hungary seeks to justify this attempt on the basis of the reference to "principles of general international law" in Article 2(1) of the Special Agreement. But the argument is totally misconceived. The phrase used in Article 2(1) is: "The Court is requested to decide on the basis of the Treaty and rules and principles of general international law ... ." Thus the Special Agreement envisaged that such rules and principles could be used to assist in the interpretation of the 1977 Treaty and to supplement the Treaty provisions, where necessary, and not to override them as a kind of jus cogens. The idea that the Parties would carefully negotiate detailed treaty provisions, as a lex specialis, and then agree that these detailed provisions would be overridden by undefined rules and principles, as if they were jus cogens, is inconceivable. The matter is further elaborated in Chapter II below.

1.46 In the final analysis, however, it becomes clear that Hungary invites the Court to rely on neither the Treaty nor the "principles of general international law". Hungary in reality invites the Court to make a political judgment about whether the Parties were right to strike the balance between economic benefit and environmental impact on which they agreed in the 1977 Treaty. In the second paragraph to its "Scientific Evaluation", Hungary contends that the "assessment of the relative importance of economic benefits and environmental impacts is ultimately a political issue". This may be correct, but it is precisely not for the Court to decide this "political issue". Nonetheless, in the introduction to its "Scientific Evaluation", Hungary places before the Court a set of scales (a balance) with economic benefit on the one side and environmental risk on the other side. In the succeeding chapters, Hungary then seeks to add weights to the risk side whilst removing the weights from the benefit side.

1.47 Thus, the Court is to be distracted from the strict requirements engendered by the legal concepts in the Vienna Convention of the Law Treaties, and even - were it applicable law - the law of necessity. The Special Agreement requests from the Court a legal and factual assessment of Hungary's arguments of a material breach of Articles 15 and 19 of the 1977 Treaty or an ecological state of necessity, not a consideration of the overall merits

of the Project. This emphasis inevitably excludes an invitation to the Court to call into question the expression of the sovereign will of the 1977 Treaty parties in their decision to select, construct and implement the G/N Project[64].

1.48 Moreover, in attempting to place before the Court a balance of environmental and economic issues and in claiming that the economic benefits are insubstantial, Hungary deliberately seeks to enlarge and extend the "environmental impact" and to disguise the absence of real breaches by Czechoslovakia of the 1977 Treaty or a real state of "ecological necessity". But, for Slovakia, it is essential to separate the Project impacts which might conceivably have a legal bearing on the dispute from those that clearly do not. For example, the economic impact that the Project might or might not have in terms of reduced crop yield for agriculture, forestry or fisheries is irrelevant to Hungary's case and must be kept quite separate from any environmental risks. The Treaty parties were at full liberty to sacrifice crop yield or areas of forestry in exchange for energy benefits (although Slovakia finds no evidence of such a sacrifice). Similarly, the realisation or otherwise of the expected benefits of the Project in terms of energy, navigation and flood control is irrelevant to Hungary's case and must be kept separate. The Treaty parties considered that the Project was the best means of achieving these goals and this cannot be challenged.

SECTION 5. The Structure of This Reply

1.49 Volume I of this Reply is divided into four Parts. In Part I, Slovakia examines the issues of international law that divide the Parties, re-examining in turn the applicable law (Chapter II), the role of environmental law (Chapter III) and the prevalence of the law of treaties over principles of State responsibility in this particular dispute (Chapter IV). In Chapters V and VI, Slovakia returns to the invalidity of the grounds relied on by Hungary for its various breaches of the 1977 Treaty and reconsiders the legality of Variant "C" in the light of claims made in Hungary's Counter-Memorial. Part II (Chapters VII to X) turns to the specific questions of legal entitlement posed in Articles 2(1) of the Special Agreement and

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64 Hungary contests this. In the very first paragraph of Chapter 1 of its Counter-Memorial, Hungary contends that the "merits" of the Project are indeed "in issue", the claim even being made that it is Slovakia that has insisted that this should be so in its discussion of the Project in its Memorial. Ibid., para. 1.01. But this is totally wrong. The whole emphasis in the Slovak Memorial - which emphasis Hungary specifically criticises - is on the existence of the 1977 Treaty, a pactum, and the fact that this Treaty is to be performed. See, for example, Hungarian Counter-Memorial, para. 4.01.

responds to these questions with specific regard to the events and conduct of the Treaty parties between May 1989 and May 1992.

1.50 In Part III (Chapters XI to XIII), Slovakia analyses the defects in Hungary's presentation of the scientific facts, relevant or otherwise, to this dispute. Hungary's analysis or, more particularly its "Scientific Evaluation", is also responded to in Volume II hereto, which highlights and addresses the allegedly scientific assessment and conclusions that Hungary has presented to the Court[65]. Both Part III and Volume II[66] turn to the detailed assessments of the actual impacts of Variant "C", compiled by more than 40 Slovak scientists and experts, and drawing from research projects and data being prepared and collected mainly as a part of a comprehensive, routine monitoring system established by Slovakia. These assessments form Volume III hereto. Finally, in Part IV (Chapter XIV), issues relating to the remedial position are addressed, followed by Slovakia's Submissions, which remain unchanged.

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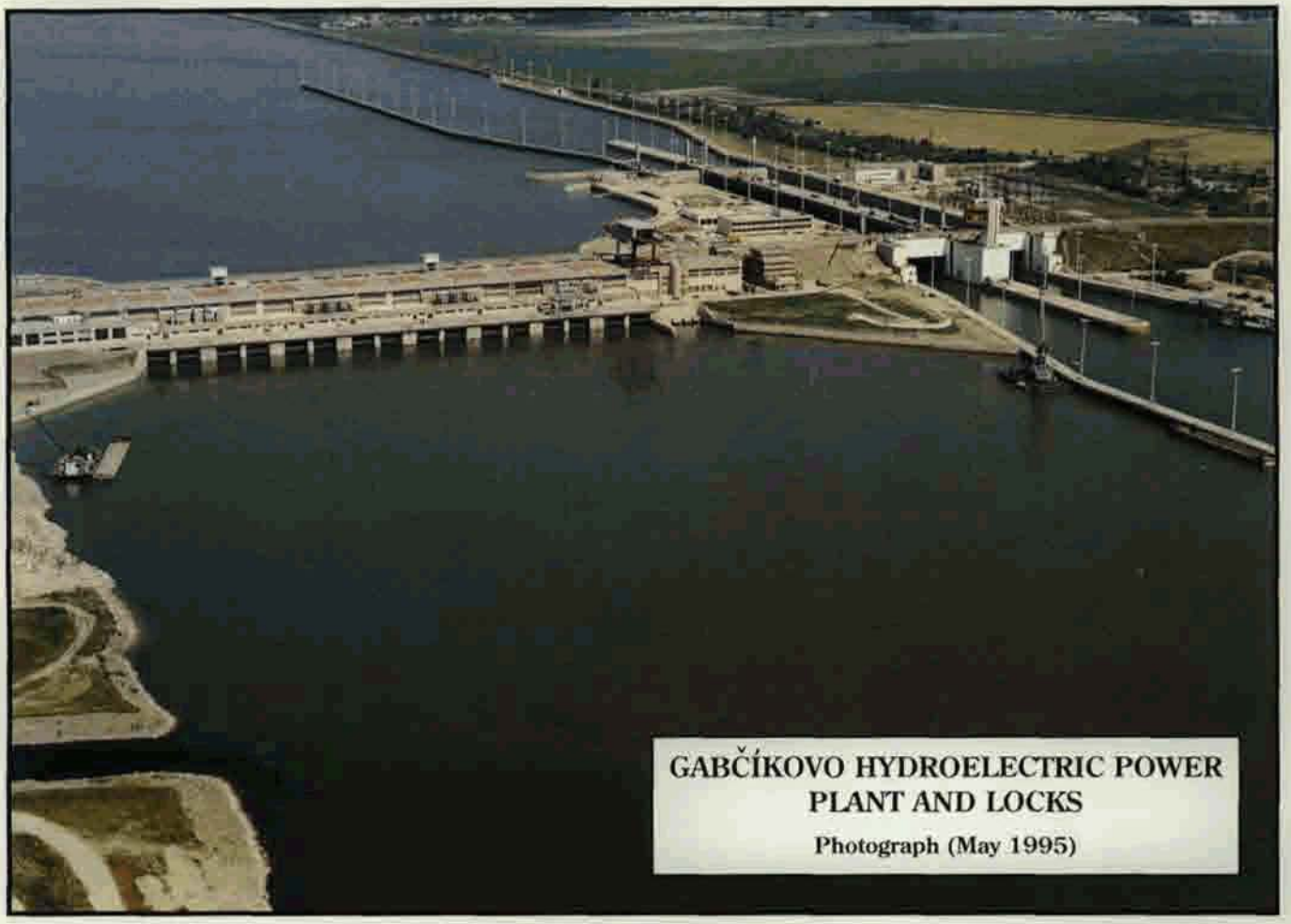
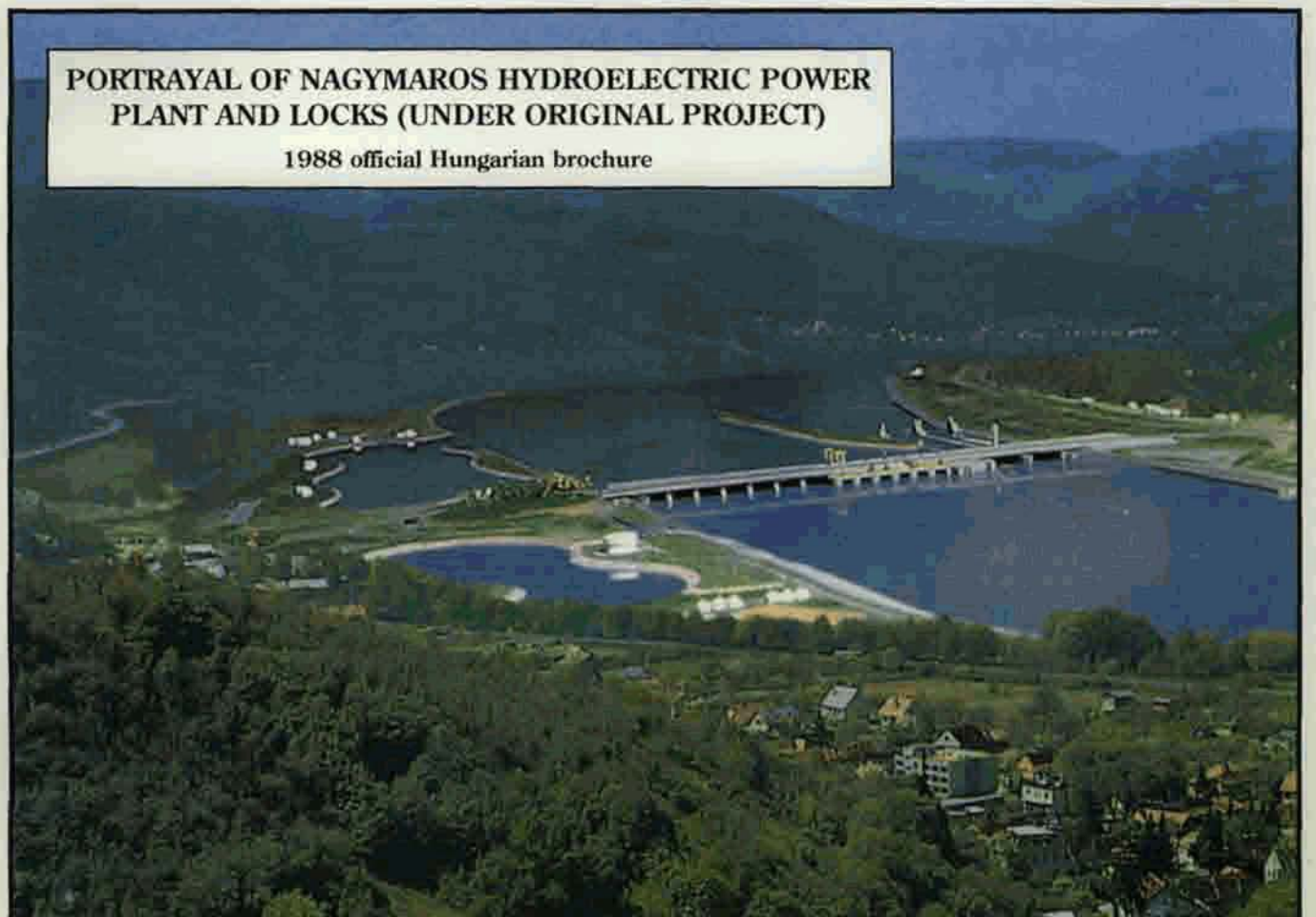
65 For further explanation as to Hungary's overall presentation, see, also, para. 11.01 (and fn. 1), below.

66 The second part of Volume II contains the Annexes to this Reply.



GABČÍKOVO HYDROELECTRIC POWER PLANT AND LOCKS

Photograph (May 1995)



PORTRAYAL OF NAGYMAROS HYDROELECTRIC POWER PLANT AND LOCKS (UNDER ORIGINAL PROJECT)

1988 official Hungarian brochure

Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-1

SLOVAK SIDE ARMS
(Photographs - May 1995)

Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-2

PART I

THE LEGAL ISSUES THAT STILL DIVIDE THE PARTIES

CHAPTER II. THE APPLICABLE LAW

2.01 The essential aim of this Chapter is to respond to the unsubstantiated legal postulates on which the line of argument in Chapter 4 of Hungary's Counter-Memorial relies[1]; and in the next Chapter of this Reply, Hungary's application of these incorrectly construed principles to the specific area of the law of the environment will be addressed.

2.02 Following faithfully the approach used extensively in its Memorial, Hungary invokes in support of its line of argument, without any attempt at differentiation, a broad mixture of rules and legal principles of diverse type, origin and date. In itself, such a way of proceeding may not necessarily be incorrect, and it is certainly arguable that:

> "According to Article 2 of the Special Agreement, the Court is requested to decide on the basis of the 1977 Treaty and rules and principles of general international law, as well as such other treaties as the Court can find applicable. This means that the Court's task is to consider both the Treaty, other relevant treaties and the rules and principles of general international law[2]."

2.03 But legal norms can have a different legal effect due, for example, to their date of entry into force (lex posterior priori derogat) or whether they are of specific or of general application (specialia generalibus derogat) - and it cannot be correct to apply the norms irrespective of this difference. Similarly, it is not acceptable to create imaginary priorities among norms that are of equal rank solely for the purposes of a specific case and a specific series of facts. Yet Hungary, in the present case, frequently resorts to such questionable means of applying legal rules. As shown in Section 1 below, Hungary distorts or ignores the relationships between the relevant treaties and, in particular, the interrelation between the 1977 Treaty and its related instruments; while, as demonstrated in Section 2, Hungary attempts to establish the precedence of the customary principles, whose existence it asserts, over those conventional rules that bind the Treaty parties.

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1 "Hungary's Legal Position".

2 Hungarian Counter-Memorial, para. 4.20.

SECTION 1. The Relationship between the 1977 Treaty and the Related Instruments

2.04 As already noted in the Slovak Counter-Memorial[3], Hungary's legal analyses are based on a curious conception of the chronology of the relevant agreements and of the relationships interconnecting them.

2.05 Equally curious, Hungary now applies a distinction not found in the Hungarian Memorial between, on the one hand, what it calls "Agreements linked to the 1977 Treaty"[4] and, on the other hand, other "related instruments"[5]; and yet Hungary does not establish what the consequences of this distinction may be and in any event employs the distinction inconsistently[6].

A. Agreements Linked to the 1977 Treaty

2.06 While in its Memorial Hungary was remarkably reticent in its discussion of the various agreements implementing or modifying the basic Treaty of 1977, in its Counter-Memorial it at least recognises the existence of these agreements, while at the same time attempting to minimise their importance[7]. Thus, Hungary suggests a distinction between:

> "... two different sets of treaties: "the basic Treaty" of 1977 as amended by the Protocol of 1983, both of which required ratification, and, on the other hand, the Agreement on Mutual Assistance, as amended [in 1983 and 1989], which was in a simplified form and did not require ratification[8]."

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3 See, e.g., Slovak Counter-Memorial, paras. 1.43 and 2.74.

4 Hungarian Counter-Memorial, p. 188.

5 Ibid., para. 4.09. At the same time, Hungary adheres to (without expressly so acknowledging) the distinction made by Slovakia between "Agreements that stemmed from the Treaty" and "other relevant agreements". See, Slovak Memorial, para. 6.24, et seq..

6 In its Counter-Memorial, Slovakia pointed out that Hungary's distinction was contrived in order to conceal the obligatory character of the Project's agreed schedule and Hungary's fundamental role in establishing the schedule, especially the agreement to accelerate the work in February 1989 (see, Slovak Counter-Memorial, para. 2.91).

7 Hungarian Counter-Memorial, para. 4.06.

8 Ibid.

2.07 The purpose of such a distinction is no mystery, and Hungary's Counter-Memorial explains this purpose immediately after it makes the distinction. It is to assert the superior status of the basic Treaty of 1977 to that of the 1977 Mutual Assistance Agreement and the Protocols amending it:

> "It is clear that these agreements could not modify the Treaty itself: they had to be - and were - instruments to further its implementation in pursuance of its purposes[9]."

From this, Hungary goes so far as to draw the conclusion that these "secondary instruments" could be suspended by one party if they were not adequate to "ensure the full implementation of the principal treaty"[10]. These arguments encounter a number of obstacles.

2.08 In the first place, the principle on which Hungary relies is entirely invented. An agreement that enters into force simply upon signature (accord en forme simplifiée), as for example the 1977 Mutual Assistance Agreement, does not have a status inferior to a formal treaty (en forme solennelle) such as the 1977 Treaty (entered into on the same day). According to Article 11 of the Vienna Convention on the Law of Treaties, the consent of a State to be bound by a treaty may be expressed either by signature, by ratification or by any other means if so agreed; and the means of expressing agreement has no legal effect on the meaning and legal validity of the treaty or agreement[11]. Besides, in the present case, Articles 2 and 3 of the 1977 Mutual Assistance Agreement modify the principle of the equal division of works and of hydroelectric power generated under the Project (provided for in Article 9 of the 1977 Treaty itself). In fact, Hungary expressly recognises this fact in its Memorial[12], although contrary to all logic it goes back on its earlier assessment in its Counter-Memorial.

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9 Ibid.

10 Ibid., para. 4.07.

11 See, in this regard, J. Combacau, Le droit des traités, Paris, 1991, p. 40; Nguyen Quoc Dinh, et al., Droit international public, Paris, 1994, p. 144.

12 Hungarian Memorial, para. 4.22.

2.09 Nevertheless, it is entirely correct that the 1977 Mutual Assistance Agreement, as amended successively in 1983 and 1989, "had a purely technical character"[13] : it essentially implemented the basic Treaty rather than modifying it, as the first phrase of its preamble indicates:

> "The Government of the Hungarian People's Republic and the Government of the Czechoslovak Socialist Republic starting from the Treaty (...) signed in Budapest on 16 September 1977, for the purpose of the effective construction of the Gabčíkovo-Nagymaros Barrage System have decided ...[14] ."

From this wording - just as from the circumstances in which the Mutual Assistance Agreement and its Protocols were concluded - it is clear that their basic purpose was the effective implementation of the 1977 Treaty, with which they were inseparably integrated.

2.10 As a consequence, except where expressly provided otherwise, the 1977 Mutual Assistance Agreement (as amended) must be regarded as the expression of the intent of the Treaty parties to implement the Treaty and of their express agreement as to how to do so. It is, therefore, neither reasonable nor legally relevant to distinguish the Treaty from the agreements to which it is linked, as Hungary attempts to do. In particular, it is more than difficult to argue that the 1977 Agreement has any relation to Articles 15 and 19 of the Treaty[15] ; but if, for the sake of argument, it were accepted that this was the case, it would be necessary to regard the 1977 Agreement as expressing the Parties' further agreement as to the means of implementing these provisions, and as being no less binding on the parties than the Treaty's Articles themselves.

2.11 In addition, it must be noted that it is entirely incorrect to say, as Hungary does, that:

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13 Hungarian Counter-Memorial, para. 4.06.

14 Hungarian Memorial, Vol. 3, Annex 22. Emphasis added.

15 Articles 15 and 19 concern, respectively, the "protection of water quality" and the "protection of nature", while the 1977 Mutual Assistance Agreement and its successive amendments, on the one hand, establish the precise work schedule and, on the other hand, modify the division of work responsibility.

> "Until the beginning of work on Variant C by Slovakia ... [t]he suspension only concerned secondary instruments, the application of which in the circumstances could not ensure the full implementation of the principal treaty[16]."

This is no more than an ex post facto argument devised specifically for the needs of this case and having no legal or factual support whatsoever. For while at the time Hungary may have announced its "suspension of works" at Nagymaros and then at Gabčíkovo without referring expressly to any particular agreement, it is nevertheless unarguable that:

- Czechoslovakia repeatedly denounced Hungary's actions as violations of the 1977 Treaty, in particular[17], while Hungary consistently defended its actions on the same treaty basis[18], and without once making a distinction between the Treaty and the so-called "secondary instruments" as it now attempts to do;

- In its 1992 Declaration, the Hungarian Government again relied on exactly the same arguments in attempting to defend the legality both of its decision to terminate the Treaty and of its earlier suspensions of works at Nagymaros and then at Gabčíkovo[19];

- Even in its Counter-Memorial, Hungary tries to justify the validity of its suspensions on the basis of Czechoslovakia's supposed violations of the basic Treaty of 1977[20];

- Similarly, Hungary has consistently and explicitly argued that the purpose of its successive unilateral suspensions of work was to put pressure on Czechoslovakia to agree to modify the basic Treaty;

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16 Hungarian Counter-Memorial, para. 4.07.

17 See, Hungarian Memorial, Vol. 4, Annexes 23, 28, 51 and 79.

18 Ibid., Annexes 24, 25 and 74.

19 Ibid., Annex 82 (at pp. 182-183).

20 Hungarian Counter-Memorial, para. 4.06.

- Finally, and most simply, it must be remembered that the suspensions concerned the construction work for which Hungary was responsible, by virtue of the same basic Treaty of 1977[21].

2.12 Thus, it is beyond question that the 1977 basic Treaty (as amended) and the 1977 Mutual Assistance Agreement (also as amended in 1983 and again in 1989) form an inseparable whole - of which the Joint Contractual Plan (JCP) is very much a part. Therefore, it cannot be seriously sustained that the suspension of works "only concerned secondary instruments": the suspended works are the very object of the basic Treaty itself.

2.13 According to Hungary, the JCP "had such status as was given it by the 1977 Treaty itself"[22]. Slovakia does not contest this proposition, which is precisely to the point: the JCP's legal status is clearly and unquestionably that of a conventional instrument due to its incorporation into the Treaty by Article 1 (4) thereof[23].

2.14 The fact that this instrument has not been formally registered with the UN Secretariat has no significance here. First, the JCP is mentioned several times in the 1977 Treaty[24], thus meeting the public notice requirements of Article 102 of the UN Charter. Second, it would have been absurd if not impossible to register the JCP: it is an extremely voluminous document that would fill a whole library shelf and, hence, its publication in the United Nations Treaty Series was entirely impracticable. Moreover, its registration would have served little purpose for, as Hungary correctly observes[25], the JCP has been continually modified and revised, reflecting the essentially flexible nature of the G/N Project and its adaptability, inter alia, in the sphere of protection of the environment.

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21 See, in this regard, Hungarian Memorial, Vol. 4, Annex 48.

22 Hungarian Counter-Memorial, para. 4.08.

23 See, Slovak Counter-Memorial, para. 2.58-2.72.

24 In fact, it is mentioned in Article 1(4); Article 3(2), (3) and (4); Article 4(1), (2) and (3); Article 5(3), (4), (8) and (9); Article 7(1) and (2); Article 12(2); Article 14(1), (2) and (3); Article 15(1); Article 19; Article 25; and Article 26(1).

25 See, Hungarian Counter-Memorial, paras. 2.22 and 3.04.

2.15 This brings out three fundamental characteristics of the 1977 Treaty (and its related agreements) on which the Parties are in agreement - although they do not draw the same conclusions therefrom[26]: (i) that a complex of conventional agreements is involved; (ii) that they are consistent with environmental protection; and (iii) that, in essence, they have the character of a framework treaty capable of evolution.

2.16 Nevertheless, Slovakia was surprised to discover, on reading Hungary's Counter-Memorial, that Hungary appears to question the objective nature - and in rem character - of the 1977 Treaty[27]. Since Hungary gives no justification for adopting such a surprising position, Slovakia - having set forth in its Counter-Memorial a detailed explanation on this point[28] - sees no purpose at this stage in addressing this issue once more, save to point out that it is wholly incorrect to claim that:

> "Slovakia does not contend that the 1977 Treaty was an objective regime or a 'real' treaty[29]."

2.17 To the contrary, the 1977 Treaty, par excellence, has all the characteristics of a treaty in rem of a territorial and localised character. It creates an objective international regime, one of whose characteristics is that it is not affected by State succession. This issue was also dealt with at some length in Slovakia's Counter-Memorial. If and when Hungary responds, Slovakia respectfully reserves the opportunity to develop its position further[30].

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26 See, Hungarian Memorial, para. 4.10, et seq.; and Slovak Counter-Memorial, para. 2.04, et seq.

27 In the course of describing the Mandate Agreement for South Africa as "characterized by its objective nature", Hungary adds: "On the other hand, the 1977 Treaty was an ordinary bilateral treaty ... ." Hungarian Counter-Memorial, para. 6.95.

28 Slovak Counter-Memorial, para. 2.45, et seq.

29 Hungarian Counter-Memorial, para. 5.44. Hungary seems to have arrived at this conclusion (in fn 41, p. 213) on the basis of a comment in the Slovak Memorial where it was indicated that "the doctrine of approximate application is not limited to treaties establishing a regime in rem". But this concerned only an analysis of positive law and did not imply that the 1977 Treaty has an in personam character.

30 Slovak Counter-Memorial, para. 3.25, et seq.

B. Other Related Instruments and Other Relevant Agreements

2.18 Alongside the "Agreements linked to the 1977 Treaty", Hungary does acknowledge the "other related instruments", but its conception of these is particularly rigid and "mechanical". It groups together seven agreements as coming within the description of "related instruments" contained in the first paragraph of the preamble of the Special Agreement and "all specifically dealing with the Barrage System in one respect or another"[31]. However, Hungary fails to recall that this "selection" simply repeats the list of the instruments "that would automatically terminate with the termination of the 1977 Treaty", in accordance with the list which is said to be annexed to Hungary's 1992 Declaration[32].

2.19 It is not easy to determine exactly which are the seven instruments referred to since the Hungarian Memorial lists only five (and only five annexes are referred to)[33]. In any event, it may be noted that in the list the 1977 Mutual Assistance Agreement is included while the Joint Contractual Plan does not appear, even though it is clearly an agreement closely tied to the basic Treaty[34]. Slovakia, of course, does not accept that these instruments which are so closely linked to the 1977 Treaty, have ceased to be in force since Slovakia regards the Treaty itself as still in full force and effect.

2.20 But the key point is that, whatever terminology is used, the other agreements are obviously relevant to the settlement of this dispute before the Court. And even here, Hungary shows a complete lack of consistency, which produces a good deal of confusion. In its Counter-Memorial, Slovakia showed that Hungary, in the interests of its case, refers to these quite different instruments without differentiation even though their relationship to the 1977 Treaty is extremely varied: thus, some of the related agreements have been repealed by the Treaty, others modified by it, while still others, in contrast, have served to

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31 Hungarian Counter-Memorial, para. 4.09.

32 Hungarian Memorial, para. 4.52. The annexed list has not been furnished by Hungary with its Memorial, contrary to the Rules of Court.

33 Ibid., para. 4.53 and fns. 48-52.

34 See, paras. 2.12-2.14, above.

implement and make more specific certain provisions of the Treaty itself[35]. It is not necessary to explain these distinctions - unless Hungary seeks to perpetuate this confusion at a later date.

2.21 Of particular concern is Hungary's treatment of the 1976 Boundary Waters Management Agreement, which it contends has not been "in any way affected by the events of 1989-1992"[36], and which it contends was violated by putting Variant "C" into operation[37]. Hungary's position here calls for a number of comments.

2.22 First, Hungary justifies the continuing validity of the 1976 Agreement in respect of the common stretch of the Danube on the basis that "it is a treaty relating to the regime of a boundary"[38]. While this conclusion is correct, it is equally valid for the 1977 Treaty, for both are treaties in rem on the basis that they established the obligations of the parties in regard to water management[39]. If the 1976 Agreement is a treaty in rem for this reason - which Slovakia does not question - so too is the 1977 Treaty, which, moreover, also deals with boundary matters.

2.23 Second, as Slovakia has already shown[40], the 1976 Agreement contains general provisions that the 1977 Treaty implements, makes more precise, or modifies, in certain respects; and it is not only those provisions that are not subsequently modified by the 1977 Treaty that continue to bind the parties. Such a conclusion applies equally to the 1948 Danube Convention[41] and the 1958 Danube Fisheries Convention[42].

2.24 Hungary's peculiar conception of the effect of conventional obligations is also seen in its reliance on various treaties without bothering to question whether they are in

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35 See, Slovak Counter-Memorial, para. 2.73, et seq.

36 Hungarian Counter-Memorial, para. 4.09.

37 Ibid., paras. 6.63-6.66.

38 Ibid., p. 190, fn. 17.

39 See, Chap. V of the 1977 Treaty.

40 Slovak Memorial, para. 6.43, et seq; Slovak Counter-Memorial, para. 2.82, et seq.

41 See, Hungarian Counter-Memorial, para. 6.67, et seq.

42 Ibid., para. 6.75, et seq.

force or not or whether they are binding on the Parties[43], and without explanation as to the way in which they may be relevant to the present case, or to how they have allegedly been violated by Slovakia, or in what specific ways they are regarded as supporting Hungary's case. Such is the case, for example, with the Espoo Convention on Environmental Impact Assessment in a Transboundary Context[44], the 1992 Rio Convention on Biological Diversity[45], and the Convention on Cooperation for the Protection and Sustainable Use of the Danube River, signed at Sofia on 29 June 1994.

2.25 Hungary has placed great emphasis on the last of these examples in its Counter-Memorial[46] where it states that:

> "By signing this instrument, Hungary and Slovakia have indicated their general acceptance of the principles and rules which are to be applied for the conservation of the quality of the water of the Danube and in the aquifer connected to it and for the protection of nature[47]."

2.26 As is evident from this Reply and Slovakia's previous pleadings[48], Slovakia is in full compliance with the principles contained in the Sofia Convention. Indeed, the Hungarian Counter-Memorial provides no evidence to the contrary:

- First, as there is, quite obviously, no question of "'vested rights' to harm the environment"[49], there is no question either of the effect of the adoption of a new convention to legitimise ex post facto Hungary's failure to respect its prior treaty obligations. After ratification (which has yet to occur), the Sofia Convention will require the parties to

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43 It must be noted in this respect that Hungary goes so far as to invoke the 1977 Treaty itself after its purported termination and maintains that Variant "C" (put into operation after the "termination") is in contradiction with the "terminated" treaty (see, e.g., ibid., para. 10.107, and Slovak Counter-Memorial, paras. 3.02-3.03.

44 See, Hungarian Counter-Memorial, p. 195, fn. 39.

45 See, e.g., ibid., para. 4.23.

46 See, e.g., ibid., paras. 4.28-4.39 and 6.19.

47 Ibid., para. 4.35.

48 See, Part III, below, and Vol. III, hereto. See, also, Slovak Counter-Memorial, Chapter VII.

49 Hungarian Counter-Memorial., para. 4.36.

"adapt" - "on the basis of equality and reciprocity" - agreements and other arrangements that may be found to run contrary to the Convention's principles[50]. But this applies only to what the parties are to do in the future[51], is subject to mutual agreement, and depends on the situation existing at the date of entry into force of the Convention for both Parties;

- Second, under Hungary's interpretation of Article 18 of the 1969 Vienna Convention on the Law of Treaties[52], the mere signing of a treaty (en forme solennelle) is assimilated to its ratification even though only the latter allows it to enter into force. Such an assimilation is not acceptable, for it eliminates any distinction between the effects of signature and of ratification[53]; the sole obligation resulting from signature is "to refrain from acts which would defeat the object and purpose" of the treaty, not to carry it out;

- Third, Hungary's portrayal of the provisions of the Sofia Convention as appropriate "guidelines" binding on the Court[54] encounters the same objections as do Hungary's use of "general principles of international law" - it fails to reflect most particularly the relationship between these principles and the treaties in force between the Parties[55]. Further, Slovakia cannot agree that "[t]he essential disagreement between the Parties *is* as to the future"[56]. As with any case before the Court, this

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50 Ibid., paras. 4.36-4.37.

51 Since, as a matter of principle, treaty provisions "do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party " (Vienna Convention on the Law of Treaties, Article 28).

52 Hungarian Counter-Memorial, para. 4.38.

53 See, North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3 at pp. 25-27.

54 Hungarian Counter-Memorial, para. 4.39.

55 See, Section 2, which follows.

56 Hungarian Counter-Memorial, para. 4.39.

dispute - submitted pursuant to a Special Agreement - concerns an actual dispute that has arisen and continues to exist between the Parties.

2.27 Hungary's portrayal of the Sofia Convention is just one of many examples that might be cited to illustrate the incorrect and, at times, almost perverse use to which Hungary puts conventional law, which it presents as a pot pourri, mixing together on the same legal footing and without any attempt at differentiation the following:

- International conventions not yet in force, treaties in force but not for the Parties, and treaties in full force and effect between the Parties;

- Recommendations of international organisations (governmental and non-governmental); and

- Non-conventional multilateral instruments such as the 1975 Final Act of the C.S.C.E. and the 1992 Rio Declaration, not to mention single draft articles - such as that of the ILC on the Law of the Non-Navigational Uses of International Watercourses[57]. Certain of these instruments continually reappear in Hungary's pleadings; others seem to vanish; but in each case, the question as to the juridical value of the given agreement and its applicability to this case must be satisfied. Hungary has not even attempted to do this.

2.28 In essence, the principle of "pick and choose" seems to underlie Hungary's legal approach. Not only does Hungary, in fact, rely on conventional provisions of a very diverse nature and import, whether in force or not, general or specific in scope, irrespective of date, but Hungary also presents these provisions as if they competed against principles of general international law, the customary nature of which Hungary affirms (although, in general, without any justification). Among all these rules, or "pseudo-rules", Hungary takes its pick irrespective of any hierarchy existing between them in this precise case.

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[57] See, e.g., Hungarian Counter-Memorial, paras. 4.23-4.25. Of course, Slovakia does not deny that the ILC's draft may constitute an authoritative statement of customary law or of de lege ferenda developments but, in any event, it cannot be substituted for or contradict treaties in force.

SECTION 2. The Relationship between the 1977 Treaty and the Principles of General International Law

2.29 Hungary attempts to justify its "pick and choose" approach by emphasising that Article 2 (1) of the Special Agreement calls on the Court "to decide on the basis of the 1977 Treaty and rules and principles of general international law"[58].

2.30 This last expression follows a common formula frequently used in agreements by which States refer disputes to third-party settlement. Yet Hungary urges that it be interpreted in a novel way. What Hungary seems to be arguing is that by including this phrase in Article 2, the Parties were asking the Court to apply any principles and rules of general international law, without regard to the Treaty, or to whether a rule would be applied retroactively, or to other principles and rules of equal rank, such as that of lex specialis. Hungary cites no authority for such a sweeping and unprecedented interpretation, and for good reason: such an interpretation is incompatible with the Parties' request that the Court also decide on the basis of "the Treaty". Hungary's interpretation - put forward for the first time in its Counter-Memorial - appears to be that, whether or not the Treaty is in force for the Parties, the Court may ignore it in favour of such general principles and rules as Hungary would have the Court apply. This the Parties manifestly could not have intended.

2.31 As is well known, the "general rule of interpretation" of treaties is set forth in Article 31 of the Vienna Convention, which provides in part that a treaty is to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In determining the "ordinary meaning" to be given to the phrase "rules and principles of general international law" in the context of Article 2 (1) of the Special Agreement, that phrase cannot be viewed in isolation from the words that precede it, i.e., "the Treaty and ...". When read in this context it becomes obvious that the phrase refers to such rules and principles as are applicable by virtue of other rules of international law and which may supplement but not contradict the Treaty. Such other rules include those relating to the law of treaties, rules concerning the relationship between treaties and general international law, rules of international responsibility, and the like. Only if such other rules indicate that a principle or rule of general international law - including the law of

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58 See, e.g., ibid., paras. 4.01, 4.20-4.21 and 6.17.

the environment - apply in the particular case should its relevance be considered by the Court. Otherwise, the Parties must be regarded as having given the Court unbridled discretion to disregard the Treaty and to pick and choose from the entire corpus of rules and principles of general international law - a result that defies reason.

2.32 But this is not to say that the "rules and principles of general international law" have no role to play in the settlement of this dispute.

2.33 In this regard, Hungary makes a caricature of Slovakia's position which it alleges is:

> "...that the general international law rules - other than pacta sunt servanda - are irrelevant to the present case[59]."

The general rules of international law are relevant for at least two reasons: (i) the Special Agreement envisages their application; and (ii) even were this not the case, the Court in carrying out its function "to decide in accordance with international law such disputes that are submitted to it" applies the different sources of law set out in Article 38 of the Statute of the Court[60].

2.34 But it does not follow from this that the Parties can invoke, and that the Court is to apply, no matter what principles or rules of international law, irrespective of the particular situation and without any consideration of their meaning, nature, the date of their entry into force, and without taking into account whether they are of a general or specific character. In the present case, it is necessary to take special account of the rules of international law applying to the relationship between customary rules and treaties, with particular reference to the 1977 Treaty. In this way, the principles of general international law can assist in the interpretation and identification of the meaning of the provisions of the Treaty (dealt with below in sub-section A) so long as they do not modify the Treaty, as Hungary contends they can do (sub-section B below).

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[59] Ibid., para. 20; see, also, paras. 4.01 and 4.21.

[60] See, in this regard, e.g., Continental Shelf, (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982, p. 18 at pp. 37-38.

A. The Principles of General International Law Do Not Justify the Disappearance or Modification of the Object or Purpose of the 1977 Treaty, Nor its Termination

2.35 According to Hungary:

> "Throughout its Memorial, Slovakia focuses, to the virtual exclusion of all other arguments, on the law of treaties ... . Within the law of treaties it focuses, to the substantial exclusion of other elements of that law, on the norm pacta sunt servanda[61]."

And it adds that Slovakia makes the mistake of presenting this norm "not as a rule but as a 'regime'"[62]. But there is no reason for Hungary to be indignant; the 1977 Treaty is in fact at the centre of the present case, and hence, as Slovakia will show more specifically in Chapters IV and VI below, the law of treaties forms the essential basis of the current dispute, whether in terms of the validity of Hungary's suspension, abandonment and purported termination of the Treaty or, equally, the validity of Czechoslovakia's entitlement to proceed with and put into operation the Gabčíkovo section of the Project through Variant "C" (i.e., in a way that was as faithful to the Treaty as was possible in the circumstances).

2.36 Not only is the performance and the purported termination of the 1977 Treaty the very subject of this case but also, by virtue of Article 2(1) of the Special Agreement, the Treaty is the primary source of applicable law[63]. Hungary, which has itself frequently invoked the Treaty[64], does not question this fact any more than it questions that the Treaty was duly entered into and remained in full force and effect until its purported termination in May 1992[65]. In such circumstances, it is hard to see how an analysis of the Treaty's performance (and its purported termination) could escape from the application of the law of treaties, whose juridical regime is dominated by the principle pacta sunt servanda. As the ILC recalled in the final commentary on the provisions of its draft articles that were to become Article 26 of the 1969 Vienna Convention:

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61 Hungarian Counter-Memorial, para. 5.03; see, also, ibid., paras. 20 and 4.01.

62 Ibid., para. 6.04.

63 See, para. 2.29, et seq., above.

64 See, fn. 43, above, and para. 5.34, et seq., below.

65 Hungarian Counter-Memorial, p. 187, fn. 5.

> "Pacta sunt servanda - the rule that treaties are binding on the parties and must be performed in good faith - is the fundamental principle of the law of treaties[66]."

And the Special Rapporteur, Sir Humphrey Waldock, emphasised its "supreme importance"[67].

2.37 The first consequence of this "universally recognised" principle (as the second clause of the Preamble to the 1969 Vienna Convention recalls) is that, from the moment of entering into force, the 1977 Treaty became the law for the parties, even as to their relations inter se under agreements and rules then binding on them, whether of a conventional or customary character[68].

2.38 In order to arrive at this conclusion, there is no need to postulate the intrinsic superiority of a treaty over customary rules, a thesis that Hungary would seem wrongly to attribute to Slovakia[69]. It is sufficient merely to apply the two general principles pursuant to which the hierarchy of norms of international law is organised: lex posterior priori derogat and specialia generalibus derogant[70]. In the present case, the 1977 Treaty is unquestionably lex specialis in relation to any relevant customary rule that may have been in force prior to the adoption of the Treaty.

2.39 Despite Hungary's contentions to the contrary[71], the same conclusion follows equally for general principles of international law of a customary character that may have appeared subsequent to the 1977 Treaty's conclusion.

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66 Commentary to Draft Article 23, Reports of the Commission to the General Assembly, Yearbook of the International Law Commission, 1966, Vol. II, p. 211.

67 6th Report on the Law of Treaties, Yearbook of the International Law Commission, 1966, Vol II, p. 60.

68 See, in this regard, C. Rousseau, Droit international public, t. I, Introduction et sources, Sirey, Paris, 1971, p. 343 (with numerous examples of the abrogation of customary rules by a treaty); S. Bastid, Les traités dans la vie internationale, Economica, Paris, 1985, p. 167; P. Reuter, Introduction au droit des Traités, P.U.F., Paris, 1985, p. 117.

69 Hungarian Counter-Memorial, para. 6.09.

70 See, in this regard, Ch. Rousseau, op. cit., p. 343; Nguyen Quoc Dinh, et al., op cit., p. 116; S. Sur, "La coutume", Jurisclasseur de droit international, fasc. 13, para. 112. Hungary itself recognises the applicability of these principles (see, Hungarian Memorial, para. 10.93).

71 Hungarian Counter-Memorial, paras. 4.10 and 4.21.

2.40 It is certainly possible, given the absence of any hierarchy between customary rules and treaties, that a conventional provision might be modified or abrogated by a subsequent customary rule. However, this possibility is given recognition by States only with the greatest caution as seen, for example, in the rejection during the 1969 Vienna Conference of the draft Article 38 submitted by the ILC, which read as follows:

> "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions[72]."

2.41 In any event, for such a result to occur, a number of conditions must all be met:

- The customary norm must have the same object as the conventional norm that it is intended to replace;

- It must have the same or a greater degree of specificity, otherwise it will be of no effect due to the principle specialia generalibus derogant;

- The customary norm must, of course, be the result of a consistent and firmly established State practice that has not been contradicted by the bilateral actions of the States in question, failing which it could not be opposable even if (as is highly doubtful) it would otherwise have been applicable;

- The Parties by their conduct must have demonstrated that they have opted to replace the treaty stipulations by the new customary rules.

2.42 These conditions are a long way from having been satisfied in the present case. In essence, the new general principles invoked by Hungary are drawn from the emerging law for the protection of the environment. As Slovakia has shown[73] and will discuss further in the next Chapter: first, these principles do not have the meaning ascribed to them by

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72 Yearbook of the International Law Commission, 1966, Vol. II, p. 236.

73 Slovak Counter-Memorial, paras. 9.47-9.100.

Hungary; second, they are far less firmly established than Hungary asserts; and third, there is no contradiction between these principles and the 1977 Treaty. Moreover, their object and purpose are quite distinct from those of the Treaty.

2.43 Although concern for the protection of the environment was not absent from the minds of the parties to the 1977 Treaty - a point on which the Parties agree[74] - it is clear this was not the Treaty's object and purpose. Hungary has clearly admitted this to be so:

> "The object and purpose of the Hungarian People's Republic and the Czechoslovak Socialist Republic in concluding the 1977 Treaty are accurately stated in the preamble. They were essentially two-fold, economic and strategic[75]."

It is indeed striking that the section of the Hungarian Memorial devoted to the examination of "The Object and Purpose of the Treaty"[76] fails to mention the question of the protection of the environment.

2.44 Obviously, the conclusion cannot be drawn from this that the protection of the environment has no relevance here or was barred from being a relevant consideration by the 1977 Treaty. As the Court has pointed out:

> " ... a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part[77]."

Thus the relevant conventional rules must be interpreted in the light of and in the context of the "wider framework"; but this in no sense leads to the radically different conclusion that the principles of general international law, that may have developed in fields related to the Treaty, could lead to its modification or the disappearance of its object and purpose. Yet this is what Hungary's reasoning implies - according to which reasoning the emerging requirements of the

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74 Hungarian Memorial, paras. 4.56 and 10.88; Hungarian Counter-Memorial, para. 4.21; Slovak Memorial, para 6.134; and Slovak Counter-Memorial, para. 2.27, et seq.

75 Hungarian Memorial, para. 4.04. This, of course, is not a complete statement of what the Treaty's object and purpose were. See, Slovak Counter-Memorial, para. 2.12.

76 Ibid., pp. 111-114.

77 Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Order of 6 June 1980, ICJ Reports 1980, p. 67 at p. 76

international law of the environment would justify and even require the abandonment of the G/N Project as a joint investment, being the very object of the 1977 Treaty.

2.45 More precisely and contrary to the implication of Hungary's argument, Article 19 of the Treaty offers a recognition of the obvious fact that construction of the Project will necessarily have some impact on the natural conditions - as would the construction of any dam of significant size. As shown in the following Chapter[78], the Article does not require the parties to ensure compliance with the obligations for the protection of nature even if this means not constructing the Project. Rather the parties are to ensure compliance with those obligations "arising in connection with the construction and operation of the System of Locks[79]". The construction and operation of the Project is, after all, the fundamental object and purpose of the Treaty. Details as to precisely how nature was to be protected during construction and operation, and the duties of the parties in this regard, were to be spelled out in the Joint Contractual Plan.

2.46 The sole hypothesis under which it would be possible for a new norm of general international law to prevail and to nullify the 1977 Treaty or certain of its provisions would be that envisaged by Article 64 of the 1969 Vienna Convention, which deals with the "Emergence of a New Peremptory Norm of General International Law" (Jus Cogens):

> "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

2.47 Here, it is not only unarguable that the principles of general international law invoked by Hungary have no such peremptory character[80] - and Hungary does not claim that they have; but also Hungary, more than once, accepts quite specifically the opposite. For

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78 See, para. 3.31, et seq., below.

79 This is the unofficial translation made by the U.N. Secretariat. In fact, the original Slovak and Hungarian texts would be better translated this way: "The Contracting Parties shall, through the means specified in the Joint Contractual Plan, ensure compliance with the requirements for the protection of nature which arise in connection with the construction and operation of the system of Locks". See, paras. 3.31-3.32, below.

80 See, para. 3.37, below.

Hungary emphasises the "self-evident"[81] validity of the 1977 Treaty right up to the moment of its unilateral notification in 1992 purporting to terminate the Treaty:

- "Hungary held the 1977 Treaty valid until its termination[82] ";
- " ... the Treaty was in force until 1992, something Hungary has never denied[83] ";
- "until the beginning of work on Variant C by Slovakia, the continued validity of the basic Treaty was not contested[84] ".

This is a clear admission that in 1977 , and in 1992, the 1977 Treaty was not in conflict with any norm of jus cogens for had it been the Treaty would have been rendered null and would have terminated automatically without any act required of either Treaty party.

2.48 In any event, not being jus cogens, any such customary principles of general international law could not have the effect of modifying or nullifying the Treaty. They may, on the other hand, be used in interpreting the Treaty - but not to the point of placing in doubt its object and purpose.

B. The Principles of General International Law Can Assist in Interpreting the 1977 Treaty and in Determining its Precise Intent

2.49 Under the guise of interpretation, Hungary in fact devotes considerable energy and ingenuity to using the customary principles of general international law in an attempt to neutralise the application of the 1977 Treaty. Faithful to its technique of "pick and

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81 Hungarian Counter-Memorial, para. 2.49.

82 Ibid.

83 Ibid., p. 187, fn. 5.

84 Ibid., para. 4.07.

choose"[85] and while at the same time noting that "the Court's task is to consider both the Treaty, other relevant treaties and the rules and principles of general international law", and that the Court must "take into account" new rules that have appeared since the entry into force of the 1977 Treaty[86], Hungary actually uses the principles and rules, not for the purpose of interpreting the Treaty, but to oppose the Treaty and drain it of any substance. Hungary offers three different bases for the time at which the treaty must be interpreted[87]. These would seem to be quite distinct, but Hungary amalgamates these in order to challenge the very object of the Treaty (the validity of which it has previously asserted):

- The Treaty must be interpreted in the light of the rules in force at the moment of conclusion;

- It must be interpreted in the light of the principles prevailing at the time of interpretation;

- And taking into account the evolution of the law during the period of the Treaty's application.

2.50 Except for the fact that the second and third of the above principles overlap in large part, Slovakia does not dispute their applicability. But it must be stressed that they cannot be applied indiscriminately, particularly since the first principle of interpretation is clearly incompatible with the second and the third ones; they can only find application in difficult circumstances, whereas Hungary mixes them continuously.

2.51 There is no question that:

> "Any international instruments must be interpreted in the light of the prevailing international law, by which the parties must be taken to have charted their course[88]."

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85 See, para. 2.28, above.

86 Hungarian Counter-Memorial, paras. 4.20 and 4.23 (emphasis added).

87 Ibid., paras. 6.11 - 6.13.

88 M. Hudson, cited in ibid., para. 6.11.

Slovakia need only note that the interpretation of a treaty is not the same as its revision[89] - whatever the general principles relied on, an interpretation of the 1977 Treaty cannot be adopted which would "go beyond the scope of its declared purposes and objects"[90]. In other words, the principles of general international law in force at the moment of the Treaty's conclusion may serve in making more precise its meaning, and to fill in possible gaps, but certainly not to contradict the Treaty.

2.52 This applies equally to such new principles that have emerged since the Treaty was entered into. No matter what their relevance may be, these principles may be used to interpret the manner in which the Treaty parties (and the Parties to this dispute) must carry out their obligations under the Treaty, but not neutralise these obligations or, even less, to prevent the accomplishment of the Treaty's object and purpose. This requirement is, moreover, in conformity with the principle of the primacy to be given to the Treaty's text "in the light of its object and purpose", which is the cardinal rule of interpretation set out in Article 31 (1) of the 1969 Vienna Convention.

2.53 Within the general framework thus established, it may indeed be correct in certain specific situations that:

> " ... an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation[91]."

2.54 But, in citing the above passage from the Court's Advisory Opinion in the Namibia case[92], Hungary fails to mention the Court's explanations for reaching such a position, which make clear that this principle can only be applied with caution and in special situations. In this respect, two considerations are essential.

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89 See, Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950, p. 221 at p. 229; and Case Concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 176 at p. 196.

90 Ibid., I.C.J. Reports 1952, p. 176 at p. 196.

91 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 12 at p. 31.

92 Hungarian Counter-Memorial, paras. 4.22 and 6.12.

2.55 First, the Court has stressed:

> " ... the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion[93] ."

Thus, the Court demonstrated its conviction that the rule of "contemporaneity" ("du renvoi fixe") remains the controlling principle. This was also the position of M. Huber in the Island of Palmas arbitration. According to this eminent judge:

> "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled[94] ."

And Ambassador Yasseen, cited also by Hungary[95], also stated his belief that only the international law prevailing at the time a treaty is concluded can determine the intent of the parties:

> " C'est lui seul qui a pu influencer l'intention des Etats contractants au moment de la conclusion du traité, le droit qui n'existait pas encore à ce moment là ne pouvant logiquement avoir aucune influence sur cette intention[96] ."

It is significant that even Hungary seems to accept this at a later stage in its Counter-Memorial:

> "Bearing in mind the rule of interpretation of treaties recalled ... above, the 1977 Treaty must in the first place be interpreted in the light of the international law prevailing at the time of its conclusion[97] ."

2.56 Second, the Court has departed from the principle of contemporaneity to adopt the method of evolutionary interpretation ("du renvoi mobile") only where the matters to be interpreted (for example, the "sacred trust" in the Namibia case) "were not static but were

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93 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971, p. 12 at p. 31.

94 2 United Nations Reports of International Arbitral Awards, p. 845.

95 Hungarian Counter-Memorial, para. 6.13.

96 M. K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", Recueil des Cours, Vol. 151, 1976, III, p. 64.

97 Hungarian Counter-Memorial, para. 6.28.

by definition evolutionary"[98]. Commentators have noted that the Court in that case "lent its support to this concept that certain provisions of a treaty may be interpreted and applied in light of international law as it has evolved and developed since the time when the treaty was concluded", but have cautioned that "[i]t has however done so within carefully circumscribed limits"[99].

2.57 Although it should not be put entirely to one side, the principle of evolutionary interpretation has only a subsidiary role to play in the present case. Regardless of Hungary's arguments it cannot operate to revise the 1977 Treaty by inserting new obligations into the Treaty that the parties could not have intended to create at the time it was concluded. Hungary "invokes" a wide variety of "fundamental principles" ranging from "the duties to perform thorough environmental impact assessment and to conserve biological diversity" to "the right to life and ... the right to a healthy and ecologically sound environment"[100]. Slovakia will take a close look at the existence and relevance of these principles in the next Chapter. But, in any event, Slovakia has great difficulty in understanding the relevance of these concepts in interpreting the 1977 Treaty, all the more since Hungary simply identifies them as "fundamental principles which have ... emerged"[101] but does not relate them to specific articles of the Treaty[102].

2.58 This method of proceeding is all the more unacceptable because it requires that the evolutionary method of interpretation (par "renvoi mobile") be applied indiscriminately to the treaty as a whole. The starting point must be, as the Court has clearly

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98 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971, p. 31. See, also, Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978, p. 3 at p. 32.

99 Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, Manchester, Manchester University Press, 1984, pp. 139-140 (emphasis added).

100 Hungarian Counter-Memorial, para. 4.24.

101 Ibid.

102 See, e.g., ibid., paras. 4.23 and 4.24.

explained[103], that a contemporaneous interpretation must prevail except where the provisions of the treaty are by their very nature evolutionary.

2.59 Clearly the object of the 1977 Treaty, whose aim was the construction of the G/N Project as a joint investment[104], does not fall within this exception. Its object is fixed ne varietum by a valid agreement between the parties and cannot be modified by the appearance of any new principle of general international law whatsoever - except where the principle has the character of a norm of jus cogens. This is not the case here, and Hungary does not claim otherwise[105]. And the Treaty does not lend itself to any such interpretation: the parties agreed to undertake a joint investment and they are obliged so to do.

2.60 It is however accepted that this is not the case with regard to the means by which the object was to be realised, which is of a truly evolutionary nature as reflected in the Treaty itself, the "framework" nature of which both Parties accept. Its provisions could be - and had to be - supplemented and adapted, in the light of experience, through the agreed provisions of the Joint Contractual Plan (JCP).

2.61 Moreover, the Treaty indicated how such a continual adaptation was to be achieved, systematically referring to the JCP and, in particular, in relation to the "technical specifications" (Article 1(4)); the discharge in the water balance (Article 14); the means to ensure protection of water quality (Article 15(1)); and "compliance with the requirements for the protection of nature which arise in connection with the construction and operation of the System of Locks" (Article 19)[106]. Thus, it was through the agreement of the parties in the form of the JCP that Czechoslovakia and Hungary had foreseen the continual adaptation of the Treaty to the difficulties they might encounter in carrying out their joint investment (a good example being Article 7(1) concerning the "emergence of unforeseeable geological conditions") and in the changing international context (including its legal aspects)[107]. This

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103 See, paras. 2.54-2.56, above.

104 Note that Chapter I of the Treaty is entitled "Purpose of the Treaty".

105 See, para. 2.47, above.

106 The translation of the United Nations Treaty Series is imperfect and is not followed here. See, para. 3.34, et seq., below.

107 See, Slovak Counter-Memorial, paras. 2.20-2.26.

adaptation could be made without any particular difficulty due to the flexibility of the Treaty until 1989[108], that is until the priorities of Hungary fundamentally changed and it was no longer willing to adapt the Treaty to the evolving circumstances and the general principles applicable, choosing instead to seek to modify the Treaty and then, purely and simply, to put an end to it without regard to its Treaty partner, Czechoslovakia.

2.62 Slovakia does not claim that the means of continual adaptation provided by the parties in the 1977 Treaty eliminates the relevance of general principles of international law that may have emerged subsequently to the task of interpreting the Treaty; but the role that such principles may be called on to play is restricted. In this regard, it should be noted that:

> "A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community[109]."

The JCP and, subsequently, the other instruments agreed between the Plenipotentiaries indicate the manner in which the Treaty parties intended to carry out the framework Treaty and the wider norms. It is only if (and to the extent that) not merely the Treaty stricto sensu but also the JCP fail to give effect to general norms that these may become applicable, and then only if they are not in contradiction with the rules expressly agreed between the Treaty parties.

2.63 In short, Slovakia must again point out that the 1977 Treaty contains its own mechanisms for evolution and adaptation and is consistent with environmental protection, not only because the parties had this in mind at the time the Treaty was entered into, but also as a result of the evolution of the conception of environmental protection under the Project by the end of the 1980s - and even as it has further evolved up to the present time. Slovakia does not thus, in principle, disagree with Hungary's contention that:

> " ... the Treaty itself allowed for the application of such rules and principles [i.e., 'the rules and principles of general international law'], especially for the

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108 Hungary points out that "[a] consolidated list of agreed modifications to the Joint Contractual Plan adopted before 31 December 1984 lists 74 amendments to the original, including such significant changes as moving the site of the tail-race canal and altering the isolation method in the head-race canal". Hungarian Counter-Memorial, para. 2.22

109 Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246 at p. 299.

> implementation of the two articles which are the most important for the present issue, Article 15 and 19[110];"

and that

> " ... there is no contradiction between the 1977 Treaty and general international law[111]."

2.64 However, it remains necessary to bear in mind that Articles 15 and 19 of the Treaty are not the main object and purpose of the Treaty and contain no express reference to rules and principles of general international law; while each of these provisions does refer specifically to the JCP in regard to the means of their implementation.

2.65 In its Memorial, Hungary seizes upon the phrase "the requirements for the protection of nature" contained in Article 19, claiming that this phrase imports into the 1977 Treaty:

> " ... independent international obligations for the protection of nature pursuant to other agreements or customary international law, whether these existed prior to the 1977 Treaty or arose subsequently[112]."

In the Hungarian Counter-Memorial, these independent "obligations"[113] expand to become the entire body of environmental law principles, and apply not only to Article 19, but also to Article 15 - and, apparently, to other unspecified provisions of the Treaty, as well.

2.66 Such an interpretation goes far beyond the clear terms of the Treaty and, as a consequence, of the "general rule of interpretation" set out in Article 31 of the 1969 Vienna Convention. In addition, it entirely invalidates the fact that the renvoi is specified and that the means of ensuring the quality of the water in the Danube and of the protection of nature are clearly designated - they are to be established by and through the JCP.

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110 Hungarian Counter-Memorial, para. 4.21.

111 Ibid., para. 6.16.

112 Hungarian Memorial, para. 6.26.

113 As indicated, above (fn. 79), it should be noted that there is, in fact, no mention of "obligations" in the Slovak and Hungarian texts of the Treaty, which both speak of "requirements".

2.67 As a result, the Treaty (together with its associated agreements) provides for sufficient flexibility in order that adjustments can be made to the Project, as and when needed, and it allows its adaptation to new general principles of international law that may govern should the Treaty parties so require. In any event, an interpretation of the 1977 Treaty "within the framework of the entire legal system prevailing at the time of interpretation"[114] would not, and could not, result in any radically new commitment as to the meaning of its terms or the obligations of the parties thereunder.

C. The Vienna Convention and General International Law

2.68 Slovakia has shown that the legal relations between Hungary and Slovakia are governed by what was freely agreed in the 1977 Treaty. Hungary must justify its suspension, abandonment and purported termination of this Treaty by reference to the law of treaties.

2.69 In Slovakia's view, the principles of treaty law that are relevant to this case are all to be found in the Vienna Convention on the Law of Treaties. Hungary, seeking to apply the Vienna Convention when it suits its case, but to deny its applicability when it does not, contends that the Vienna Convention "cannot directly be applied in the legal dispute of the 1977 Treaty"[115]. (This was because it entered into force for both parties after 1977.) At the same time, Hungary states that "the Convention, at the time of its formulation partially conformed with customary law".[116]

2.70 Slovakia has taken the view that the Vienna Convention does apply in its entirety to the present dispute because, by its acceptance of the 1989 Protocol, Hungary "affirmed the substantive obligations of the 1977 Treaty" - and the Vienna Convention was by then in force for both parties[117]. Hungary rejects this argument, declaring the 1989 Protocol to be only an amendment to the Mutual Assistance Agreement; that protocols in any event do not "substantively

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114 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971, p. 12 at p. 31.

115 Hungary's 1992 Declaration, Slovak Memorial, Annex 17 (at p. 300).

116 Ibid.

117 Ibid., para. 6.59.

re-enact" the treaty itself; and that the Vienna Convention does not operate retrospectively[118]. Slovakia makes no suggestion that the Vienna Convention operates retrospectively. Nor are Hungary's other arguments convincing. The 1989 Protocol is not a free-standing instrument, unrelated to the 1977 Treaty. While its purpose was indeed to amend a schedule of work, that schedule of work was work to be done under the 1977 Treaty. The 1989 Protocol cannot but entail an affirmation of the substantive obligations of the 1977 Treaty. In concluding the 1989 Protocol, which amended the 1977 Mutual Assistance Agreement, which itself implemented the 1977 Treaty from which it is inseparable[119], the Treaty parties in fact affirmed their complex treaty arrangements. Any other conclusion is wholly artificial.

2.71 The 1977 Mutual Assistance Agreement and the 1977 Treaty are in reality indissoluble. Hungary itself has acknowledged that the 1977 Treaty is "part of a matrix of ... treaties"[120]. It is not to be assumed that an amendment to a treaty is governed by one set of rules, while the treaty being amended and another treaty to which it is inextricably related are governed by different rules (if there are indeed any differences).

2.72 In any event, and notwithstanding the caveats in Hungary's 1992 Declaration, there appears from the pleadings to be no fundamental disagreement between the Parties on the applicability of the 1969 Vienna Convention. This is because Hungary "recognises, as the Court has itself repeatedly recognised, that the Convention may in many respects be considered as a codification of existing customary international law"[121]. Moreover, Hungary accepts that "[t]here is then no difficulty in using the Vienna Convention as a guide to the content of general international law"[122].

2.73 Even if the Vienna Convention is not directly applicable as such, both Parties recognise that its provisions as to the grounds for termination of a treaty relied on by Hungary - fundamental breach, impossibility of performance, rebus sic stantibus - represent also the

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118 Hungarian Counter-Memorial, para. 5.05 and fn. 4.

119 See, para. 2.06, et seq., above.

120 Hungarian Memorial, para.4.56.

121 Hungarian Counter-Memorial, para.5.04.

122 Ibid., para.5.05.

pre-existing general international law on these matters. Hungary has had no hesitation in relying on the Vienna Convention when it has served its purposes to do so. Thus the 1992 Declaration refers in terms to Article 62(1) on fundamental change of circumstances[123], and it analyses the requirements of the Vienna Convention. It refers to Article 60(1) on the objects and purposes of a treaty and to Article 60(3)(b) on material breach to support its arguments[124]. Hungary also looks to Part III of the Vienna Convention to find support for the unilateral suspension of construction at Nagymaros and later at Gabčíkovo. Thus, both Parties are agreed that it is the provisions of the Vienna Convention that apply to those justifications offered by Hungary[125].

2.74 The Vienna Convention on the Law of Treaties contains, in Article 65, important procedural provisions, which Slovakia believes Hungary has not complied with. The legal consequences of this non-compliance are discussed further on in Chapter X hereto. The precise formulation of the procedures to be complied with under Article 65 may not simply reflect existing procedural rules of customary international law; however, the concepts underlying the entirety of Article 65 do indeed reflect well established principles. Hungary would appear to share this view, for in the last paragraph of the 1992 Declaration it makes reference to meeting "her obligation established by Article 65 of the Vienna Convention, to settle disputes arising from a treaty by peaceful means". Far from there being any suggestion that Article 65 is not binding upon Hungary, as post-1977 non-customary law, Hungary acknowledges itself to be under an obligation based on this clause.

2.75 Hungary rightly discerns an underlying purpose of Article 65 to be that of settling disputes by peaceful means. Indeed, the Commentary on the text of what was to become Article 65 says that the ILC has taken:

> "... as its basis the general obligation of states under international law to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered' which is enshrined in Article 2, paragraph 3 of the Charter, and the means for the fulfilment of which are indicated in Article 33 of the Charter[126]."

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123 See, Slovak Memorial, Annex 17 (at pp. 301-302).

124 Ibid., at pp. 302-303.

125 The Parties are of course in dispute over whether there also exists, under the law of State responsibility, a further ground for termination of a treaty, namely that of "necessity". On this, see, Chapter IV, below.

126 Yearbook of the International Law Commission, 1966, Vol.II, p.262.

Thus an abrupt termination of a treaty, without a three month period for notification, and an opportunity for response thereto, was seen as inimical to the duty to settle disputes peacefully.

2.76 There were other reasons too - reasons having their roots in general international law - for the procedural obligations of Article 65. In the first place, as Special Rapporteur Sir Humphrey Waldock pointed out, there existed a substantial State practice denying automatic legal effect to a unilateral termination. Having referred to the strong opposition of many States to any such suggestion, Sir Humphrey continued:

> "In the Free Zones Case even the claimant state took the position that either the agreement of the other party or a decision of a competent tribunal was necessary to bring about the termination of a treaty on the basis of the rebus sic stantibus doctrine[127]."

The Special Rapporteur cited other authority to the same effect. The non-automatic effect of a declared termination fits exactly with the requirement that notice be given and the agreement of the other party be sought.

2.77 Moreover - and this was a point of critical importance for the ILC - the procedural requirements of Article 65 were a guarantee against arbitrary behaviour. The Commentary to what was then Draft Article 62 stated that:

> "Many members of the Commission regarded the present article as a key article for the application of the provisions of the present part dealing with the invalidity, termination or suspension of the operation of treaties[128]."

Further:

> "Governments in their comments appeared to be at one in endorsing the general object of the article, namely, the surrounding of the various grounds of invalidity, termination and suspension with procedural safeguards against their arbitrary application for the purpose of getting rid of inconvenient treaty obligations[129]."

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127 2nd Report on the Law of Treaties, ibid., Vol.II, 1963, p.87.

128 Ibid., 1966, Vol.II, p.161.

129 Ibid.

It was important to have an:

> "... express subordination of the substantive rights arising under the provisions of the various articles to the procedure prescribed in the present article and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty[130]."

2.78 There was a widespread consensus that parties, by negotiating and concluding a treaty, "have brought themselves into a relationship in which there are particular obligations of good faith"[131]. Indeed, Sir Humphrey had earlier explained that the object of these provisions was "to put the bona fides of the claimant state to the test"[132].

2.79 The "requirements of good faith" underlie and pervade the whole of the law of treaties[133]. As the Court has noted:

> "... the law of treaties ... requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity[134]."

2.80 It may thus be concluded that the entirety of Part III of the Vienna Convention is the applicable law, binding on both parties, in answering the questions put to the Court for resolution.

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130 Ibid., p.263.

131 Ibid., p.262.

132 Ibid., 1963, Vol.I, p.171.

133 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p.392 at p.420.

134 Ibid. See, also, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, p.73 at p.96.

SECTION 3. Conclusions

2.81 Article 2(1) of the Special Agreement calls upon the Court "to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable".

2.82 The first obvious consequence of this is that the 1977 Treaty is applicable in arriving at a resolution of the present dispute. Further, it can be said that such a formulation is quite different from others found in compromis in a few other cases. For example, in the Case Concerning the Land, Island and Maritime Frontier Dispute (El-Salvador/Honduras), the Court was called on to:

> " ... take into account the rules of international law applicable between the Parties, including, where pertinent ['s'il y a lieu'] the provisions of the General Treaty of Peace[135] ."

Such a form of words could raise doubts as to the applicability of the Treaty. But there is no such possibility in the present case: by virtue of the Special Agreement, the 1977 Treaty is not only applicable but has priority of place.

2.83 Further, a framework Treaty is involved here, which must be read and applied in conjunction with a large number of related agreements that implement it by making more specific its terms and, in certain cases, by modifying it.

2.84 The 1977 Treaty itself organise the ways and means of its continuous adaptation, notably through its reliance for implementation on the Joint Contractual Plan. The Plan's flexibility permits and facilitates the taking into consideration - insofar as the parties are in agreement - any evolution in general international law, particularly in regard to the protection of the environment. And in practice the JCP has performed well the role established for it by the Treaty parties.

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[135] Special Agreement between El Salvador and Honduras, 24 May 1986, see, text in Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Judgment, I.C.J. Reports 1992, p. 351 at pp. 352-358.

2.85 To the extent that this is not so, the possibility would not be excluded of considering the general principles of international law in interpreting the Treaty or even completing it. But this can only be envisaged in a framework that is compatible with the terms of the Treaty itself, without attempting to raise doubts (as Hungary attempts to do) as to its object and purpose - which is to carry out the joint investment of the parties in the G/N Project.

2.86 In addition, and in any event, the Treaty's interpretation cannot be carried out "in a vacuum". If principles of general international law have a particular relevance, it is first, because they are part of the positive law applicable between the Parties - and Hungary invokes many principles that are not part thereof - and second, because they can be related to one or more specific provisions of the Treaty - whereas Hungary has systematically avoided indicating to which Article of the Treaty a particular principle that it invokes is related.

2.87 Hungary's strategy has only one aim: to "neutralise" the 1977 Treaty and escape from its clear Treaty obligations. This is done either by declaring that it is no longer in force, or by its attempt to empty it of all substance through recourse to pseudo-legal principles that undermine its provisions or to highly debatable principles of interpretation. Perhaps this is the most simple admission that could be made of the importance of this instrument as to which Slovakia once more recalls, with the greatest insistence, that it is and will remain the law between the Parties and the essential element of the solution of this dispute before the Court.

2.88 Finally, in answering the questions put to the Court, alongside the 1977 Treaty, Part III of the Vienna Convention (in its entirety) is the applicable law.

CHAPTER III. THE ROLE OF THE LAW OF THE ENVIRONMENT

SECTION 1. Introduction

3.01 In its Counter-Memorial, Hungary once again attempts to support its position by relying on the general international law of the environment, and by referring to a variety of non-binding instruments[1].

3.02 Slovakia has shown that the source of the Parties' rights and obligations in this case is in fact the 1977 Treaty[2], that any principles of general international law that are inconsistent with the Treaty, whether they arose prior or subsequent to its conclusion, do not override the specific obligations of the Parties under that agreement[3]; and that the Treaty itself contains mechanisms for responding to any changes in the factual situation or in the state of scientific knowledge as it relates to the G/N Project (a characteristic of the Treaty Hungary also recognises)[4]. Nevertheless, Hungary in its Counter-Memorial continues to cite almost indiscriminately a variety of instruments relating to the environment in general or international watercourses in particular in support of its arguments, without attempting to explain their legal relevance. In short, Hungary seems intent upon using these instruments, many dating from the 1990s, as a standard for judging conduct engaged in by Czechoslovakia and Slovakia in good faith implementation of their obligations under the 1977 Treaty - even though that conduct occurred prior to the adoption of these instruments, all of which are either non-binding or not relevant to the present dispute.

3.03 But there is a more subtle and pervasive strategy that Hungary has pursued throughout its pleadings to date that Slovakia wishes briefly to address. That strategy is to attempt to give the Court the impression that Hungary is concerned about the environment but Slovakia is not, and that this purported lack of concern has led Czechoslovakia, then Slovakia, to pursue

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1 Hungarian Counter-Memorial, para. 4.10, et seq.

2 See, e.g., Chapters I and II, above, Chapter VI of Slovakia's Memorial and Chapter IX of Slovakia's Counter-Memorial.

3 See, e.g., Chapter II, above.

4 See, e.g., Slovak Counter-Memorial, paras. 9.06, 9.07 and 9.10; and Hungarian Memorial paras. 4.21, 6.286a4d1e4

blindly a project that would cause serious and irreparable harm to the environment in disregard of their obligations under international environmental law.

3.04 The present Chapter will begin, in Section 1, by addressing this attempt by Hungary to cast Czechoslovakia and Slovakia in the role of the environmental villain, and by showing how it is in fact Hungary that has failed to protect the environment. Section 2 then examines Hungary's argument concerning the interpretation of Article 15 of the 1977 Treaty. Finally, Section 3 demonstrates why Hungary's use of "general principles of environmental law" in this case is misguided.

SECTION 2. Hungary's Mischaracterisation of Slovakia's Attitude Toward the Environment and International Environmental Law; and Hungary's Own Failure to Protect the Environment

3.05 Slovakia has already demonstrated that the facts do not support either Hungary's contentions concerning the environmental effects of the Project or its insinuations that Czechoslovakia and Slovakia were bent on pursuing a project they knew would be environmentally disastrous[5].

3.06 More generally, Slovakia has certainly never suggested that it somehow does not accept rules of international law concerning the environment, and in fact takes pride in its record with regard to ratification of recent instruments in that field[6]. With regard to the environmental considerations invoked by Hungary, Slovakia recalls that it has already identified factors other than concern for the environment that are more plausible motivations for this action by Hungary[7].

3.07 With regard to Slovakia's observance of international environmental law, Hungary in its Counter-Memorial begins its discussion of this branch of international law by stating:

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5 See, Slovak Memorial, Chaps. II and V; Slovak Counter-Memorial, Chaps. VII and VIII; and Part III, below.

6 For example, Slovakia has ratified both the Convention on Biological Diversity and the Framework Convention on Climate Change, and approved the London Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer of 29 June 1990.

7 Slovak Memorial, para. 3.31, et seq.

> "The contrast between the Hungarian and Slovak Memorials on the issue of the international law of the environment is stark. While Slovakia claims that Variant C is good for the environment of the region, it appears equally to claim that this benefit is on its part a voluntary act, and that general international law imposes no relevant obligations on it in this regard[8]."

The clear implication here is that Slovakia is wearing blinkers that cause it to be oblivious both to the environmental consequences of its actions and to its obligations under international environmental law. Using a technique that it resorts to often, Hungary sets up straw men by mischaracterising both the facts and Slovakia's position on the law.

3.08 With regard to the facts, Hungary conveniently skips over the crucial point that the riverine environment was deteriorating rapidly well before the Project's inception[9]. The reversal of this degradation is one of the principal benefits of the Project[10]. Thus, the Project will permit - and to the extent possible, given Hungary's non-participation, has already permitted - environmental enhancements. In this important sense, the Project, which Variant "C" partially and approximately implements, is "good for the environment of the region"[11]. By refusing to participate in the Treaty and perform its obligations thereunder, Hungary is in fact the one who is harming the environment of the region. It is not the Project (or Slovakia) that is causing the harm.

3.09 In the same vein, Hungary states in its Counter-Memorial that Slovakia makes "the remarkable claim that Variant C has done little or no 'significant' damage to Hungary"[12]. This "claim" is hardly "remarkable." As noted above, one of the objectives of the Project as it has developed is the protection and enhancement of the environment through, inter alia, the improvement of surface and ground water and the revitalisation of the dried up branch system[13]. It is in fact Hungary's own self-serving refusal, until April 1995, to bring water into the

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8 Hungarian Counter-Memorial, para. 4.10.

9 The deterioration was due primarily to erosion of the bed of the Danube itself caused by a complex of factors - the consequent lowering of the water table and the drying up of the branch system. See, Slovak Memorial, para. 1.57, et seq.

10 See, generally, Slovak Memorial, Chap I, Sec. 2.

11 Since Variant "C" is no more than an attempt to implement the Project as nearly as possible in the absence of Hungary's participation, it achieves the same benefits as that portion of the Project would, albeit in some respects in a more limited way. See, Chapters XII and XIII, below.

12 Hungarian Counter-Memorial, para. 4.10.

13 See, Slovak Memorial, para. 6.132.

branch system on its side of the Danube that is to blame for any environmental harm it has suffered in that region. Hungary's refusal was based on fears expressed repeatedly in the Hungarian Parliament and elsewhere that constructing underwater weirs might weaken Hungary's position in the present dispute[14]. Only after the conclusion of the Agreement of 19 April 1995 will the recharge of the branch system on the Hungarian side now be possible, making the Project appear to be what it is - beneficial to the environment of the region, on both sides of the river.

3.10 Thus, rather than being caused by Variant "C", any harm to the branch system on the Hungarian side, including associated ground water, has in fact been self-inflicted. The deliberate nature of this action by Hungary constitutes a clear violation of its obligations under Article 8 of the Convention on Biological Diversity of June 5, 1992[15]. Article 8 is entitled "In-situ Conservation" and requires, inter alia, that each party "(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; ... [and] (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies ..."[16]. Since the flood plain forest and the branch system were drying out prior to the inception of the G/N Project, Hungary would have had these obligations even in the Project's absence. The Project enabled the revitalisation of the branch system through the works to be constructed[17] - inter alia, an intake structure at the Dunakiliti weir, for which Hungary was responsible, and the underwater weirs to be constructed in the old bed of Danube. Yet, until April 1995, Hungary had refused to restore water to its river branches by these or any other means. This refusal has resulted in:

- A failure by Hungary to protect the ecosystems and natural habitats in the branch system and thus to maintain viable populations endemic to that area; and especially

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14 Magyar Hirlap, 1 March 1994, Slovak Counter-Memorial, Annex 33.

15 Entered into force 29 December 1993. Both Hungary and Slovakia are parties. UNEP/Bio.Div/CONF/L.2, reprinted in 31 International Legal Materials (1992), at p. 822.

16 Ibid., Art. 8 (d) and (f).

17 See, e.g., Slovak Memorial, para. 2.87. See, also, para. 11.10, below.

- A failure to rehabilitate and restore the degraded ecosystems of the branch system;

both in clear violation of Article 8 of the Convention on Biological Diversity. By failing to bring water into the branch system on its side through these structures, Hungary also violated the 1977 Treaty[18].

3.11 As to the quality of both surface and ground water that might be affected by Variant "C", the findings of the EC Working Group of Experts and the results of monitoring contained in Volume III indicate that no significant impacts on surface or ground water quality have occurred or are expected from Variant "C"[19], except for beneficial ones. Therefore, far from being a "remarkable claim" by Slovakia, the lack of harm to Hungary associated with Variant "C" is in fact borne out by the evidence[20].

3.12 The second kind of mischaracterisation Hungary employs in an effort to distort Slovakia's position concerns Slovakia's legal arguments. Slovakia must note that it is mystified at how Hungary could have concluded that Slovakia is claiming that the benefits of Variant "C" for the environment of the region are on Slovakia's part "a voluntary act". While Slovakia might well have taken measures to restore the branch system on its side of the Danube even had there been no 1977 Treaty or Biodiversity Convention, it has always been Slovakia's position that the restorative measures permitted by Variant "C" are required by the 1977 Treaty. Slovakia has not invented them out of thin air.

3.13 Hungary further seeks to portray Slovakia as being unmindful of its legal obligations in its statement, quoted above, that Slovakia appears to claim "that general international law imposes no relevant obligations on it" with regard to the environment in the region of Variant "C". Hungary then states that Slovakia makes this claim in part "by claiming that the 1977 Treaty is a lex specialis, which contained its own regime, however inadequate, on the subject," and in part

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18 See, e.g., Slovak Memorial, paras. 6.132-6.140.

19 See, para. 12.08, et seq., below.

20 Slovakia's actual statement was that "Hungary has not shown 'significant' harm caused by Variant "C" ... ". Slovak Memorial, para. 7.85. That also remains true.

"by asserting that developments in the international law of the environment are the product of 'soft law', and that they impose little or no constraints on state action"[21].

3.14 It is true that Slovakia has pointed out that many of the instruments cited by Hungary as evidence of rules of international environmental law are non-binding statements and declarations[22]. But this is in fact beside the point since, as demonstrated in the previous Chapter, the relevant rights and obligations of the Parties derive not from the general international law of the environment but from the 1977 Treaty. Moreover, the regime of the Treaty and its related instruments is hardly "inadequate" to deal with environmental considerations. Hungary has itself extolled the Treaty as being "consistent with the maintenance of water quality and with environmental protection generally"[23].

3.15 But even if the Treaty as concluded in 1977 could be considered "inadequate" by today's standards of environmental protection, it is hardly a static, rigid document. Hungary recognised this quality in its Memorial when it characterised the 1977 Treaty as "a framework treaty, one which could be modified or adjusted by agreement in the light of changing circumstances"[24]. Slovakia has likewise emphasised that rather than consisting of a set of hard and fast rules, the 1977 Treaty constitutes a flexible framework that permits the parties to respond to developments as they unfold while achieving the essential object and purpose of the Treaty as set forth in Article 1[25]. Therefore, Hungary's suggestion that the regime of the 1977 Treaty is "inadequate" as far as the environment is concerned is both self-contradictory and inaccurate.

3.16 Finally, it has never been Slovakia's position that the general international law of the environment "impose[s] little or no constraints on state action". That it - like any branch of international law - does impose such constraints is axiomatic. What Slovakia does maintain is that the matters here at issue are governed by the 1977 Treaty, which is entirely consistent with general principles of international environmental law, rather than by a given branch of general

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21 Hungarian Counter-Memorial, para. 4.10.

22 See, for example, Slovak Counter-Memorial, para. 11.31.

23 Hungarian Memorial, para. 4.21. See, also, ibid., paras. 6.28 and 10.73.

24 Ibid., para. 4.21.

25 See, e.g., Slovak Counter-Memorial, paras. 9.06, 9.07 and 9.10.

international law - a vastly different proposition[26]. Only to the extent that there are matters that are not covered by the Treaty could general international law supplement the Treaty's provisions.

3.17 To summarise, Hungary criticizes the 1977 Treaty as being "inadequate" with regard to the environment, while at the same time praising the Treaty as being consistent with environmental protection. Hungary further seeks in more subtle but pervasive ways to characterise Slovakia as a country that does not take seriously the international law of the environment. This insinuation Slovakia flatly rejects. It is one thing to maintain that a treaty is not superseded by rules of general international law, which Slovakia does in this case; it is a much different thing to claim that those rules "impose little or no constraints on state action" as a general proposition, which Slovakia has never done. If either Party in the present case has indicated that rules of international law do not constrain its actions it is Hungary, by virtue of its having flouted its obligations under the 1977 Treaty.

SECTION 3. Hungary's Argument Concerning the Interpretation of Article 15 of the 1977 Treaty

3.18 Both in its Memorial and in its Counter-Memorial, Hungary argues strenuously that Article 15 of the 1977 Treaty should be interpreted to include ground water. That article provides, in relevant part: "The Contracting Parties shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks"[27]. Hungary argues that the phrase "water of the Danube" should be construed "broadly ... so as to include the subsurface water related to it..."[28]. Slovakia would observe that the "ordinary meaning"[29] of "water of the Danube" would seem to be surface water flowing in the bed or channel of the Danube; Hungary as much as confirms this in its reference to "subsurface water related to it", i.e., related to water "in" the Danube. This is logical since if the quality of surface water is not impaired, that of ground water will not be. In fact, Slovakia does not wish to challenge Hungary's interpretation.

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26 The extent to which newly-formed principles of general international law may be used to interpret an earlier agreement is examined in Chapter II, above.

27 1977 Treaty, Article 15.

28 Hungarian Counter-Memorial, para. 4.12 (emphasis added).

29 Vienna Convention on the Law of Treaties, Article 31(1). That paragraph provides in part: "A treaty shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

3.19 Slovakia must record, however, that it does find Hungary's use of authority in support of its argument rather mystifying. Hungary relies upon various documents of the International Law Commission - the Commission's 1994 Report and extracts from reports of two of its special rapporteurs - to "support [its] assertion as to the scope of Article 15 ..."[30]. While Slovakia has no quarrel with the content of the passages quoted from those documents by Hungary - passages which simply reflect hydrologic reality[31] - Slovakia is puzzled as to how Hungary believes those documents are relevant to the interpretation of the 1977 Treaty. Hungary cites them not as evidence of law[32] but, from all that appears, only as evidence of the fact - now well understood - that ground water is usually interrelated with surface water. This is yet another example of Hungary's indiscriminate use of a wide variety of sources of varying authoritative value.

3.20 Slovakia must, however, take exception to one conclusion drawn by Hungary from these documents. After quoting extensively from the ILC's commentary and from the conclusions of the 1992 Dublin Water Conference[33], Hungary states: "These texts underline the lack of merit of Slovakia's allegation that the quality of the water in the aquifer in the areas where the hydropower plant was to be built could be ensured by simple monitoring after the construction was finished." Slovakia would make the following observations.

3.21 First, Slovakia has never alleged that water quality in the area in question could be "ensured by simple monitoring." This proposition is absurd on its face. Monitoring is necessary to ascertain what the quality of the water is at a given moment; it is a means of measuring water quality, not improving or "ensuring" it. Slovakia's position has always been that the careful "monitoring of water quality in connection with the construction and operation of the System of

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30 Hungarian Counter-Memorial, para. 4.13.

31 The first passage, taken from the ILC's commentary to article 2 of its draft articles on international watercourses, describes the different components of the terrestrial elements of the hydrologic cycle. The second, an excerpt from the report of the International Conference on Water and the Environment, held at Dublin from 26 to 31 January 1992, emphasizes the importance of protecting ground water. And the third, a quote from a report of one of the ILC's special rapporteurs on watercourses, Professor Schwebel as he then was, concludes that report's discussion of ground water, describing its interrelationship with surface water.

32 As discussed in para. 2.56, et seq., above, Hungary also argues that treaties are to be interpreted in light of the law prevailing at the time of the interpretation. But, as just indicated, Hungary does not offer these documents as evidence of prevailing law.

33 As excerpted in a Note annexed to the Second Report of the ILC's Special Rapporteur.

Locks" (the quotation is from paragraph 2 of the same Article 15 to which Hungary refers) is not only required by the 1977 Treaty but is necessary to provide current data on water quality so that any possible problems can be detected at an early stage and measures can be taken immediately to address them.

3.22 Second, it has likewise never been Slovakia's position - nor has it been the practice of the parties to the 1977 Treaty - that potential impacts of the Project on water quality need not be evaluated in advance, but could be appropriately addressed only "after the construction was finished". Slovakia has repeatedly emphasised that the numerous studies conducted by both Treaty parties prior to and during the construction of the Project belie any implication that they took a "build-it-now, fix-it-later" approach. All possible impacts of the Project - including its possible impact on water quality[34] - were carefully and thoroughly studied a number of times, by the parties themselves and by independent entities[35]. In its Memorial Slovakia has described adjustments made to the G/N Project - preventive measures - to optimise the quality of ground water supplying wells and waterworks[36]. Thus Hungary's characterisation of Slovakia's position in this regard is, at best, misleading.

3.23 Third, Slovakia has shown that the quality of ground water has not suffered as a result of the Project's operation, and the EC Working Group of Experts has confirmed this finding as do the results of monitoring contained in Volume III hereto[37]. And fourth, it is also clear that negative impacts upon ground water occurred as a result of Hungary's suspension and its abandonment of work on the Project. Any resulting harm to ground water is thus attributable solely to Hungary.

3.24 In sum, Hungary's argument concerning Article 15 of the 1977 Treaty is unnecessary, of uncertain relevance, and factually unfounded. It is unnecessary in the respect that it

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34 Slovak Memorial, paras. 2.90-2.107 (describing studies on the projected impact of the G/N System on surface and ground water).

35 Studies conducted both prior and subsequent to the conclusion of the 1977 Treaty are discussed in Slovak Counter-Memorial, Chapter IV.

36 Slovak Memorial, paras. 5.45 and 5.46.

37 See, paras. 12.08 and 12.14, below.

devotes much space to a point Slovakia has not contested, i.e., that ground water is included in Article 15. It is of uncertain relevance in its indiscriminate use of a variety of instruments for purposes that are, to Slovakia, unclear. And it is factually unfounded in its mischaracterisation of both Slovakia's position and the regime of the 1977 Treaty concerning the protection of water quality.

SECTION 4. Hungary's Use of "General Principles of Environmental Law"

3.25 In its Counter-Memorial Hungary once again insists that the obligations of Czechoslovakia and Slovakia - and, presumably, its own, as well - in relation to the G/N Project are governed by general principles of environmental law[38]. According to Hungary, these consist of the "international law rules ... in force during the whole lifetime of the System of Locks ... includ[ing] those new rules which have appeared since the entry into force of the 1977 Treaty"[39]. Hungary's Counter-Memorial bases this argument on three sources: Article 2 of the Special Agreement; the 1977 Treaty; and the decision of the Court in the Namibia case[40]. Slovakia has explained its position in Chapter II of this Reply[41], as well as in both of its previous pleadings[42], that this argument is not supported in law, policy or common sense. Slovakia has also demonstrated, however, that its conduct in relation to the Project, as well as that of Czechoslovakia, has nevertheless been in conformity with applicable rules of general international law relating to the environment[43]. Moreover, Hungary has failed to offer convincing scientific evidence to support its claims concerning environmental harm or the threat thereof[44]. Hungary's post hoc "Scientific Evaluation", belatedly submitted with its Counter-Memorial, represents its best effort but does not begin to substantiate its claims, as shown in Part III, below, and in Volumes II and III hereof. Slovakia has shown that the evidence that does exist of the actual, recorded impacts of Variant "C" demonstrates that it has had, and will continue to have beneficial impacts on the environment in the

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38 Hungarian Counter-Memorial, Chapter IV, Section C(2), "General Principles of Environmental Law", para. 4.20, et seq.

39 Ibid., para. 4.21.

40 Ibid., paras. 4.20-4.22.

41 See, para. 2.35, et seq., above.

42 Slovak Memorial, paras. 8.106-8.112; Slovak Counter-Memorial, paras. 9.95-9.100 and 10.91-10.92.

43 Slovak Counter-Memorial, para. 9.47, et seq.

44 See, Part III, below.

region[45]. The only exception to this state of affairs has been caused by Hungary's refusal to take the measures necessary (and required under the Treaty) to supply water to the branch system on its side. This refusal has prevented the Project from producing benefits there similar to the ones that have been recorded on the Slovak side[46].

3.26 Thus, Hungary's argument concerning the applicability of general principles of international environmental law is, in any event, moot. But since Hungary in its Counter-Memorial persists in attempting to find bases for the argument, Slovakia will once again address it. The following sub-sections will first touch briefly upon two points that are examined in depth in other Chapters of this Reply: Hungary's argument concerning the relevance of "new rules" of general international law (subsection A)[47], discussed in detail in Chapter II above; and Hungary's argument that Variant "C" is illegal under rules of general international law (subsection B)[48], examined in Chapter VI below. Two additional aspects of Hungary's contentions concerning general principles of international environmental law will then be examined: Hungary's failure to observe those principles, assuming arguendo that they are applicable (subsection C); and the consistency of those principles with the 1977 Treaty and hence with the relief sought by Slovakia (subsection D).

A. Hungary's Argument Concerning "New Rules which have Appeared Since the Entry into Force of the 1977 Treaty"

3.27 As indicated above, Hungary bases its argument that "new rules" of international environmental law are applicable in this case on three sources, the first of which is Article 2 of the Special Agreement. Slovakia has discussed the Special Agreement, and in particular the interpretation of Article 2 thereof, in Chapters I and II of the present Reply.

3.28 The second source cited by Hungary in support of its argument concerning the applicability of new rules of the general international law of the environment is the 1977 Treaty, specifically Articles 15 and 19. Characteristically, Hungary fails to specify the conduct of

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45 Ibid.

46 See, Slovak Counter-Memorial, para. 8.10.

47 This argument is made in Ch. 4, Section C, of Hungary's Counter-Memorial, paras. 4.10-4.27.

48 This argument is made in Ch. 6, Section A (2), of Hungary's Counter-Memorial, paras. 6.18-6.41.

Czechoslovakia or Slovakia to which it seeks to apply the Treaty. In addition, Hungary nowhere explains how this reliance on the Treaty is compatible with its claim that the Treaty has been terminated.

3.29 In its Counter-Memorial, Hungary makes the flat assertion, without further explanation, that "[i]n both cases [i.e., in the case of both Article 15 and Article 19] the applicable international law rules are those which are in force during the whole lifetime of the System of Locks ... includ[ing] those new rules which have appeared since the entry into force of the 1977 Treaty"[49]. Slovakia finds this argument to be highly implausible and, in any event, wholly without foundation.

3.30 First, as pointed out in Chapter II above, neither Article 15 nor Article 19 contains any reference to rules or principles of general international law. Article 15 does contain two references to other instruments that are to govern the implementation of its provisions: the JCP (paragraph 1) and "the agreements on frontier waters in force between the governments of the Contracting Parties" (paragraph 2). It is obvious that neither of these references includes rules or principles of general international law. As shown in Chapter II above, those rules and principles may, under certain conditions, be relevant to the interpretation of treaty provisions but cannot amend them.

3.31 As for Article 19, "Protection of Nature", the only express reference in this article is, once again, to the JCP. Article 19, as translated in the United Nations Treaty Series, provides in full:

> "The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."

3.32 Slovakia first wishes to recall the fact that the translation of Article 19 contained in the United Nations Treaty Series is, in crucial respects, not accurate[50]. A more accurate translation of the original Slovak and Hungarian versions of the Treaty is the following:

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49 Hungarian Counter-Memorial, para. 4.21 (emphasis added).

50 See, paras. 2.45-2.46, above, and fn. relevant to Art. 19's translation.

"The Contracting Parties shall, through the means specified in the Joint Contractual Plan, ensure compliance with the requirements for the protection of nature which arise in connection with the construction and operation of the System of Locks."

3.33 This translation makes clear that the parties to the 1977 Treaty did not have independent legal "obligations" for the protection of nature in mind at all in formulating Article 19. Instead, they recognised that it was not possible to foresee in detail all of the ways in which nature might need to be protected during the construction and operation of the Project. They therefore left themselves the flexibility, as in other articles of the Treaty, to provide in the JCP for specific steps to be taken to protect nature, as the need arose.

3.34 Even if the translation in the United Nations Treaty series is utilised, Hungary's interpretation of the phrase "obligations for the protection of nature" is erroneous, as demonstrated in Chapter II above[51]. In addition, application of the fundamental rule of interpretation of the 1969 Vienna Convention is illuminating. When the words, "obligations for the protection of nature" are given their ordinary meaning in the context of both the rest of the article and the other article in Chapter VII of the Treaty (Article 20), and in the light of the object and purpose of the 1977 Treaty as a whole, several points become clear:

- The phrase "ensure compliance with the obligations for the protection of nature" must be read in conjunction with the phrases immediately preceding and following it, namely, "through the means specified in the joint contractual plan" and "arising in connection with the construction and operation of the System of Locks". When read in this context, Article 19 clearly contemplates that its general provisions will be elaborated upon by agreement between the parties in the JCP, which is to specify the manner in which nature was to be protected during the "construction and operation of the System of Locks".

- Focusing upon a different aspect of the context of the phrase in question, obligations cannot, legally speaking, "arise" from the construction and operation of a project. They arise from rules of law. For the phrase to have meaning, it must therefore be taken to refer to obligations deriving

51 Ibid.

from the JCP that "arise", in the sense of being triggered or coming into play, by virtue of the construction and operation of the Project.

- It is striking that Article 19, unlike both the other article in Chapter VII and Article 15, contains no reference to any specific agreement other than the JCP. Since both of the other articles dealing with environmental issues define the parties' obligations in terms of the JCP or other specific agreements, it seems highly unlikely that the parties would have intended that their obligations for the protection of "nature" - a term that is far more vague than "water quality" (Article 15) or "fishing interests" (Article 20) - be defined by general international law. This is especially true since "obligations for the protection of nature" under general international law were even less clearly defined in 1977 than they are today.

- Conversely, nowhere else in the Treaty is a general phrase like "obligations for the protection of nature" used. It is therefore difficult to believe that in this one case the parties decided to provide that their obligations would be governed by unspecified general rules for the protection of "nature", a term that could be understood quite broadly but that is not defined in the Treaty.

- Such an interpretation would make this phrase a complete anomaly in the Treaty, which otherwise spells out the parties' obligations clearly in its text or refers to other agreements that do so or - in the case of the Joint Contractual Plan - will do so. On the other hand, it would be entirely consistent with the pattern established in numerous other provisions of the Treaty for Article 19 to be interpreted to mean that the parties would agree on the steps to be taken to protect "nature" in the JCP, and that these steps would be taken, as necessary, during the construction and operation of the Project.

3.35 Therefore, when interpreted according to the standards of the Vienna Convention, Article 19 cannot have the meaning that Hungary assigns to it. In particular, the burden that Hungary would place on the words "obligations for the protection of nature" in Article 19 - i.e., that they carry with them the entire body of general principles of environmental law - is

one that those words, especially when read in their context and in light of the object and purpose of the 1977 Treaty, simply cannot support.

3.36 The third source cited by Hungary in support of its argument concerning the applicability of newly emerging general principles of international environmental law is the Namibia case. Hungary has removed from its context the statement of the Court in this case concerning the circumstances under which a treaty may be interpreted in the light of the law prevailing at the time of the interpretation. The present case, involving as it does a practically-oriented agreement for the joint development of an international watercourse, is a far cry from the Namibia case and the Covenant of the League of Nations. While the meaning of the concepts in Article 19 of the 1977 Treaty are not rigid, they do not remotely approach the status of those contained in Article 22 of the Covenant, which include that of "the well-being and development" of the peoples in question and that of the "sacred trust of civilisation". As discussed in greater detail in Chapter II above, these considerations cast grave doubt upon the applicability in the present dispute of the exception identified by the Court in the Namibia case.

3.37 It has been noted in Chapter II above that Hungary "invokes" a wide variety of what it characterises as "fundamental principles". In fact, these "principles" vary significantly from one another in terms of both their legal status and their importance[52]. Some of these concepts are quite new and are based on treaties (such as those of environmental impact assessment (1991)[53] and biological diversity (1992)[54]) - some of which are not in force, while others were in force at the time the 1977 Treaty was concluded (such as the right to life). Still others are controversial to this day (such as the "right" to a healthy and ecologically sound

52 Hungarian Counter-Memorial, para. 4.24.

53 Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991.

54 Convention on Biological Diversity, 5 June 1992.

environment)[55]. Even to the extent such principles may have "emerged", they would not override or in any way alter the provisions of the 1977 Treaty.

3.38 In any event, an interpretation of the 1977 Treaty "within the framework of the entire legal system prevailing at the time of the interpretation" - which would presumably be in the mid-1990s - would not result in any radically new understanding as to the meaning of its terms or the obligations of the parties thereunder. As Hungary recognises, the Treaty "was consistent with the maintenance of water quality and with environmental protection generally"[56]. In addition, Slovakia has demonstrated that the Treaty together with its associated agreements provide for sufficient flexibility that adjustments can be made to the Project as and when needed[57]. This is true, for example of the Treaty's provisions on monitoring (Article 15, para. 2)[58] and on the establishment of a joint cooperative mechanism (the Government Plenipotentiaries - Article 3) to ensure ongoing coordination and communication with regard to all aspects of the Project, including environmental ones[59].

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55 In support of the existence of this "right" Hungary refers to para. 10.24 of its Memorial (presumably meaning para. 10.38). That paragraph does not explain the origin of the right but merely refers to an "emerging human right to the environment." The footnote to the passage in question contains quotations from the Stockholm and Rio Declarations, neither of which refers to a "right to environment" of any kind. The Experts Group on Environmental Law of the World Commission on Environment and Development concluded: "It cannot be said that the fundamental human right to an adequate environment already constitutes a well-established right under present international law. As a matter of fact there are as yet no treaties which provide for a specific human right to an adequate environment." R.D. Munro & J.G. Lammers, Environmental Protection and Sustainable Development, Graham & Trotman/Martinus Nijhoff, London/Dordrecht/Boston, 1987, p. 40. Birnie and Boyle point out that "no treaty refers explicitly to the right to a decent environment" as an individual right. P. Birnie & A. Boyle, International Law and the Environment, Clarendon Press, Oxford, 1992, p. 191. According to these authors, "[t]he more common view ... is that no independent right to a decent environment has yet become part of international law ... ." Ibid., p. 192. See, also, P.-M. Dupuy, "Le Droit à la Santé et la Protection de l'Environnement", in R.-J. Dupuy (ed.), The Right to Health as a Human Right, Alphen aan den Rijn, 1979, p. 340, arguing, inter alia, that unlike the right to life, such a right is not inherent in the human condition; Alston, "Conjuring Up New Human Rights: A Proposal For Quality Control", 78 American Journal of International Law (1984), p. 607; and Jacobs, 3 Human Rights. Reports (1978), pp. 170-173.

56 Hungarian Memorial, para. 4.21.

57 Slovak Counter-Memorial, paras. 2.20-2.26 and paras. 9.06-9.07.

58 This provision is discussed, inter alia, in Slovak Counter-Memorial, para. 9.06, where it is noted that the operation of the monitoring system has been evaluated favorably in both the Bechtel Report and in the EC Working Group report of 2 November 1993.

59 The joint cooperative mechanism established by the Treaty is discussed in Slovak Counter-Memorial, para. 9.07.

B. Hungary's Argument that Variant "C" is Illegal under Rules of General International Law

3.39 In Chapter 6, Section A of its Counter-Memorial, Hungary specifically addresses what it terms "the illegality of Variant C under general international law". Slovakia has shown in this and prior pleadings, first, that the law applicable in this case is the 1977 Treaty; second, that Variant "C" is nothing more than the result of Czechoslovakia's application of the 1977 Treaty in as approximate a fashion as it could after Hungary's unilateral and unlawful abandonment of its obligations under that agreement; and third that Variant "C", being an approximate application of the 1977 Treaty, has effects that are either identical with those that would have been produced by implementation of the Gabčíkovo section as originally envisaged (e.g., the channeling of water through the bypass canal) or smaller in scope (e.g., the size of the reservoir). Therefore, Variant "C" cannot be regarded as being unlawful, since it is an implementation of Czechoslovakia's and Slovakia's obligations under the applicable law, i.e., the 1977 Treaty.

3.40 Slovakia has further demonstrated that, as Hungary has itself recognised, the 1977 Treaty "was consistent with the maintenance of water quality and with environmental protection generally"[60]; and that, unsurprisingly in light of this last-mentioned characteristic of the Treaty, the conduct of Czechoslovakia and Slovakia from the conclusion of the 1977 Treaty to the present has in any event been consistent with principles and rules of general international law concerning natural resources and the environment.

3.41 In Chapter VI below, Slovakia examines Hungary's contentions concerning general principles of the law of international watercourses, highlighting the fact that Hungary has made no mention of a key aspect of the principle of equitable and reasonable utilisation: that of equitable participation. Slovakia there demonstrates that Hungary acted inconsistently with that principle by unilaterally abandoning work on the G/N Project, which constitutes an agreed expression of what constitutes an equitable and reasonable utilisation of the Danube. Slovakia further shows in that Chapter that its conduct and that of Czechoslovakia has at all times been consistent with the principle of equitable utilisation itself, as well as with that of avoidance of significant harm to other riparian States; and that Hungary's complaints concerning the effects of Variant "C" are without foundation.

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60 Hungarian Memorial, para. 4.21.

3.42 Therefore, even if these general principles of international environmental law are applicable in this case, Slovakia has acted consistently with them, while Hungary has not. The following Section will examine Hungary's behavior in the light of other principles of the law of international watercourses.

C. Assuming that General Principles of International Environmental Law Are Applicable in this Case, Hungary Acted Inconsistently with those Principles

3.43 Hungary relies heavily in its pleadings upon general principles of international environmental law, notwithstanding that the present case is governed by the 1977 Treaty. Slovakia has demonstrated in Chapter II that those principles may be invoked in support of the Treaty to the extent they are in harmony with it but not to contradict its terms. Moreover, to the extent those principles are applicable, it is Hungary rather than Czechoslovakia or Slovakia whose conduct has not been in conformity with them.

3.44 The present sub-section will focus upon two principles of the law of international watercourses, a field that Hungary includes within the area of international environmental law: the principle of prior notification and consultation concerning planned measures; and the principle requiring a State to provide a reasoned and documented explanation of actions that would delay the implementation by another State of planned measures on an international watercourse. The present case illustrates dramatically how important the observance of these principles can be to other States sharing a watercourse. As Slovakia will demonstrate in Chapters VII and VIII below, Hungary failed utterly to observe the principles with regard to its suspension and subsequent abandonment of both Nagymaros and Gabčíkovo, causing substantial harm to Czechoslovakia and Slovakia.

Hungary Failed to Observe the Principle of Prior Notification and Consultation in Relation to its Suspension and Abandonment of Nagymaros and Gabčíkovo

3.45 There is now little doubt that a requirement of prior notification of planned activities that may cause harm to other States has emerged as a general principle of international law. In the context of shared fresh water resources, the draft articles on the law of the non-navigational uses of international watercourses adopted by the International Law Commission on

second reading in 1994 furnish the latest authoritative evidence of the general principles of international law governing the utilisation of those resources.

3.46 The Commission's draft articles provide in essence that when a State riparian to an international watercourse (a "watercourse State") is planning measures related to the watercourse that may adversely affect another watercourse State, it must provide the potentially affected State with prior notification of its planned measures[61]. If the notified State finds that implementation of the plans would cause it significant harm or violate the principle of equitable utilisation, the two States must "enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation." The consultations and negotiations are to be "conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State"[62].

3.47 Hungary made no pretence of notifying Czechoslovakia prior to announcing its unilateral decisions to suspend Nagymaros and Gabčíkovo, respectively, and it failed, similarly, to notify its Treaty partners before abandoning these sections of the Project. A fortiori, it did not consult with its Treaty partner prior to taking these actions[63]. It is hardly necessary to note the irony: on the one hand, Hungary falsely accuses Czechoslovakia of not notifying Hungary of its intent to proceed with Variant "C", an undertaking smaller in scope than the one to which Hungary had already agreed; on the other hand, Hungary itself failed to provide its

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61 Draft articles on the law of the non-navigational uses of international watercourses, Report of the International Law Commission on the Work of Its Forty-Sixth Session, document A/49/10, article 12, at p. 260 (1994). A similar principle, but one of more general applicability, is contained in the 1992 Rio Declaration on Environment and Development. Principle 19 of the Rio Declaration provides: "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith." Document A/CONF.151/5/Rev.1, 13 June 1992, reprinted in 31 International Legal Materials 874, at p. 879 (1992). According to Hungary, the Rio Declaration "reflects the emerging consensus of members of the international community with regard to the basic principles to be promoted, both individually and collectively." Hungarian Counter-Memorial, para. 7.28. See, also, the ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, March 17, 1992, Art. 9(2)(h), reprinted in 31 International Legal Materials 1312 (1992).
Of course, Hungary was under a treaty obligation to provide prior notification of, and to consult with Czechoslovakia concerning its plans to suspend and abandon Nagymaros and Gabčíkovo under Article 3(c) and (d) of the 1976 Agreement between Czechoslovakia and Hungary on the Management of Boundary Waters - an obligation which it breached, as shown in Chapters VII and VIII, below.

62 Report of the ILC, op. cit., Article 17, at p. 273.

63 The September-October 1989 negotiations concerning Gabčíkovo were directed at when and on what conditions Hungary's unilateral suspension might be ended. Czechoslovakia was given no prior notice of, and was not consulted over, Hungary's abandonment of Gabčíkovo.

Treaty partner with prior notification and an opportunity to consult with regard to the actions it took that were utterly antithetical to the Project that had been agreed to by both States and in which Czechoslovakia had already invested substantially.

Hungary Failed to Provide a Reasoned and Documented Explanation of Its Suspension and Abandonment of Nagymaros and Gabčíkovo

3.48 The International Law Commission has also recognised that a decision by a watercourse State that will inevitably delay or alter measures planned by another watercourse State should not be taken lightly or without good faith communication with the other State. The ILC's draft articles on international watercourses accordingly provide that the affected State must be notified of such a decision and that the notification is to be accompanied by a substantiated explanation of the reasons therefor[64]. The Commission reasoned that a right to require the other State to delay implementation of its plans "justifies the requirement ... that the [State calling for the delay] demonstrate its good faith by showing that it has made a serious and considered assessment of the effects of the planned measures"[65]. A substantiated explanation is the least that can be expected from the State causing the delay or alteration as a demonstration of that State's good faith. This is all the more true when the action in question will cause significant harm and violate the principle of equitable utilisation, which were the effects upon Czechoslovakia and Slovakia of Hungary's suspension and ultimate abandonment of both Nagymaros and Gabčíkovo.

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64 Article 15 of the Commission's draft articles deals with the reply by a State that has been notified of measures planned by another State. It provides that if the notified State finds that implementation of the planned measures would cause it significant harm or violate the principle of equitable utilization, it is to so inform the notifying State and provide that State with "a documented explanation setting forth the reasons for the finding". Article 15, para. 2, Report of the International Law Commission on the Work of Its Forty-Sixth Session, op cit., at p. 270. The notified State is permitted to require the notifying State to suspend the implementation of the planned measures for a period of six months; however, this is in addition to the initial six-month period allowed for the notified State to study the plans of the notifying State. See, Arts. 13(a) and 17(3), ibid., at pp. 267 and 273, respectively.

65 Ibid. (emphasis added).

D. The 1977 Treaty is Consistent with General Principles of International Environmental Law; Those Principles Support the Relief Sought by Slovakia

3.49 Hungary argues in its Counter-Memorial that "the Court cannot accept the main submissions of Slovakia in respect of reparation [because] the continued operation of Variant C - let alone the completion of the Original Project - would provoke irreparable damage and create major risks to the environment of the region ... "[66]. This contention is factually unfounded and also contradicts other positions taken by Hungary. Moreover, as Slovakia has repeatedly stressed, Hungary's arguments of this kind are legally irrelevant in this case: the governing law is the 1977 Treaty; Hungary has not established, nor could it establish, either a ground for lawfully suspending or terminating the Treaty under the Vienna Convention or a norm of jus cogens that would render the Treaty void. It bears emphasis that, as with its other arguments, Hungary makes no attempt to frame this contention in terms of either Vienna Convention grounds for termination or jus cogens. Instead, it makes emotional appeals based on vague and misleading references to doctrines of no relevance to this case. Its argument should not be countenanced for this or for the following additional reasons.

3.50 Hungary cannot at the same time confirm that the 1977 Treaty is consistent with environmental protection and claim that the completion of the Project - as called for by that very Treaty - "would provoke irreparable damage and create major risks to the environment of the region"[67]. In fact, it is Hungary's abandonment of the Project that posed serious threats to the environment of the region[68] - threats that would have materialised in severe damage but for the implementation of Variant "C"[69].

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66 Hungarian Counter-Memorial, para. 7.26.

67 See, also, Slovak Counter-Memorial, para. 9.04, et seq. Slovakia has also demonstrated that since its conduct, as well as that of Czechoslovakia, has been in compliance with the Treaty throughout, it follows that such conduct has been consistent with "environmental protection generally"; Slovakia has further shown that it has also been in conformity with general principles of international environmental law. See, generally, Slovak Memorial, paras. 7.72-7.86, and Slovak Counter-Memorial, Chap. IX.

68 See, Slovak Memorial, paras. 5.10-5.11.

69 Ibid., paras. 5.52-5.61.

3.51 Further, as Slovakia has demonstrated in this and prior pleadings[70], neither Variant "C" nor the Original Project would "provoke irreparable damage" or "create major risks to the environment of the region". On the contrary, as Slovakia has shown, the Project as originally envisaged and as provisionally implemented through Variant "C" - which permits, e.g., revitalisation of the entire Danube inland delta - is far more beneficial to the environment of the region than the "do nothing" approach advocated by Hungary - which would result in the continued progressive degradation of the riverine ecosystems in the braided section of the Danube. Hungary in any case had no convincing scientific evidence of the kinds of environmental damage or risks to which it refers, either when it took its suspension and abandonment decisions or when it purported to terminate the 1977 Treaty. It also failed to conduct the studies that it claimed were needed as to possible effects of the Project on the environment. The "Scientific Evaluation" belatedly assembled by Hungary and presented in its Counter-Memorial likewise falls far short of establishing anything more than the most remote possibility of such risks, as demonstrated in Part III and in Volumes II and III to this Reply.

3.52 In an attempt to support its thesis, Hungary invokes the "notion of sustainable development" as contained in the Rio Declaration and argues that that concept "is a harmonious combination of the right of each State to exploit its natural resources with its duty to protect the environment of other States"[71]. Slovakia is in full agreement with this statement, which perfectly describes the combination of environmental protection and economic development - to say nothing of the protection against natural disasters and other benefits - achieved by Hungary and Czechoslovakia in the 1977 Treaty. As Slovakia has shown, far from being inconsistent with the relief it seeks in this case, the concept of sustainable development is in fact given concrete expression in the form of the G/N Project[72].

3.53 Hungary betrays its desperation in the manner in which it concludes its Counter-Memorial. It resorts to pejorative characterisations of the G/N Project (calling it a "dinosaur"[73]) and of the period in which the Project was planned and the 1977 Treaty was

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70 See, in particular, Chap. XII, below, and Vols. II and III, hereof.

71 Hungarian Counter-Memorial, para. 7.29.

72 See, e.g., Slovak Counter-Memorial, paras. 9.04-9.11.

73 Hungarian Counter-Memorial, para. 7.38.

concluded (referring to it as "another age, in which any consideration for the protection of the environment was systematically underestimated and subordinated to a narrow vision of development ..."[74]). Hungary goes so far as to characterise Slovakia's case as amounting "to a request to the Court to return to this ancien régime in violation of the law, both as it was and as it has further evolved"[75]; it even instructs the Court that it "is bound itself to apply a precautionary approach"[76] - whatever that may mean in the context of this case.

3.54 But derisive comments are no substitute for careful scientific study or close legal analysis. Slovakia must emphasise yet again the following fundamental points: First, the fact that an agreement was concluded a number of years in the past, even in another era, is not in and of itself a ground for its suspension, termination or invalidity under the law of treaties; to fail to uphold the 1977 Treaty on the ground that it "comes from another age", an "age" that existed less than two decades ago, would imperil the stability of international agreements and thus of the relations between States. Second, the 1977 Treaty, by Hungary's own appraisal, is "consistent with ... environmental protection"; if, as seems obvious, by calling the original Project a "dinosaur", Hungary intends to suggest that it is not consistent with environmental protection, Hungary contradicts itself. Third, the notion that environmental protection was systematically ignored at the time the 1977 Treaty was concluded, in addition to being legally irrelevant, is demonstrably inaccurate. Slovakia has drawn the Court's attention to the impressive number of studies conducted by the parties to the 1977 Treaty preparatory to its conclusion, many of which dealt with environmental considerations[77]. Further, as Hungary is fond of emphasising[78], the Treaty itself contains provisions directed specifically to the protection of not only water quality (Article 15) but also nature (Article 19). One of the great ironies of this case is that Hungary, which condemns what it characterises as the lack of concern for the environment during the period in which the 1977 Treaty was prepared and concluded, was itself unwilling to undertake appropriately detailed environmental studies concerning the effects of the Project until it compiled its "Scientific Evaluation" in the autumn of 1994. And fourth, Hungary gives such sweeping meaning to the

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74 Ibid., para. 7.36.

75 Ibid., para. 7.37.

76 Ibid.

77 See, Slovak Memorial, para. 2.10, et seq.

78 See, e.g., Hungarian Counter-Memorial, para. 4.21.

"precautionary principle" that it would thwart most public development projects, especially in the field of energy production[79]. As Slovakia has demonstrated, the Project as implemented by the Treaty parties and by Czechoslovakia and Slovakia since Hungary's withdrawal is fully consistent with a precautionary approach.

3.55 Hungary's argument concerning what it refers to as "the real remedial context" should therefore be dismissed as contradicting its other arguments and as lacking in reason, factual substantiation and legal foundation. It is a desperate and misguided appeal to emotion that should receive no credit in a court of law.

SECTION 5. Conclusions

3.56 The following conclusions may be drawn from the foregoing examination of Hungary's use in its Counter-Memorial of "general principles of environmental law", including the law of international watercourses:

- First, and foremost, insofar as those principles urge on co-riparian States the need for Agreements, the 1977 Treaty met that need.

- Those general principles do not constitute the applicable law in this case; that law is contained in the 1977 Treaty. However, even if such principles are in some way relevant, they do not advance Hungary's case, nor are they in any way inconsistent with that of Slovakia. In fact, if anything, they reinforce the soundness, from the point of view of environmental law and policy, of the G/N Project.

- Slovakia would underline once again that the "general principles of environmental law" invoked by Hungary are, by definition, general. They are hardly suited to regulating the obligations of the Treaty parties in relation to a project of the complexity of the G/N System, and indeed have in effect been given specific expression in the Treaty and the Project as it has developed.

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[79] See, generally, Slovak Counter-Memorial, paras. 9.80-9.94.

- In the latter regard, the Treaty is a lex specialis from which subsequently developing general principles would not derogate, even if they were somehow applicable.

- In the present instance, however, they are applicable to interpret the intention of the Parties to the 1977 Treaty but not to change it.

- Yet Slovakia has shown that, in any event, the conduct of Czechoslovakia and Slovakia throughout has been consistent with such principles.

- Moreover, Slovakia has demonstrated that it is Hungary that is in violation of the very principles it asserts, as well as some principles - such as that of equitable participation - that it conveniently ignores.

- Finally, Hungary's argument that the Court should not grant the relief requested by Slovakia because the 1977 Treaty is tainted by old regimes and rendered obsolete by new trends, is both misplaced and unfounded. There is no legal bar - deriving from international environmental law or any other branch of international law - to granting the relief Slovakia requests. On the contrary, to grant such relief would be to give effect to the norm of pacta sunt servanda. The environmental horrors paraded by Hungary have absolutely no basis in fact; on the contrary, serious and impartial studies have found environmental and water quality benefits from the Project. In addition, Slovakia's submissions are fully consistent with, and are indeed supported by, the concept of sustainable development, contrary to Hungary's unsubstantiated assertions. To accept Hungary's argument would be to encourage the repudiation of treaties on the flimsiest of pretexts.

CHAPTER IV. THE LAW GOVERNING THE VALIDITY OF HUNGARY'S SUSPENSION AND ABANDONMENT OF WORKS AND PURPORTED TERMINATION OF THE 1977 TREATY

4.01 In responding to two of the questions put to the Court under Article 2 of the Special Agreement, the Parties have given not only different substantive answers but have applied different rules of international law in arriving at those answers.

4.02 The Court will find in the earlier pleadings some arguments on the law applicable to answering Article 2(1)(a) ("whether the Republic of 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 the Republic of Hungary") and Article 2(1)(c) ("what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary")[1].

4.03 Some of Hungary's justifications for suspension, abandonment and termination of the Treaty are based on the law of treaties: the debate on them can be joined at the level of substance. But some of its justifications - where the law of treaties provides no assistance - are based on the law of State responsibility[2].

4.04 In its Counter-Memorial Hungary refers to "Slovakia's attempt to exclude the law of state responsibility ... in the mandate of the Court in the present case or in public international law more generally"[3]. Slovakia finds this way of putting the matter curious. The fact

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1 Particular reference may be made to the arguments on applicable law at paras. 8.09-8.25 of the Slovak Memorial; and paras. 9.19 and 10.03-10.77 of the Hungarian Memorial (where the applicable law is to be deduced from the substantive justifications for suspension, abandonment and termination advanced by Hungary); para. 1.03-1.06 and 9.95-9.101 of the Slovak Counter-Memorial; and paras. 5.03-5.22 of the Hungarian Counter-Memorial.

2 Slovakia has already drawn attention to the fact that this "mix and match" approach can lead to the adoption of curious positions. For example, a simultaneous reliance on Article 60 of the 1969 Vienna Convention and on countermeasures means that Hungary is at one and the same time declaring its termination to be lawful by reason of material breach; and protected from categorisation as not lawful by the law of State responsibility on countermeasures.

3 Hungarian Counter-Memorial, para. 5.08.

that Article 2(1) of the Special Agreement requests the Court to decide "on the basis of the Treaty and rules and principles of general international law" does not mean that therefore Hungary can seek to justify its suspension and termination by reference to both treaty law and the law of State responsibility. It simply means that the Court will look at the 1977 Treaty itself, and at the rules and principles of general international law to determine what is the applicable law. Space law is also part of general international law: Article 2(1) hardly turns that into "applicable law" to determine the legality or otherwise of the conduct of the Parties.

4.05 Slovakia has some difficulty in understanding the assertion that it is "attempting to exclude the law of State responsibility ... in public international law more generally". This case is concerned with the adjudication of certain specific points put to the Court, and it is in relation to these - and especially to questions 2(1)(a) and 2(1)(c) of the Special Agreement - that Slovakia believes that international law indicates the answers are to be found in the application of the principles of the Vienna Convention on the Law of Treaties. This is hardly excluding the law of State responsibility in public international law generally.

4.06 Against this background, Slovakia has thought it useful to address the issue of the applicable law in this case. In Chapter II it has addressed the issue as it applies generally in the present litigation. In this Chapter, Slovakia focuses on the applicable law to determine the legality or otherwise of Hungary's suspension and abandonment of works and purported termination of the 1977 Treaty.

Hungary's Reliance on "Necessity" as a Grounds Justifying its Breaches

4.07 Hungary usefully groups in its Memorial its grounds of justification, as enunciated in its 1992 Declaration[4]. Fundamental change of circumstances and material breach can

[4] See, ibid., para. 10.03, where Hungary distinguishes two groups of "material breach" - the "planned construction" of Variant C" (indent 5) and other alleged breaches. Hungary makes no real attempt to show that the latter could - even if correct - amount to material breaches entitling termination under Article 60 of the Vienna Convention. But it does not advance any argument in relation to these alleged breaches by Slovakia, that it was entitled to respond by way of countermeasures under the law of state responsibility. So here the Parties are in agreement that Hungary's arguments stand or fall by reference to the Vienna Convention on the Law of Treaties.

readily be perceived as reliance on the law of treaties. But Hungary's leading argument - "necessity" - is unambiguously said to be a ground for termination by reference to Article 33 of the ILC Draft Articles on State Responsibility[5].

4.08 Slovakia does not seek to "exclude state responsibility in public international law generally", nor indeed even to draw rigid divisions between State responsibility and the law of treaties. Slovakia stated at the very outset: "There can be no artificial and rigid separation of the law of treaties and the law of State responsibility[6]."

4.09 But not every norm of international law is applicable to every circumstance. Slovakia adheres to its position that the approach to applicable law must be such that: "Norms emanating from the different branches of international law must supplement and support each other, not render each other nugatory[7]."

4.10 The issue is this: Does the ground of necessity[8], as it is elaborated in the law of State responsibility, entitle Hungary to suspend, abandon and terminate the 1977 Treaty? Slovakia is convinced that the answer is to be given by applying the law of treaties - and that the law of State responsibility itself does not suggest otherwise. In other words, the law of State responsibility as it refers to the concept of necessity does not purport to provide a separate ground, over and above those elaborated in the Vienna Convention, to justify termination of treaties. The evolution of concepts regarded as within the law of State responsibility is proceeding exactly in a manner that supplements and supports the existing law of treaties. It does not purport - as Hungary's inappropriate use of it would do - to render nugatory the carefully fashioned provisions of the Vienna Convention.

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5 Hungary also relied on "subsequently imposed requirements of international law" which justify its termination of the Treaty, i.e., not the law of State responsibility, which might preclude wrongfulness, but the law of the environment and international watercourses, the breach of which (if it could be shown) is also said to be a ground for termination. On this too, see, Chapters II and III, above.

6 Slovak Memorial, para. 8.23.

7 Ibid.

8 Assuming, arguendo, that Hungary believed that such a state of necessity existed at the relevant time; and that objectively it did exist - but which Slovakia has shown not to be the case. See, paras. 7.53, et seq., 7.69, et seq., 8.32, et seq., and 8.51, et seq., below.

4.11 Hungary's suggestion that "necessity" was a proper ground for terminating the 1977 Treaty goes considerably beyond what has ever before been suggested in the debate about the correct relationship between the law of treaties and the law of State responsibility.

4.12 Part V, Section 3, of the Vienna Convention deals only with termination and suspension of the operation of treaties. Termination and suspension because of the misconduct of the other treaty party is dealt with in Article 60. Article 60(1) of the Vienna Convention provides that: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." The term "material breach" is defined in Article 60(3). Nothing in Article 60, or in Part V, Section 3 generally of the Vienna Convention, addresses the question of what other remedies might be available for breaches of non-material provisions.

4.13 What then is the relationship between the law of State responsibility and the law of treaties, and which is applicable law for the questions that the Court must determine in this case?

4.14 The broad demarcation between the law of treaties and the law of State responsibility is clear enough. The Vienna Convention deals with, inter alia, the permitted grounds for termination and suspension. And the law of State responsibility deals with the consequences of a termination or suspension that is unlawful. This natural relationship between the law of treaties and the law of State responsibility was well illustrated by the finding of the Court in the Tehran Hostages Case that:

> "Successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963 ..."

led to:

> "... conclusions which flow from it, in terms of the international responsibility of the Iranian state vis-à-vis the United States of America."

The Court found that due to breaches of relevant treaties (as well as of general international law), Iran

> "... has incurred responsibility toward the United States. As a consequence of this finding, it clearly entails an obligation on the part of the Iranian state to make reparation for the injury thereby caused... [9] ."

4.15 Although this correctly describes the essential relationship, it does not fully cover its entirety because the ILC itself, when discussing whether the draft Vienna Convention should include provisions on the legal liability arising from a failure to perform treaty obligations, had stated that this question

> "... involves not only the general principles governing the reparation to be made for a breach of a treaty, but also the grounds that may be invoked in justification of the non-performance of a treaty[10] ."

4.16 The ILC decided to put to one side difficult issues of State responsibility (and of State succession and of the outbreak of hostilities) and provided in Article 73:

> "The provisions of the present Convention shall not prejudge any question that may arise ... from the international responsibility of a state."

4.17 It has sometimes been suggested that Article 73, read together with the dictum cited in paragraph 4.15 above, means that the ILC itself was signalling that separate grounds for termination of a treaty might somehow exist under the law of State responsibility[11] .

4.18 But nothing in the texts of the ILC dictum or Article 73 suggest this - nor do other considerations.

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9 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3, at pp. 42-43 (para. 90).

10 Yearbook of the International Law Commission, 1964, Vol. II, pp. 175-176, para. 18.

11 See, P. Weil, "Droit des traités et droit de la résponsabilité", International Law in an Evolving World, Liber Amicorum Eduardo Jiménez de Aréchaga, Vol. II, 523-526.

4.19 The dictum of the ILC referred to the fact that justifications for non-performance might also be a matter of State responsibility. Whether a State incurs responsibility for violating a provision essential to the accomplishment of the object or purpose of the treaty (Article 60(3)(b)) may indeed be a matter of State responsibility. And unless it is, exceptionally, free from responsibility for its material breach, then the injured party will be entitled to terminate the treaty under Article 60(1).

4.20 But this is not at all the same thing as saying that there are separate grounds for termination beyond those indicated in the Vienna Convention. The ILC's dictum does not refer to additional termination grounds being a matter falling within State responsibility - it refers to an entirely different matter, that of non-performance (that might in certain circumstances lead the other party to terminate). And to read Article 73 as allowing additional grounds for termination, beyond those set out in the Vienna Convention, is to read into the text what is simply not there. How does the stipulation that "the present Convention shall not prejudge any question that might arise ... from the international responsibility of a state" mean this? "A question that might arise ... from the international responsibility of a state" is not, on any normal reading, an acknowledgment that the law of international responsibility of States might provide additional grounds for termination.

4.21 Not only do the texts of the celebrated ILC comment and of Article 73 not sustain such a conclusion but both the context and indeed the travaux préparatoires suggest otherwise. The real debate has been - until this case - about the role of the law of State responsibility in the face of the undeniable fact that Article 60 addresses only suspension and termination of the treaty for material breach. The question of remedies for a non-material breach (indeed even of an important breach of a provision not essential for the securing of the objects and purposes of the treaty) is simply not dealt with under the Vienna Convention. It may be that the law of State responsibility will have a role to play here; but neither the Vienna Convention nor the work of the ILC on State responsibility suggests that in so doing it is enlarging the permitted grounds for suspension or termination.

4.22 Instead, the law of countermeasures may play its part as a response, which the law of State responsibility declares non-wrongful, to a non-material breach of a bilateral treaty.

This was exactly the import of the Air Services Case[12], in which the arbitrators found that the action of the United States was a permitted countermeasure to a breach of a treaty provision by France. France's breach of treaty was never determined to be "material"; the importance of proportionality[13] in the application of the countermeasures was emphasised; and the Tribunal thought it important that the countermeasures were exactly directed towards securing full treaty performance by France. The United States did not seek the remedy of termination.

4.23 It is in this way that Article 73 of the Vienna Convention and the law of State responsibility can be understood to be harmonious and mutually supportive. The law of countermeasures may be relevant to answering a treaty question on which the Vienna Convention is silent - namely, how may a state respond to a non-material breach. As one writer has explained:

> "In view of the sound policy reasons for preserving a deterrent to minor as well as to major treaty breaches, the references to materiality in the text should be read not as excluding entirely the right to respond to minor breaches, but simply as a means to ensure that minor breaches are not used as a pretext for denouncing a treaty which has become inconvenient or for suspending performance of more than proportional obligations[14]."

4.24 The specification of the grounds for suspension or termination for material breach indicates that suspension and termination were not left to be available for non-material breach by virtue of some parallel development in the law of State responsibility[15]. Equally, because the ILC had so carefully considered whether to include force majeure generally as a ground for

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12 Case Concerning the Air Services Agreement of 27 March 1946 (United States v. France), 54 International Law Reports 304 (1978).

13 The countermeasures had to have "some degree of equivalence with the alleged breach"; ibid., at p. 338.

14 L. Damrosch, "Retaliation or Arbitration - or Both? The 1978 United States-France Aviation Dispute", 74 American Journal of International Law (1980) 785, at p. 790.

15 "Only a stringent limitation of the right to respond to a breach with unilateral abrogation of the infringed treaty is in accordance with reciprocity as the underlying principle and with the precept of proportionality governing all responses to international wrongs. Termination is the most rigorous remedy at the disposal of the injured state, but by no means the only one. Therefore, it is not at all exaggerated to say that in order to justify putting an end to the whole treaty, the breach must itself be of a kind that does practically that." B. Simma, "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law", 20 Österreichische Zeitschrift für öffentliches Recht (1970) 5, at p. 29. To the same effect, see, D. Greig, "Reciprocity, Proportionality and the Law of Treaties", 34 Virginia Journal of International Law (1994) 275, at p. 360.

termination, but had ultimately decided that only supervening impossibility of performance should be a ground under Article 61 for suspension or termination, it is not to be supposed that "necessity" is reserved as a ground justifying termination under the law of State responsibility. There is nothing in the texts of the Vienna Convention (including Article 73), or the draft articles on State responsibility on necessity, or the travaux to the Vienna Convention, or the ILC's work on State responsibility, that lead to these conclusions. And reasons of policy also dictate otherwise.

The Work of the International Law Commission on the Law of Treaties

4.25 The relationship between the law of State responsibility and the law of treaties was considered on many occasions.

4.26 Sir Gerald Fitzmaurice addressed the matter in his 4th Report in 1959, and would indeed have included it in his articles "Circumstances justifying non-performance of a treaty" and "Consequences of and means for redress for breach of a treaty". His draft articles 18 and 20 would have entitled non-performance or non-observance of a treaty obligation by way of reprisal or reciprocity[16]. The Commentary to Article 18 ("Non-performance by way of legitimate reprisals") makes it clear that it was not being suggested that a party could terminate the treaty - that was still dependent upon there being a fundamental breach of the treaty. The treaty would remain in force, even if non-performance of a particular provision might be allowed. For Fitzmaurice, his draft articles exactly contemplated cases where the breach was not fundamental and where therefore no possibility of termination arose. And indeed his draft article 18(5) required that non-performance based on a legitimate reprisal must cease as soon as the other party resumed its performance of its treaty obligations[17].

4.27 With regard to "necessity", Fitzmaurice stated in the Commentary to his draft article 17 dealing with emergency conditions, that he did not consider that any general doctrine of necessity should be included among the grounds justifying non-performance of a

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16 Yearbook of the International Law Commission, 1959, Vol. II, pp. 45-46.

17 Ibid., pp. 66-71.

treaty[18]. He did refer separately to major emergencies arising from natural causes. Paragraph 3 of his draft article 17 provided that, unless the emergency renders further performance totally impossible, terminating the treaty by reason of supervening impossibility of performance, the emergency could justify only temporary non-performance.

4.28 Thus neither a state of necessity, nor indeed a natural disaster, could justify termination of a treaty unless it fell within the grounds of supervening impossibility of performance[19].

4.29 Questions relating to the relationship of the law of State responsibility with that of the law of treaties appeared again in the 1964 Report of Sir Humphrey Waldock. In draft article 55 on pacta sunt servanda, Waldock proposed the inclusion of a paragraph stating that the failure of a State to comply with its obligations in good faith engages its responsibility unless this failure is excusable under the general rules of State responsibility[20]. Nowhere was it suggested that an excusable reason for not complying with an obligation also gave the non-complying state a right of termination or suspension of a treaty.

4.30 It is striking that, when the ILC, in its 1964 Report to the General Assembly, noted that it had decided to exclude from its codification of the law of treaties matters related to the law of State responsibility, it referred to grounds that could be invoked to justify non-performance. There was no reference at all to reserving for the law of State responsibility further entitlements to terminate or suspend a treaty[21].

4.31 Again, in its 1966 Report to the General Assembly, the ILC (in paragraph 31) noted that the draft articles on the law of treaties did not contain provisions concerning the international responsibility of a State for its failure to perform a treaty obligation. But again, there

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18 Ibid., p. 66, para. 77.

19 Ibid.

20 Yearbook of the International Law Commission, 1964, Vol.II, p. 7.

21 Ibid., pp. 175-176.

was no reference to suspension or termination. Professor Ago (as he then was) indicated en passant that he was reserving the question of whether a treaty could be terminated as a result of State responsibility. He offered no explanation and the entirety of the rest of the travaux préparatoires in fact reject that possibility[22].

4.32 It is true that in its Commentary to Articles 39-42 of the Vienna Convention, the ILC stated that it had decided not to include "the possible implications of a succession of States or of the international responsibility of a state in regard to the termination of treaties"[23]. But it is clear that the ILC was not, in this brief phrase, reserving the question of whether State responsibility could offer additional grounds for terminating a treaty. This phrase follows closely on a comment which clearly indicates the contrary. Referring to Article 39(2) which provided that "A treaty may be terminated ... only as a result of the application of the terms of the treaty or of the present articles", the ILC stated:

> "(5) The words 'only through the application of the present articles' and 'only as a result of the application of the present articles', used respectively in the two articles are also intended to indicate that the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles are exhaustive of all such grounds, apart from any special cases expressly provided for in the treaty itself[24]."

The provision in the last line did not say "apart from any special cases expressly provided for in the treaty itself or by the law of state responsibility".

4.33 The general reservation that came to be accomplished in Article 73 in fact followed upon a debate that was almost entirely on State succession. At the last moment Professor Lachs (as he then was) proposed broadening the formula to include a reference to State responsibility; and Ago added a further reference to armed hostilities[25].

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22 Yearbook of the International Law Commission, 1966, Vol. I, Part II, p. 302, para. 31.

23 Ibid., p. 237, para.5.

24 Ibid. (emphasis added).

25 Yearbook of the International Law Commission, 1966, Vol. I, Part 2, pp. 297-298 and 301-303.

4.34 The travaux of the Vienna Convention thus confirm the texts of Articles 42(2), Articles 54-64 and Article 73 that the grounds for suspending or terminating a treaty are indeed only those enunciated in the Vienna Convention. Such reservations as may have been made for future agreed work on the law of State responsibility do not detract from this fact.

The Work of the International Law Commission on State Responsibility

4.35 Hungary is misguided in insisting that the law of State responsibility provides it with its leading ground of justification - necessity. Indeed, it is doubly misguided: first, because the law of State responsibility itself, as it is evolving in the work of the ILC, does not make a claim that necessity entitles a State to terminate a treaty; and secondly, because in any event the ILC's criteria for "necessity" are not met in the present case.

4.36 Article 2 of Part 2 of the draft articles on State responsibility adopted in 1983 provides:

> "... the provisions of this part govern the legal consequences of any internationally wrongful act of a state, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question[26]."

Insofar as one of the consequences of material breach is concerned - the right to terminate - that has surely been determined by other rules of international law relating specifically to the internationally wrongful act in question, as those contained in the Vienna Convention. Since Part 2 attempts to indicate when and how a State may respond by countermeasures to a breach of an international obligation, including a breach of treaty, we may conclude that countermeasures do not countenance suspension or termination of a treaty arising as a response to a material breach thereof.

4.37 This was specifically affirmed in the Commentary to Article 16 [27], by the Special Rapporteur, Professor Riphagen, who said that:

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[26] Yearbook of the International Law Commission, 1983, Vol.II, Part 2, p. 42.

[27] Article 16(a) provided: "The provisions of the present articles shall not prejudge any question that may arise in regard to (a) the invalidity, termination and suspension of the operation of treaties."

> "... it is necessary to indicate what falls outside the scope of those articles - in other words, fields of internationally wrongful acts and/or legal consequences thereof in regard to which those articles are not even meant to be residual rules.
>
> One such field of legal consequences is formed by the legal consequences of an internationally wrongful act on the level of the invalidity, termination and suspension of the operation of treaties, a matter dealt with in the 1969 Vienna Convention[28]."

In an interesting comment, the Special Rapporteur observed that Article 73 of the Vienna Convention was "sweeping", and then continued:

> "In point of fact, Part 2 of the draft in its entirety was based on the premise that the question of invalidity, termination or suspension of the operation of a treaty as such is situated on a quite different legal plane from that of the legal consequences - in terms of allowed or prescribed conduct of states - of an internationally wrongful act[29]."

Further, it is made explicit in his comments that what was reserved by Article 73 of the Vienna Convention was exactly what it did not purport to deal with. Accordingly, draft article 16 as submitted by the Special Rapporteur reserved the question of the invalidity, termination and suspension of the operation of treaties. Where a matter was covered by the Vienna Convention, the reciprocal courtesy should be extended by indicating that the matter was reserved to that instrument[30].

4.38 The draft articles 6-16 of Part Two proposed by Professor Riphagen (inter alia) were referred to the Drafting Committee by the Commission at its thirty seventh and thirty eighth sessions. Article 8 refers to suspension of performance of an obligation by way of reciprocity (with a close link being required); and Article 9 refers to suspension of performance of obligations by way of reprisals (with proportionality being required). It is clear from the texts of these articles that they were directed to temporary non-performance of specific obligations, and not

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28 Yearbook of the International Law Commission, 1985, Vol.II, Part I, p. 15.

29 Ibid., Vol.I, p. 86, para. 5.

30 1891st Meeting, 30 May 1985, Yearbook of the International Law Commission, 1985, Vol. I, p. 93, para. 13.

to suspension of a treaty as a whole - still less to its termination. The more recent text of Article 11[31] speaks clearly of the entitlement "not to comply with one or more of its obligations towards a state ... as necessary to induce it to comply with its obligations..."[32]. (This assumes, of course, that the obligations continue - and if they are treaty obligations, that the treaty has not been terminated.)

4.39 There is thus no suggestion that the law of countermeasures envisages the recognition of any new ground of suspension or termination of a treaty beyond those designated in the Vienna Convention.

4.40 Although Hungary does allege breaches of treaty by Slovakia, it seeks to justify a right to terminate the 1977 Treaty because of these breaches by reference to the Vienna Convention rather than to countermeasures.

4.41 It is Hungary's main justification for termination - "necessity" - that is most insistently rooted in the law of State responsibility. The ILC has acknowledged that "grave danger to the ... ecological preservation of all or some of its territory" could constitute a "necessity" which a State might use "to justify its acts"[33]. That State of necessity is, however, subject to many conditions, including the imminent character of the danger, the impossibility of averting it by any other means, "and the necessarily temporary nature of this justification"[34]. By definition, necessity cannot be a ground - even within the law of State responsibility - for terminating a treaty. And in none of the cases referred to by the ILC where necessity was used to justify non-performance of a treaty obligation was necessity used to terminate the treaty[35]. And of course it is well established

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31 A/CN 4/L.480, 25 June 1993.

32 Subject to certain conditions that, in any event, are not met in this case.

33 Report of the ILC on the work of its 32nd session, p.35, Yearbook of the International Law Commission, 1980, Vol. II, Part 2, para.3.

34 Ibid., p.39, para.14.

35 Anglo-Portuguese dispute of 1832, 10 United Nations Reports of International Arbitral Awards, pp. 280-281; Oscar Chinn, Judgment, 1934, P.I.C.J. Series A/B, No .63, p. 65, at p.89; Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952, p. 176. They are discussed at Report of the International Law Commission on the work of its 32nd session, Yearbook of the International Law Commission, Vol. II, Part 2, pp.40-42.

that a State may not rely on "necessity" to terminate financial obligations, even if it seeks to postpone payment. This line of cases too was referred to by the ILC when discussing its draft article on necessity[36].

4.42 Slovakia concludes that necessity - even if the conditions for its invocation are met - is not regarded in the law of State responsibility as having the ability to terminate an obligation. A fortiori, it is not regarded, even within the law of State responsibility, as having the ability to terminate an obligation entered into by treaty, whose terms are governed by the Vienna Convention.

4.43 Not only does the Vienna Convention itself determine exhaustively the circumstances in which a treaty may be suspended or terminated (Article 73 not indicating any contrary conclusion); but as the ILC continues its work on countermeasures and on necessity, it equally assumes that it is not formulating additional grounds for the suspension and termination of treaties.

4.44 Policy considerations support these clear findings of law. If a State could be totally excused from performing a treaty by reliance on a justification in the draft Articles on State Responsibility, "the treaty will no longer be performable ... De facto this means that the factor precluding wrongfulness brings the treaty to an end"[37]. The ILC deliberately drew very narrowly the grounds for suspension and termination in the Vienna Convention, wishing to preserve the stability of international contracts. In commencing what is now Article 42, the Commission stated that it was desirable:

> "... as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles[38]."

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36 Ibid., pp.37-8.

37 D.W. Greig, op.cit., at p. 376. Professor Greig speaks of "the unsatisfactory nature of this result".

38 Yearbook of the International Law Commission, 1966, Vol.II, p. 236 (emphasis added).

There is no reason to suppose that what they so carefully achieved with one hand they are throwing away with the other.

4.45 The same considerations of stability and good faith also underlie the deliberately restrictive drafting of Article 61 on Impossibility of Performance[39]. Where States have freely entered into treaties, they are entitled to believe the treaty will continue in existence save insofar as they have expressly agreed otherwise or insofar as the termination and suspension provisions of the Vienna Convention provide otherwise.

4.46 In its Counter-Memorial[40], Hungary returns to the theme of the relationship between the law of State responsibility and the law of treaties - but often in terms so broad that they have no relevance for the issues that the Court has to determine under the Special Agreement. The questions posed are not whether certain specific violations of obligations by Hungary under the 1977 Treaty can be justified by reliance on the law of State responsibility[41], but whether Hungary was justified in suspending and terminating the entire Treaty by invoking the ground of necessity.

4.47 Hungary claims that the incompleteness of the Vienna Convention "especially with regard to claims of invalidity, suspension or termination" is recognised and applied in the Rainbow Warrior Case. Slovakia believes this not to be so.

4.48 It is not to be thought that the Rainbow Warrior arbitration is compelling authority that the law of State responsibility authorises a party to a treaty to terminate that treaty on grounds other than those enumerated in the Vienna Convention. In that case, the French removal of two officers from the Pacific island where they were serving their sentence appeared to violate the agreement that had been made between France and New Zealand. The Tribunal there stated that:

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39 See, D. Bowett, "Treaties and State Responsibility", Mélanges Michel Virally, 137-145, at p. 139.

40 Hungarian Counter-Memorial, paras. 5.03-5.22.

41 To which Slovakia's answer would still be in the negative.

> "... the legal consequences of a breach of a treaty, including the termination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary law of state responsibility[42]."

4.49 In that case, France relied on the doctrine of distress to preclude its wrongfulness in breaching the terms of agreement. But it did not seek (as does Hungary in invoking necessity) to terminate the Treaty. The Tribunal did not accept distress as an applicable ground[43] and found other reasons for precluding wrongfulness on the part of France. France was absolved from future performance because the treaty had terminated according to its terms, but France still had a duty to make reparations for the breach. The uncertain basis of the Award is underlined by the fact that there had been material breaches of the agreement. That the law of State responsibility did not, on these facts, absolve France from the treaty breach was emphasised by the duty France had to make reparation. At the same time, the obligation to return the officers ended when the three year period for their detention ran out. This was not a ground based in the law of State responsibility but precisely on treaty law. And France was absolved from future performance of the agreement.

4.50 Nothing from these very singular findings - which are certainly open to criticism - is authority for the proposition that necessity is now to be regarded as a ground for lawfully terminating a treaty[44]. The Tribunal did imply that distress, had it existed, could exclude wrongfulness - but as a response to a charge by New Zealand of material breach, not as a basis for a claim by France to terminate the treaty.

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42 Rainbow Warrior (New Zealand v. France), 82 International Law Reports (1990) 499, at p. 551.

43 Ibid., at pp. 553-555. Nor was necessity found to apply to these circumstances.

44 Professor Weil, in his exposition of the Rainbow Warrior Case, asserts that "Le breach of Treaty n'est pas regi par le droit des traités mais par celui de la responsabilité": "Droit des traités et droit de la responsabilité", Liber Amicorum Jiménez de Aréchaga, 523, at p. 528. Slovakia believes this to be far too broad a claim for the reasons set out in this Chapter. But in any event, none of Professor Weil's arguments are in fact arguments in support of the law of State responsibility providing grounds for termination of a treaty additional to those in the Vienna Convention. They are all directed to justifications for breach rather than grounds for termination. Hungary's claim remains beyond any current point of legal authority, or even debate.

4.51 In its Counter-Memorial Hungary refers to many propositions on State responsibility that have no relevance to the present issue. It cites the ILC's statement that the origin of an obligation does not justify the choice of one form of reparation over another[45]. But this ILC comment was never directed at the issue of whether necessity could provide a ground of termination of a treaty, outside of the Vienna Convention. Again, its citation of Article 17(1) - that the origin of an international obligation breached by a State does not affect the international responsibility of that State[46] - equally takes one nowhere. Hungary tells the Court that it relies on the customary international law of treaties in order to demonstrate the lawfulness of its conduct - but nothing in the case turns on this at all[47].

4.52 Nor is one led in that direction by the argument that the international law of State responsibility admits of no distinction in responsibility as it applies to delicts and contracts, in contrast to much domestic law[48]. Leaving aside whether this is an accurate description of domestic law - where the current trend is often towards a single "law of obligations", the point does not advance matters. The fact that there is indeed a law of responsibility, which applies to violations of treaties and non-contractual obligations alike, simply does not answer the question of whether the grounds for termination of a treaty are therefore governed by provisions outside of the Vienna Convention.

4.53 By contrast, Slovakia's arguments on the relationship between the law of treaties and the law of State responsibility are directed precisely to the issues before the Court. The law that governs Hungary's claimed justifications for suspending and abandoning works and for terminating the 1977 Treaty is the Vienna Convention on the law of treaties. This is because the Vienna Convention, by reference to its terms and to its travaux préparatoires, clearly so provides. It is further so, because the law on State responsibility, including specifically the law on necessity,

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45 Hungarian Counter-Memorial, para. 5.16.

46 Ibid., para. 5.17.

47 Ibid., para. 5.05, and fn. 4. Hungary reiterates the inapplicability of the Vienna Convention to the 1977 Treaty. Slovakia both notes that Hungary has developed no arguments dependent upon this; and affirms the correctness of its own analysis in the Slovak Memorial, para. 6.59. See, in this regard, para. 2.68, et seq., above.

48 Hungarian Counter-Memorial, para. 5.19, drawing on the Rainbow Warrior Award.

clearly does not intend to offer a further ground for termination or suspension of a treaty. The law of State responsibility, too, assumes that the Vienna Convention governs suspension and termination of treaties.

CHAPTER V. THE INVALIDITY OF THE LEGAL GROUNDS INVOKED BY HUNGARY FOR ITS SUSPENSION AND ABANDONMENT OF WORKS AND PURPORTED TERMINATION OF THE TREATY

SECTION 1. Introduction

5.01 Hungary considers that it is relieved of the obligation to rebut Slovakia's discussion of Hungary's violations of the 1977 Treaty set out in the Slovak Memorial. Its pretext is that Slovakia has examined separately Hungary's internationally unlawful actions, on the one hand, and Hungary's attempts at justification on the other hand, but without relating one to the other.

5.02 According to Hungary:

> "There is ... little to be said on this score, since the Slovak Memorial limits itself to the repeated assertion of Hungarian non-compliance with treaty provisions, without bothering to examine the legal grounds on which Hungary claimed to be acting (these are only examined in a subsequent chapter, and then only partially)[1]."

And in a footnote it is added:

> "The illogicality of the Slovak Memorial on this point appears clearly from para 6.90:
>
> > "It is not the purpose of this Chapter to deal with these so-called 'justifications'. It suffices to show that such a unilateral termination that relates to the 1977 Treaty ... is per se an extremely serious breach of well-established and fundamental principles of general international law."
>
> It hardly needs saying that until it has been shown that a purported termination is unjustified, that termination cannot be described as a breach of international law[2]."

5.03 It is surprising to find such a statement being made by Hungary who,

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1 Hungarian Counter-Memorial, para. 5.24.

2 Ibid., fn. 16, p. 207.

elsewhere, attaches such importance to the law of international responsibility[3]. In accordance with the approach commonly followed where issues of responsibility are involved, it would appear logical in the most elementary sense to determine: first, whether, prima facie, an internationally unlawful act has been committed; second, whether circumstances exist that nonetheless exclude the unlawful nature of the act. It is on this basis that the first section of the ILC's Draft Articles on State Responsibility proceed, Chapters I-IV of which are devoted to various aspects of internationally wrongful acts by States, while Chapter V deals with "circumstances excluding wrongfulness". However, as explained in Chapter IV above, the law of State responsibility does not provide a ground for termination of treaties.

5.04 This approach, nevertheless, is no less appropriate for the law of treaties. Regardless of Hungary's particular aversion to it, the cardinal principle and point of departure for this branch of law is the maxim: pacta sunt servanda. The principle being stated, however, it is correct that:

> " ... this needs qualification. A party may in certain limited circumstances denounce or withdraw from a treaty, or the operation of a treaty may for a time be suspended, or the treaty may terminate[4]."

But this is a question only of exceptions to the basic rule and, here again, it is both legitimate and logical to start, first, from the basic principle in order to ascertain if there is a prima facie breach, and second, in this case, whether there are any circumstances that justify the conduct in question.

5.05 Two conclusions can clearly be drawn from the objection raised by Hungary as to Slovakia's method of proceeding[5]. In the first place, it clearly follows that Hungary has recognised that, prima facie, it acted in violation of its conventional obligations arising from the 1977 Treaty and the agreements linked or related to it. This is an

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3 See, Chapter IV, above.

4 Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, 9th ed., Longmans, London, 1992, p. 1256; emphasis added.

5 See, para. 5.02, above.

unambiguous acceptance of the material nature of the breaches[6] and "a recognition as to the imputability of ... the activities complained of"[7]. And from this it follows, secondly, that there is no point in this Chapter in returning to the breaches: these are admitted and recognised by Hungary; the only question remaining to be dealt with here is whether exceptional circumstance exist to justify them.

5.06 Although the Hungarian Counter-Memorial is rather unclear here, it appears that Hungary continues to rely on the same three arguments to justify in a general way the validity of the prima facie breaches constituted by its suspension and abandonment of works and its purported termination of the 1977 Treaty:

- An alleged "state of necessity";
- An alleged fundamental change of circumstances;
- Alleged breaches of the 1977 Treaty by Czechoslovakia.

It is noted that the very strange argument based on impossibility of performance contained in the Hungarian Memorial seems to have been abandoned in its Counter-Memorial[8]. However, the latter devotes, once more, many pages to an attempt to show - against all logic - the lack of relevance of Article 27 of the Treaty, dealing with "Settlement of Disputes".

5.07 Slovakia has responded to these arguments at length in its previous pleadings[9]. It is nonetheless useful to re-examine them in the light of the new legal arguments and, in particular, the new presentation of the facts contained in Hungary's Counter-Memorial.

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6 Since, definitionally, according to Article 60 of the Vienna Convention, only a material breach may justify the termination or suspension of the treaty. The paradox here is that Hungary invokes its own breaches.

7 Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 45.

8 Hungarian Memorial, paras. 10.41-10.58.

9 Slovak Memorial, Chapter VII; Slovak Counter-Memorial, Chapter X.

SECTION 2. The Alleged Justifications

A. The Alleged "State of Necessity"

5.08 The use in the Hungarian Counter-Memorial of the "state of necessity" as a means to justify violations of the 1977 Treaty is very odd. While this concept was used by Hungary in its Memorial to justify the termination of the Treaty[10], in its Counter-Memorial it is used only in relation to the suspension and subsequent abandonment of works[11] - although in essence Hungary limits itself to referring back to its Memorial - declaring "groundless" the Slovak assertion "that Hungary did not believe that a state of necessity existed"[12], and discussing briefly only "two points of a more general character"[13]. The first is obscurely titled: "The invocation of necessity" and simply repeats the arguments made in the Hungarian Memorial; the second focuses on: "The relevance of Article 27 of the Treaty".

5.09 Slovakia considers that necessity is not a ground in law for suspending or terminating a treaty. As shown in the previous Chapter, the law governing the validity of Hungary's suspension, abandonment and purported termination of the 1977 Treaty and related agreements is the law of treaties and, clearly, necessity is not a justification recognised by the law of treaties[14].

5.10 Nonetheless, and with the aim of providing a complete answer to Hungary's argument, Slovakia will demonstrate below that, in any case, there was no "necessity" in the present case.

5.11 In its Memorial, Slovakia demonstrated that Hungary did not believe, at the moment it unlawfully suspended, abandoned its performance under and purported to

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10 Hungarian Memorial, paras. 10.06-10.40.

11 Hungarian Counter-Memorial, para. 5.25, et seq.

12 Ibid., para. 5.25.

13 Ibid.

14 See, para. 4.07, et seq., para. 4.27, et seq., above, and para. 8.51, et seq., below.

terminate the 1977 Treaty, that a state of necessity existed[15]. In response, Hungary adopts a tone of indignation, claiming to regard this as an accusation of bad faith, while at the same time hiding behind the fact that various NGOs active in the field of the environment shared its concerns. This fails to respond to the question as to whether or not the initiatives taken by Hungary between 13 May 1989 (the suspension of works at Nagymaros) and 19 May 1992 (the notification of termination) were founded on Hungary's genuine conviction that the completion of the Project would create a major ecological risk and that this meets the requirements of the defence of necessity under the law of State responsibility. Slovakia has shown that the response to this question is negative; Hungary has failed to show the opposite; it, in fact, recognises that "the realisation of the Project ... posed an enormous financial burden which the deteriorating state budget could hardly finance"[16], which is not a legitimate basis for invoking a defence of necessity.

5.12 It is important to explain once more the exact significance of Slovakia's approach. It is not argued that Hungary did not invoke as its reason ecological impacts of the Treaty project. Hungary did so repeatedly from May 1989 onward (although it must be recalled that this was only three months after Hungary had obtained the formal acceleration of the work schedule - in the Protocol of 6 February 1989 - also on the basis of ecological arguments). Nor is it Slovakia's point that Hungary did not consider itself to have any option but to take unilateral actions in violation of the 1977 Treaty - which, after all, betokens a type of "necessity", if only in its everyday (not its legal) sense. Hungary no longer considered it convenient to meet its financial obligations and, knowing that financial considerations did not constitute a ground to escape its legal obligations[17], therefore turned to environmental risks[18]. In short, Hungary "disguised" a situation of what it considered was "economic necessity" as one of an "ecological necessity". Like the sorcerer's apprentice Hungarian authorities find themselves overwhelmed by the movement their actions had triggered. Their arguments were taken up with enthusiasm by organisations active in the defence of the environment - all the

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15 Slovak Memorial, paras. 8.29-8.57.

16 Hungarian Counter-Memorial, para. 2.10.

17 See, e.g., Serbian Loans, Judgment No. 14, 1929, P.C.I.J, Series A, No. 20, pp. 39-40, or Russian Indemnity Case, United Nations Reports of International Arbitral Awards, XI, p. 44.

18 See, the Hardi Report of September 1989 (Hungarian Memorial, Vol. 5 (Part I), Annex 8, whose logic was similar to that of the Marjai letter of 19 May 1984. See, Slovak Memorial, para. 3.37, et seq., and Slovak Counter-Memorial, paras. 5.29, et seq.

more so because ecological issues in Central and Eastern Europe, and particularly in Hungary, had become a powerful factor in the struggle against the communist regimes.

5.13 According to Hungary itself, the excuse of necessity can only be invoked under the strictest of conditions, which include:

> "(1) the absolutely exceptional nature of the alleged situation; (2) the imminent character of the danger threatening a major interest of the State[;] and (3) the impossibility of averting such a danger by other means[19] ."

5.14 Slovakia has shown in its Counter-Memorial that none of these conditions has been met in the current dispute[20] . And this demonstration is repeated below in the final Sections of Chapter VII and VIII. The new "Scientific Evaluation" offered by Hungary in no sense modifies this conclusion as is amply demonstrated in Volume II of this Reply; moreover, Hungary in no way shows how the problems were perceived in 1989; it only tries to show how they could be presented in 1994 for the sole purpose of litigation.

5.15 Furthermore, Hungary makes no attempt to link the findings of its "Scientific Evaluation" set out in Volume 2 of its Counter-Memorial to a legal theory that would establish their relevance in terms of justifying Hungary's breaches of the 1977 Treaty and its related agreements, the material nature of which Hungary recognises[21] .

5.16 Hungary claims that:

> "At the time when suspension of work was decided on, Hungary anticipated severe damage to flora, fauna, agriculture and sylviculture in the region, and had concern over the seismic integrity of the Project. But, above all, irreversible damage was foreseen which could affect the drinking water for millions of people[22] ."

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19 Hungarian Memorial, para. 10.16.

20 Slovak Counter-Memorial, paras. 10.40-10.60.

21 See, para. 5.05, above.

22 Hungarian Counter-Memorial, para. 5.27.

But this is not so: Hungary nowhere demonstrates that these alleged risks actually existed at the time. Nonetheless, Hungary suspended and abandoned the works and purported to terminate the Project in breach of all its Treaty obligations.

5.17 As will be fully demonstrated below in Part III (as well as in Volumes II and III of this Reply) - and only highlighted here - the facts on which Hungary relies entirely fail to establish the three principal bases on which it claims to justify its invocation of a "state of necessity"[23]. These bases concern: (i) drinking water quality; (ii) earthquake risk; and (iii) the "anticipated severe damage to flora, fauna, agriculture and sylviculture in the region".

5.18 First, as to drinking water quality - and Hungary's pleadings are focused essentially on Budapest's drinking water - the following conclusions are evident: (i) the aquifer underlying the region of the Project, which Hungary wrongly fears may be irreversibly damaged by the Project, is the source of drinking water for Bratislava, supplying not one drop to Budapest and has in no way been affected adversely by implementation of the Project; and (ii) the Project is not shown to have affected or be capable of affecting in the least the bank-filtered wells downstream of Nagymaros that are the only upstream source of Budapest's drinking water[24].

5.19 Second, the attempt in Hungary's "Scientific Evaluation" to demonstrate a "state of necessity" based on the risk of damage from earthquakes (and the alleged failure of the Project to meet appropriate engineering standards in the light of this risk) relies on incorrect (and as to its importance, greatly exaggerated) data and unproven hypotheses. The "Scientific Evaluation" calls for more study on the basis of the lack of adequate information available to the author of Hungary's analysis in Volume 2 of its Counter-Memorial, even though this information has been in Hungary's possession from the start as joint participant in the Project; and at the same time the "Scientific Evaluation" ignores recent studies that are directly relevant to its risk assessment, such as the widely accepted 1991 reevaluation downward of the magnitude of the 1763 earthquake at Komárno, which is the only historically recorded earthquake of importance in the region. Thus, Hungary's analysis is scientifically invalid; and the information available to evaluate earthquake risk and engineering

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23 See, para. 5.13 above.

24 See, para. 12.03, et seq., and Illus. No. R-4, appearing before Chapter XI, below.

standards, particularly as to the safety of dykes, has either not been examined or has been deliberately ignored[25]. There is no question that the area in which the G/N Project is located is relatively inactive seismically and that the risk of earthquake damage to the critical parts of the Project is relatively low. The applicable degree of risk was carefully calculated and reevaluated in the light of new scientific knowledge and technological advances, and the design and construction of the Project was based on appropriately updated standards.

5.20 Third, it is clear - not least on the basis of actual data of over two years of operation of the Gabčíkovo section of the Project - that the flora and fauna in the floodplain region can be (and on the Slovak side have been) restored to their pre-1960s condition by taking (inter alia) the steps to supply water to the sidearms contemplated under the Project (already at the time Hungary began to breach the Treaty in May 1989). This is proven by actual data taken from the Slovak sidearms, which have been supplied with water and have been rejuvenated. In contrast, Hungary's "Scientific Evaluation" is based on an entirely theoretical analysis, whose errors and omissions are pointed out in Part III and in Volumes II and III of this Reply[26].

5.21 Turning, then, to the strict conditions considered essential in order to invoke "necessity"[27]: first, there was certainly no situation here of an "absolutely exceptional nature":

- As to drinking water, the Project posed no risk at all to the drinking water of Budapest (or any other town or village); the situation is in no way exceptional, and Hungary's allegation, which is no more than "that

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25 For more detailed explanation, see, para., 12.54, et seq., below.

26 See, para. 12.25, et seq., below. As to agriculture and sylviculture (forestry), the only damage shown was that anticipated and accepted by the Treaty parties in entering into the Treaty - mainly the use for the reservoir and the canal of forestry areas and agricultural lands (the latter being solely on the Slovak side). No scientific basis for predicting any other adverse impacts as a result of the operation of the Project has been shown. See, para. 13.01, et seq., below.

27 See, para. 5.13, above; see, also, Slovak Counter-Memorial, paras. 10.41-10.60.

there are both positive and negative effects"[28], hardly seems to suggest otherwise;

- As to earthquake risk, the relevant region is not seismically active, and earthquake risk was fully accounted for in the design and construction of the Project; Hungary's allegation of "reasonable grounds for concern, review and reassessment of risks" could not constitute a situation of an absolutely exceptional nature;

- As to flora and fauna, there is no evidence of likely adverse effects that were not either accepted in advance by the Treaty parties (i.e., by definition, unexceptional), or capable of mitigation or elimination by the measures planned under the Project.

5.22 Second, as to the "imminent character" of the danger, there was no danger to the quality of drinking water; no high risk of earthquake danger, and none not adequately anticipated and reflected in the Project's plans and construction; and no danger threatens the flora, fauna, agriculture and forests not accepted in advance by the Treaty parties or capable of being averted or mitigated by implementing the Project's measures planned (in particular, to supply direct water recharge into the sidearms).

5.23 Third, the condition of "averting the danger by other means" can apply only to the alleged threat to flora and fauna, etc. The experience of two years' operation of the Gabčíkovo section under Variant "C" demonstrates that other means are entirely effective; and Hungary seems now to have acknowledged this by signing the Agreement of 19 April 1995, under which water will now be supplied by direct recharge to the side arms (and flora and fauna) on the Hungarian side.

5.24 In any event, Slovakia considers that, as a matter of law, the state of necessity invoked by Hungary does not constitute grounds for suspending or terminating a treaty. In its aim to give the fullest response to Hungary's claims, Slovakia has nonetheless

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[28] Hungarian Counter-Memorial, para. 1.92. Slovakia does not accept the claim as to "negative effects". See, para. 12.02, et seq., below.

examined these claims using Hungary's own criteria and on the basis of its "Scientific Evaluation". In the light of this examination, it is clear that neither in 1989, nor in 1992, nor today, do Hungary's claims, (which lack any juridical basis), find support on the facts. If there was indeed a "state of necessity", it was caused first by the process of degradation prior to the Project, then by the prolonged suspension imposed by Hungary; instead, it was the Project that attempted to deal with the problems - and the Project's partial implementation through the implementation of Variant "C" has in part remedied these.

B. The Alleged Fundamental Changes in Circumstances

5.25 Hungary states in its Counter-Memorial that it has offered, in Chapter 10 of its Memorial, its arguments for termination of the 1977 Treaty "for cause, i.e., for one of the reasons referred to in other provisions [other than Article 56] of the Vienna Convention, such as breach (Article 60), impossibility of performance (Article 61) or fundamental change of circumstances (Article 62)"[29]. It comments that: "The Slovak Memorial gives only a rather cursory account of these." Slovakia is content to refer the Court to its arguments of law at pages 333 through 342 of its Memorial, and also to pages 303 through 318 of its Counter-Memorial.

5.26 It is notable that in its Counter-Memorial, Hungary merely reiterates certain assertions without once relating them to the requirements of the Vienna Convention and without attempting to refute the legal arguments of Slovakia based on the Vienna Convention.

5.27 Hungary's Counter-Memorial offers three "fundamental changes". The first is the political changes in Eastern Europe. Hungary refers to the ending of control of the Soviet Union of Eastern Europe, the falling of the Berlin Wall, the termination of the Warsaw Pact and of COMECON, the withdrawal of Soviet troops, free elections, and the end of the Cold War[30]. Hungary insists that these were more than "internal political changes"[31]. They were indeed. But a recitation of momentous international events does not constitute a legal argument to show that, by

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29 Hungarian Counter-Memorial, para. 5.41.

30 Ibid., para. 5.46.

31 Slovakia referred to "internal political changes" at para. 8.78 of its Memorial, because at that time it had no idea that Hungary would wish to refer to events wholly external to the parties' relationship as constituting rebus sic stantibus.

reference to the well-developed international law on fundamental change of circumstances, they were in any way relevant to a claimed justification to terminate the Treaty. In what way do the ending of the Warsaw Pact, or of COMECON, or the falling of the Berlin Wall - "not least because of the access Hungary provided to East Germans travelling to the West"[32] - constitute a fundamental change of circumstance within the meaning of Article 60 of the Vienna Convention, having a bearing on the 1977 Treaty? This is never explained.

5.28 Nor can this absence of legal analysis be made good by the comment that Hungary does not actually claim that by themselves these political changes constitute a fundamental change of circumstances in relation to the 1977 Treaty - but that they are an "essential part of the overall situation"[33]. Many elements can be introduced to describe the "overall situation" - but a mere accumulation of factors does not constitute a fundamental change. It still has to be shown that the totality of the factors bears on the Treaty in the sense required by Article 62 of the Vienna Convention.

5.29 Hungary emphasises as one of the factors - though apparently not as one that could stand alone - that the 1977 Treaty had been concluded under COMECON's auspices and within its economic system. But the relevant legal consideration is whether COMECON's disappearance ended the raison d'être and original object of the Treaty. Slovakia has dealt with the legal requirements in its Memorial and its Counter-Memorial[34] - but Hungary has yet to advance any legal argument; it merely recites certain new events as if that alone suffices to allow termination on grounds of fundamental change.

5.30 Hungary offers a list of factors that apparently are meant cumulatively to amount to a "fundamental change of circumstances". Some of them clearly are simply a rehearsal of arguments advanced under other heads: the "increasing indications that it would be environmentally damaging" (a formula that may be thought to be less than that required for "necessity", in support of which Hungary has advanced catastrophic predictions coupled with an admission that "mere possibility of a risk" should be regarded as sufficient evidence). Reference is

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32 Hungarian Counter-Memorial, para. 5.46.

33 Ibid., para. 5.47.

34 Slovak Memorial, paras. 8.71-8.74; Slovak Counter-Memorial, paras. 10.66-10.71.

made to the "economic irrationality" of the Project. But one Treaty party does not share that perception; even taken with "the end of the Cold War, etc."[35], this would not amount to a fundamental change of circumstances, as Slovakia has shown in its Memorial[36].

5.31 Hungary again in its Counter-Memorial makes reference, in the context of an argument based on fundamental change, to "the justified rejection of the Nagymaros Barrage, which brought with it the collapse of the conception of a 'single and indivisible operational system' "[37]. Slovakia has already in its Counter-Memorial addressed this remarkable claim[38]; and now deals in depth below with the circumstances surrounding Hungary's suspension of its obligations at Nagymaros[39]. It may here be noted that - in view of the fact that its action was taken with no prior notification, let alone consultation or negotiation - Hungary was alone in determining whether the "rejection" of this crucial element of the Project was "justified". Hungary's abandonment of Nagymaros removed an important element of the "single and indivisible operational system" and, according to Hungary, the "rejection" worked a fundamental change of circumstances, justifying Hungary in terminating the Treaty. According to this line of argument, then, a party to a treaty can justify the termination of the treaty by breaching it, then invoke the consequences of the breach as a fundamental change of circumstances[40]. The argument makes a mockery of the doctrine of rebus sic stantibus in particular, and the law of treaties in general. It is a transparent attempt by Hungary to profit from its own wrong, which is prohibited by, inter alia, the Vienna Convention on the Law of Treaties: "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: ... (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty"[41].

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35 Hungarian Counter-Memorial, para. 5.46.

36 Slovak Memorial, para. 8.69.

37 This quotation is from Article 1, paragraph 1, of the 1977 Treaty. Hungarian Counter-Memorial, para. 5.47.

38 Slovak Counter-Memorial, paras. 10.73-10.75.

39 See, Chapter VII, below.

40 See, Slovak Counter-Memorial, para. 10.73.

41 Vienna Convention on the Law of Treaties, Art. 62(2)(b).

5.32 Moreover, it should not be forgotten that Hungary was prepared at one point to proceed with the Treaty Project at Gabčíkovo, although refusing to proceed with its obligations at Nagymaros[42]. It clearly did not consider the Project as "single and indivisible" or even that its own abandonment of Nagymaros constituted such a fundamental change as to deny all purpose to the 1977 Treaty. The only Party that would be entitled to rely on arguments on the "indivisibility of the Project" if it so chose is Slovakia - most certainly not Hungary.

5.33 Among the factors listed in the "combination of elements" that amount to a fundamental change of circumstance is "the apparently irrevocable determination of Czechoslovakia to proceed to unilateral diversion of the Danube, which itself put an end to the idea of joint control and joint investment"[43]. Slovakia has fully explained the provisional nature of Variant "C", and the possibility of resumption of joint control and joint investment if Hungary will fulfil its obligations under the Treaty[44].

C. The Alleged Violations by Czechoslovakia of the 1977 Treaty and its Related Agreements

5.34 According to Hungary:

> "As to termination of the 1977 Treaty for breach, by far the most important breach relied on was the continued and active insistence by Czechoslovakia on constructing and operating Variant C[45]."

It is to this assertion that Slovakia will devote the major part of this Section. However, in its Counter-Memorial, Hungary returns to its allegations of violations of several individual provisions of the 1977 Treaty and its related agreements, and these also will be addressed.

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42 See, para. 8.13, et seq., and paras. 8.53-8.56, below.

43 Hungarian Counter-Memorial, para. 5.47.

44 See, Slovak Memorial, 5.63, et seq.; Slovak Counter-Memorial, para. 12.16. See, also, Chapter XIV, below.

45 Hungarian Counter-Memorial, para. 5.48.

Variant "C" Does Not Breach the 1977 Treaty, but Implements it in Part

5.35 Hungary's pleadings make almost no attempt to demonstrate how Variant "C" was allegedly a breach of the 1977 Treaty: this scarcely finds mention in its Memorial; and in its Counter-Memorial, although Hungary says the matter is to be addressed in Chapter 6[46], it is once again hardly addressed. The heart of Hungary's arguments on Variant "C" is not that it was illegal under the Treaty, but that it was illegal under what Hungary alleges to be requirements of customary international law and international environmental law.

5.36 The reason for this is not hard to find: Variant "C" is clearly a best-possible application of the 1977 Treaty, not a violation of it.

5.37 The lawfulness of Variant "C" by reference to the 1977 Treaty has been explained by Slovakia in its Memorial[47] and in its Counter-Memorial[48]. It is further analysed in this Reply[49].

5.38 Some brief preliminary points will, however, be made here. In Hungary's view, the contingent planning and the commencement of construction of Variant "C" constituted violations of the 1977 Treaty - even before the putting into operation of Variant "C" in October 1992[50]. Slovakia's position is that Czechoslovakia began, with full notification to Hungary, a study of possible variants in case Hungary should ultimately fail to resume performance of the Gabčikovo section of the Project. This was contingency work whose good sense was confirmed by the termination of the Treaty by Hungary in May 1992.

5.39 Hungary declares that "the first official threat of a unilateral solution in August 1989 with the diversion of the Danube in 1992 form one barely interrupted continuum"[51].

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46 Ibid..

47 Slovak Memorial, para. 7.11, et seq.

48 Slovak Counter-Memorial, para. 11.03, et seq.

49 See, Chapter VI, below.

50 Hungarian Counter-Memorial, para. 2.93, et seq.

51 Ibid.

To study what one might have to do if a treaty is terminated by one's partner (who has given good cause for such anxiety) is not a breach of treaty. The Court has been provided with details of these preparatory studies on possible variants[52]. Studies began in the autumn of 1989, and Hungary itself was briefed on them and had itself studied them in 1990; in February 1991 they were discussed in the Slovak and Hungarian Academies of Science; and in the summer of 1991 Hungarian officials visited the site[53]. During the 1991 negotiations, where Hungary's sole aim was to gain Czechoslovakia's agreement to terminate the Treaty, the argument that a material breach of the 1977 Treaty was being committed by Czechoslovakia through its study of alternative variants was not made by Hungary, who sought Czechoslovakia's agreement to the Treaty's termination.

5.40 Work on the selected Variant did not in fact begin until November 1991[54], though Hungary seeks to assert that construction had begun earlier [55].

5.41 The fact that the studies, construction and implementation were not an "unbroken continuum", so far as alleged breach of the Treaty was concerned, is evidenced by the very terms of the Special Agreement. Article 2(1)(b) refers to Czechoslovakia proceeding to the provisional solution in November 1991, and putting it into operation in October 1992. Hungary thus clearly recognised the distinct phases - and the legal significance thereof.

5.42 It remains the case that until November 1991 Czechoslovakia limited itself to study, discussion, negotiation and contingent construction. By the time Variant "C" was implemented, Hungary had issued its notification of termination of the Treaty - precisely the cause of Variant "C" moving from a contingency plan to actual implementation, though its provisional nature remained unchanged, as is more fully discussed below in Chapter IX.

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52 See, Slovak Memorial, para. 5.14, et seq.

53 See, Slovak Counter-Memorial, para. 5.68.

54 See, the Chronology of Decisions and Actions, Slovak Counter-Memorial, Illus. No. CM-16, p. 284.

55 See, para. 9.06, below.

Czechoslovakia Did Not Breach Any Provision of the 1977 Treaty or its Related Agreements

5.43 According to Hungary, its conduct:

> "... has to be considered in the context of the wrongful acts previously committed by Czechoslovakia. In particular, the reason Hungary relied on a state of 'environmental necessity' first to suspend the work and then to terminate the 1977 Treaty is that it was confronted with a situation created by Czechoslovakia's breach of its treaty obligations[56]."

5.44 Three comments may be made. First, as so often, Hungary confuses two legal arguments that are in fact quite distinct - its arguments as to "necessity", on the one hand (which it is repeated once more does not constitute a ground for terminating[57]) and on the other hand, its claims as to Treaty violations by Czechoslovakia which might justify suspension and then termination in accordance with the principle of Article 60 of the Vienna Convention on the Law of Treaties. Neither the legal debate nor Hungary's legal arguments can be helped by such confusion. Second, Hungary only invoked this argument for the first time in its 1992 Declaration, and this attempt to justify the suspension and subsequent abandonment of works by alleged Treaty violations by Czechoslovakia has not been pursued save for in the current proceedings. It follows that Hungary has in no way respected the procedural and formal conditions necessary to effect the suspension of a treaty by reason of its violation by another party[58]. Third, Hungary offers no new arguments in this area and simply refers back (without specific reference) to Chapter 6 of its Memorial[59]. Thus, Slovakia can do little more than to refer to its own response to Hungary's claims its Counter-Memorial[60].

5.45 However, it may be added that Articles 15 and 19 of the 1977 Treaty are entirely consistent with the general principles of international environmental law, as

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56 Hungarian Counter-Memorial, para. 5.07.

57 See, para. 5.09, above.

58 See, para. 10.09, et seq., below.

59 Hungarian Counter-Memorial, para. 5.07, fn. 7.

60 Slovak Counter-Memorial, paras. 10.93-10.109.

Hungary accepts[61] and as Slovakia has established above[62]. As Slovakia has shown, both it and Czechoslovakia have scrupulously complied with such principles[63].

Section 3. The Relevance of Article 27 of the Treaty

5.46 Hungary devotes several pages of its Counter-Memorial to discussing the "relevance of Article 27 of the Treaty", which concerns the "Settlement of Disputes"[64]. According to this Article:

> "1. The settlement of disputes in matters relating to the realisation and operation of the System of Locks shall be a function of the government [plenipotentiaries].
>
> 2. If the government [plenipotentiaries] are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

5.47 In response to the Slovak assertion that Hungary failed to make use of these mechanisms, Hungary argues that:

> "In practice the system of Plenipotentiaries and of regular communication between the parties operated in a relatively flexible way[65]."

This is so - and it is precisely this flexibility that was so useful. But the problem does not lie there. Instead, it is that in spite of the merits of this means of settlement, Hungary stood in the way of its application and brutally ended it by ending negotiations over resumption of part of the Project in early 1990 and in purporting to terminate the Treaty in May 1992[66]. It cannot be maintained that to confine negotiations to terminating the Treaty[67] - which was Hungary's sole aim in the 1991 negotiations (besides getting Czechoslovakia to stop work on the Project)

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61 Hungarian Counter-Memorial, para. 6.16.

62 See, para. 3.18, et seq., above.

63 Ibid.

64 Hungarian Counter-Memorial, paras. 5.31-5.38.

65 Ibid., para. 5.33.

66 See, Part II, below, passim.

67 See, para. 9.07, et seq., below.

- is a bona fide application of Article 27. Moreover, Hungary de facto abolished the post of its own plenipotentiary even prior to its purported termination[68].

5.48 As the Court has stressed - confirming thus the customary nature of Article 60(4) of the 1969 Vienna Convention:

> "In any event, any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes[69]."

But this principle does not apply solely to the purported termination of the 1977 Treaty on the ground of alleged breaches by the other party - an hypothesis that is at issue in the present case. In accordance with the customary rule codified by Article 70(1) of the Vienna Convention, the termination of a treaty:

> "b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."

5.49 In the light of the fact that Hungary had suspended and abandoned performance of all works on the G/N Project under the Treaty well prior to issuing its unilateral notice of purported termination of the Treaty on 19 May 1992, it must be concluded that a legal situation had been created prior to the purported termination, from which arose the right of Czechoslovakia, and then Slovakia, to have the dispute resolved in conformity with the Treaty, regardless of the effects of the purported termination[70]. It would, moreover, be wholly illogical to allow such a notification to apply to certain of the grounds invoked by Hungary[71] but not to others.

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68 See, Slovak Memorial, para. 6.157.

69 United States and Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3, at p. 28.

70 See, Chapter X, below.

71 See, Hungarian Counter-Memorial, para. 5.48, for specific allegations of Treaty violations.

5.50 This confirms that, whatever effects the unilateral "termination" of the Treaty by Hungary may have had, Hungary breached its Treaty obligations in refusing to resolve the dispute resulting from its series of actions in accordance with Article 27[72].

5.51 Hungary would have the Court believe, in thus insisting on the obligatory nature of the recourse to the means of settlement provided by Article 27 of the Treaty, that Slovakia was reserving for itself "a veto over modifications to the Project"[73].

5.52 Once more, it must be stressed that the problem is not as Hungary presents it. The Treaty, signed and ratified by its parties in all regularity, must be respected by them. The principle pacta sunt servanda creates, at the very least, such a presumption. Of course, no legal rule prevents the parties to a treaty mutually agreeing to such modifications as are jointly agreed to be necessary. It is in response to this need that the multiple mechanisms for control and consultation allowed for in the Treaty exist[74] and which, in practice, led to the frequent modifications, adaptations or additions to the Project. But absent such an agreement or while it is pending - and it must be recalled that, contrary to Hungary's claims, Czechoslovakia (then Slovakia) never sought to reject such a possibility - the Treaty must continue to apply. If there is a "veto", it operates during the period of application of the Treaty on the grounds that "every treaty in force is binding upon the parties to it and must be performed by them in good faith"[75].

5.53 But it is quite a different sort of veto that Hungary claims should be applied: not against the non-application of the Treaty but, on the contrary, against its implementation. If such a theory were to be accepted, the stability of legally binding agreements would be called into question and the very foundations of international law would be shaken. Such obviously cannot be the law.

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72 As Slovakia will demonstrate below (para. 10.09, et seq.), Hungary failed to respect reasonable deadlines between the time of its notification and the date of the alleged treaty termination.

73 Hungarian Counter-Memorial, para. 5.36.

74 Ibid., para. 5.35.

75 Vienna Convention on the Law of Treaties, Article 26.

CHAPTER VI. THE LEGAL PRINCIPLES SUPPORTING THE PROCEEDING WITH AND PUTTING INTO OPERATION OF VARIANT "C" BY CZECHOSLOVAKIA

SECTION 1. Under the 1977 Treaty

A. Approximate Application

6.01 The lawfulness of Variant "C" can only be assessed by reference to the entire history and context. It is that history and context that defines the appropriate applicable norms and allows assessment of the reasonableness of their application.

6.02 The sequence of events that led in November 1991 to the first preparations for Variant "C" and to its putting into operation in October 1992, is clearly explained in Chapter IX below. A careful tracking through the diplomatic history from the end of 1989 until October 1992, looking at the entirety of the facts and examining the full texts of relevant documents, shows that proceeding with Variant "C" was a consequence of Hungary's abandonment of the Treaty and its resolute and publicly stated resolve never to return to it. The purported termination of May 1992 made it inevitable that the Gabčíkovo section should be put into operation by means of Variant "C".

6.03 The damming of the Danube, the diversion of part of its waters on to Czechoslovak territory, and the locating of the major navigation channel in this bypass canal, were all envisaged in the 1977 Treaty. Hungary had since July 1989, when it suspended work at Dunakiliti, taken every step to prevent this happening. When Hungary says that it had to terminate the Treaty "to avoid any pretext for the diversion"[1], it affirms that by May 1992 it believed the only way finally to ensure that the Treaty obligations would not be implemented was to terminate the Treaty in its entirety.

6.04 This is the background to Variant "C", and to Czechoslovakia's belief in its entitlement, with so many delays endured, so much already built, such vast sums already expended, to see the essential objects of the Treaty implemented. It has explained to the Court how Variant "C" was designed to secure the object of the Treaty, in the face of Hungary's refusal to perform its

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[1] Hungarian Counter-Memorial, para. 5.30.

treaty obligations. Good sense and equitable considerations underlying this doctrine of approximate application had been articulated by Judge Lauterpacht in the Advisory Opinion on Admissibility of Hearings of Petitioners by the Committee on South West Africa[2]; and the pertinence of his observations for the facts of this case have been put to the Court in Slovakia's Memorial[3].

6.05 Hungary's responses to Czechoslovakia's insistence upon its legal right to secure the objectives of a Treaty in which it had fulfilled all its own obligations, are interesting. First, it contends that Variant "C" was not in fact compatible with the objects and purpose of the Treaty, because it was unilateral in character. But the objects it secures - the damming to create a reservoir (albeit on a smaller scale than envisaged), the bypass canal, the new navigation channel, are all envisaged in the Treaty. And the only reasons Variant "C" secures these agreed objectives by a unilateral act is exactly because Hungary refused to perform its own obligation of damming at Dunakiliti, allowing the Project to proceed on the basis jointly agreed in the Treaty.

6.06 It is equally absurd of Hungary, having abandoned and purportedly terminated the integrated and cooperative Treaty Project, to proclaim Variant "C" as contrary to the purpose of the Treaty because the Treaty "was to promote jointly an integrated and co-operative project"[4]. Nor can it be a serious argument for Hungary, who refused to cooperate in the implementation of Treaty obligations, to invoke Articles 3, 7 and 11 in support of the proposition that only "co-operative" acts by Slovakia would be approximate to what was envisaged in the Treaty[5]. Slovakia has provided substantive answers to this point in its Counter-Memorial[6].

6.07 Hungary offers as a separate ground for Variant "C" not to be an appropriate application of the Treaty the allegation that it is irreconcilable with the water quality and environmental protection obligations in Articles 15 and 19. Slovakia has provided ample evidence to show that Variant "C" is fully in accord with Articles 15 and 19, and indeed was the

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2 Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956, p. 23 at p.46.

3 Slovak Memorial, paras. 7.11-7.33.

4 Hungarian Counter-Memorial, para. 6.81.

5 Ibid.

6 Slovak Counter-Memorial, paras. 11.04-11.07.

only way responsibly to comply with those Articles and to protect the environment in the face of Hungary's decision to walk away from a project in an advanced state of construction. Variant "C" has been, on balance, beneficial to the environment and its full benefits can be made available to Hungary too if it chooses to take the necessary steps for the benefits of its own people and environment[7].

6.08 Hungary repeats in its Counter-Memorial that there were in any event "vital differences between the Original Project and Variant "C"" (a point already made in its Memorial at paragraph 1.16) that preclude the latter being an approximate application of the former.

6.09 What are these "vital differences" to which Hungary refers to show that Variant "C" is not an approximate application of what was envisaged in the Treaty? Hungary refers the Court to its Memorial[8]. Slovakia has already replied at paragraph 11.07 of its Counter-Memorial, pointing out the only significant differences were the reduction in size of the reservoir and the changed location of the damming of the Danube, made absolutely necessary by Hungary's refusal to complete the dam on its own territory. No structures were erected outside the territory envisaged in the Treaty. The objectives of flood control, improvements in navigation, and energy production, are all met by Variant "C" on the basis envisaged in the Treaty. More satisfactory ground water levels can be achieved once the underwater weirs are operational and are now achieved through the direct recharge system. Only peak production is not achieved. And this is due solely to Hungary's abandonment of Nagymaros.

6.10 Hungary states that approximate application is the only Slovak argument to demonstrate that no contradiction exists between the operation of Variant "C" and the obligations of the Treaty[9]. The meaning of this comment is not clear. Whether or not contradictions exist between Variant "C" and the Treaty is a matter of objective analysis. If they do not, the doctrine of

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7 See, Slovak Counter-Memorial, paras. 8.11 and 11.08, et seq. Hungary will in fact benefit from revitalisation of the branches: see, the Agreement of 19 April 1995, Annex 1, hereto. Further, during his visit to Budapest on 25 January 1995, Prime Minister Mečiar expressed his willingness to discuss the circumstances in which Hungary might participate in the economic uses of Gabčíkovo.

8 At para. 6.81 of its Counter-Memorial, Hungary refers to para. 1.116 of its Memorial. Slovakia takes this to mean para. 1.16 of the Memorial.

9 Hungarian Counter-Memorial, para. 6.103.

approximate application may be applied. It is not the principle that establishes whether the proposed application is approximate - only that, if it is, it may lawfully be proceeded with.

6.11 The matter may be explained thus: the building of Gabčíkovo is integral to the Project. The 1977 Treaty provided for a diversion of waters between the bypass canal and the old riverbed, and the 1947 Protocol[10] further stipulated that waters were to be provided to the Mosoni Danube. If these important conditions can be met, and if environmental factors are fully taken into account, then Gabčíkovo can still be operated without cooperation from Hungary. Naturally - and exactly as had been noted by Judge Lauterpacht in the Petitioners' Case - approximate application necessarily entails an inability to put the contract into place precisely as envisaged[11]. It is Hungary that has stopped the dam being built at Dunakiliti (though it is built as nearby as possible). As it was Hungary that prevented the full implementation of the 1977 Treaty, it does not lie in its mouth to complain that Variant "C" - fully consistent with the objectives of the Treaty, and adhering to all other important conditions in the Treaty - is not at the place envisaged in the Treaty.

6.12 Hungary denies the existence of any such principle on which Slovakia may rely. Slovakia has pointed to the doctrine as explained in Judge Lauterpacht's opinion in the Petitioners Case as entirely consistent with established principle[12].

6.13 The reason is not hard to find. It is virtually without precedent for a State to breach, and indeed repudiate, a major treaty for the construction of an on-going cooperative project, and then to tell a court that the party which has fulfilled its obligations and made all of its capital expenditures, offends the rights of the violating State by causing the agreed work to be completed as best it may. Quite simply, the complaint is so remarkable as almost never to be heard - and there has been no occasion for the Court to pronounce upon or elaborate upon the matter.

6.14 That is why the issue must be dealt with as one of principle. Some introductory points are in order. The first point that is to be made is that it is of no relevance

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10 Hungarian Memorial, Vol. 3, Annex 3.

11 Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion: of June 1st, 1956: I.C.J. Reports 1956, p. 23 at p. 467.

12 Slovak Memorial, para. 7.21, et seq.

whatever that Judge Lauterpacht elaborated the principle in a separate opinion, he and the majority reaching the same outcome in that case by different routes. There is nothing in the majority opinion that rejects the principle. It simply does not rely on it. The principle is thus either good or bad. The second is that in all the cases concerning South Africa, commencing with the Advisory Opinion of 1950, the Court itself (albeit without employing the term as such) did in fact seek to secure an approximate application of the mandate treaty, in the face of South Africa's refusal to perform its obligations thereunder.

6.15 The third introductory point relates to the fact that the Court, in the Petitioners Case, was undeniably faced with a special regime, that of the mandate[13]. The mandate was an objective legal regime. Contrary to what Hungary asserts, Slovakia did not in its Memorial suggest that Sir Hersch Lauterpacht "*affirmed* the fundamental rule" that a State confronted with a breach of treaty can "impose some approximation to performance on the other party"[14]. In the first place, Slovakia believes its action on Variant "C" is fully in conformity with principle and with international law. It has no need to show a "fundamental rule of positive law". On the contrary, it is for Hungary, the party in breach of its Treaty obligations, to show on what rule of international law it can base its remarkable claim that disregard of its obligations entitles it to demand non-performance of the objects of the Treaty. By its non-performance a State has ensured that it has avoided its obligations. What legal norm stipulates that non-performance entitles a State to more - namely, to the entire failure of the treaty? This is not a legal benefit that is offered as a reward for non-performance.

6.16 In November 1991, when Czechoslovakia began construction work on Variant "C", Hungary had long since fully abandoned work on both the Nagymaros section and the Gabčíkovo section[15]. Czechoslovakia was fully entitled to proceed with approximate application at this point - a process that was in fact fully reversible. In May 1992, Hungary purported to terminate the 1977 Treaty. Czechoslovakia was thus fully entitled to proceed to put the provisional solution into application through the damming operation carried out from 24-27 October 1992.

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13 Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956, p. 23.

14 Hungarian Counter-Memorial, para. 6.97.

15 Hungary abandoned work on the Nagymaros section on 27 October 1989 and on the Gabčíkovo section by the end of June 1990, at the latest.

6.17 If the Treaty had been lawfully terminated by Hungary in May 1992, then the putting into effect of Variant "C" in October 1992 cannot be explained as an approximate application of the Treaty. But if, as Slovakia contends, the Treaty was not lawfully terminated in May 1992, then the situation in October 1992 was simply that one party - Hungary - had refused performance of its Treaty obligations. By what "rule of positive international law" is it entitled, in addition, to insist that the Treaty itself be not put into operation? That is in essence to give exactly that power of termination to a State in circumstances in which it may not lawfully terminate.

6.18 What Slovakia carefully said was that, although the Court, and Judge Lauterpacht, were faced with a treaty establishing a regime in rem, there were reasons of principle and policy to suggest that the doctrine should have a wider application. It is true - as Judge Lauterpacht observed - that in what he terms "an ordinary treaty", satisfaction is often secured through damages. But this will not invariably be so. Slovakia showed that in the present case, while compensation for financial loss and quantifiable harm would be needed, financial compensation alone could not then, and cannot now, eradicate the environmental harm of leaving the works of the Project in an unfinished state; nor can it guarantee flood protection; nor can it guarantee the draught depths required by the Danube Commission for safe navigation; nor can it allow the movement from coal fired energy to secure, clean, renewable domestic energy[16].

6.19 And this is exactly because the G/N Project is not "an ordinary" Treaty. It is, as Slovakia has elaborated in detail in the Counter Memorial, indeed a Treaty creating rights in rem[17]. It is exactly the sort of contract relationship in which approximate application is the most appropriate way forward, and violates no rights of the party in breach of its obligations.

6.20 The starting point for an analysis of the principle of approximate application is another principle - that the wronged party is entitled to be put in the position as if the wrong had not been committed. It is thus entitled to see the objects of the treaty secured. In a treaty in rem the objects of the treaty will not be mere financial profit, and therefore the doctrine of approximate

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16 Slovak Memorial, paras. 7.27-7.33.

17 Slovak Counter-Memorial, paras. 2.35-2.38. It is not correct, contrary to Hungary's statement at para. 5.44 of its Counter Memorial, that Slovakia does not contend that the 1977 Treaty is not an objective regime creating rights in rem. It is absolutely clear from Slovakia's Counter Memorial that it does so.

application will have a particular pertinence. This principle, enunciated by Judge Lauterpacht in the Petitioners Case, finds ample reflexion in domestic legal systems in relation to contracts that are not "ordinary contracts". It is clearly to be seen operating in diverse legal systems in construction contracts, which are obviously a particularly pertinent analogy to the Treaty for the construction of the Gabčíkovo-Nagymaros Project. Where one party to a contract refuses to perform at all its construction obligations, the injured party is entitled to complete the work originally assigned to the other party under the contract. This is so, for example, in the French law on building contracts, in the English law on building contracts, and in the United States law on building contracts.

6.21 Indeed, the suggestion that the defaulting party may stop the work being done, by claiming it to be illegal to do so, finds absolutely no mention. On the contrary, the legal principle entitling the wronged party approximately to complete the contract is dealt with in the context of mitigation and damages - that is to say, the point at issue has been the duty of the wrongful party to pay for the completion by the wronged party of the contract obligations which it should itself have performed. The entitlement so to complete is not even contested, but is taken as the natural starting point.

6.22 Thus in Radford v. De Froberville[18], the defendant had contracted to carry out work on his own land which would benefit the plaintiff's land. The defendant failed to carry out his work obligations under the contract. The High Court held that in these circumstances:

> "The plaintiff was entitled to claim damages for breach of that contract which would compensate him for the cost of carrying out on his own land, as nearly as possible, that which the defendant had failed to do[19] ".

The Court expressly rejected the idea that there was a "critical difference" between a contract between A and B to erect a building on B's land and a contract between A and B to erect a building on A's land. If A could secure broadly comparable benefit from the construction taking place on his own land, then he was entitled to put that in place (and recover damages for it), in the event of B failing to do the work on B's own land. The Court spoke[20] of compensation being "to enable him to carry out, as nearly as possible, for himself what the defendant had failed to do for him".

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18 1 All England Law Reports 33 (1978).

19 Ibid., at p.34 (italics added).

20 Ibid., at p. 41.

6.23 Reverting to the proposition that a wronged party is entitled to be put in the position that it would have been in if the wrong had not occurred, the Court said:

> "... the only thing that will put that plaintiff in approximately as good a position as that in which he would have been if the contract had been performed would be an award of the amount required to enable him to have the equivalent work done on his side of the wall[21] ...".

The plaintiff was successful in seeking damages "to enable him to do, as nearly as possible, what the defendant has failed to do"[22].

6.24 Emden's Construction Law[23] confirms the same principle. Referring to incomplete work, it states that among various alternative heads for damages is included "the cost of rectifying or completing the work". It is, says the learned author, "the general rule" that the wronged party is entitled to recover the cost of completing the work, "such cost to be assessed at the time that it was reasonable for him to carry out the work".

6.25 The construction contract law of Ireland is the same. In Murphy v. Wexford County Council[24], Lord Justice O'Connor spoke of the loss including "the cost of doing the work which in breach of contract the defendant has failed to do". He added:

> "I have already mentioned the case of the plaintiff who does the work himself before he sues: I cannot see that it matters that he did it without his being under an obligation to do it. After all, he contracted for valuable consideration that it should be done."

6.26 This is exactly the position in which Czechoslovakia found itself. Czcehoslovakia was fully entitled, having itself made vast expenditures in connection with the 1977 Treaty, to do itself, as nearly as possible, what Hungary had failed to do. And there is ample authority that Hungary must meet Czechoslovakia's costs in doing so.

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21 Ibid., at p. 44.

22 Ibid., at p. 48.

23 (1994), Vol.I, ss.154-160.

24 2 Irish Reports 230 (1921), at p. 240.

6.27 Far from enunciating a doctrine that "is virtually unheard of"[25], Judge Lauterpacht had introduced into consideration of an international treaty in rem a notion that is commonplace in domestic contracts where the wronged party cannot be put by money compensation alone in the position of the wrong never having occurred. The practice is so familiar that it could properly be termed a "general principle" within Article 38(1)(c) of the Statute of the International Court - though Slovakia remains of the view that it is Hungary which has to show a rule of international law as to why, having refused to perform, it is entitled to stop Slovakia from securing the objectives of a still existing treaty.

6.28 The entitlement of the wronged party to complete the construction - even though the contract had indeed assumed performance would be by the defaulting party - is simply assumed in all the leading textbooks on construction law, and the matter is subsumed in the discussion of damages. Thus Keating on Building Contracts, says:

> "Where the contractor fails to complete, the measure of damages in the first instance is the difference between the contract price and the amount it would actually cost the employer to complete the contract work substantially as it was originally intended, and in a reasonable manner, and at the earliest reasonable opportunity[26]."

Further, where there has been "substantial completion", a plaintiff can recover for carrying out the remaining works in a reasonable manner[27].

6.29 The position in the United States is the same. The wronged party is entitled to complete performance of the contract work and to recover costs therefor "that will put him in as good a position as he would have been had there been no breach"[28]. This leading textbook states that where one party fails to keep its agreement under a construction contract, the measure of damages to the other party:

> "... is always the sum that will put him in as good a position as if the contract had been performed. If the defect is remediable from a practical standpoint, recovery

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25 Hungarian Counter-Memorial, para. 6.65.

26 5th ed. 1991, p. 202 (emphasis added). See, also, Mertens v. Home Freehold Co., 1921, 2 King's Bench 526, Court of Appeal.

27 Ibid.

28 Williston on Contracts, 3rd ed. (1968), vol. II, s.1363, Building Contracts, p. 340.

generally will be based on the market price of completing or correcting the performance[29]."

6.30 Williston refers approvingly to the summary of the rule given by a court[30]:

"The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that a party is entitled to have what he contracts for or its equivalent ... [the aggrieved party] is entitled to the cost of making the work conform to the contract."

6.31 The situation is no different in civil law jurisdictions. The French Code Civil provides in Article 1144 that where there is an obligation de faire that has not been met, performance is authorised of that obligation by the wronged party at the expense of the party who should have performed the obligation[31].

6.32 As Judge Lauterpacht pointed out in the Petitioners Case, a refusal by one party to perform its obligations will necessarily entail certain departures by the injured party from the original terms of the treaty when it comes itself to perform those agreed obligations. He had

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29 Ibid., at pp.344-345. See, also Keystone Engineering Corp. v. Sutter, 196 Md. 620, 78 A.2d 191 for the proposition that when a party to a building contract fails to perform, one of the remedies to the other party is to complete the contract and charge the cost to the wrong doer.

30 Shell v. Schmidt, 164 Cal.App. 2d 330, 330 P.2d. 817, 76 ALR 2d 792, *cert.denied*, 359 US 959, 3 L.Ed. 2d. 766, 79 St. Ct. 799.

31 S.1144 provides that: "Le créancier peut aussi, en cas d'inexécution, être autorisé à faire executé lui-même l'obligation aux dépens du débiteur": "The creditor may also, in case of inexecution, be authorised to have the obligation executed himself at the expense of the debtor", Slovakia trans. S.1144 of the French Civil Code addresses all kinds of obligations. While acknowledging that the situation of debtors and creditors is not identical to the situation of the parties in the present case, it is analogous. In "ordinary contracts" a court order may first be needed, but in cases governed by commercial law or in cases of urgency, notice to the defaulter suffices. B. Nicholas, The French Law of Contract, 2nd ed. (1992) at p.217. Hungary had ample notice from Czechoslovakia of its intention to proceed with Variant "C" if Hungary repudiated all intention of performing its obligations.

On approximate application it might be useful to refer to Art.218 of the Russian Civil Code which provides as follows - "In case of non-performance by the obliger of an obligation to carry out a specific task, the obligee is entitled to carry out this task at the obliger's expense, unless otherwise provided for by law or the contract, or to demand damages." The Civil Code of the RSFSR, 11 June 1964, as amended. This entitlement is affirmed in Article 397 of the 1994 Civil Code of the Russian Federation (trans. 1995 by W.E. Butler, InterList, London and Moscow). This provides "In the event of the failure to perform an obligation by a debtor ... to fulfil specified work ... the creditor shall have the right within a reasonable period to commission the fulfilment of the obligation to [sic: "from" is clearly intended] third persons for a reasonable price or to fulfil it by his own efforts unless it follows otherwise from a law, other legal acts, the contract, or the essence of the obligation, and to demand from the debtor compensation for necessary expenses and other losses incurred."

spoken of the need for performance by the non-violating party to "be applied in a way approximating most closely to its primary object" and noted that that ensured that what was being done was giving effect to the instrument, and not changing it[32].

6.33 In this context it is striking that, in the contract law of public utilities, even where a party is unable to perform its contract through no fault of its own, a substitute performance by the other party will be allowed (provided that does not place significantly heavier burdens on the non-defaulting party). Thus, in the Canadian case of Placer Development Limited v. British Columbia Hydro and Power Authority[33], the defendants' power line was damaged by a lawful strike of the plaintiff's employees. Three weeks later, the defendant having failed to repair the lines, the plaintiff entered onto the defendant's property, without permission, and completed the repair of the power lines. The Supreme Court of British Columbia found unacceptable the refusal of the defendant "to take any risk at all, no matter how remote, to honour its contract". Sufficient weight had not been given to the duty the defendant owed the plaintiff and to the plaintiff's mounting monetary losses. In the circumstances the plaintiff was entitled itself to secure performance of the contract obligation that had been the duty of the defendant.

6.34 This principle would seem to be a fortiori when it is not the acts of third parties that had made performance difficult for Hungary.

6.35 Slovakia concludes this section by submitting:

- A party wronged by non-performance of a contract by another party is entitled to be put in the position as if the default had not occurred.

- In "non-ordinary contracts", and particularly in treaties and contracts for objective and continuing regimes, and for rights in rem, money compensation will not secure that entitlement.

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32 Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956, p. 23 at p.46; and Slovak Memorial, para. 7.21.

33 46 British Columbia Law Reports 329 (1983).

- In such circumstances, the wronged party is entitled itself to perform the contract obligations which should have been performed by the defaulting party, as approximately as possible to the treaty or contract, and to secure the objects and purposes of that treaty or contract.

- This principle is referred to by Judge Lauterpacht in his separate opinion in the Petitioners Case[34], and reflects a general principle already well established in the construction and public utilities law of different legal systems.

- By contrast, there is no rule or general principle of law to support Hungary's contention that a party in default of its obligations can insist that those obligations be not performed, at its cost, by another.

- In particular, Hungary cannot claim that Czechoslovakia, and now Slovakia, has lost its entitlement to secure the objects of the 1977 Treaty because Variant "C" is necessarily not identical to what had been envisaged if Hungary had performed its obligations.

- Variant "C" is in all essentials closely approximate to what was envisaged under the 1977 Treaty, adding no burdens for Hungary.

- And it was undertaken at a reasonable time, giving Hungary ample time to reconsider its attitude.

- Accordingly, not only was Czechoslovakia fully entitled to proceed with and to have put Variant "C" into operation, but Hungary is liable for the costs.

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[34] Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion: of June 1st, 1956: I.C.J. Reports 1956, p. 23.

B. The Duty to Mitigate

6.36 Without ever actually denying the existence of a duty to mitigate, Hungary seeks to cast doubt on it. It is suggested that it is not a general principle of international law, because the examples that Slovakia had cited in international tribunals actually referred to, or where based in, municipal law. But a general principle of law, to be applied by an international tribunal - and by the International Court - under Article 38 of its Statute, is exactly a principle that is present in most domestic systems[35].

6.37 So it is not easy to understand what legal point Hungary is making at paragraphs 6.105-6.118 of its Counter-Memorial. Its complaint appears to be that the principle is on occasion applied by international tribunals, though stemming from municipal law. In any event, it is clear beyond doubt that this is a general principle of contract law recognised in diverse legal systems[36].

6.38 The fact that the matter has arisen only occasionally in international tribunals is without legal relevance. And the matter is so routinely accepted that it is only when, very unusually, it is challenged - as also with Hungary's denial that an aggrieved party is entitled to perform itself the obligations of a defaulting partner in a contract for rights in rem - that the matter falls for resolution in international litigation.

6.39 Hungary states that "mitigation of loss goes to quantification, not to

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35 See, Waldock, "General Course on Public International Law", 106 Hague Recueil (1962-II) p.54; Lord McNair in International Status of South West Africa, Advisory Opinion: I.C.J. Reports 1950, p. 128 at p. 148. See, also, Lord Phillimore's statement in the course of discussion by the Advisory Committee of Jurists on Art. 38(1) CC1, Procès verbaux of the Proceedings of the Committee (June 16-July 24, 1920, L.N. Publication) p. 355.

36 For the proposition that this is a part of English, American and German law, see, Treitel, Remedies for Breach of Contract - a Comparative Account (1988) p. 180. See, also Art. 254, para. 2 of the German Civil Code, Art. 254 of the Russian Civil Code, Art. 88 Uniform Law on the International Sale of Goods, Art. 77 United Nations Convention on Contracts for the International Sale of Goods. On the duty to mitigate in South African (Roman-Dutch) law, see, Joubert, General Principles of the Law of Contract (1987) p. 254. See, also, the Czechoslovak Commercial Code 513/91, which entered into effect on January 1, 1992, and which is still in effect in Slovakia. Article 384 provides, inter alia: "(1) A person facing the threat of damages is obligated, taking into account the circumstances of the case, to take measures necessary to avert the damage or to mitigate it. The obligor has no duty to compensate the damage that was caused due to the failure of the damaged person to fulfil this obligation. (2) The obligor is obliged to pay all costs that the other party may have incurred in order to fulfil its obligations under (1)."

justification"[37]. This is to oversimplify. Slovakia has already shown that the entitlement to approximate application of a treaty is closely related to the issue of default in non-performance. And because the defaulting party will be required to pay for loss and damage, it is also closely related to the issue of mitigation. The putting into place of the Treaty obligation may also be the best way of mitigating the loss and damage occasioned to date by Hungary's refusal to perform and purported termination of the 1977 Treaty.

6.40 The relationship has been clearly explained:

> "No doubt the measure of damages and the plaintiff's duty and ability to mitigate are logically distinct concepts ... . But to some extent, at least, they are mirror images, particularly in cases of damages for breach of contract; for the measure of damages can be, very frequently, arrived at only by postulating and answering the question, what can this particular plaintiff reasonably do to alleviate his loss and what would be the cost to him of doing so at the time when he could reasonably be expected to do it ... [A]lthough the two concepts of measure and mitigation may be logically distinct, I doubt whether, at any rate in the context of a contractual claim, they can practically be treated separately because the enquiry is to what sum would be required to put the plaintiff in the same situation as that in which he would have been if the contract had been performed, almost necessarily involves an enquiry as to what sum would be reasonably required by him to mitigate by putting himself into that position[38]."

6.41 It is generally accepted that an act in mitigation may indeed be an act not wholly identical to the original contract, but closely related to it. As noted in Farnsworth on Contracts[39]:

> "Whether an available alternative transaction is an appropriate substitute depends on many factors, including the similarity of the performance that the injured party will receive."

In the case of Hoehne Ditch Co. v. John Flood Ditch Co.[40], the defendant, having agreed to carry the plaintiff's water in its ditch, subsequently refused to do so. The plaintiff built for itself a new ditch and changed the point of diversion. The defendant claimed that it was not liable to pay

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37 Hungarian Counter-Memorial, para. 6.113.

38 Radford v. De Froberville, 1 All England Law Reports 33 (1978), at p. 44.

39 (1982) at p. 167.

40 233 Pacific Reporter 167 (1925).

damages because of the plaintiff's own wrongful act. The Supreme Court of Colorado held that the plaintiff's act could amount to reasonable steps taken in mitigation:

> "We are not prepared to say ... that the plaintiff, as a matter of law as applied thereto, did not have a legal right to construct a new ditch and change the point of diversion after the defendant had refused to carry the plaintiff's appropriation [i.e. water] as by contract it had agreed to do[41]."

The pertinence of these principles to the facts of the present case is apparent.

6.42 It is of course right, as Hungary contends, that the duty to mitigate cannot authorise an illegal act. But it can certainly justify the selection of a lawful option by one party in the face of non-performance by the other. And Slovakia has already shown that, in a situation such as the Gabčíkovo-Nagymaros Project, the option to perform as nearly as possible the Treaty obligations was both lawful and in fact a mitigation of other even greater losses that would otherwise be borne by Czechoslovakia, and now Slovakia, for which Hungary would be liable.

6.43 As for Article 27 of the ILC Draft Articles adopted on 2nd Reading on the Law of Non-Navigational Uses of International Watercourses (which Hungary expressly recognises to reflect general international law), Slovakia believes that Variant "C" does indeed mitigate damage caused by Hungary for Hungary (as well as for Slovakia). This is exactly because it approximates performance of the 1977 Treaty, which in turn was agreed to by the parties to protect both States - Hungary as well as Czechoslovakia - from the catastrophe of repeated floods (which are specifically mentioned in Article 27). So even though it is not the applicable law in this case[42], Variant "C" does conform with Article 27 of the ILC Draft Articles.

6.44 Hungary makes two further points relating to action in mitigation. First, it prefers "a negotiated solution ... balancing the share of costs and benefits among the two parties..."[43]. Slovakia has already observed in its Counter-Memorial[44] that Hungary's suggestions

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41 Ibid., at p. 169.

42 See, para 2.27, above.

43 Hungarian Counter-Memorial, para. 6.106.

44 Slovak Counter-Memorial, para. 7.122, et seq.

for "balancing the share of costs and benefits" bears no relation whatever to the actual and real vast losses sustained by Slovakia at the hands of Hungary.

6.45 Hungary also appears to suggest[45] that action in mitigation somehow becomes unlawful when "the treaty binding on the two parties contains a provision establishing negotiation as a regular process for implementation of treaty obligations" - a remarkable comment from the State party which had purported to terminate the Treaty five months before the putting into operation of Variant "C". Hungary reiterates again, apparently believing it relevant to the issue of mitigation, that it "repeatedly sought ways of resolving the issue". Slovakia has shown, in its Memorial[46]; Counter-Memorial[47]; and in this Reply[48] that far from seeking ways of resolving the issue, from early 1990 all Hungary was interested in was the negotiation of the termination of the Treaty (but not the amelioration of any objectively identified environmental problems); and all it was interested in litigating was Variant "C".

C. Countermeasures

6.46 Because Czechoslovakia was and Slovakia is entitled to secure the objects and purposes of the Treaty for the Gabčíkovo-Nagymaros Project in the face of Hungary's failure to perform its obligations, Slovakia does not see Variant "C" as a countermeasure. A countermeasure is a measure justifying a State's non-compliance with one or more of its obligations towards another State which has committed an internationally wrongful act[49]. Slovakia needs no justification for non-compliance with its obligations towards Hungary, as it has complied with all such obligations, including when implementing Variant "C". However, Slovakia has already shown in its Counter-Memorial that, even if Variant "C" was an act of Czechoslovakia in non-compliance with obligations owed to Hungary, it could in fact still be justified as a countermeasure. Slovakia refers the Court to its Counter-Memorial at paragraphs 11.54-11.74.

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45 Hungarian Counter-Memorial, para. 6.114.

46 Slovak Memorial, Chapter IV

47 Slovak Counter-Memorial, Chapter V.

48 See, para. 9.07, et seq., below.

49 ILC Draft Article 11, A/CN.4/L.480, 25 June 1993.

SECTION 2. Conformity with Other Relevant Legal Rules

A. Specific Treaties

6.47 Slovakia has already amply shown that Variant "C" does not conflict with any of the treaties relevant to the international frontier between Hungary and Czechoslovakia, then Slovakia[50].

6.48 Slovakia has also shown that Variant "C" is fully in conformity with the 1976 Boundary Water Management Agreement[51]). Hungary returns to some of these matters in its Counter-Memorial[52]). It cites Article 3(a) of the 1976 Agreement, whereby the parties are not to carry out water management activities without mutual agreement. But the 1977 Treaty exactly represents that "mutual agreement", and to that extent supplements the general provisions of the 1976 Agreement[53].

6.49 Hungary suggests[54] that as the 1976 Agreement applies to all boundary waters and not only to the Danube, the 1977 Treaty could not represent the "mutual agreement" foreseen in the 1976 Agreement. But Article 3(a) of the 1976 Agreement does not speak of a single mutual agreement. It refers to mutually agreed conditions. If, in relation to the Danube, there was later mutual agreement on water management by virtue of the 1977 Treaty, then those activities in the 1977 Agreement were fully compatible with Article 3(a) of the 1976 Agreement, notwithstanding that they did not regulate all boundary waters.

6.50 Hungary contends that Article 3 of the 1976 Agreement was violated "by not giving due notice to Hungary of the construction of Variant "C", and by not entering into consultations". Slovakia was not in fact bound by any duty to consult fully. The duty to consult is a general principle of watercourse law. But it is hardly incumbent upon a party seeking

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50 See, Slovak Memorial, paras. 7.48-7.62; Slovak Counter-Memorial, paras. 11.11-11.18.

51 Slovak Memorial, paras. 7.63-7.71.

52 Hungarian Counter-Memorial, paras. 6.63-6.66.

53 See, Slovak Memorial, para. 6.44.

54 Hungarian Counter-Memorial, para. 6.66.

approximate application of a treaty because of non-performance by another party, to be under a duty to "consult" that wrongdoer. But in any event Slovakia has shown that Hungary was indeed notified that continued suspension and abandonment of its obligations would entail an alternative solution being found[55] and that Hungary was fully aware of the consideration being given by Czechoslovakia to alternative, provisional solutions[56]. As for the alleged failure to consult, Slovakia has also fully evidenced Czechoslovakia's willingness at all times to consult to establish on the basis of scientific studies whether genuine and significant problems did exist, and how to address them. This has been shown by Slovakia in Chapter IV of its Memorial; in Chapter V of its Counter-Memorial; and in considerable detail in Chapters VII and VIII of the present Reply.

6.51 Finally, Hungary complains that Variant "C" was not foreseen by the 1976 Agreement. But Variant "C" is the best possible application of the 1977 Treaty which was agreed. As such, it fully meets the requirement of Article 3(a) of the 1976 Agreement notwithstanding that Hungary has made it necessary because of its failure to carry out those measures it contracted for in 1977.

6.52 Variant "C" is also fully compatible with the 1948 Danube Convention.

6.53 In its Counter-Memorial Hungary claims that Variant "C" violates Article 3 of the 1948 Danube Convention[57]. The first paragraph of Article 3 stipulates that:

> "The Danubian States undertake to maintain their sections of the Danube in a navigable condition for river going and, on the appropriate sections, for sea going vessels, to carry out the works necessary for the maintenance and improvement of navigation conditions and not to obstruct or hinder navigation on the navigable channels of the Danube. The Danubian States shall consult the Danubian Commission (Art.5) on matters referred to in this article."

6.54 Hungary appears to argue that the 1977 Treaty is not relevant to the implementation of Article 3 of the Danube Convention as "improvement of navigation is not one of the major objectives of the 1977 Treaty"[58]. To support that view the preamble is cited. The

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55 See, Slovak Counter-Memorial, paras. 5.25 and 5.68.

56 Ibid.

57 Hungarian Counter-Memorial, paras. 6.67-6.74.

58 Ibid., para. 6.71.

reference to the development of water resources and transport in the preamble was certainly understood to embrace improved navigation. Article 1 of the 1977 Treaty is replete with references to navigation and locks. Chapter VI of the Treaty is indeed entitled "Navigation". It is equally clear from Article 18(1) that navigation was very much part of what the parties were agreeing upon. Further, both Hungary and Czechoslovakia perfectly well knew of the Danube Commission's recommended depth and have undertaken to comply with this. They concluded that this commitment could only be met by the G/N Project. Both parties also knew that the Project would improve the navigability of the Danube from 120 days per year to 330 days. The Treaty Project would thus greatly improve navigation and provide greater safety. That both parties were aware of, and had determined upon, these navigation improvements is undeniable. And it is not for Hungary to require the Court to call this into question.

6.55 Hungary points to Article 18(4) of the 1977 Treaty and protests that under Variant "C" there is now no international navigation in the main bed of the Danube[59]. But the Project exactly envisaged the new, improved international navigation being moved out of the old bed into the new canal. Hungary merely protests what it itself agreed to. Nothing in the 1948 Danube Convention prohibited the transfer of international navigation from the main river bed into the canal, and indeed the Danube Commission had approved the concept of the Project[60].

6.56 Nor does anything in Variant "C" - so closely based on what was intended in the Project - violate Article 3. The Danube Commission was notified about the damming of the Danube, to enable the implementation of Variant "C". No member of the Danube Commission (save Hungary) questioned the right of Czechoslovakia to transfer navigation into the canal.

6.57 Only international navigation (as envisaged in the 1977 Treaty) is now excluded from the old riverbed. While the use has for the moment been lost of some landing stages for pleasure boats, no commercial ports or harbours have been interfered with by Variant "C" (there being none) - and nothing has happened that was not envisaged by the 1977 Treaty. And such impact as there is upon Hungary's "rights" between rkm 1852-1811 in riparian management is due solely to Hungary's own resolute refusal to implement its 1977 Treaty obligations.

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59 Ibid., para. 6.68.

60 See, Slovak Counter-Memorial, para. 7.116, where details are given.

6.58 Hungary is also well aware that the second stage of Variant "C" allows route for navigation within the old riverbed - and the design of the underwater weirs will not preclude this. Slovakia has been systematically fulfilling its obligations under the 1948 Danube Convention,[61] and the pertinent question is as to how Hungary will "ensure uninterrupted and safe navigation on the Danube"[62] on the Nagymaros sector, given its refusal to do it through the agreed mechanisms of the 1977 Treaty.

6.59 Hungary also claims that the Danube Fisheries Agreement of 1958 has been violated by Slovakia in the putting into operation of Variant "C", and refers particularly to paragraphs 3 and 4 of Article 5 of that Convention. Hungary asserts that Slovakia has not safeguarded the migratory movements of fish and safeguarded their breeding.

6.60 The migration and breeding of fish is indeed an important matter and its protection will depend upon the particular circumstances. If dams or similar works block the migration routes of anadromous species, such as sturgeon, salmon, sea trout and herring then, according to some expert views, a special "fish pass" would need to be constructed. (However, even then the "fish pass" may not be the best solution if there is a large upstream area of stationary water, such as a reservoir, which has a disorientating effect on migration patterns.) But no purpose is served by the construction of fish passes in lowland zones, where there is little migration of anadromous fish, and where litophil species do not require migration through the whole river reach[63].

6.61 In the light of these considerations, and bearing in mind the existence of water works on the Lower Danube[64] and water works on the Upper Danube[65], no real purpose

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61 It is also noticeable that Hungary in its pleadings avoids all reference to the second paragraph of Article 3, whereby: "The riparian states may within their own jurisdiction undertake works for the maintenance of navigation, the execution of which is necessitated by urgent and unforeseen circumstances."

62 Hungarian Counter-Memorial, para. 6.74.

63 For expert comment to this effect prior to the signature of the 1977 Treaty, see, I. Bastl, "Information on effectivity of fish leads from the fishing standpoint to their need in future", (1974) Proceedings from the Conference of Ichthyologic Section , Patince, SR; J. Holčik, "Water structures and their impact on fishing", (1974) Proceedings from the Conference of Ichthyologic Section, Patince, SR.

64 That is, Iron Gate I and II in Romania.

65 In Austria and Germany - see, Slovak Memorial, para. 1.10, et seq.; and Illus. No. 12.

was served by a fish pass. As for the Čunovo weir, within Variant "C", a permanent navigation lock that is presently under construction for boats and sports-vessels will make it possible for fish that accidentally find themselves in the weir during their migration period to pass through.

6.62 In order to ensure environmental conditions that guarantee normal spawning, it is desirable to connect the branch systems on both sides of the old riverbed of the Danube - that is, in Szigetköz and also in the left side branch system. This can be done only by the construction of underwater weirs in the old riverbed. It is thus of considerable importance that Hungary has now agreed to construct at rkm 1843 one underwater weir, on the basis of the Agreement of 19 April 1995[66]. This substantial weir structure, with its rocky slippage, will fully guarantee fish migration between the branch system of Szigetköz and the old riverbed and thus address the problem alluded to by Hungary at paragraph 6.77 of its Counter-Memorial.

6.63 Slovakia has repeatedly stressed the need for the (agreed) construction of several underwater weirs in the old riverbed of the Danube[67]. This would not only solve the entire problem of fish migration between both branch systems and the old riverbed, but it would increase the diversity of habitats for fish, and possible breeding grounds. It would also create an unprecedented example of restoration of original riverain habitat.

6.64 It may thus be seen that Variant "C" is not incompatible with the 1958 Danube Fisheries Convention and that it behoves Hungary to approve measures, and itself to engage in measures, to safeguard the migratory movements and spawning of fish on this section of the Danube.

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66 Agreement between the Government of the Slovak Republic and Government of the Republic of Hungary Concerning Certain Temporary Measures and Discharges in the Danube and Mosoni Branch of the Danube, 19 April 1995. Annex I, hereto.

67 In fact, the EC experts recommended at least two weirs - see, EC Working Group report of 1 December 1993, Hungarian Memorial, Vol. 5 (Part II), Annex 19 (at p. 816).

B. Customary Law

6.65 Hungary in its Counter Memorial refers to "Slovakia's Argument that Variant "C" was lawful apart from the 1977 Treaty"[68]. Slovakia has rather said that Variant "C" is lawful by reference to the applicable law, the 1977 Treaty. The putting into operation by Czechoslovakia of the Gabčíkovo section of Variant "C" is also lawful by reference to customary international law.

6.66 Hungary does not persist with its argument that there is a peremptory rule prohibiting the diversion of boundary rivers. Rather, it complains that the diversion is not consented to. Further, Hungary says that the Treaty was consent to a diversion that was not unilateral, but was to occur in the framework of the joint integrated system[69]. Hungary thus uses its own violations as the reason for further "withdrawing" consent given to the entirety of the Project.

6.67 The Slovak Memorial examined the Lake Lanoux and Diversion of the Meuse cases to show that Variant "C" would be consonant with general international law[70]. Hungary finds differences between the cases that it deems critical. It is of course true that the diverted water in the Lake Lanoux Case was to be restored to the River Carol before it reached Spanish territory. But there is nothing in the case that turns on that point - the case concerned, just as here, the impact of the diversion on Spain's claims as a riparian[71]. Indeed, the Award emphasises that the principle of territorial sovereignty yields to the limitations of international law, both by reference to the Additional Act and otherwise, and that comprehensive agreements must be sought[72].

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68 Hungarian Counter-Memorial, p. 227.

69 Ibid., para. 6.43.

70 Slovak Memorial, para. 7.43, et seq.

71 Further, Hungary emphasises the 40km deviation - but all but 10 km of that was on the basis of agreement, including all of the major installations.

72 Lake Lanoux Arbitration (France v. Spain), 24 International Law Reports (1957) 101, at p. 119; 12 United Nations Reports of International Arbitral Awards (1957) p. 285. The Award further emphasises that consultations and negotiations "must be genuine, must comply with the rules of good faith and must not be mere formalities".

6.68 Hungary introduces long passages from the Lake Lanoux award to show that on "a careful reading" it "contradicts the Slovak claim"[73]. They do nothing of the sort. What the passage at page 303 of 12 United Nations Reports of International Arbitral Awards, 1957 indeed shows is that, unlike Hungary, Spain made no unsupported claims of a diminution of waters, pollution due to the diversion, or allegations of risks beyond those in "other works of the same kind which today are found all over the world". The Court will determine whether, in the present case, such claims are based on any sound scientific evidence. But that fact can hardly make Lake Lanoux less than authority for what it determined on the claims before it - merely, that so long as the waters are returned, even substantial changes in river flow require no consent of the other riparian. Variant "C" entailing no substantial diminution of the waters to which Hungary is entitled (although Hungary will in fact be receiving more water than is required by the 1977 Treaty), nor causing pollution of the returned waters, nor presenting risks of a different order to those known elsewhere, the Lake Lanoux principle will apply.

6.69 Hungary also introduces citations (from pages 306-307 and 311 of the Award) in which the Tribunal refers to the obligation to negotiate and to the suspension by parties of the exercise of their rights in order that the negotiations can succeed. But this is to take those passages out of their context in a most misleading fashion. In the present case the agreement - the 1977 Treaty - already exists. Hungary relies on these extracts for an entirely different proposition from that in the Award - namely, to contend that, notwithstanding an existing agreement, one party can demand that another party suspend the exercise of its rights in order to negotiate the demise of the agreement. The paragraph immediately preceding those cited by Hungary (from pages 306-307 of 12 United Nations Reports of International Arbitral Awards, 1957) makes the point. It reads (in English translation[74]):

> "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

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73 Hungarian Counter-Memorial, para. 6.48.

74 24 International Law Reports (1957), at p. 128. That the passage cited by Hungary is but a component part of what has gone before may seen be from the French version cited in the body of para. 6.53 ("...[L]a pratique internationale...") but not from use of the English translation in fn. 59 ("International practice requires ...").

veto', which at the discretion of one state paralyses the exercise of a territorial jurisdiction of another.
That is why international practice prefers to resort to less extreme solutions ... ."

6.70 Read properly in context, these passages explain exactly why Hungary may not legally hold up the implementation of the Treaty. Hungary, which refused to negotiate anything but the termination of its obligations, was asserting a "right of veto" over a project to which it had agreed in a treaty. It denied to Czechoslovakia (and then Slovakia) their "normal competence" to act, "as a result of ... [Hungary's] unconditional and arbitrary opposition...". Hungary was effectively deploying "a right of veto", and demanding a "right of assent".

6.71 As for the passage cited by Hungary at paragraph 6.54, footnote 60 (drawn from page 311 of 12 United Nations Reports of International Arbitral Awards, 1957), it is noteworthy that the Tribunal said, of the suspension of the full exercise of rights during negotiations, that if "engagements" to do this "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". Exactly so. Czechoslovakia offered to negotiate environmental guarantees; it tolerated for three full years the delay in damming; and it undertook to accept whatever measures the trilateral commission might propose. If it was required unconditionally to stop all work on the Project until Hungary's agreement was secured, then Slovakia would have lost both the right to negotiate and indeed the right to complete the Project as provided for in the Treaty.

6.72 Not only does the text of the passage cited by Hungary (from page 311) qualify the proposition that the parties must consent to the suspension of their full rights during negotiations, but so do the facts of the case. Before the case went to arbitration France had announced a three month suspension while a Special Mixed Commission prepared proposals. But when the Special Commission terminated its work, having been unable to produce an acceptable compromise, France resumed its work. The Tribunal simply noted, without any adverse comment, that "the work had by the date of the present judgment been largely completed..."[75].

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[75] 24 International Law Reports (1957), at p. 111; 12 United Nations Reports of International Arbitral Awards, at p. 295.

6.73 Hungary in its Counter Memorial[76] complains of Czechoslovakia's unwillingness to engage in "meaningful negotiations". But the record clearly shows that the only negotiations that would be "meaningful" for Hungary were those that would lead to the termination of the 1977 Treaty. It was thus Hungary's conduct that was "incompatible with the good faith to achieve an agreement", to which the Lake Lanoux Tribunal had referred.

6.74 As for the Diversion of the Waters from the Meuse Case, Slovakia notes that, while Hungary apparently believes the 1977 Treaty irrelevant as the applicable law for this case, it wishes to emphasise that that case concerned "the particular treaty obligation in force between Belgium and Netherlands"[77]. That is of course true, though it is widely referred to - including in the work of the ILC on watercourses - as in any event closely according to general international law. But Slovakia is satisfied to observe that Hungary appreciates that when a treaty exists, it is indeed the provisions of that treaty that fall to be applied.

6.75 The rules and principles of general international law are relevant for the purpose of interpreting the 1977 Treaty, but do not somehow replace clear Treaty terms. It is the rules and principles of general international law in effect at the time of the conclusion of the Treaty to which recourse should be had, to the extent necessary, to interpret the Treaty's terms. The 1977 Treaty is a lex specialis from which neither contemporaneous nor later developing rules of general international law would derogate, to the extent that they were applicable - only a contrary norm jus cogens would have this effect. As Hungary has itself recognised, the 1977 Treaty "was consistent with the maintenance of water quality and with environmental protection generally"[78]. The conduct of Czechoslovakia and Slovakia from the conclusion of the 1977 Treaty to the present has in any event been consistent with principles and rules of general international law concerning natural resources and the environment.

6.76 In respect of Variant "C" in particular, Hungary identifies a number of what it refers to as "customary rules" whose "salience and specific applicability" it claims to have

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[76] Hungarian Counter-Memorial, para. 6.55.

[77] Ibid., para. 6.61.

[77] Yearbook of the International Law Commission, 1974, Vol. II, Part II, 187.

[78] Hungarian Memorial, para. 4.21.

demonstrated in its Memorial.[79] Among these is "the principle of the reasonable and equitable use of transboundary natural resources", which Hungary claims Slovakia regards as "only a 'soft' norm".[80] Once again, however, Hungary mischaracterises Slovakia's position, which was clearly stated in its Memorial: "Slovakia has no quarrel with the proposition that evolving international law does indeed require reasonable and equitable use of such shared resources [referring to transboundary natural resources]"[81]. Hungary nevertheless devotes the ensuing six paragraphs to an attempt to demonstrate that this principle, and its specific expression in the context of international watercourses, constitutes a principle of international law.[82] It is telling, however, that throughout its discussion of the principle Hungary does not so much as mention a key element of the concept as framed by the ILC: that of equitable participation.

6.77 The principle is set forth in Article 5 of the ILC's draft articles on the non-navigational uses of international watercourses, which is entitled "Equitable and reasonable utilization and participation". The principle of equitable and reasonable utilisation is contained in paragraph 1 of the article. Paragraph 2, which lays down the principle of equitable participation, provides as follows:

> "2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles[83]."

6.78 The meaning of the concept of equitable participation is elaborated upon in the ILC's commentary to this provision:

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79 Hungarian Counter-Memorial, paras. 6.18 and 6.19.

80 Ibid., para. 6.21.

81 Slovak Memorial, para. 7.74.

82 Hungarian Counter-Memorial, paras. 6.22-6.27. However, Hungary goes beyond this, arguing that the principle of equitable utilisation of international watercourses "already belonged to general international law" at the time the 1977 Treaty was concluded. Ibid., para. 6.28. As support for this proposition it refers to the work of the International Law Commission in the field of international watercourses; yet this work does not purport to fix a specific date or even a general time-frame when this principle became part of general international law. The first discussion of the principle in the ILC's work was in a 1982 report of a special rapporteur; it was then embodied in the draft articles adopted by the Commission on first reading in 1991 and on second reading in 1994.

83 Report of the ILC on the Work of Its Forty-Sixth Session, p. 218, document A/49/10 (1994).

> "The core of this concept is cooperation between watercourse States through participation, on an equitable and reasonable basis, in measures, works and activities aimed at attaining optimal utilization of an international watercourse, consistent with adequate protection thereof. Thus the principle of equitable participation ... recognizes that, as concluded by technical experts in the field, cooperative action by watercourse States is necessary to produce maximum benefits for each of them, while helping to maintain an equitable allocation of uses and affording adequate protection to the watercourse States and the international watercourse itself. ... Thus watercourse States have a right to the cooperation of other watercourse States with regard to such matters as flood-control measures, pollution-abatement programmes, drought-mitigation planning, erosion control, disease vector control, river regulation (training), the safeguarding of hydraulic works and environmental protection, as appropriate under the circumstances. Of course, for greatest effectiveness, the details of such cooperative efforts should be provided for in one or more watercourse agreements. But the obligation and the correlative right provided for in paragraph 2 are not dependent on a specific agreement for their implementation[84]."

6.79 The details of the cooperative efforts Hungary and Czechoslovakia regarded as appropriate for the attainment of optimal utilisation of the Danube were provided for in the 1977 Treaty. That agreement was obviously premised upon the active participation of both parties in the construction, maintenance and operation of the system of locks. Hungary's repudiation of the 1977 Treaty signalled its refusal to participate, contrary to both the Treaty and the rule reflected in paragraph 2 of Article 5. The crucial point that paragraph 2 expresses is that achievement of an equitable allocation of the uses and benefits of an international watercourse, to say nothing of optimal utilisation thereof, is virtually impossible in most cases without the participation of the states sharing that watercourse. Hungary has prevented the achievement of optimal utilisation of the Danube by abandoning Nagymaros, and has deprived Czechoslovakia and Slovakia of their equitable shares by refusing to participate on any basis, let alone an equitable and reasonable one, in the completion and operation of works relating to the Gabčikovo section. In addition, Hungary's failure to participate has made it impossible to ensure "adequate protection" of the watercourse: by refusing for two years to recharge the branch system on its side of the Danube, Hungary has harmed the ecosystem of the watercourse in violation of Article 20 of the Commission's draft articles[85]. In sum, the "right" of Czechoslovakia and Slovakia "to the

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84 Ibid., pp. 219-220.

85 Article 20 of the Commission's draft articles, entitled "Protection and preservation of ecosystems", provides as follows: "Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses." Ibid., p. 280.

cooperation of [Hungary] with regard to such matters as flood-control measures, ... river regulation (training), the safeguarding of hydraulic works and environmental protection" has been violated by Hungary's refusal to participate in the attainment of optimal utilisation of the Danube through the G/N Project.

6.80 As far as the application of the principle of equitable utilisation itself to Variant "C" is concerned, Slovakia has once again made its position clear from the outset: "... Variant 'C' fully conforms to it while Hungary's entire conduct, from 1977 onwards, has been unreasonable and inequitable"[86]. In its Counter-Memorial, Hungary claims that Slovakia has violated the principle of equitable utilisation through the operation of Variant "C". Before addressing this charge, Slovakia would recall two points: first, that the 1977 Treaty is a concrete implementation of the principle of equitable and reasonable utilisation, and thus was designed to provide each party with a reasonable and equitable share of the beneficial uses of the Danube[87]; and second, that Variant "C" has been nothing more than a good faith attempt by Czechoslovakia (and then Slovakia) to implement the 1977 Treaty as nearly as possible after Hungary's abandonment of its obligations thereunder[88].

6.81 In the light of these points, it is ironic that Hungary would claim that Slovakia has violated the principle of equitable utilisation through its acquisition "of exclusive control over the production of electricity, navigation and water discharge in a vital common reach of the Danube". The Project is still fully capable (except for the lack of Nagymaros) of providing each party with a reasonable and equitable share of the beneficial uses of the Danube; it is Hungary that is obstructing its own realisation of those beneficial uses through its continued refusal to live up to its obligations under the Treaty[89]. Hungary, having abandoned the performance of its treaty obligations, can hardly be heard to complain of continued performance by its treaty partner, performance that was as close to what was called for under the 1977 Treaty as Hungary's non-

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86 Slovak Memorial, para. 7.74.

87 Ibid., para. 7.77.

88 Ibid., para. 7.11, et seq.

89 Moreover, even under present conditions, Slovak Prime Minister Mečiar invited Hungary to take part in utilisation of Gabčíkovo, meaning thereby the settlement of the Hungarian share in the electricity produced (taking into account the percentage of investment realised and compensation for damage caused), a proposal that has remained unanswered till now.

participation would permit. "Exclusive control" is an odd way for a party to refer to the situation that results when it abandons its treaty obligations, leaving the other party to carry on without it or suffer massive damage.

6.82 Hungary also finds a violation of the principle of equitable utilisation in that "Slovakia has placed itself in the position of exercising manifold pressure on its downstream neighbour"[90]. But in the Lake Lanoux award, the tribunal declared that "there is not . . . in the generally accepted principles of international law, a rule which forbids a State, acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international obligations, to do even serious injury to a neighbouring State"[91]. Here, Czechoslovakia and Slovakia were "acting to protect [their] legitimate interests" in completing the Project as nearly according to plan as they could without Hungary's participation, as explained in Chapter V. In brief, Hungary's abrupt about-face in 1989 and the abandonment in early 1990 of its works under the Project left Czechoslovakia and Slovakia with no choice but to protect, inter alia, their substantial investment from serious deterioration and their citizens from potentially devastating flood damage. Moreover, as Slovakia has demonstrated, it has caused Hungary no "serious injury" and is not "in violation of its international obligations." And finally, at no time has Czechoslovakia or Slovakia "exercis[ed] manifold pressure on its downstream neighbor", nor does Hungary so claim. It merely states that Slovakia has "placed itself in the position" of doing so - but this is a situation the Lake Lanoux tribunal recognised to be a common feature of modern life, given "man's growing mastery of the forces and secrets of nature"[92].

6.83 Hungary further claims that Slovakia has created "a situation incompatible with the inherent 'perfect equality of rights' characterising the community of interest which is at the core of the principle of equitable use"[93]. The quotation is presumably meant to be from the River Oder case, although the Permanent Court did not there use this precise phrase. It instead referred to "the perfect equality of all riparian States in the use of the whole course of the river and the

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90 Hungarian Counter-Memorial, para. 6.31.

91 Lake Lanoux Arbitration (France v. Spain), 24 International Law Reports (1957), p. 101, at p. 126, Yearbook of the International Law Commission, 1974, p. 194, at p. 196, para. 9 of award.

92 Ibid.

93 Hungarian Counter-Memorial, para. 6.31.

exclusion of any preferential privilege of any one riparian State in relation to the others"[94]. Yet as Slovakia has already pointed out[95], it is in fact Hungary that destroyed the "perfect equality" of the parties that had been elaborated in detail in the 1977 Treaty by asserting the "preferential privilege" of bringing the Project to a halt.

6.84 Hungary proceeds to complain of the "dramatic decrease in the quantity of water received on Hungarian territory since October 1992"[96], and of the fact that "the adverse consequences resulting from the operation of Variant C are different on both sides of the river"[97]. Slovakia has shown that to the extent that this decrease was not the result of measures to which Hungary had agreed in the 1977 Treaty, it was the result of Hungary's own refusal to bring water into the branch system on its side of the Danube[98]. Slovakia has also shown that the basis for Hungary's appraisal of the nature of the "consequences resulting from the operation of Variant C" - its 1994 "Scientific Evaluation" - is too little, too late: it is flawed legally in that Hungary obviously could not have relied upon it in deciding to abandon its Treaty obligations[99]; and it is flawed factually in that it does not square with other scientific appraisals of the effects of the Project based on actual monitoring[100].

6.85 Finally, Hungary asserts that Variant "C" "has created a situation that constitutes the archetype of a violation of the obligation not to cause appreciable or significant harm to another watercourse state"[101]. Characteristically, however, Hungary does not specify the "harm" that Variant "C" is supposed to have caused. Slovakia has addressed the issue of factual "harm" in great detail in this and other pleadings and will not do so again here[102]. For present

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94 Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 5, at p. 27.

95 Slovak Memorial, para. 7.86.

96 Hungarian Counter-Memorial, para. 6.32.

97 Ibid., para. 6.33.

98 Slovak Counter-Memorial, para. 8.11.

99 See, para. 11.01, below.

100 See, Part III and Vols. II and III, hereto. See, also Slovak Counter-Memorial, para. 8.21, et seq., concerning the actual, recorded impacts of Variant "C".

101 Hungarian Counter-Memorial, para. 6.34 (emphasis in original).

102 See, Chapters VII and VIII of Slovak Counter-Memorial; see, also, Chapters XI-XIII, below.

purposes Slovakia will confine itself to noting the following: Hungary accepted in the 1977 Treaty a "situation" substantially equivalent to the one produced by Variant "C", any "harm" to Hungary is self-inflicted in that Hungary refused to take adequate measures for the recharge of the side arms; and in any event, it is in fact Hungary that has caused substantial harm to Czechoslovakia and Slovakia in walking away from its Treaty obligations and forcing its Treaty partner to attempt to salvage its investment by bearing the entire burden of completing the Gabčikovo section itself.

6.86 Not only does Hungary distort the factual situation, it also misapplies the law. It first discusses the obligation not to cause significant harm at great length[103] - as if this principle had been challenged by Slovakia, which it has not. As Hungary correctly observes, the ILC in its work on the law of the non-navigational uses of international watercourses has concluded that this obligation is one of due diligence. According to the Commission, the obligation of due diligence "is not intended to guarantee that in utilizing an international watercourse significant harm would not occur"[104]. Thus, "[i]t is an obligation of conduct, not an obligation of result"[105]. Furthermore, the Commission has expressed the obligation not to cause significant harm as "a process aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case"[106]. The Commission explained that article 5 of its draft articles, setting forth the obligation of equitable utilisation, did not by itself "provide sufficient guidance for States in cases where harm was a factor" and that:

> "... the fact that an activity involves significant harm, would not of itself necessarily constitute a basis for barring it. In certain circumstances 'equitable and reasonable utilization' of an international watercourse may still involve significant harm to another watercourse State. Generally, in such instances, the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interests at stake[107]."

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103 Hungarian Counter-Memorial, paras. 6.34-6.39.

104 Report of the International Law Commission on the Work of Its Forty-Sixth Session, p. 237; A/49/10 (1994), citing, inter alia, P.M. Dupuy, La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle (1976) and "La responsabilité internationale des Etats pour les dommages causés par les pollutions transfrontières", in OECD, Aspects juridiques de la pollution transfrontière (1977).

105 Ibid.

106 Ibid., p. 236.

107 Ibid.

6.87 Thus the Commission recognises that a regime of equitable and reasonable allocation of the uses and benefits of an international watercourse may entail some harm to one or more of the states sharing the watercourse. The objective, however, is "reaching an equitable result in each concrete case". This is precisely the state of affairs produced by the 1977 Treaty: each party agreed to accept certain physical alterations within its territory, which Hungary is now characterising as "harm", in exchange for the manifold benefits the Project would produce for it. Therefore, even if Hungary were able to show that the Project had caused it significant harm, this would not establish a breach of an obligation by Slovakia. It would instead be viewed in the overall context of the regime of equitable utilisation which Hungary helped to devise and construct, and in which Hungary is free to participate.

6.88 Furthermore, there is no question but that Czechoslovakia and Slovakia have exercised due diligence to avoid causing harm. As Slovakia has shown, in addition to the numerous studies undertaken in the planning of the Project itself, Czechoslovakia studied a number of alternative responses to Hungary's abandonment of the Project prior to selecting Variant "C"[108]. Czechoslovakia and Slovakia have undertaken measures additional to those in the original Project to restore the side arm system and to ensure good ground water conditions[109]. Slovakia is continuing to pursue its program of waste water treatment and other activities to protect Danube water quality[110]. And Slovakia continues to operate the monitoring system to assist it in its efforts to maintain good water quality. In contrast, at least until 19 April 1995, Hungary has done little or nothing to improve conditions on its side of the Danube. And it can hardly be said that Hungary exercised due diligence to prevent harm to Czechoslovakia when it withdrew from the Project.

6.89 This latter point leads to Hungary's claim that Slovakia failed to exercise due diligence because "Slovakia 'intentionally ... caused the event which had to be prevented'"[111]. Hungary here refers to the following passage of the ILC's commentary in which the Commission explains the nature of the obligation of due diligence: "What the obligation entails is that a watercourse State whose use causes significant harm can be deemed to have breached its obligation

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108 Slovak Memorial, para. 5.12, et seq.

109 Ibid., paras. 5.36-5.46.

110 See, para. 7.17, below.

111 Hungarian Counter-Memorial, para. 6.40. Hungary's quotation is from the ILC's commentary to article 7 of its draft articles, set forth in the sentence following.

to exercise due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing the event or has abstained from abating it." Hungary is thus, in effect, characterizing the completion of the Project as "the event which had to be prevented". Hungary is therefore arguing in effect that it may participate in the design of the Project, conclude a treaty thereon, lead its treaty partner through a series of delays and accelerations, watch as its partner effects significant alterations of its territory and expends substantial resources on its construction obligations, then, quite literally, leave its partner "high and dry" by repudiating the treaty - and cry foul when its partner attempts to complete the Project in a manner closely approximating that to which Hungary had agreed.

6.90 Surely this is not what the ILC had in mind. Indeed, the entire approach of the Commission's draft articles is that of a "framework agreement" which encourages states sharing international watercourses to enter into specific agreements applying and adjusting the principles contained in the draft articles to the characteristics of the watercourse and the needs of the states concerned[112]. This is precisely what the 1977 Treaty does. But even if the completion of the Project were somehow regarded as "the event which had to be prevented", Hungary has not demonstrated that this "event" caused it significant harm. More fundamentally, in this line of argument Hungary attempts to distract the Court's attention from the fact that it was Hungary that intentionally caused Czechoslovakia and Slovakia not merely significant, but substantial harm through its cavalier decision to abandon its treaty partner and its obligations under the 1977 Treaty.

6.91 Slovakia wishes to make a final observation concerning Hungary's treatment of the obligation not to cause significant harm: Hungary misunderstands the ILC's careful framing of this obligation by ignoring the very process the Commission's draft article establishes. If significant harm is caused to a watercourse State despite the exercise of due diligence by the State whose use causes the harm, then, "in the absence of agreement to such use,"[113] the latter State is to consult with the harmed State concerning:

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112 See, article 3 of the Commission's draft articles, and commentary thereto, Report of the International Law Commission on the Work of Its Forty-Sixth Session, p. 206, et seq., document A/49/10 (1994).

113 ILC, Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, Art. 7, para. 2, Report of the International Law Commission on the Work of Its Forty-Sixth Session, p. 236, document A/49/10 (1994) (emphasis added).

"(a) the extent to which such use is equitable and reasonable taking into account the factors listed in article 6;
(b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation[114]."

6.92 In the first place, of course, here there was an "agreement to [the] use" of which Hungary complains - the 1977 Treaty. Even ignoring that agreement, however - and assuming that it is Czechoslovakia or Slovakia that is causing the harm, not Hungary - Slovakia has demonstrated that Czechoslovakia was always open to consultations and was willing to make adjustments in the Project to meet Hungary's concerns. It was Hungary that ultimately spurned this process. The Commission explains that if the consultations do not lead to a solution, the dispute settlement procedures contained in the draft articles apply. The draft articles thus recognize that the parties may require assistance in arriving at an equitable allocation, in light of "the complexity of the issues and the inherent vagueness of the criteria to be applied"[115] - characteristics of the law in this field wholly ignored by Hungary's wooden treatment of it.

6.93 Slovakia thus concludes by saying that even if customary international law be applicable law beyond the limits specified above, the proceeding with and putting into operation of the Gabčíkovo section through Variant "C" is fully in conformity with its rules and principles.

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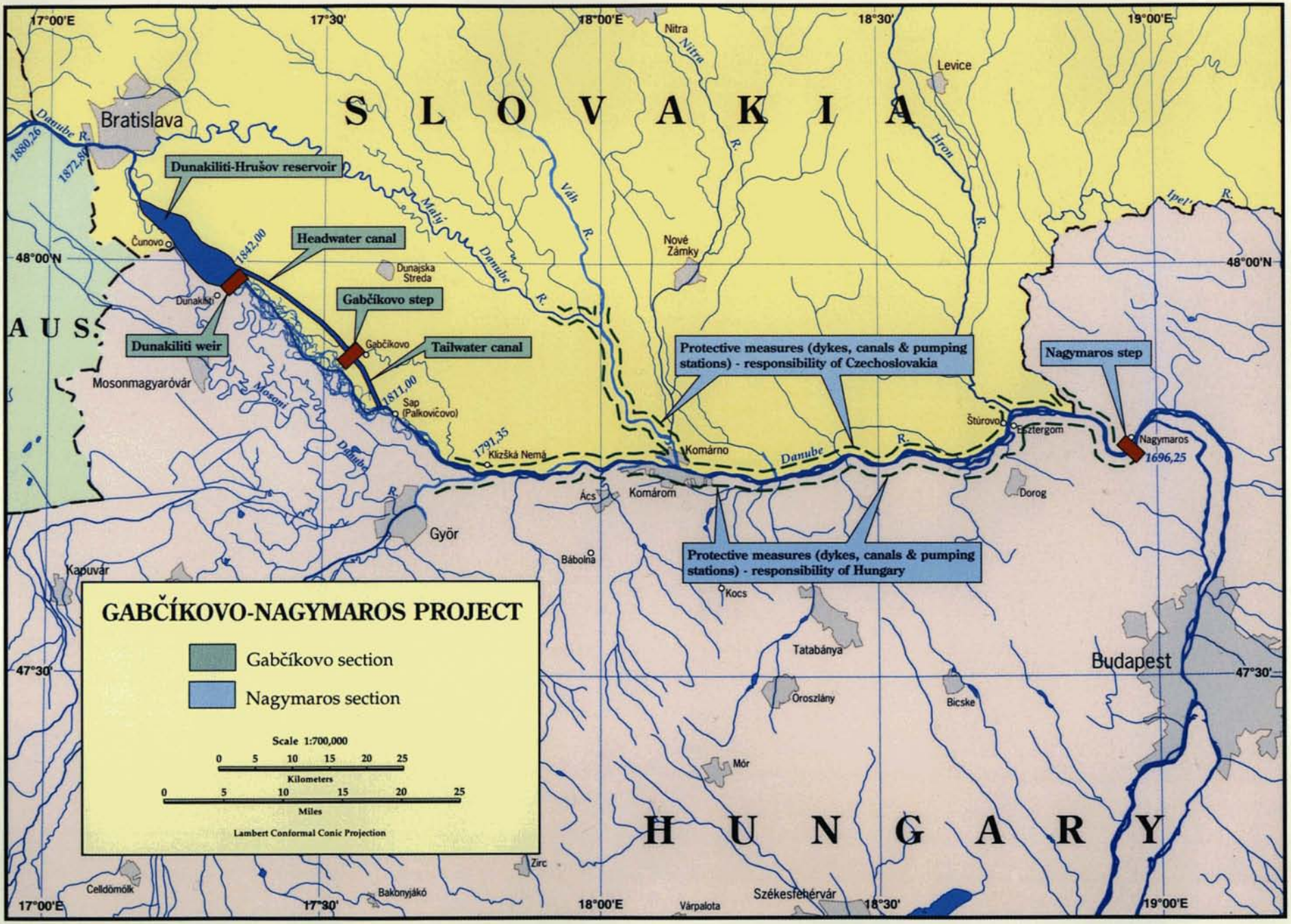
114 Ibid. Article 6, referred to in sub-paragraph (a), is entitled "Factors Relevant to Equitable and Reasonable Utilization." Ibid., p. 231.

115 Ibid. p. 244.



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-3

PART II

THE EVENTS AND CONDUCT OF THE PARTIES - AND THE APPLICABLE LAW - RELEVANT TO ANSWERING THE QUESTIONS PUT TO THE COURT UNDER ARTICLES 2(1)(a), 2(1)(b) AND 2(1)(c) OF THE SPECIAL AGREEMENT

CHAPTER VII. ARTICLE 2(1)(a): WHETHER HUNGARY WAS ENTITLED TO SUSPEND AND SUBSEQUENTLY ABANDON, IN 1989, THE WORKS ON THE NAGYMAROS SECTION OF THE G/N PROJECT

SECTION 1. Introduction

7.01 The Parties are in agreement that the works at Nagymaros were suspended by Hungary on 13 May 1989 and abandoned by Resolution of the Hungarian Government on 27 October 1989. The evidence is absolutely clear that, thereafter, the possibility of Hungary's resumption of work at Nagymaros was never entertained, let alone proposed, by Hungary or made the subject of negotiations between the Treaty parties. Hungary treated Nagymaros as having been abandoned definitively in 1989 and not a matter for discussion other than to formalise its abandonment by Treaty amendment (and after the Hungarian Government's Resolution of 20 December 1990, by Treaty termination). In contrast, both during and after 1989, Czechoslovakia continued to adhere to the carrying out of the entire G/N Project agreed under the 1977 Treaty, including Nagymaros, and at no stage consented to Hungary's suspension or termination of that part of the Treaty that concerned Nagymaros.

7.02 Hungary's pleadings seek to divert attention from its actions to suspend and abandon Nagymaros and to place more emphasis on the events concerning the Gabčíkovo section of the Project and Variant "C". Offhandedly, Hungary's Counter-Memorial refers to the "justified rejection of the Nagymaros Barrage", wrongly implying mutual rejection[1]; and it totally ignores Nagymaros when it contends that:

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[1] Hungarian Counter-Memorial, para. 5.47.

> "Throughout, Hungary was willing to resolve the dispute by negotiations, by involving third parties and even by resort to the Court[2]."

Yet after the Hungarian Government abandoned Nagymaros on 27 October 1989, there is no indication at all that Hungary considered the Nagymaros section of the Project any longer to be part of the dispute to be resolved. As Illus. No. R-3 (appearing at the start of this Chapter) shows, the Nagymaros section of the Project consisted of considerably more than just the construction by Hungary of the step at Nagymaros. Extensive flood control work on the Czechoslovak side of the Danube was also involved, for which the Czechoslovak portion of this work was originally budgeted at 1.237 million crowns, or almost one-tenth of the entire Czechoslovak budget for the Project[3].

7.03 The evidence leaves no doubt that Czechoslovakia protested at once Hungary's action to suspend work at Nagymaros[4]; and Slovakia's Counter-Memorial has demonstrated the lack of any merit to the repeated attempts in Hungary's Memorial to imply Czechoslovakia's acquiescence in the abandonment of Nagymaros[5].

7.04 It is curious that in the discussion in its Counter-Memorial of the conduct of the Treaty parties, Hungary devotes over 20 paragraphs to the contention that Slovakia in this case has accused Hungary of bad faith[6]. Hungary goes so far as to argue that:

> "... the primary and fundamental claim presented in the Slovak Memorial [is] that Hungary acted in bad faith in invoking environmental concerns as a basis for the suspension of works and the subsequent termination of the Treaty[7]."

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2 Ibid., para. 6.83.

3 See, Slovak Memorial, para. 2.73, and Illus. No. 28. Czechoslovakia continued to perform this work after Hungary's abandonment of Nagymaros. See, Slovak Counter-Memorial, paras. 5.24 and 5.53.

4 Ibid., para. 5.16.

5 See, ibid., paras. 5.14-5.15, 5.20-5.23, 5.50-5.53 and 5.77. It is interesting to note that this acquiescence argument does not reappear in the Hungarian Counter-Memorial. Instead, Hungary argues that its acts in respect to Nagymaros could not have been unexpected in the light of the events preceding Hungary's suspension announcement on 13 May 1989. Such a shift in emphasis is understandable. Aside from the failure of the evidence put forward by Hungary to establish acquiescence, the proposition itself implies that Hungary's acts were taken unilaterally and in breach of the Treaty, and required Czechoslovakia's acquiescence in order to correct the breach. See, Hungarian Counter-Memorial, paras. 2.29-2.34.

6 See, e.g., ibid., Introduction, paras. 8 and 17; paras. 2.01-2.08; 2.11-2.12; and paras 2.118-2.128.

7 Ibid., para. 2.01.

Yet the Slovak Memorial may be searched in vain for any accusation against Hungary using the words "bad faith"[8]; such a characterisation of Hungary's conduct is entirely the inspiration of Hungary[9].

SECTION 2. The Disputed Interpretation of the Events Preceding the Suspension of Nagymaros

7.05 Slovakia's analysis of the period between 1977 and 13 May 1989 is fully set out in its Memorial and Counter-Memorial[10]. Hungary's Counter-Memorial takes issue with much of this analysis. In particular, Hungary contests that the reasons for seeking to delay the Project initially - for up to 10 years - were essentially economic not environmental. While admitting that economic factors were involved[11], Hungary's Counter-Memorial contends that the "underlying issue" at the time was "what to do in case of scientific uncertainty". This is certainly not borne out by the evidence, particularly the Marjai letter of 19 March 1984[12]. As Slovakia has already shown, this letter established that the Hungarian Government sought environmental arguments to support its attempts to postpone the Project for economic reasons; but its Academy of Sciences failed to produce any environmental arguments sufficiently meritorious to be helpful in the negotiations with Czechoslovakia[13].

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8 The words "bad faith" do not appear in Slovakia's Memorial and appear only once in Slovakia's Counter-Memorial - at para. 9.28 - where Slovakia suggests that the "Hungarian position seems to be that Czechoslovakia acted in bad faith" (emphasis added).

9 See, e.g., Hungarian Counter-Memorial, para. 2.05, where a reference is made to para. 4.36 of the Slovak Memorial as an example of "Slovakia [accusing] Hungary of abusive conduct". But the reference is to Czechoslovakia's rejection at the time of Hungary's "abusive interpretation" of the meeting held (shortly before) on 20 July 1989.

10 Slovak Memorial, Chapter III; Slovak Counter-Memorial, Chapter IV.

11 The Hungarian Counter-Memorial, para. 2.10, refers to the G/N Project as an "enormous financial burden", contending that the Project was adopted to a large extent for political reasons. See, also, ibid., para. 2.14.

12 See, Slovak Counter-Memorial, para. 4.21. Although itself introducing into evidence the 1984 Marjai letter with its Counter-Memorial, Hungary (paras. 2.11-2.13) attempts to portray the letter as insignificant: a single internal Hungarian document among thousands; and Mr. Marjai as merely the Minister responsible for financial matters. The true situation was very different, and the 1984 Marjai letter is a document of major importance. For Mr. Marjai was the Hungarian Deputy Prime Minister and, as such, the Hungarian Chairman of the top-level committee overseeing the G/N Project, the ESTC Committee.

13 See, Slovak Counter-Memorial, para. 4.13; Slovak Memorial, para. 3.32, et seq. Hungary was ultimately able to delay the Project for some four years, as formalised in the 1983 Protocols.

A. Project Affirmation: The 1985 EIA

7.06 This is not to say that environmental issues were not given serious attention by Hungary during this period, as illustrated by its environmental studies in 1981, 1982 and its 1985 Environmental Impact Assessment ("EIA")[14]. The importance of the 1985 EIA was not simply that it constituted a thorough reassessment of the Project's environmental impact; it led also to a renewed and definitive commitment to the Project by Hungary.

7.07 This is clear from the Hungarian Government's Resolution of 15 August 1985, which decreed that construction of the Project "should be implemented in accordance with the deadline defined in the Treaty" taking full account of the EIA's findings:

> "2. ...The recommendations of the impact study should be considered during implementation, and work serving the purpose of environment protection should be carried out simultaneously with the building of the water barrage system.
>
> 3. The subjects of scientific research, and the questions related to technology and technology development that are to be solved before the operation of the [Project] has started, together with the problems during operation should be defined in view of the environmental impact study's conclusions.
>
> ...
>
> 4. Scientific research should be continued in co-operation with the Slovak Academy of Sciences, and the findings should be used during detailed planning and operation.
>
> 5. The construction of a monitoring system that was scheduled in the plans should be built in co-ordination with the Czechoslovak partners before the operation of the [Project] starts and it should be continually operated[15]."
>
> ...

7.08 Furthermore, Hungary's new commitment to the Project was officially communicated at once to Czechoslovakia - by Deputy Prime Minister Marjai himself. This occurred on 19 August 1985, when the Prime Minister of Czechoslovakia met Mr. Marjai and

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[14] Slovak Counter-Memorial, paras. 4.21-4.30 and 7.73-7.77. See, paras. 1.24-1.30, above, for further discussion of the 1985 EIA and Hungary's weak attempt to disparage it. The Slovak environmental studies at the time were the 1975-1976 Bioproject updated in 1986. See, Slovak Memorial, paras. 2.17-2.22, and Slovak Counter-Memorial, para. 4.06.

[15] Hungarian Counter-Memorial, Vol. 3, Annex 41.

the Hungarian Ambassador at Hungary's request[16]. Mr. Marjai explained that the Hungarian Government had just "examined the findings of the approximately two-year extensive and high quality scientific research", known as the "Environmental Impact Study", which had served to "convince the Party and the Government that the construction of the water power plant system is a sensible use of the Danube"[17].

7.09 The Hungarian account of this meeting reveals the lack of any bias in favour of the Project - in clearest contradiction to the portrayal now provided by Hungary of a Government stubbornly proceeding with the Project, oblivious to any question of environmental impact. As to environmental concern and risk, Mr. Marjai specifically emphasised that the parties' joint work on the Project should be accompanied by continuous research and monitoring. As to the public's concern over the environmental effects, the impression given is again directly contrary to Hungary's current portrayal. Rather than showing a predilection to suppress any opposition to the Project, he said that "opposing arguments must not be prohibited - on the contrary, we should convince those who emphasise such arguments". As to the financial-economic side, Mr. Marjai candidly admitted the Project was a "great burden, a painful issue"; yet, given Hungary's international and national interests and the existence of the favourable EIA:

> "... we had no other option left but to continue the work according to our treaty obligations ... . [T]he only reasonable option is to construct the project jointly with the greatest possible speed utilising the achievable benefits to a maximum. There is full harmony between the Hungarian and Czechoslovak side concerning this."

7.10 The Czechoslovak Prime Minister replied by calling attention to the great political and international importance of the decision just reached by Hungary following its appraisal of this study. The Hungarian EIA, he said, responded to the questions that had been raised as to the Project's environmental impact during the preceding years; and in the light of such response, like Mr. Marjai, he concluded that:

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16 Ibid., para. 2.19, and Vol. 3, Annex 40, a translation of a Hungarian internal report of the meeting. See, also, the Aide-Mémoire of the discussions of the Co-Chairmen of the ESTC Committee on 19 August 1985. Annex 4.

17 He was referring to the 1985 Hungarian EIA. According to Mr. Marjai, the Hungarian study had been handed over to his Czechoslovak counterpart on the ESTC Committee.

> "Together with this [a reference to the 1985 EIA] ... we cannot do else but implement the project. During implementation, we naturally [must] consider the ecological factors and the results that will emerge during implementation[18] ."

The Prime Minister also showed his awareness of the "vital question" of water quality; and as to the protection of the natural environment, he stated that "it has to be especially ensured that nature be conserved as it used to be"[19] . This would require, he said, that the Project's plans be revised by agreement, as they proceed. Thus, Czechoslovakia would study the EIA to see if it required any such steps to be taken. He emphasised that, in implementing the Project, Czechoslovakia:

> "... will take pains so that the project will not have any unfavourable impact [on] the environment. Should there be new facts and reasons pointing to the fact that this is not ensured, it should be examined and solutions would be searched for. In his view ... the only certain way to convince people about the advantages of the project is to solve these problems."

7.11 It is important to appreciate the character of this evidence. It was, according to Hungary, a "[s]trictly confidential note of the secretariat of the Hungarian Government" minuting the meeting. And what was said at the meeting was not for public consumption. The significance of what took place at this meeting is that it reveals the following:

- The 1985 EIA was reviewed and its findings were officially accepted by the Hungarian Government, which praised the extent and high scientific quality of this study, although in terms of the economic burden of the Project the Hungarian Government no doubt would have preferred to

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18 It is stressed that this is the Hungarian account of what the Czechoslovak Prime Minister said.

19 In this respect, it is important to note the Czechoslovak Prime Minister's refusal to be over-impressed by scientific findings of low risk and his openness to the need to address fully environmental concerns. As summarised in Hungary's account:

> "He mentioned the Orlik water barrage, where the natural environment during the last 5-8 years had suffered increasing damage. Before construction the scientists claimed that everything was all right, but now they report problems (on the surface of the water there appears a green, cloudy, polluting layer). His own reaction to this problem was that attention should have been called to these issues 15 years ago, and now scientists have to promote the solution of those problems."

see environmental reasons weigh against completion[20]; and it was officially transmitted to Czechoslovakia as Hungary's assessment of the environmental risks of the Project and a reaffirmation of the Project;

- Following the EIA, the Hungarian Government decided to proceed energetically to carry out its Treaty obligations; and Czechoslovakia was officially advised of and clearly relied upon this decision;

- Contrary to the assertions in the Hungarian Counter-Memorial concerning the repression of the environmentalist groups[21], both Governments at the highest level - as early as 1985 - emphasised the need to heed such objections and to attempt to respond positively to them; for by that time environmentalist objections to the Project had already started to become a political factor in both countries;

- Finally, both Governments confirmed in August 1985 that certain environmental risks were necessarily involved in a project such as this, and they specifically and deliberately accepted these risks because of the low probability of their occurrence and the means available to mitigate such risks should they appear and, of course, because of the Project's benefits; they concluded that greater attention should be given to research and monitoring so that preventive measures could be taken and, where appropriate, modifications made to the Project.

7.12 As already explained in the Slovak Counter-Memorial, following the 1985 EIA: (i) the Hungarian Government employed Austrian contractors to assist in the work at Dunakiliti and at Nagymaros and called on Czechoslovakia to accelerate the Project; (ii) Hungary immediately put in motion the acceleration on its side; (iii) by an overwhelming

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20 The Marjai letter of March 1984 provides indisputable evidence of this.

21 See, Hungarian Counter-Memorial, para. 2.24, referring to the alleged "continuing governmental practice [in both countries] against dissent, such as dismissal from employment, police surveillance, home search, arrest, etc.", citing as support " a publication of an environmental group which it fails to annex. See, also, Hungary's 1988 official brochure, "Environment and River Dams", Annex 5, hereto. The brochure describes the extensive public discussion in Hungary of the Project at the time, in contradiction to Hungary's pleadings.

majority, the Hungarian Parliament approved on 7 October 1988 the entire Project as already accelerated by Hungary; and (iv) in line with certain directives of the Hungarian Parliament, immediate steps were then taken to prepare a separate agreement dealing with accelerating water quality protection through the construction of sewage disposal plants and more systematic monitoring of the water quality of the Danube, a pre-condition to peak mode operation.

B. Project Affirmation: The Hungarian Parliamentary Resolution of 7 October 1988

7.13 The disingenuous attempts in the Hungarian Memorial to minimise the significance of the resounding approval given to the Project by the Hungarian Parliament in October 1988[22] are repeated in its Counter-Memorial, where Hungary argues that:

> "The real message of the 1988 October decision of Parliament was not the adoption of the idea of continuation with the construction, but the identification of the environmental criteria without which the Project was *not* to be operated. This was succinctly stated in the Declaration: ecological interests should take priority over short-term economic concerns[23]."

7.14 Such an interpretation is clearly wrong. The "real message" of the decision was the unambiguous approval of the accelerated continuation of the G/N Project as an integrated investment, which the Government Resolution (approved by the Parliament in October 1988) had stressed was so critical to preserve:

> "The barrage system must be constructed as it stands in the initial concept, including the Nagymaros Barrage; namely, to enable peak capacity operation. Without full implementation of the Project the technical-economic and development goals forming the basis of the decision on the investment cannot be attained. The modification of the concept would cause considerable damage[24]."

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22 See, Slovak Memorial, paras. 4.39-4.41.

23 Hungarian Counter-Memorial, para. 2.30.

24 Hungarian Memorial, Vol. 4, Annex 145 (at p. 344).

This is not to say that the Hungarian Parliament was not concerned to give the proper emphasis to environmental issues. But Hungary's description of its Government's reaction to that concern is simply misleading. Hungary argues:

> "From that moment onwards the Hungarian Government was anxious not to neglect the concern of the population expressed by the huge wave of public protest against the Project, and committed itself to act in a way consistent with the sustainable use of Hungary's natural resources[25]."

As already seen above, by 1985 both Governments were paying close attention to the environmental concerns resulting from new approaches toward environmental protection as well as those expressed by their people[26].

7.15 In both its actions taken in respect to Nagymaros, starting on 13 May 1989, and its actions with regard to water quality measures, the Hungarian Government elected to put economic or short-term political concerns ahead of ecological interests - the very opposite of what its Parliament had called for[27]. For the Hungarian Government had decided, unlike Czechoslovakia, that the cost of accelerating construction of sewage disposal plants - a national investment outside of the joint G/N Project's budget - in order to permit peak mode operation under the integrated Project comprising the Nagymaros and Gabčíkovo sections, was too high. As a result, it frustrated the follow-up water quality measures undertaken on the heels of the Hungarian Parliament's decision in October 1988, doing so at a time when a joint proposal to be incorporated in a special treaty had been drafted, agreed and was ready for final approval[28]. Such a case of putting cost and tactical political considerations ahead of environmental interests would not have been permitted had the Hungarian Government proceeded with the Nagymaros section of the Project and with preparations for

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25 Ibid.

26 See, para.7.06, et seq., above.

27 See, Slovak Counter-Memorial, paras. 4.39-4.41 and 5.09-5.13, for a detailed analysis of these actions and the relevant documents.

28 Slovak Counter-Memorial, paras. 4.42-4.46. Even today, in the region of Győr, untreated waste water spills into the Mosoni Danube and the Rába River, which flow into the Danube well downstream of the Gabčíkovo weir, contributing materially to the pollution of the Danube. This condition, together with the background pollution in the area of the bank-filtered wells that supply drinking water to Budapest, is an immediate and serious threat to the quality of that water. See, Slovak Memorial, Annex 62, a Hungarian scientific paper of June 1989, indicating that the serious waste treatment problem at Győr will not be resolved before 1995 or even 2000.

peak-power operation as a part of the integrated G/N Project approved by the Hungarian Parliament (on the accelerated schedule that Hungary had pushed for adoption after the 1985 EIA).

7.16 The Hungarian Counter-Memorial reflects a great sensitivity to this evidence of Hungary's frustration of the final approval to proceed with the agreed water quality measures. First, it contends that a pactum de contrahendo had been reached and so the mere refusal by the Hungarian Chairman to sign the protocol of the ESTC Committee on 3 May 1989 would not have frustrated the agreement on water quality measures[29]. Second, it argues that no specific evidence has been introduced to prove Hungary's actual refusal to sign the protocol of the meeting; and the Hungarian Counter-Memorial offers in evidence a new document aimed at showing that it was Czechoslovakia that frustrated the agreement in water quality measures[30]. Third, the Hungarian Counter-Memorial tries to deflect attention from the issue by arguing that the evidence of the measures taken in the 1980s and 1990s by Czechoslovakia and by Slovakia to deal with water quality by constructing waste disposal plants and improved standards of monitoring, set out in the Slovak Memorial, is deficient in not showing how many plants have actually been completed[31].

7.17 But the central point involved here has been omitted in the Hungarian Counter-Memorial. Given the Hungarian Parliament's approval of the accelerated construction schedule, it was essential that the steps in relation to water quality measures be accelerated also. The necessary plants had to be in place and operating before putting Nagymaros into operation and before peak mode operation could begin, according to the pre-condition established by Hungary's Parliament based on sound technical reasons. Once the decision to suspend Nagymaros had been unilaterally taken by Hungary, that urgency no longer existed in the eyes of the Hungarian Government - the additional, but nonetheless essential, expenditures involved could be delayed (and after the abandonment of Nagymaros, indefinitely postponed). This was a

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29 Hungarian Counter-Memorial, paras. 2.31-2.33.

30 Ibid., para. 2.33, and Vol. 3, Annex 44, an English translation of a unilateral Hungarian account of the 3 May meeting, the original of which has not been furnished, contrary to the Rules of Court. Evidence of Hungary's refusal to sign the protocol is furnished by Slovakia here as Annex 6, the translation of a Hungarian press report dated 4 May 1989.

31 Ibid., paras. 2.16-2.17. The Hungarian Counter-Memorial also attempts to blur the precise issue here by confusing this specific treaty with the environmental guarantees discussed in the later October - November 1989 negotiations.

clear case of the Hungarian Government placing economic and short-term political factors ahead of environmental issues. Unlike Hungary, Czechoslovakia (and now Slovakia) has maintained its program of installing waste disposal plants regardless of Hungary's abandonment of Nagymaros[32]. Hungary has supplied no evidence of its own similar activities to improve the water quality of the Danube; and Hungary's water quality experts have been outspoken in their criticism of this failure by the Hungarian Government to be concerned with water quality[33].

SECTION 3. Hungary's Suspension of Nagymaros on 13 May 1989

7.18 In examining below Hungary's suspension of Nagymaros (this Section 3) and its subsequent abandonment of Nagymaros (Section 4), the following questions make up a sort of prima facie test against which to consider Hungary's actions:

- What reasons did Hungary give at the time?
- Could Hungary then have believed these reasons?
- What was their immediacy?
- Did Hungary disclose at the time evidence to its Treaty partner reasonably substantiating these reasons?
- Did such evidence contain any new facts?

7.19 The evidence shows that Hungary's 13 May announcement took the Czechoslovak Government by surprise; and the events preceding this decision, just discussed in

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32 To meet Hungary's request for more data, the current status of construction and operation has been further updated and is furnished by Slovakia with this Reply as Annex 7, hereto.

33 See, Slovak Memorial, paras. 2.105-2.107 and 3.52, and Annex 32 (an article co-authored by Prof. Somlyódy, who also participated in Hungary's 1994 studies on water quality in its "Scientific Evaluation").

the preceding Section, underscore the reasons for this[34]. In the light of (i) the 1985 EIA, (ii) the Prime Minister-level meeting in August 1985, (iii) the Parliamentary Resolution of October 1988, and (iv) the Protocol of 6 February 1989 formally approving the 15-month acceleration of both sections of the Project only three months before, Czechoslovakia could hardly have expected such a sudden Hungarian decision - preceded by no discussion at all between Governments[35]. Not only had the Czechoslovak Government every reason to be taken aback by the 13 May announcement, but Hungary has not now made any attempt to show that its decision had been taken after agreement with Czechoslovakia. On what conceivable basis, therefore, could Hungary be considered to have been entitled to take this action - the first of the questions put to the Court under Article 2(1)(a) of the Special Agreement?

7.20 Hungary characterises the 13 May decision as a "cautious measure of a [S]tate acting reasonably"[36]. But it does not explain why such caution required an abrupt decision to be taken without the agreement of, or even notice to or consultation with, Czechoslovakia. Hungary contends that:

> "... at the same time as it suspended construction at Nagymaros, Hungary called for a comprehensive environmental study of the entire Project. Czechoslovakia refused to call a halt on construction and ultimately refused to agree to long-term environmental or other studies in cooperation with Hungary[37]."

This statement is wrong in many respects starting with the fact that there is not the slightest evidence that Hungary called for such a comprehensive environmental study either with its

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34 The Hungarian Counter-Memorial, para. 2.33, introduces a new document (referred to above in para. 7.16) as evidence that the Czechoslovak Government was aware of internal debates within Hungary concerning Nagymaros. Contrary to the Rules of Court, the original of this document has not been furnished by Hungary. But of course there had been internal debates in both countries about the Project since 1985. See, in this regard, Annex 5, hereto, an official brochure of the G/N Project issued by Hungary in 1988, which specifically refers to these internal debates and directly addresses the issues raised.

35 Czechoslovakia's surprise is reflected in its immediate protest (Slovak Counter-Memorial, para. 5.16), in its attempts to clarify just what the scope of Hungary's decision was (Slovak Memorial, paras. 4.07-4.10), and in its repeated request for the scientific basis for this sudden unexplained action (a request not met for 44 days after the 13 May announcement and then only in two technical papers that cited no new issues or data concerning environmental or other risks, over and above risks already exhaustively considered - Slovak Counter-Memorial, paras. 5.14-5.17).

36 Hungarian Counter-Memorial, para. 2.26.

37 Ibid., para. 1.38. As is pointed out in Chapter 7 of Vol. II hereof, commenting on Chapter 7 of Hungary's "Scientific Evaluation" (in Vol. II of the Hungarian Counter-Memorial), in 1989 Hungary revoked its EIA Decree of 1984 and did not adopt new EIA legislation until 1993.

unilateral act of suspension or indeed thereafter. Hungary's action to suspend construction at Nagymaros on 13 May took the form of a Government Resolution, which Slovakia has closely analysed in its Counter-Memorial[38]. Nowhere does this Resolution call for a comprehensive environmental study of the entire Project. The only studies referred to there were those related to preparing for negotiations to amend the Treaty, including the consequences of abandoning Nagymaros[39].

7.21 In its legal analysis, the Hungarian Counter-Memorial contends that when Hungary suspended work:

> "...it used its right flowing from the 1977 Treaty to ask for the full and correct implementation of [Articles 15 and 19 of the 1977 Treaty]. This was in conformity with the 1977 Treaty itself[40]."

And Hungary goes on to contend that the reason Hungary relied on a state of "environmental necessity" to suspend work is that "it was confronted with a situation created by Czechoslovakia's breach of its treaty obligations"[41]. In other words, according to Hungary, on 13 May 1989, Czechoslovakia was in breach of certain Treaty obligations - presumably a reference to Articles 15 and 19 - and this required Hungary to invoke a state of "environmental necessity" as the basis for its 13 May decision.

7.22 But Hungary's resolution of 13 May makes no reference to these Articles, and no claim of breach was even hinted at by Hungary at the time. Had Hungary done so, such a claim would have been disputed at once by Czechoslovakia; for as the events discussed above in Section 2 show, environmental and water quality issues, which were the concern of these Articles of the Treaty, had been given close attention.

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38 Slovak Counter-Memorial, paras. 5.09-5.13. This document, which was not presented to Czechoslovakia at the time, first came to Slovakia's attention with the filing of the Hungarian Memorial.

39 It was on the basis of the Resolution's text that the Slovak Counter-Memorial observed that:

> "There can be no doubt from both the text and the tone of this Resolution that the decision of 13 May was seen by the Hungarian Government as the first step toward a planned termination of the Nagymaros section of the G/N Project." Ibid., para. 5.10.

40 Hungarian Counter-Memorial, para. 4.06 (fn. deleted).

41 Ibid., para. 5.07. The fn. to this passage refers generally to Chap. 6 of the Hungarian Memorial.

7.23 Yet, aside from this false allegation of breach, what possible environmental threat could justify suspension of Nagymaros without agreement, when Nagymaros was then some three years away from being put into operation? Taking even the most dire of the possible risks now invoked by Hungary, that of a major earthquake, Hungary has never claimed the risk of an earthquake to be imminent; it only argues (wrongly as the Slovak Reply shows below) that there had been inadequate seismic study of the region[42]. To act as Hungary did unilaterally to suspend work at Nagymaros cannot be justified. At the very least, Hungary had a duty to its Treaty partner, before acting, to discuss with it the issues that Hungary now claims it believed to require suspension, and to bring to Czechoslovakia's attention any claimed breaches of the Treaty.

7.24 In its discussion of Article 27 of the Treaty, the Hungarian Counter-Memorial at first seems to acknowledge such a duty:

> "What [Article 27] said was that the parties should seek to resolve their disputes at the appropriate level ... [43]."

And the Hungarian Memorial devotes attention to the question of the obligations of the Treaty parties to consult and negotiate in the context of its Nagymaros suspension[44]. However, after laying the groundwork to try to justify suspension, Hungary goes on to argue that:

> "... once it became clear that future work on the Nagymaros Barrage was subject to the most serious doubts ..., it was lawful for Hungary immediately to suspend construction and to seek forthwith to resolve the difficulties[45]."

And then, the argument continues, "it was a matter for the parties in good faith to negotiate with a view to resolving the difficulties ... [46]."

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42 See, Chapter 12, Section 3, below.

43 Hungarian Counter-Memorial, para. 5.37.

44 Hungarian Memorial, paras. 9.18-9.29.

45 Ibid., para. 9.23.

46 Ibid., para. 9.24.

7.25 But this seems to resemble the travel slogan: "Travel now; pay later." Only here it was: "Suspend now; discuss later." And, regardless of Hungary's claims to the contrary, there is absolutely no justification for such an approach either under the Treaty or under international law. The suspension of work at Nagymaros was like a "bolt from the blue" - with neither advance notice nor discussion and certainly without agreement. A fortiori, Hungary's suspension was not justified as a first step in the planned abandonment of Nagymaros.

SECTION 4. Hungary's Abandonment of Nagymaros on 27 October 1989

7.26 The period of suspension of work at Nagymaros lasted between 13 May and 27 October 1989, when Nagymaros was definitively abandoned by Hungary. The Hungarian Memorial contends that during this period Czechoslovakia refused to address Hungary's concerns relating to Nagymaros[47], and it gives the impression that Hungary's Governmental Resolution abandoning Nagymaros on 27 October, approved by its Parliament on 30 October, followed the failure of negotiations over Nagymaros[48], an impression that Slovakia has demonstrated is entirely contrary to the evidence[49].

7.27 The sequence of the relevant events between the 13 May suspension and the 27 October abandonment of Nagymaros, and their meaning, are straightforward matters to explain:

- Czechoslovakia immediately protested the suspension of Nagymaros announced by Hungary on 13 May 1989[50]; Czechoslovakia at once demanded to know the scientific basis for such a surprise decision, but had to wait 44 days before being handed two technical papers setting out Hungary's reasons (26 June);

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47 Ibid., para. 9.28.

48 Ibid., paras. 3.100 and 9.28-9.29.

49 Slovak Counter-Memorial, paras. 5.33-5.42. See, also, Slovak Memorial, paras. 4.12-4.34.

50 Not having been given Hungary's 13 May Resolution, Czechoslovakia was not aware that it was the first step in Hungary's abandonment of Nagymaros.

- At a meeting on 24 May 1989 between Prime Ministers, it was agreed to form a joint group of experts to assess the ecological, seismic and other aspects of Nagymaros;

- On 2 June 1989, the Hungarian Parliament granted an exemption from the Parliamentary Resolution of 7 October 1988 - an exemption requested by the Hungarian Government on 13 May - so as to permit the elimination of Nagymaros from the Project;

- A meeting of experts was held during 17-19 July to discuss the 26 June papers of Hungary, together with Czechoslovakia's response to them prepared and handed to Hungary (13 July) shortly before the meeting[51]; the central point made by Czechoslovakia at the meeting (as set out in its scientific analysis of 13 July) was that "the material contains no new viewpoints for an intervention as radical as stoppage of construction of the Nagymaros Stage"[52];

- On 20 July (the day after the experts' meeting ended), the Hungarian Government adopted a Resolution to "extend" the Nagymaros suspension until 31 October 1989[53]; and

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51 Apparently not having got the facts straight, the Hungarian Counter-Memorial attempts to construct the prejudicial argument, supposedly illustrating the "inflexibility" of Czechoslovakia, that the Czechoslovak experts allowed their Hungarian colleagues only four days to examine the Czechoslovak reply to the 26 June papers, produced only in Slovak. Hungarian Counter-Memorial, para. 2.35. The situation was quite different. The Czechoslovak experts had to wait 44 days for a scientific explanation of Hungary's 13 May suspension, although the urgency with which it was taken would have suggested that such an explanation ought to have been instantly available. To assist the meeting of experts scheduled for 17-19 July, Czechoslovakia put together a response in two weeks' time, having received Hungary's papers only on 26 June.

52 Slovak Memorial, Annex 63 (at p. 83).

53 There had been no advance warning or discussion of this so-called "extension" - the experts had only just finished three days of meetings to examine a wide range of issues concerning the environment, water quality and seismic investigations, going far beyond the question of peak mode operation at Gabčíkovo and the suspension of construction at Nagymaros. Czechoslovakia had previously been informed, incorrectly, that the initial Resolution of 13 May had ordered a suspension for only two months. See, Slovak Counter-Memorial, paras. 5.09-5.13 and 5.18 (and fn. 34). In fact, no time limit had been set out in the Resolution. Ibid.

- Also on 20 July, after a meeting of Prime Ministers, Hungary informed Czechoslovakia of the contents of its Resolution of the same day, and Mr. Németh advanced two alternative proposals for delaying the G/N Project; however, at the meeting of Prime Ministers, there was no exchange between the parties that faintly resembled negotiations over Nagymaros.

7.28 Before continuing with the sequence of events, it is useful to pause here to survey the situation as it stood just after the meeting of 20 July 1989 and the adoption of the Resolution by the Hungarian Government that same day. A joint expert study of Nagymaros had been agreed on 24 May, but no more than an exchange of papers had taken place, which revealed the parties to be far apart, the core issue between them being that Czechoslovakia was unable to discern in the Hungarian papers any new information or data concerning alleged risks that had not already been studied and taken into account in the development of the Project. In its Counter-Memorial, Hungary asserts that between May and October 1989 "the question raised ... was whether to construct or abandon the construction of the Nagymaros sector"[54]. But this was never a question put to Czechoslovakia before Hungary acted on 13 May (and again on 20 July) to suspend Nagymaros.

7.29 The events between 20 July and 27 October indicate that Hungary had already made its mind up to abandon Nagymaros, leaving only the delicate question of how to secure Czechoslovakia's consent to abandonment to be resolved. The events were these:

- In September 1989, the Hardi report recommended the abandonment of Nagymaros and laid out a strategy by which Hungary could do so with minimal financial and legal repercussions[55];

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54 Hungarian Counter-Memorial, para. 2.37.

55 See, Slovak Counter-Memorial, paras. 5.29-5.32, and 7.10, et seq. The Hardi report's strategy was expressly based on COMECON principles, not new principles reflecting the changes soon to sweep through Central and Eastern Europe. For example, the report contains this statement:

> "In accordance with the current and routine practice among CMEA countries we are obliged to honour obligations to pay damages only to the extent and in the form acknowledged by us, even in the long run." Hungarian Memorial, Vol. 5 (Part I), Annex 8 (at p. 166).

- On 4 October 1989, Prime Minister Németh expressed Hungary's view that it had the "right and obligation to suspend work in the interest of avoiding undesirable ecological effects, and to commence negotiations"[56]; accordingly, he proposed joint discussions "regarding technical/economic concerns pertaining to the abandonment" of Nagymaros and the corresponding Treaty amendment - clearly not a proposal to discuss the merits of abandonment but the technical means of its achievement;

- On 11 October 1989, the Prime Ministers again met - there is no official record of the meeting, and Hungary has not placed in evidence the document it cites to support its version of what transpired[57]; but accepting Hungary's account at face value, Hungary proposed a "trade": Czechoslovakia would agree to abandon Nagymaros and the parties would agree to environmental and water quality guarantees and to the non-peak mode operation of the Gabčíkovo section - Hungary, in turn, would continue to prepare to close the Danube and after the conclusion of the agreement on guarantees would actually proceed to close it.

7.30 This proposed "trade" set the stage for the two pivotal events concerning the abandonment of Nagymaros: (i) the meeting of Prime Ministers on 26 October 1989, evidence as to which is contained in the Czechoslovak Note Verbale of 30 October 1989 confirming the position taken by the Czechoslovak Prime Minister at the 26 October meeting[58]; and (ii) the Hungarian Government's Resolution of 27 October abandoning Nagymaros. In reviewing these events, the Hungarian Counter-Memorial makes several serious factual mistakes in its attempt to explain away the evidence that so clearly establishes Hungary's breaches of the Treaty as to Nagymaros (and as to Gabčíkovo, as well).

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56 Letter of 4 October 1989 from Prime Minister Németh; Hungarian Memorial, Vol. 4, Annex 27.

57 Hungarian Memorial, paras. 3.96-3.97. Once again, Hungary has failed to comply with the Rules of Court by specifically referring to an unpublished document to support its contentions which it neither annexes nor furnishes.

58 See, Slovak Counter-Memorial, paras. 5.37-5.42.

7.31 First: relying on the lack of an agreed record of the 26 October meeting, the Hungarian Counter-Memorial contends that the willingness subsequently manifested by Czechoslovakia in its Note Verbale of 30 October to initial a treaty on environmental guarantees was not made clear at the 26 October meeting. Thus, so Hungary argues, faced with continued Czechoslovak intransigence, Hungary adopted a Resolution the next day to abandon Nagymaros, and it seized its Parliament of the question. By the time the Czechoslovak Note Verbale of 30 October was delivered, with its "compromise offer", it was, according to Hungary, too late. In fact, Hungary asserts that the Note was:

> "... delivered at a moment when the offering party could be certain that it could not be incorporated into the decision to be adopted by the Parliament 20 hours later[59]."

7.32 Ignoring this intimation of bad faith, Hungary's version of events is directly disproved by the evidence produced by both Parties. For in the very opening paragraph of the 30 October Note Verbale itself, Czechoslovakia indicated that it was "presenting the position" of the Government of Czechoslovakia "expressed by the Prime Minister of Czechoslovakia ... at the [26 October meeting]"[60]. It is apparent that the Note constituted a formal confirmation of the official position taken earlier by the Czechoslovak Prime Minister at the 26 October meeting. There can, thus, be no sense in which the Note Verbale of 30 October was delivered "too late". In fact, Czechoslovakia had had the time since the 11 October meeting to consider the "trade" offered by Hungary (according to Hungary's own account), and on 26 October the Czechoslovak Prime Minister formally presented an alternative proposal, which was then confirmed on 30 October by Note Verbale.

7.33 Second: the Hungarian Memorial recounts these events as if there had been a collapse of negotiations by then and that Czechoslovakia had failed to address, inter alia, the important Hungarian "goal" of abandoning Nagymaros[61]. But as Slovakia has pointed

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59 Hungarian Counter-Memorial, para. 2.45 (emphasis added).

60 Slovak Memorial, Annex 76. The text of Hungary's translation is not materially different. See, Hungarian Memorial, Vol. 4, Annex 28. Once more it is noted that there is no agreed record of this meeting.

61 Hungarian Memorial, para. 3.109.

out[62], the 30 October Note (and the Czechoslovak Prime Minister's statement at the 26 October meeting) directly addressed the question of Nagymaros, offering a most reasonable compromise. At the 26 October meeting, Czechoslovakia proposed that rather than abandoning Nagymaros, for which it could see no justification: (i) both sides "would pledge to limit or exclude peak operation"[63]; and (ii) a slow down of the work at Nagymaros would be mutually agreed, delaying its completion some 15 months (the period by which the Protocol of 6 February 1989 would have accelerated the work at Nagymaros) "to enable the Hungarian side to use this period for studying the ecological questions and to submit respective proposals in due course".

7.34 When such a 15-month period is added to the existing period of three years before Nagymaros was to be put in operation, it is evident that there was more than enough time to conduct the joint studies agreed at the 24 May meeting[64]. This would have left enough time to conduct another EIA, as well, which the Hungarian Counter-Memorial now argues should have been carried out but never mentioned at the time[65]. As to peak mode operation, there were many alternatives to be considered and evaluated; but Czechoslovakia's proposal was to the effect that both sides pledge themselves to accept whatever the studies should recommend, whether it be the exclusion of peak mode operation or a form of limitation. The important point was that Czechoslovakia was prepared to see the issue of peak mode operation placed firmly on the negotiating table[66].

7.35 Hungary's action on 27 October - the day following the tabling of this proposal of Czechoslovakia - by which Hungary irrevocably abandoned Nagymaros, as well as peak mode operation at Gabčíkovo, cannot be justified. First, "necessity" could not possibly have been a factor in the circumstances - especially given the Czechoslovak offer of

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62 Slovak Counter-Memorial, para. 5.39.

63 Slovak Memorial, Annex 76. Compare, Hungarian translation, Hungarian Memorial, Vol. 4, Annex 28: "both parties would oblige themselves to limitations or exclusions of peak hour operation mode".

64 Hungary had also commissioned the Bechtel study in July 1989, and its report was rendered in February 1990 - facts not then known to Czechoslovakia.

65 See, para. 7.20, above, and relevant fn.

66 The long interval of time before Nagymaros was to go into operation would also have allowed adequate time for water treatment plants to be completed before peak mode operations went into effect, thereby spreading out the financial strain for Hungary over several years.

compromise[67]. Second, Hungary's action represented an outright failure to negotiate on its part in contradiction to its obligations under Article 27 of the Treaty and under general principles and rules of international law.

7.36 Aside from the serious mistakes of fact committed by Hungary in its account of the 26 October meeting, the Hungarian Counter-Memorial's analysis of Czechoslovakia's 30 October Note Verbale, in which it tries to explain away the actions of the Hungarian Government at the time, is also wrong[68]:

- It is argued by Hungary that the individual "ecological guarantees" to constitute the future agreement were not specified by Czechoslovakia in the Note - *but neither were they specified by Hungary (who had suggested them in the first place);*

- Hungary claims that Czechoslovakia's position would have required immediate preparations for the closure of the Danube - *but by 30 October it was already too late to carry out this operation, as Hungary well knew, so the damming operation had successfully been postponed unilaterally by Hungary for a whole year;*

- The Note, according to Hungary, constituted a "blank refusal to consider any amendment to the 1977 Treaty" - *but it was nothing of the kind: it was a specific refusal to agree to the abandonment of Nagymaros, while at the same time offering the pledge to limit or exclude peak mode operation and to agree to the slow down of work there in order to allow more than enough time for the fears expressed by Hungary to be fully explored and dealt with by agreement;*

- It also "threatened unilateral implementation" of a provisional solution - *but the 30 October Note itself shows that it was Hungary who was*

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67 See, para. 7.69, et seq., below.

68 Hungarian Counter-Memorial, para. 2.45.

acting unilaterally, and that Czechoslovakia was reluctant to respond in like manner[69].

7.37 Moreover, it is apparent from the Note that the possibility that Czechoslovakia might be forced to take provisional measures was in no way related to Nagymaros and afforded no excuse at all for Hungary's action to abandon definitively Nagymaros on 27 October 1989; the possibility was invoked solely as a response to Hungary's unilateral actions affecting the Gabčíkovo section of the Project.

7.38 In conclusion, Hungary's actions to suspend and then to abandon Nagymaros reveal:

- An extraordinary shift in position during 1989, predating the formation of a new Government in May of 1990 following the political changes in Hungary[70];

- Hungary's curious presumption that, because the Nagymaros barrage was to be built on Hungarian territory, its construction was a matter for Hungary to decide without agreement, advance notice or consultation with Czechoslovakia, the consequences to be negotiated afterwards. Such an attitude and course of conduct ran strictly counter to the joint concept that lay at the root of the G/N Project and which, paradoxically, Hungary now accuses Czechoslovakia (and Slovakia) of having violated in proceeding with Variant "C". It also ignored the fact that the Nagymaros section of the Project consisted of far more than just the step

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69 After indicating that if Hungary should act unilaterally to abandon Nagymaros this would be in violation of its international obligations, for which damages would be claimed, the Note went on to say that - as to the Gabčíkovo section - if Hungary, in spite of Czechoslovakia's expressed willingness to enter into a separate agreement on technical, operational and ecological guarantees, should nevertheless fail to fulfil its obligations there, and continue unilaterally to violate the Treaty by suspending the works at Dunakiliti, Czechoslovakia would have to proceed to take provisional measures. See, text of Note Verbale of 30 October 1989 at Annex 76, Slovak Memorial.

70 In an attempt to offer "moral justification" for its violations of the Treaty, Hungary has sought refuge in the fact that a change of regime had occurred. But it must be noted that in this case it was the same Government headed by the same Prime Minister (Mr. Németh), and the same Parliament, which had speeded up the Project in February 1989, that then acted to suspend the works at Nagymaros in May 1989 and to abandon Nagymaros in October 1989.

to be constructed on Hungarian territory, for Czechoslovakia was responsible under the Treaty for a substantial part of the work under the Nagymaros section[71];

- The good faith efforts of Czechoslovakia to compromise in order to avoid the scuttling of the G/N Project, and its confidence that if time were allowed for scientific studies, the basic structure of the G/N Project would be maintained;

- The willingness of Czechoslovakia to give ecological considerations priority over economic interests, inter alia, in its pledge even to exclude peak mode operation if justified.

7.39 There is no record of any official Hungarian response to the 30 October Note Verbale from Czechoslovakia: evidently, Hungary's unilateral act of abandoning Nagymaros was regarded by it as its answer. Hungary proceeded to abandon Nagymaros, terminating the contracts for its construction, without any attempt to explore the compromise proposal offered by Czechoslovakia; and on 30 November, Hungary tabled a proposal that the 1977 Treaty be amended to reflect the fait accompli - the abandonment of the Nagymaros section of the Project by Hungary.

7.40 This abandonment was effective before any joint study into the alleged risks - let alone a full-scale EIA that Hungary now talks about - could ever have begun. It occurred some four months before the outside study that Hungary commissioned to be undertaken by Bechtel had been completed, even though the Nagymaros section was a principal subject of that study. After its action to abandon Nagymaros on 27 October 1989 (and the cancellation of all contracts for construction work at Nagymaros in November 1989), the Hungarian Government never again allowed the question of resumption of work there to be considered. No joint studies were proposed as to Nagymaros by Hungary, and it never itself undertook any such studies other than the Bechtel study, whose results it did not wait for before taking definitive action - an action that subsequently was not supportable on the basis of

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[71] See, para. 7.02, above, and Illus. No. R-3, appearing at the front of this Chapter.

the Bechtel study. The issue of Nagymaros was a closed book for Hungary, one it never allowed to be reopened.

SECTION 5. Conclusions in the Light of the Applicable Law

7.41 Slovakia has shown in Chapter IV above that the law governing the validity of Hungary's suspension, abandonment and purported termination of the 1977 Treaty is the law of treaties, and has demonstrated in Chapter V, inter alia, that these actions taken by Hungary are not justified under that body of the law. The present Chapter has examined in detail above the facts relevant to answering the two questions put to the Court concerning the Nagymaros section of the G/N Project in Article 2(1)(a) of the Special Agreement: whether, in 1989, Hungary was entitled: (i) to suspend work on the Nagymaros section of the Project, and (ii) subsequently to abandon work on that section. In the present Section, Slovakia draws legal conclusions from those facts on the basis of the applicable law and submits what it believes to be the answers the Court should give to these two questions.

7.42 The following points have an important bearing upon these two questions. First, the Nagymaros section was an essential element of the integrated G/N Project, which was comprised of two sections, the other being Gabčíkovo; the Nagymaros section involved not only work by Hungary in constructing the Nagymaros step but also a substantial amount of flood control work by Czechoslovakia on its own territory[72]. Second, the Nagymaros section was necessary for the peak mode operation of the Gabčíkovo hydroelectric plant; but equally it was an essential part of the Project's navigation and flood control schemes and was also to have produced non-peak power. Third, Hungary concedes in its pleadings that, from its standpoint, the G/N Project as a whole was not justified without the Nagymaros section[73]. Thus the suspension and subsequent abandonment of Nagymaros significantly affected the Project as a whole.

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[72] See, para. 7.02 and Illus. No. R-3, above.

[73] Slovak Counter-Memorial, para. 5.10.

A. Hungary's Suspension of Nagymaros Constituted a Breach of the 1977 Treaty

7.43 Hungary's decision on 13 May 1989 to suspend the works on the Nagymaros section of the G/N Project constituted a breach of the 1977 Treaty. There is no dispute that the Treaty was in full force and effect at that time (as were the related and associated agreements that, inter alia, had modified the timetable for its implementation).

7.44 It will be recalled that the 1977 Treaty and its associated agreements - in particular the 1979 Joint Statute Agreement - established joint cooperative mechanisms for ongoing communication and consultation in the implementation and operation of the Project[74]. The 1977 Treaty also contained a specific provision, Article 27, for the settlement of disputes.

7.45 The Treaty and related agreements included no provision for unilateral suspension of its performance, and Czechoslovakia at no time agreed to any such suspension. Hungary's decision was entirely unilateral and was taken without informing Czechoslovakia in advance, let alone after consultation or negotiation. Even had there been some prior indication of Hungary's dissatisfaction with the Project, this would not have excused Hungary's breach of the Treaty in suspending the works at Nagymaros[75].

7.46 As the 1969 Vienna Convention on the Law of Treaties makes clear, the suspension of the performance of a treaty obligation is justified only with the consent of the other party (Article 57) or by reason of a prior breach by that other party (Article 60). Neither condition was fulfilled in this case. Hungary's failure to provide prior notification to Czechoslovakia of its plans to suspend work on Nagymaros, and to consult with Czechoslovakia concerning those plans, violated the Treaty's provisions for joint cooperation as well as Article 27 of the 1977 Treaty.

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74 See, discussion in Slovak Memorial, para. 6.153, and Slovak Counter-Memorial, paras. 9.05-9.09.

75 A breach of a treaty does not cease to be a breach if the other party is aware of the wrongdoer's intention to commit the breach. Awareness does not constitute agreement.

Agreement or Acquiescence: Not a Defence

7.47 Hungary attempts to defend this breach on the grounds that Czechoslovakia allegedly agreed to Hungary's suspension of works at Nagymaros, but it does not attempt to explain how Czechoslovakia could have agreed to the suspension when Hungary did not notify Czechoslovakia of its intent to suspend before it had acted.

7.48 Czechoslovakia immediately protested the Hungarian decision[76], a protest that included the following elements:

- An observation that the Hungarian decision had been taken "without any discussions with the Czechoslovak side";
- A declaration that Hungary's action "infringed the provisions of the [1977] Treaty";
- A statement that Czechoslovakia regarded the suspension as putting the entire Project in jeopardy;
- An insistence on the completion of the Project in accordance with the Treaty; and
- A reservation of Czechoslovakia's right to claim compensation[77].

7.49 As to acquiescence, the evidence quite simply shows that Czechoslovakia did not acquiesce in Hungary's suspension decision[78]. The great lengths to which Czechoslovakia was prepared to go to work with its Treaty partner, in attempting to reach a mutually acceptable solution and to preserve the original Project, only underscore Hungary's breach and in no sense imply acquiescence in Hungary's suspension of the works at Nagymaros. With astonishing aplomb Hungary's pleadings accuse Czechoslovakia of total inflexibility in the face of Hungary's alleged

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[76] Slovak Counter-Memorial, para. 5.16, describing the "position paper" read and handed to the Hungarian Ambassador in Prague by the Czechoslovak Minister of Foreign Affairs on 15 May 1989.

[77] Ibid., Annex 10.

[78] Ibid., paras. 5.20-5.25, 5.50-5.53 and 5.77.

concerns; then in the same breath they turn around and claim that Czechoslovakia's demonstrated flexibility constituted acquiescence in Hungary's breach.

7.50 Furthermore, Czechoslovakia's response to Hungary's suspension was not confined to its protest; it continued to attempt to work with its Treaty partner in good faith as shown, inter alia, by its agreement at the meeting of Prime Ministers on 24 May 1989 to form a joint group of experts to assess the ecological, seismic and other aspects of Nagymaros; and by the cooperation displayed at the October 26 meeting, where instead of rejecting Hungary's one-sided proposal, Czechoslovakia offered a most reasonable compromise[79].

Alleged Prior Breach by Czechoslovakia: Not a Defence

7.51 In its Counter-Memorial, Hungary advances a new argument: that its suspension of work was a response to Czechoslovakia's alleged breach of Articles 15 and 19 of the 1977 Treaty[80]. Presumably, this is a claim that the suspension of work was a response to a prior "material breach" of the 1977 Treaty under Article 60 of the Vienna Convention on the Law of Treaties.

7.52 This new argument is untenable for a number of reasons. First, there is not the slightest evidence of Hungary's having complained to Czechoslovakia of such a breach at the time of its decision to suspend work at Nagymaros[81]. Second, such a response - i.e., unilateral suspension of work - was not in conformity with treaty law, which contains such procedural safeguards as requiring (i) notification in writing of the grounds for suspending the operation of a treaty, (ii) setting forth "the measure proposed to be taken with respect to the treaty and the reasons therefor"[82], and (iii) waiting a period of three months before carrying out the measure proposed[83] -

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79 See, para. 7.26, et seq., above.

80 See, para. 7.21, above. The earliest evidence of any accusation being made by Hungary of a breach of Articles 15 and 19 appears in the Hungarian 1992 Declaration officially indicating the reasons for Hungary's purported termination of the 1977 Treaty, which was handed to Czechoslovakia on 19 May 1992.

81 See, paras. 7.22-7.23, above.

82 Vienna Convention on the Law of Treaties, Arts. 65(1) and 67. These safeguards are discussed in detail in para. 10.09, et seq., below.

83 Ibid., Art. 65(2).

none of which Hungary complied with. Third, neither Article 15 nor Article 19 of the Treaty is a "provision essential to the accomplishment of the object or purpose of the treaty"[84], as Slovakia has shown[85]. Hence, even had Czechoslovakia breached either or both of these Articles, quod non, that would not qualify as a "material breach" under Article 60 of the 1969 Vienna Convention. Fourth, such a response would also not be in conformity with the 1977 Treaty, which lays down specific procedures for the settlement of disputes in Article 27, procedures with which Hungary failed to comply. There is, in any event, no substance at all to Hungary's claim that Czechoslovakia breached those Articles[86].

"Ecological State of Necessity": Not Applicable in Fact or in Law

7.53 Slovakia has shown above, and in its prior pleadings, that the only grounds justifying the suspension or termination of a treaty are those set forth in the Vienna Convention on the Law of Treaties, and that a "state of necessity", not being grounds for suspension or termination under the Vienna Convention, cannot be invoked by Hungary to preclude the wrongfulness of its conduct[87]. But even if, arguendo, Hungary could invoke such grounds, the suspension of Nagymaros could not be justified on the basis of a "state of necessity" as that concept is defined in international law[88].

7.54 First, Hungary did not claim at the time that scientific studies and data established the existence of "grave and imminent peril"; it claimed merely that the lack of scientific studies and data required the suspension (and subsequent abandonment) of the works at Nagymaros in the light of the alleged risk of earthquakes and of the environmental harm that peak mode operation might cause. This was far from meeting the legal requirements for the existence of a "state of necessity".

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84 Ibid., Art. 60(3)(b).

85 See, para. 2.45 and para. 3.31, et seq., above.

86 See, Slovak Counter-Memorial, para. 9.16, et seq. See, also, para. 7.24 and para. 7.29, et seq, above.

87 See, para. 5.08, et seq., above. See, also, Slovak Memorial, para. 8.61, et seq., and Slovak Counter-Memorial, paras. 10.42-10.43.

88 See, Slovak Memorial, para. 8.26, et seq.,; Slovak Counter-Memorial, para. 10.38, et seq.

7.55 Under the standards set out by the International Law Commission in its Draft Articles on State Responsibility, the suspension must have been necessary "to meet a grave and imminent danger which threatens an essential interest of the State"[89]; the danger "must have been a threat to [an essential] interest at the actual time"; and the "adoption by that State [here Hungary] of conduct not in conformity with an international obligation binding it to another State must definitely have been its only means of warding off the extremely grave and imminent peril which it apprehended. In other words, the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations"[90]. Furthermore, "the State invoking the state of necessity is not and should not be the sole judge of the existence of the necessary conditions in the particular case concerned"[91].

7.56 Second, insofar as Hungary's justification of suspension relied on the alleged lack of adequate study, the comprehensive scientific studies then in the hands of the Treaty parties gave no support to the need for any suspension on such a basis. These studies were, principally, Hungary's 1985 EIA, on the basis of which the Project's schedule had been accelerated and overwhelmingly approved by the Hungarian Parliament, and Czechoslovakia's 1976 Bioproject, updated in 1986[92].

7.57 Third, even as accelerated by the Protocol of 6 February 1989, the Nagymaros barrage was not scheduled to go into operation before 1993 - leaving almost four years in which to study and deal with the supposed risks. Clearly, in these circumstances, Hungary cannot claim that there was evidence that a "grave and imminent peril" existed "at the actual time" it made its decision. Had Hungary notified and consulted with Czechoslovakia in advance of its decision it would have found, as it did thereafter,[93] that suspension was not "the only means of warding off" the dangers.

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89 International Law Commission, Draft Articles on State Responsibility, Part I, Art. 33 ("State of Necessity"), para. (1)(a), Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 34.

90 Ibid., para. 33 of commentary, at p. 49 (emphasis added).

91 Ibid., para. 36, at p. 50.

92 See, Slovak Counter-Memorial, para. 4.06. Of course, there were also the many pre-1977 and post-1977 studies. Ibid., para. 4.04-4.05 and 4.09-4.10. See, also, the multiple references at the end of each Chapter of Vol. III, hereto.

93 See, para. 7.26, et seq., above.

7.58 It is also important to recall that, as demonstrated in the Slovak Counter-Memorial[94], Hungary's Resolution of 13 May 1989 was regarded by the Hungarian Government as the first step toward a planned termination of the Nagymaros section of the G/N Project; and the studies called for in that Resolution related not to the environmental effects of putting Nagymaros into operation but to the consequences of its abandonment.

7.59 Hungary's Counter-Memorial suggests that (as to Nagymaros) the questions put to the Court under Article 2(1)(a) of the Special Agreement should be recast in the form of a determination "whether Hungary was reasonable in believing in 1989 that there was a substantial likelihood of major risks and damages ... from the operation of the Nagymaros sector, especially in peak power mode"[95].

7.60 The fundamental defects in law of Hungary's "reasonable belief" test have already been demonstrated above in the Introduction[96]. But even were this the correct legal test for the suspension and the subsequent abandonment on 27 October 1989 of the works at Nagymaros and of peak mode operation at Gabčíkovo, it was not reasonable for Hungary to believe in a "substantial likelihood of major risk and damage" from the operation of the Nagymaros section and from peak mode operation:

- The putting into operation of Nagymaros, even under the accelerated Project formally agreed in February 1989, was three to four years off into the future;

- Czechoslovakia had proposed postponing this period by an additional 15 months;

- There were no new data or studies to indicate any risks not already taken into account; but in any event, the delay proposed by

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94 Slovak Counter-Memorial, paras. 5.09-5.13.

95 Hungarian Counter-Memorial, para. 1.47.

96 See, paras. 1.34-1.36, above.

Czechoslovakia allowed more than enough time for the risks claimed by Hungary to be studied and dealt with, including a new EIA if deemed necessary;

- Finally, as to peak mode operation, Czechoslovakia proposed that both parties "pledge to limit or exclude peak operation" if so indicated by the studies into possible environmental effect[97]; thus, any questions as to the impacts of peak mode operation are academic.

General Principles of Environmental Law: If Applicable, Hungary's Violations

7.61 Slovakia has shown above that the lawfulness of Hungary's conduct falls to be judged by the terms of the 1977 Treaty and that its suspension of Nagymaros was in violation of the Treaty. But even if, as Hungary argues, the general principles of international environmental law are relevant in this dispute - either to interpret the 1977 Treaty or as the governing law - Hungary's conduct violated those principles as well.

7.62 As demonstrated in Chapter III above, Hungary's unilateral action in suspending work on Nagymaros was contrary to the principles of prior notification and consultation concerning planned measures that might cause significant harm to other watercourse states[98]. Those principles would apply to any change in the status quo, and by 1989 the Treaty parties had sufficiently implemented the Treaty Project that it represented the status quo. Further, Hungary's failure to discuss its plans to suspend Nagymaros violated the principles of consultation and negotiation concerning planned measures. These procedures of prior notification, consultation and negotiation are fundamental to the cooperation that is essential between States sharing an international watercourse[99].

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97 See, para.7.26, et seq., above.

98 See, para. 3.45, et seq., above.

99 Ibid.

7.63 Hungary's unilateral decision of 13 May 1989 to suspend work on Nagymaros constituted a breach of the 1977 Treaty for which Hungary has no valid defence or justification. Therefore, the answer to the question put to the Court in Article 2(1)(a) of the Special Agreement, as to whether "Hungary was entitled to suspend ... , in 1989, the works on the Nagymaros Project", must be that Hungary was not so entitled.

B. Hungary's Abandonment of Works at Nagymaros Constituted a Breach of the 1977 Treaty

7.64 Hungary's decision of 27 October 1989 to abandon peak hour operation and work at Nagymaros constituted a breach of the 1977 Treaty:

- There is no dispute that the Treaty was in full force and effect on that date;
- There can also be no question as to the significance of this action; for by it Hungary unilaterally canceled one of the two sections of the G/N Project, which was intended under the Treaty to operate as a "single and indivisible operational system"[100];
- The significance to Hungary of the decision is that thereafter the G/N Project was pointless[101];
- And the abandonment of the Nagymaros sector of the Project meant for Czechoslovakia a very substantial loss of energy production, due to the inability to operate Gabčíkovo at peak mode operation, and it made it impossibile to achieve the navigation and flood control aims envisaged by the Treaty.

7.65 The evidence is clear that Hungary's abandonment of Nagymaros on 27 October 1989 had been carefully calculated[102], was carried out in a peremptory fashion - without

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100 See, para. 7.42, above.

101 Ibid.

102 See, Hardi report of September 1989, discussed in the Slovak Counter-Memorial, para. 5.29, et seq.

prior notice and without any sort of negotiation (except as to how to obtain Czechoslovakia's acceptance to an amendment of the Treaty) - and was definitive. The only question that Hungary was willing to discuss thereafter was how to get Czechoslovakia to agree to the abandonment of Nagymaros. Moreover, as in the case of suspension, Hungary's failure to observe the Treaty's mechanisms for joint cooperation, as well as its failure to give prior notice or to engage in negotiations, constituted in themselves violations of Article 27 of the Treaty.

Agreement or Acquiescence: No Defence

7.66 The evidence clearly establishes that Hungary has no valid defence based either on Czechoslovakia's alleged agreement or acquiescence. At the meeting of Prime Ministers on 11 October 1989, Hungary proposed that agreement be reached on abandoning both peak mode operation and the Nagymaros works. At their next meeting, on 26 October, the Czechoslovak Prime Minister formally responded by putting forward an alternative proposal[103]: to slow down the Nagymaros works by 15 months to allow further time for alleged problems concerning peak mode operation to be studied and dealt with - pledging to abandon or modify peak operation if called for by these studies. But he refused to agree to the abandonment of Nagymaros, which of course was essential to the other aims of the Treaty for which Nagymaros had been designed, quite aside from peak mode operation. Thereafter, Czechoslovakia's position remained clear - that the entire G/N Project under the Treaty was to be maintained[104].

Alleged Prior Breach by Czechoslovakia: No Defence

7.67 What has been said above under the same heading in relation to suspension is sufficient to dispose of any claim that Nagymaros' abandonment was justified because of alleged prior breaches of Czechoslovakia. Such a claim of breach was never made at the time by Hungary.

7.68 The only relevant event here that took place between the time of Hungary's suspension of Nagymaros (13 May 1989) and its abandonment of the works (27 October 1989) relates solely to Hungary's suspension of the Gabčíkovo works at Dunakiliti in July 1989. For following that act, in August 1989, Czechoslovakia first mentioned the possible need to examine

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103 Formally confirmed by the Czechoslovak Note Verbale of 30 October 1989. See, para. 7.29, et seq., above.

104 See, e.g., Slovak Counter-Memorial, paras. 5.20-5.25, 5.50-5.53 and 5.77.

alternative technical solutions of a provisional nature. Aside from the fact that this occurred over two years before Czechoslovakia proceeded with the "provisional solution"[105], Czechoslovakia's comment had only to do with putting the Gabčíkovo section into operation; it had nothing to do with the Nagymaros section.

"Ecological State of Necessity": Not Applicable in Fact or in Law

7.69 The discussion above under this heading in relation to suspension is applicable, a fortiori, to Hungary's decision to abandon Nagymaros. Indeed, the evidence is even stronger against Hungary's entitlement to abandon Nagymaros on these grounds even if, arguendo, a state of necessity constituted legal grounds for this unilateral action of Hungary.

7.70 As with suspension, Hungary alleged the lack of study and data, not the existence of an "extremely grave and imminent peril", as the reason for its action. That there was no "imminent peril" was shown, inter alia, by the fact that, in the face of Czechoslovakia's demands to know what new unstudied risks had given rise to Hungary's sudden suspension, Hungary required 44 days to put together two scientific papers that were a mere re-hash of already known and carefully examined risks. Hungary produced nothing at all new in the way of any alleged risk or peril[106]. At the scientific discussions between the experts on 17-19 July 1989, it was clear that the issue between them was not over the existence of some alleged "imminent peril" but over whether adequate studies had been conducted into potential risks alleged to exist by Hungary. Czechoslovakia's scientific experts made clear their view that such matters had already been carefully studied.

7.71 At the first meeting of Prime Ministers that followed Hungary's suspension (24 May 1989), Czechoslovakia had committed itself to establishing a joint group of experts to assess ecological, seismic and other aspects of Nagymaros[107]. But after the 17-19 July meeting of experts where the difference that emerged between the parties was over whether there had been adequate studies and data, the Hungarian Government did not act to lift its suspension of Nagymaros and propose to proceed with such studies while the work at Nagymaros continued -

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105 See, para. 9.01, below.

106 See, Slovak Counter-Memorial, para. 5.14, et seq.

107 Ibid., para. 5.15.

during the three or more years before Nagymaros became operational. To the contrary, Hungary informed Czechoslovakia the following day (20 July) that it had extended the suspension at Nagymaros to 31 October 1989[108].

7.72 While in his letter of 4 October 1989 Hungary's Prime Minister still complained of the lack of substantive technical discussions, at the meeting of Prime Ministers on 11 October he formally proposed the abandonment of both peak mode operation and the entire Nagymaros section of the Project (without waiting for the results of the Bechtel study, which had been commissioned by Hungary in July 1989). As has been described in detail above[109], Czechoslovakia's official response at the next meeting of Prime Ministers on 26 October (confirmed formally by Note Verbale on 30 October) was a significant step forwards towards compromise, which ought to have led to Hungary's lifting of the Nagymaros suspension. The alleged risks could have been studied over the lengthy period before any risk could even theoretically have arisen (that is, once Nagymaros became operational) - a period Czechoslovakia offered on 26 October to prolong by an additional 15 months. And Czechoslovakia even pledged to abandon peak mode operation - which was the source of Hungary's supposed ecological worries - if the studies so indicated.

7.73 It was in the light of these facts that Hungary's definitive abandonment of Nagymaros by Resolution of 27 October is to be considered. In November 1989, without prior notice to its Treaty partner, Hungary terminated all contracts for the Nagymaros works. Thereafter, Hungary made it clear that the resumption of Nagymaros was neither a possibility nor an issue for discussion. The abandonment of Nagymaros was a closed book so far as Hungary was concerned.

7.74 Thus, not only was there no threat to an essential Hungarian interest "at the actual time" that Hungary decided to abandon Nagymaros, but also Czechoslovakia's proposals to study Nagymaros, and its pledge to modify or even abandon peak mode operation if justified by such studies, demonstrated conclusively that the requirement that "the peril must not have been escapable by any other means" was not satisfied[110].

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108 Hungary withheld from Czechoslovakia the fact that the 13 May Resolution suspending work at Nagymaros was in fact for an unlimited period and, therefore, there was no question of any "extension" of suspension. See, Slovak Counter-Memorial, para. 5.09, et seq.

109 See, para. 7.29, et seq., above.

110 See, para. 7.55, above.

General Principles of Environmental Law: If Applicable, Hungary's Violations

7.75 As in the case of its suspension of Nagymaros, Hungary's conduct in relation to its abandonment of Nagymaros violated a number of principles of international environmental law even if, arguendo, this body of law was in any way applicable. Thus, as has been demonstrated in sub-section A above, Hungary's unilateral decision to abandon Nagymaros was taken without informing or consulting with Czechoslovakia in advance. This failure was in utter disregard of the principles of prior notification and consultation concerning planned measures that might cause significant harm to other watercourse States.

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7.76 It has been demonstrated that Hungary's unilateral decision of 27 October 1989 to abandon the Nagymaros sector of the G/N Project constituted a breach of the 1977 Treaty and that Hungary has no valid defense to justify this breach. This breach was pivotal since, with the abandonment of Nagymaros, the G/N Project ceased to have any raison d'être for Hungary. The abandonment of Nagymaros was thus a major step toward Hungary's abandonment of the entire G/N Project.

7.77 Accordingly, the question put to the Court in Article 2(1)(a) of the Special Agreement, as to whether "Hungary was entitled to ... subsequently abandon, in 1989, the works on the Nagymaros Project", must be answered in the negative.

CHAPTER VIII. ARTICLE 2(1)(a): WHETHER HUNGARY WAS ENTITLED, IN 1989, TO SUSPEND AND SUBSEQUENTLY ABANDON THE WORKS ON THE PART OF THE GABČÍKOVO SECTION OF THE PROJECT FOR WHICH THE TREATY ATTRIBUTED RESPONSIBILITY TO HUNGARY

8.01 The Resolution of the Hungarian Government of 20 July 1989 initiated the suspension by Hungary of works at Gabčíkovo. Czechoslovakia was informed of this action following a meeting of Prime Ministers. This was as much a surprise to Czechoslovakia as Hungary's 13 May decision concerning Nagymaros had been; and an even greater shock.

8.02 In this regard, the pre-1989 background dealt with in the previous Chapter, together with the events in 1989 preceding this action, are largely relevant to Hungary's 20 July decision concerning Gabčíkovo and to the question whether Hungary was entitled to suspend and then to abandon its part of the work at Gabčíkovo.

8.03 The key point brought out below concerns Hungary's essential acceptance in 1989 that the risks it perceived to be involved in regard to the Gabčíkovo section of the Project (and the evidence in relation thereto) did not then require more than an agreement on ecological and technical guarantees in order for work to be resumed. As Section 1 demonstrates, Hungary's official position with regard to the various risks it alleged concerning water quality, the environment and seismic conditions, was the following:

- Hungary was prepared (and it agreed) promptly to resume the damming of the Danube if Czechoslovakia entered into an agreement on ecological and technical guarantees; and

- Hungary considered that the new studies it had in hand in September 1989 were inadequate to guide the Treaty parties in coping with the alleged risks in proceeding with the Project; therefore, Hungary insisted that - coupled with the agreement on guarantees - joint studies (with possible outside scientific participation) should be undertaken by the parties, while the work proceeded at Gabčíkovo.

What appears from Sections 1 and 2 below is that, after Czechoslovakia had formally accepted the concept of an agreement on environmental and technical guarantees, Hungary abandoned the Gabčíkovo section before even attempting to negotiate such guarantees, and before embarking on joint studies.

8.04 It is useful before examining Hungary's suspension of works for which it was responsible at Gabčíkovo (Section 1) and its subsequent abandonment of such works (Section 2), to set out the same questions posed in Chapter VII above in considering Nagymaros, making up a sort of prima facie test against which to consider Hungary's actions:

- What reasons did Hungary give at the time?
- Could Hungary then have believed these reasons?
- What was their immediacy?
- Did Hungary disclose at the time evidence to its Treaty partner reasonably substantiating reasons?
- Did such evidence contain any new facts?

SECTION 1. Hungary's Suspension of Work on 20 July 1989

8.05 No advance notice was given by Hungary nor was any attempt made to consult with Czechoslovakia before the Hungarian Government, by its 20 July Resolution, ordered work at Dunakiliti to be suspended until 31 October 1989 (effectively postponing the damming of the Danube for a year, with the consequential effects this action had on the agreed schedule for the entire Gabčíkovo section of the Project[1]). Czechoslovakia's shock over this

[1] See, Slovak Memorial, para. 4.02, and Slovak Counter-Memorial, para. 5.18 (fn. 35), regarding the narrow "window" of time occurring only once each year around the end of October-early November, when hydrological conditions allowed the damming operations to take place. See, also, para. 8.30, below.

decision is easily understandable[2]. Unlike Nagymaros, work on the Gabčíkovo section was nearing completion[3]; and the jointly agreed operating plan called for the damming of the Danube in late October of 1989, which was to be the initial step in the filling of the reservoir and bypass canal and the testing of the works at the Gabčíkovo step. Yet, like Nagymaros, because of the location of the Dunakiliti weir on Hungarian territory, with the damming side located on the common reach of the river (and with the boundary running along the navigation line), the damming operation for the Gabčíkovo section was under Hungary's physical control and, hence, it was in a position to impose its will (or in other terms, its "veto") on its Treaty partner[4].

8.06 The immediate, vehement series of protests made by the Czechoslovak Government against the Dunakiliti suspension have already been discussed in detail by Slovakia[5]. In contrast to Hungary's actions concerning Nagymaros, which never became the subject of negotiations, Hungary's 20 July suspension of Dunakiliti did lead to negotiations between the parties in September and October 1989, the details of which (and their aftermath) have a direct bearing on the answers to the two questions put to the Court under Article 2(1)(a) of the Special Agreement in relation to the Gabčíkovo section.

8.07 It will be recalled that two alternative proposals were made by Hungary's Prime Minister at the 20 July meeting[6], which raised the questions of how long the suspension at Gabčíkovo was to last and under what conditions work might be resumed.

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2 The 20 July Resolution and the meeting of Prime Ministers the same day are fully discussed at paras. 5.18-5.23 of the Slovak Counter-Memorial. Czechoslovakia's surprise was all the greater because, at the Plenipotentiary level, prior assurances had been given by Hungary that the 13 May decision concerned only Nagymaros and that an extension of the decision to suspend the Gabčíkovo sector was not being contemplated.

3 See, Slovak Memorial, Illus No. 31, referred to at para. 3.27. The situation on the ground is depicted in Illus. No. CM-IA, appearing at the end of Chapter IV of the Slovak Counter-Memorial. Not to complete this part of the Project would have left on Czechoslovak territory a huge devasted area, as well as useless works for which no return could ever be foreseen.

4 Hungary's remarkably different perspective of the gravity of its action on 20 July is reflected in the comment in the Hungarian Memorial (para. 9.31) that "this suspension was of a minor character [compared to Nagymaros], since the Dunakiliti weir itself was essentially complete" - a reaction lacking any logic.

5 Slovak Memorial, paras. 4.36 and 4.38.

6 Slovak Counter-Memorial, para. 5.19; and Slovak Memorial, paras. 4.35-4.39.

However, neither alternative proposed by Hungary on 20 July contemplated that the damming operation at Dunakiliti would take place in accordance with the agreed Treaty schedule[7].

8.08 The Hungarian Counter-Memorial contends that Hungary's actions to suspend the Project were an exercise of its right to insist on a "full and correct implementation" of Articles 15 and 19 of the 1977 Treaty; and that they were a response to wrongful acts previously committed by Czechoslovakia - that is, to Czechoslovakia's supposed breach of these Articles[8]. But, just as in the case of Nagymaros, there was no claim by Hungary at the time of such breach. Although Hungary's actions were zealously defended in the self-serving Hungarian Note Verbale of 1 September 1989 (from which Hungary's Memorial extensively quotes[9]), this Note made no mention at all of Articles 15 and 19 of the Treaty, let alone suggested their breach by Czechoslovakia[10].

8.09 This Note of 1 September is of particular significance because it explained that the period of suspension announced by Hungary was for the purpose of allowing "further investigations of the ecological risks entailed by the project" to take place, urging that:

> "...this period of suspension is the last possibility for the two [Treaty parties] to confront thoroughly and for all times the joint work with the requirements of environmental protection and to this end to weigh up all the circumstances very carefully."

8.10 In other words, whatever studies Hungary had available to it at the beginning of September 1989 were not regarded by the Hungarian Government as an adequate basis for reaching a joint decision as to when and how to proceed with work on the Gabčíkovo section; more research was required in Hungary's view - and this was intended by Hungary to

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7 Not surprisingly, Czechoslovakia's response to these proposals in its Prime Minister's letter of 31 August was generally negative. See, Slovak Memorial, para. 4.38.

8 See, paras. 7.21-7.23, above.

9 Hungarian Memorial, Vol. 4, Annex 24; and paras. 3.88 and 9.31.

10 Rather, it was Czechoslovakia's mention of a possible provisional alternative (if Hungary did not resume work on the Gabčíkovo section of the Project) that attracted harsh criticism in Hungary's Note of 1 September. The Note also claimed Czechoslovakia's acquiescence in Hungary's 20 July decision - in spite of Czechoslovakia's repeated denials and protests; and it accused the Czechoslovak Government of refusing to negotiate - at a time when negotiations were just about to start.

be joint research (possibly with outside expert participation), as the 1 September Note made clear.

8.11 This points to a clear contradiction to be found in Hungary's first two pleadings. For they repeatedly emphasise the importance of the new studies in Hungary's possession by September 1989: the two Ecologia-INFORT studies and a World Wildlife Fund (WWF) study of August 1989, not to speak of the two papers (26 June) presented by Hungary at the experts meetings just before the 20 July decision was taken[11]. But, aside from the 26 June papers, Czechoslovakia was not informed of these studies (presumably reflecting Hungary's low estimation of their worth), and it is evident from the 1 September Note that in Hungary's view none of them offered an adequate basis for reaching a decision beyond the initial suspension of work at Dunakiliti. Hungary made it clear that further joint research was required to investigate the claimed risks.

8.12 The same emphasis on the need for joint research prior to taking any further steps may be found in Prime Minister Németh's letter of 4 October 1989. He complained of the lack of "substantive discussions held between experts of the two sides". This may be accepted as accurate: in the period from May 1989 up to 4 October there had been no more than an exchange of position papers between the parties just prior to the expert meeting on 17-19 July[12].

8.13 On 11 October 1989, a meeting of Prime Ministers was held at which certain proposals were made by Hungary of essential importance to this case. According to Hungary, the following proposal (referred to earlier[13]) was made by Hungary comprising:

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11 In July 1989, the Hungarian Government also commissioned the Bechtel study, whose results were given to Hungary in February 1990. At the time, Czechoslovakia had no knowledge of this study.

12 There was no scientific basis, however, for Mr. Németh's conclusion: "We consider the execution of experiments on nature having uncertain effects to be extraordinarily risky." This ignored entirely the extensive research of the Treaty parties, both before and after the Treaty, into ecological risks, and the decisions taken by both Governments after Hungary's 1985 EIA, in which these very risks were explored. The tone of the letter is surprising in the light of the fact that it was signed by the same Prime Minister who had succeeded in February 1989 in obtaining Czechoslovakia's formal approval to the Project's accerleration sought by Hungary.

13 See, para. 7.29 (last item), above. For Hungary's account of the 11 October meeting (for which no agreed record exists), see, Hungarian Memorial, para. 3.96. The document on which Hungary relies for its account of this meeting has not been produced, either in its original version or in translation, contrary to the Rules of Court.

- First, an agreement to abandon Nagymaros as well as peak mode operation;

- Second, an agreement incorporating complex environmental, water quality and technical guarantees;

- Third, if Czechoslovakia adopted the "suggestion" set out earlier in the proposal: "Hungary would continue to prepare for the closure of the Danube, and would actually close it after the conclusion of the agreement."

However, Prime Minister Németh added (according to the Hungarian Memorial) that "in the absence of agreement" the Hungarian suspension of all construction would "last until environmental requirements were met".

8.14 At the next meeting of Prime Ministers on 26 October 1989, the Czechoslovak Prime Minister officially responded to the 11 October proposal of Hungary with a most reasonable alternative proposal, which was formally confirmed by the Czechoslovak Government in its Note Verbale of 30 October 1989[14].

8.15 Hungary makes no claim that its proposal was merely a negotiating tactic aimed at inducing Czechoslovakia to agree to the abandonment of Nagymaros. It is, therefore, necessary to take a close look at the implications of this Hungarian proposal, and of Czechoslovakia's response. Hungary's proposal must also be interpreted in the light of the subsequent Hungarian Resolution of 27 October and Note Verbale of 3 November 1989.

8.16 Hungary's undertakings both as to resuming work and to completing the damming of the Danube were confirmed in the Hungarian Government's Resolution of 27 October 1989 in the following terms:

> "The condition for filling the Dunakiliti-Hrušov reservoir is the conclusion of the intergovernmental agreement [concerning guarantees]. In the event of a

[14] See, para. 7.29, et seq., above.

> Czechoslovak statement of willingness to conclude the inter-governmental agreement [being] given, the preparatory works on the relocation of the riverbed of the [river] could be continued[15]."

This commitment was again formally confirmed by Hungary's Note Verbale of 3 November 1989, in similar terms:

> "The precondition of filling up the Dunakiliti-Hrušov reservoir is the conclusion of the inter-governmental agreement. In case of a Czechoslovak statement of intention about ... the conclusion of the inter-governmental agreement, the preparatory work of the riverbed diversion at the reservoir can be continued[16]."

This second confirmation, following as it did Czechoslovakia's counter-proposal making clear that the Czechoslovak Government did not accept the abandonment of Nagymaros, establishes that Hungary's commitment at the time concerning Gabčíkovo was contingent only on an inter-governmental agreement as to guarantees; it was quite separate from Nagymaros, as to which Hungary had already acted, on 27 October. This confirmation also followed Czechoslovakia's response to Hungary's proposal, by which it declared "its readiness to conclude such an agreement [on guarantees] in a short time" provided that Hungary "starts without delay preparatory work on damming the Danube riverbed at Dunakiliti"[17]. In spite of Czechoslovakia's official position against the abandonment of Nagymaros, Hungary's confirmation on 3 November of its proposal to resume work at Gabčíkovo on the basis of an agreement on guarantees did not tie such resumption of work to the condition that Czechoslovakia agree to the abandonment of Nagymaros by Treaty amendment.

8.17 Neither side had indicated at that stage any details concerning the provisions of such an agreement of guarantees[18]. Comparing Hungary's proposal as to Gabčíkovo with Czechoslovakia's response, the only difference seems to have been over how soon Hungary would resume the work at Dunakiliti in preparation for the closure of the Danube. But by the date of the Czechoslovak response (26 October), this was about to

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15 Hungary's translation wrongly uses the word "reservoir", which clearly makes no sense, and which Slovakia has replaced with "river" in brackets. See, Hungarian Memorial, Annex 150.

16 This text confirms the correction made just above in the Hungarian translation of the 27 October Resolution.

17 See, Slovak Memorial, paras. 4.48-4.49, and Annex 76.

18 See, para. 7.36 (first item), above.

become a moot question, for little if any time was left in which this operation could be carried out in the current year, in the light of the narrow "window" of time within which the damming could be carried out technically - barring which the operation could not be undertaken until October 1990.

8.18 So with the passage of time since Hungary's suspension of works at Dunakiliti on 20 July, any obstacle to agreement on Gabčíkovo seemed to have vanished, and nothing of substance appeared to stand in the way of the resumption of work at Dunakiliti based on Hungary's proposal to negotiate and reach agreement on a system of guarantees, which Czechoslovakia's 30 October Note urged be completed by the end of March 1990[19]. Hungary had undertaken to proceed to complete the damming of the Danube ("actually close it after the conclusion of the agreement")[20], once such an agreement on guarantees was reached. It was in these circumstances that the September-October 1989 negotiations over suspension of Dunakiliti in the Gabčíkovo section of the Project came to an end. For, by Note Verbale of 30 November (forwarding the draft of a treaty to amend the 1977 Treaty), Hungary revealed a change of position[21].

8.19 The introductory section of the draft treaty tabled by Hungary on 30 November indicated a modification of Hungary's earlier undertaking by specifying that the completion and operation of the Gabčíkovo section by Hungary was contingent on Czechoslovakia's agreement to amend the 1977 Treaty so as to abandon Nagymaros (which of necessity entailed the abandonment of peak mode operation at Gabčíkovo, as well). In short, the new position taken by the Hungarian Government in tabling this draft treaty came down to this:

- First, Hungary made a threat: if Czechoslovakia did not, by Treaty amendment, acquiesce in Hungary's breach of the 1977 Treaty by its abandonment of Nagymaros and consequently of peak mode operation,

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19 The Hungarian translation of this document mistakenly indicates the date suggested by Czechoslovakia as March 1993 rather than March 1990. See, Hungarian Memorial, Vol. 4, Annex 28.

20 Ibid., para. 3.96, setting forth Hungary's version of the offer made by the Hungarian Prime Minister at the meeting of 11 October 1989.

21 Ibid., Vol. 4, Annex 30.

(at Gabčíkovo), and did not agree to the termination of this part of the Treaty, Hungary would not carry out its obligations under the rest of the Treaty;

- Second, Hungary made a promise: if the conditions of this threat were met: (i) Hungary was "prepared to complete and operate the remaining installations"; and (ii) if Czechoslovakia "manifests its intention to conclude an ecological-guarantee agreement", then Hungary "will immediately proceed with the preparatory operations for the Dunakiliti bed-decanting"[22];

- Third, Hungary proposed to substitute a new disputes settlement provision (presumably to replace Article 27 of the Treaty). Under this provision, a two-tier procedure of disputes settlement was envisaged (subject to time limits), with ultimate settlement to be by compulsory arbitration or by the International Court of Justice. To these procedures Hungary proposed adding a special provision:

> "Without prejudice to [the above procedural provisions] and subject to parallel informing the other Contracting Party, in the case of significant danger directly threatening the natural environment, the Contracting Parties shall have the right to take [any] urgent measures necessary to avert danger even without having recourse to [the procedures set forth above]. The justified expenses resulting from these measures shall be borne by the two states in an equal proportion."

This was an obvious attempt to ratify a procedure that was contrary to the 1977 Treaty and was a formal acknowledgment by Hungary of the unlawfulness of its unilateral acts of suspension and, in the case of Nagymaros, abandonment.

8.20 Hungary's 30 November proposal ignored completely Czechoslovakia's counter-proposal concerning Nagymaros presented on 26 October and confirmed by Note Verbale on 30 October; and it modified Hungary's earlier proposals for it sought to link the

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22 Ibid. Presumably, the operation of "bed-decanting", as the Hungarian translation reads, referred to the operation of damming the Danube and diverting part of the flow of the river to the bypass canal.

carrying out of Hungary's other obligations under the Treaty concerning Gabčíkovo to a requirement that Czechoslovakia agree to abandon Nagymaros and peak mode operation by Treaty amendment.

8.21 By the time it received Hungary's proposal for amending the Treaty, however, Czechoslovakia was in the throes of its "Velvet Revolution", and there was no possibility of dealing with the 30 November proposal promptly[23]. A new Government was installed in Prague on 10 December 1989, and a President was elected on 29 December[24].

SECTION 2. Hungary's Abandonment of Work on the Gabčíkovo Section of the Project

8.22 The relevant events that took place in the six-month period after the end of 1989 have been covered in detail in Slovakia's earlier pleadings[25]. The suspension of work, which initially affected only Dunakiliti, was extended to all construction work by Hungary on the Gabčíkovo section and then, de facto, developed into the total abandonment of the Gabčíkovo works by Hungary, culminating in the termination by Hungary of all contracts for works at Gabčíkovo by the end of June 1990. All of these additional actions were taken without notice to or consultation with Czechoslovakia and certainly without its agreement.

8.23 As to the negotiating stance of the Treaty parties, in his letter of 10 January 1990 to Czechoslovakia's new Prime Minister[26], Prime Minister Németh announced another shift in Hungary's position (an astonishing one not least because he had been Hungary's Prime Minister throughout 1989). He proposed the following:

- That "we not hold negotiations towards the amendment of the [1977 Treaty]" as initiated by Hungary's 30 November Note Verbale;

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23 See, Slovak Counter-Memorial, para. 5.42, and fn. 72, thereto.

24 In Hungary, the Németh Government was not replaced by a multi-party Government until May 1990.

25 See, Slovak Counter-Memorial, para. 5.43, et seq., and the cross references there to the Slovak Memorial.

26 Hungarian Memorial, Vol. 4, Annex 32.

- But instead, that joint scientific studies (with outside assistance) examine the "complex ecological effects" of the various parts of the Gabčíkovo section "along with the assessment of the present environmental situation and the recording thereof"; and

- That the commencement of the operation of the reservoir (in other words the damming of the Danube) and of the Gabčíkovo hydroelectric plant be dependent on the results of these studies.

8.24 This was a total renunciation by Hungary of its proposals of October 1989, even as modified on 30 November. Reduced to its essentials, Mr. Németh's 10 January letter put the 1977 Treaty "on hold"[27] - insofar as it had not already been abandoned - its resumption to depend on the agreement of the Treaty parties to the results of joint scientific studies yet to be started. There was no further mention of resuming work on the basis of a guarantees agreement. However, Mr. Németh said that he thought these studies could be completed by the first half of the year and that, then, the commencement of negotiations to modify the Treaty could begin. He said not a word about when resumption of work on the Gabčíkovo section of the Project might resume, a matter then under Hungary's physical control near Dunakiliti.

8.25 When Czechoslovakia's new Prime Minister responded by welcoming the "immediate renewal of the bilateral negotiations" leading to the "putting into operation of the Gabčíkovo Barrage during the year 1991"[28], Prime Minister Németh responded by abruptly shutting the door to negotiations in his letter of 6 March 1990[29]; and his view of the

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27 The peremptory character of this decision and Hungary's attempt to revert to the starting point of its discussions with Czechoslovakia are revealed in these paragraphs of the 10 January letter:
"I would like to inform you that the Hungarian party shall suspend construction work during this period and shall only preserve the existing 'status quo'. I would recommend the attention of the Czechoslovak Government to the same.
Our recommendation is founded upon the initiatives we made between 20 July and 30 November 1989. Thus, I would, for example, remind you that on 20 July, the Hungarian Government in one of its proposals suggested the suspension of construction work for a period of 3-5 years and that joint studies serve as the basis of our decisions."

28 Slovak Memorial, Annex 80 (letter of 15 Feb. 1990). This necessarily presumed the damming of the Danube during late October-early November 1990.

29 Hungarian Memorial, Vol. 4, Annex 35.

possibility of resumption of work at Gabčíkovo was reflected in his statement that the "handling of this issue includes ... the settlement of the fate of a gigantic investment fiasco". Within three months, Hungary had terminated its contracts for works at Gabčíkovo[30]. And by Resolution on 20 December 1990, the Hungarian Government formally abandoned the Gabčíkovo section of the Project[31]. Thus, nothing was left of the G/N Project in terms of a "joint investment" and a "well-balanced system".

8.26 Returning to the questions put to the Court in Article 2(1)(a) of the Special Agreement, Hungary clearly was not entitled to abandon works on Gabčíkovo, even judged by its own standards. Hungary had declared in its Note of 1 September 1989 that no further steps ought to be taken without further joint study, and yet its action to abandon was taken precisely without such studies. Furthermore, Mr. Németh's letter of 6 March 1990 - by which further negotiation was abruptly halted and which represented a definitive step in the abandonment of the works - was sent shortly after Hungary's receipt of the Bechtel report. This new and independent study - commissioned in the same month as Hungary suspended works at Dunakiliti - in no sense gave scientific support for a decision to abandon the Gabčíkovo section of the Project (or, indeed, the Nagymaros section)[32]. Hungary had sought further investigations of the ecological risks, and these had been carried out by Bechtel, indicating that such risks were not a bar to proceeding with the Project. Hungary had sought ecological guarantees, and Czechoslovakia had agreed to this proposal. There was no basis for Hungary's decision to abandon Gabčíkovo.

SECTION 3. Conclusions in the Light of the Applicable Law

8.27 The present Chapter has examined in detail above the facts relevant to answering the two questions put to the Court concerning the Gabčíkovo section of the G/N Project in Article 2(1)(a) of the Special Agreement: whether, in 1989, Hungary was entitled (i) to suspend work on the Gabčíkovo section of the Project, and (ii) subsequently to abandon work on that section. In the present Section, Slovakia draws legal conclusions from those facts on the basis of

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30 See, Slovak Counter-Memorial, para. 5.48 and fn. 80. See, also Hungary's 1992 Declaration, para. 14, Hungarian Memorial, Vol. 4 (at p. 162).

31 Hungarian Memorial, Vol. 4, Annex 153.

32 See, para. 11.22, below, for a rebuttal of Hungary's observation concerning the Bechtel report.

the applicable law and submits what it believes to be the answers the Court should give to these two questions. Since many of the conclusions reached in Section 5 of Chapter VII concerning Nagymaros apply equally here, the conclusions here can be reduced by reference back to Chapter VII where appropriate.

8.28 By way of introduction, it is useful to recall three particular elements of the factual context in which Hungary suspended and subsequently abandoned the works on the Gabčíkovo section of the Project. First, Hungary's abandonment of Nagymaros in October 1989 made peak mode operation at Gabčíkovo impossible. Second, Hungary had complete control over the putting into operation of the Gabčíkovo section because Hungary controlled the construction of the Dunakiliti weir and also the damming of the Danube (to occur on a common reach of the Danube). Third, the technical complexities of the damming operation were such that only a narrow "window" of time existed each year - at a time of low river flow - when the Danube could be dammed.

A. Hungary's Suspension of Gabčíkovo Constituted a Breach of the 1977 Treaty

8.29 Hungary's decision of 20 July 1989 to suspend construction work on the Gabčíkovo section of the G/N Project until 31 October 1989 constituted a clear breach of the 1977 Treaty:

- There is no dispute that the Treaty was in full force and effect at the time, as were the related agreements modifying the timetable for its implementation.

- The agreed Project timetable then in effect included no provision for unilateral suspension of work, and Czechoslovakia at no time agreed to it in any other way.

- Hungary's decision was entirely unilateral and was taken without prior notification to, and without consultation or negotiation with, its Treaty

partner, and certainly without its agreement[33].

8.30 Hungary's 20 July action resulted in the suspension for a year of work on much of the rest of the Gabčíkovo section to be carried out by Czechoslovakia: the jointly agreed Project schedule had called for the Danube to be dammed at Dunakiliti in late October 1989; by suspending work at Dunakiliti until 31 October 1989, Hungary ensured that the small "window" of time within which the Danube could be dammed that year was missed; and without the diversion of water into the reservoir and bypass canal, other elements of the Project to be carried out by Czechoslovakia were delayed for a year. This delay, without prior consultation, caused Czechoslovakia significant financial losses. It directly affected Czechoslovakia's ability to perform a large portion of its Treaty obligations in relation to that section of the Project for a year.

Alleged Prior Breach by Czechoslovakia: Not a Defence

8.31 For the reasons already set out in the previous Chapter[34], Hungary's defence based on the alleged prior breach by Czechoslovakia of Articles 15 and 19 of the Treaty can have no application to Hungary's suspension of work on 20 July 1989 at Dunakiliti.

"Ecological State of Necessity": Not Applicable in Fact or in Law

8.32 Slovakia's comments on the defence of "necessity" in the previous Chapter in the context of Hungary's suspension of Nagymaros apply equally here: it is a doctrine outside treaty law on which Hungary's breach of the 1977 Treaty cannot be justified; and even if, arguendo, a "state of necessity" were a defence, it could not properly be invoked here under the standards established under international law for such a defence[35].

8.33 There are, however, certain facts peculiar to Hungary's suspension of the Gabčíkovo section that need to be mentioned, although the same general points apply to both

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33 As in the case of Nagymaros, even if Czechoslovakia had been aware of Hungary's intent to suspend work at Gabčíkovo for which it was responsible (quod non), this would not have excused Hungary's breach. See, para. 7.45, above. See, also, para. 7.46, above, regarding the requirement under the 1969 Vienna Convention that a suspension to be justified must have the other Treaty party's consent.

34 See, paras. 7.51-7.52, above.

35 See, para. 7.53, et seq., above.

suspensions: there was no evidence of any identified "grave and imminent danger" to meet which this suspension was necessary; there was no threat to an "essential interest at the actual time"; and action to suspend was not the "only means of warding off the extremely grave and imminent peril" which Hungary claimed to fear[36].

8.34 The 20 July decision to suspend work at Dunakiliti was the very day after the 17-19 July meeting of experts, which Czechoslovakia had believed, when the meeting was called, was to be devoted to the subject of the Nagymaros suspension. In fact, Czechoslovakia had been wrongly informed by Hungary that the 13 May suspension of Nagymaros had been for only two months[37], and hence Czechoslovakia hoped to get that suspension lifted. But the two papers produced on 26 June by Hungary[38], stating its views prior to the meeting, related to the entire Project not just to Nagymaros. These papers (as analysed by a Czechoslovak document prepared in two weeks' time in order to be ready for the meeting) and the discussion among experts at the meeting, made it clear that as to Gabčíkovo, just as for Nagymaros, there was no new evidence produced by Hungary of some alleged "imminent peril"[39]. The core issue over which the Treaty parties differed fundamentally did not concern the actual existence of certain identified environmental dangers - for that was not what Hungary claimed - but whether adequate studies and data existed to allow the Project to proceed.

8.35 With regard to Nagymaros, as noted above, there were several years in which to conduct these studies before that section became operational and any of the alleged risks could arise. But the putting into operation of the Gabčíkovo section of the Project by damming the Danube at Dunakiliti had been jointly agreed to occur at the end of October 1989, three months away. It must be emphasised once more that this damming operation was controlled by Hungary under the Project.

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36 Ibid.

37 See, para. 7.71, above, and relevant fn.

38 A surprisingly long period of 44 days after the Nagymaros suspension, rather than at the time of the suspension, given the urgent grounds for its action alleged by Hungary.

39 In Czechoslovakia's estimation, the Hungarian papers and the ensuing discussion amounted to merely a re-hash of already known and carefully studied possible risks. See, para. 7.27, et seq., above.

8.36 When the experts' meeting ended on 19 July - on a note of fundamental disagreement over the issue of the need for further studies in order to proceed - it would be reasonable to have expected that at the Prime Minister level the consequences of such a sharp difference of view would have been promptly considered in order to formulate a plan of action - the sort of discussion contemplated by Article 27 of the Treaty! This did not happen. Following the meeting, the Hungarian Government adopted a Resolution suspending all work at Dunakiliti, thereby postponing the damming of the Danube under the agreed schedule for an entire year.

8.37 The taking of this action was not discussed at the meeting between Prime Ministers; Czechoslovakia was merely informed afterwards. Yet the three months remaining before the brief period in which the damming operation could take place left ample time for discussion - perhaps even for a partial study of the alleged risks. There were certainly alternative means available for "warding off" any perceived peril, although it must be repeated that it was the alleged lack of study, not any concrete peril, that Hungary relied on then to justify the suspension. For example, after getting studies under way the Treaty parties might have agreed that the damming operation should proceed as scheduled - so as not to forfeit a whole year before putting the Gabčíkovo section into operation. Since the filling of the reservoir and the bypass canal was a six-month operation, which occurred prior to the start of the growing season, any adverse environmental effects would have been minimal; and the reversal of the damming was entirely feasible, if the parties so decided.

8.38 Had it been acting reasonably, Hungary would have informed Czechoslovakia that it had just commissioned the Bechtel study, whose report was expected in February 1990; and the parties might have agreed to base their actions on the findings of this report. Instead, Czechoslovakia was never informed of the Bechtel study, and Hungary acted without awaiting its results.

8.39 Thus, it can only be concluded that even if, arguendo, a "state of necessity" were a defence that could validly be invoked, it would fail totally in the circumstances to justify Hungary's suspension of all work at Dunakiliti, thereby postponing the damming of the Danube for a year with all the collateral effects on the Project this action caused.

8.40 For the same reasons, if Hungary's "reasonable belief" test were the applicable legal standard by which to judge Hungary's conduct[40], which it clearly is not, Hungary's action to suspend work at Dunakiliti would certainly fail to meet even that standard. For on 20 July 1990 there was clearly no basis for believing that there was a "substantial likelihood of major risks and damage" from closing the Danube at Dunakiliti - to quote the relevant part of Hungary's test. All the reliable expert studies and data in the hands of Hungary showed there that was not a "substantial likelihood of major risks and damages". Clearly, Hungary lacked confidence in the two alarmist papers it handed Czechoslovakia on 26 June in preparation for the 17-19 July meeting, as well as in the Ecologia reports, which in any event dealt primarily with Nagymaros[41]. Hungary's belief, as shown at that meeting, was in its lack of adequate knowledge and the need for further study, prompting it to commission the Bechtel study at that time. If Hungary had wanted to reach an informed opinion, it would have awaited the Bechtel report (not scheduled to be completed until February 1990). It would have sought to gain Czechoslovakia's agreement to postpone the damming operation for a year, or to some other alternative such as just suggested above. Perhaps - quite rightly as it turned out - Hungary feared that the Bechtel report would not support the actions it wanted to take to end the Project.

General Principles of Environmental Law: If Applicable, Hungary's Violations

8.41 As in the case of its suspension of Nagymaros, Hungary's conduct in relation to its suspension of work on the Gabčíkovo section of the G/N Project violated a number of principles of international environmental law even assuming, arguendo, this body of law is applicable. As demonstrated earlier, Hungary's unilateral decision to suspend work on the Gabčíkovo section was taken without informing or consulting with Czechoslovakia in advance. This failure was in disregard of the principles of prior notification and consultation concerning planned measures that might cause significant harm to other watercourse States[42].

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40 Hungarian Counter-Memorial, para. 1.47.

41 See, para. 8.11, above.

42 See, paras. 7.61-7.62, above.

8.42 Hungary's unilateral decision of 20 July 1989 to suspend work at Gabčíkovo constituted a clear breach of the 1977 Treaty. Hungary has no valid defence to justify this breach. Therefore, the question put to the Court in Article 2(1)(a) of the Special Agreement, as to whether "Hungary was entitled to suspend ..., in 1989, the works ... on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to [Hungary]" must be answered in the negative.

B. Hungary's Abandonment of Works at Gabčíkovo Constituted a Breach of the 1977 Treaty

8.43 The date of Hungary's abandonment of work on the part of the Gabčíkovo section of the Project for which it was responsible seems to have been fixed as "in 1989" by Article 2(1)(a) of the Special Agreement (although it may be open to question whether this date was intended only to apply to the suspension and abandonment of Nagymaros and not to Gabčíkovo). Czechoslovakia has demonstrated in its Counter-Memorial that, at least by mid-1990, Hungary had abandoned Gabčíkovo de facto, the final decisive act being the termination of all related contracts[43]. By Resolution of 20 December 1990, the Hungarian Government gave formal recognition to its abandonment of the entire Project[44].

8.44 There is no dispute that the Treaty was in full force and effect at each of these dates. Hungary's abandonment brought to an end all work on the Project to which Hungary had been assigned responsibility under the Treaty.

8.45 As in the case of Nagymaros and the suspension of works at Gabčíkovo (postponing the damming of the Danube at Dunakiliti for a whole year), Hungary provided no prior notice to Czechoslovakia of its intent to take this action to abandon unilaterally the remainder of the Project. Hungary failed to consult or negotiate over the taking of that decisive action, in violation of the Treaty provisions for cooperation and of Article 27 of the 1977 Treaty.

8.46 Although there were discussions subsequently in 1991 concerning the Gabčíkovo section, long after Hungary's abandonment, these were not over Hungary's resuming

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43 See, para. 8.25, above.

44 Ibid.

performance of this part of its Treaty obligations[45]. There is not the slightest evidence of any willingness on the part of Hungary to resume any of its Treaty obligations after their abandonment. Hungary's only purpose in entering into the 1991 discussions, and those that followed, was to attempt to obtain Czechoslovakia's agreement to terminate the Treaty - and to stop Czechoslovakia from continuing to perform its Treaty obligations by putting the Gabčíkovo section into operation under a "provisional solution".

Alleged Prior Breach by Czechoslovakia: Not a Defence

8.47 The first of Hungary's arguments alleging Czechoslovakia's prior breach of the Treaty is based on Articles 15 and 19 of the Treaty and is discussed in Chapter VII above, as well as referred to earlier in this Section[46]. There is no need to repeat here why such a defence fails.

8.48 However, Hungary's pleadings seek to give some substance to a defence of prior breach based on Variant "C" by advancing the dates relevant to Variant "C" and by conjuring up a diabolic scheme under which Czechoslovakia had long planned to take over the Project for its sole benefit, to the detriment of Hungary, its environment and even its drinking water[47].

8.49 The artificiality and falsity of this argument have been demonstrated in the Slovak Counter-Memorial, and the argument is further discussed below in the next Chapter[48]. However, the main reasons why this defence fails are summarised here.

8.50 The defence based on Variant "C" as an alleged prior breach fails because:

- First, it is not legally plausible to pick a date prior to November 1991 for a claimed breach of the Treaty attributable to Variant "C", for Article 2(1)(b) of the Special Agreement specifically identifies that as the time when Czechoslovakia "proceeded with the provisional solution". If an action had been taken at an earlier date in respect to Variant "C", which might arguably

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45 See, para. 9.07, et seq., below.

46 See, paras. 7.51-7.52, 7.67 and 8.31, above.

47 See, paras. 9.01-9.06, below.

48 Slovak Counter-Memorial, Chap. VI and Chap. IX, below.

have been in breach of the Treaty, the Parties would have formulated this Article of the Special Agreement differently; and

- Second, prior to November 1991, only preliminary planning work toward a "provisional solution" had been undertaken; official approval of logistical and financial planning was not given by the Czechoslovak Government until 25 July 1991, well over a year following Hungary's de facto abandonment of Gabčíkovo and its termination of contracts to perform the work for which it was responsible in this section of the Project[49].

"Ecological State of Necessity": Not Applicable in Fact or in Law

8.51 It is evident that the reasons why the suspension of Gabčíkovo cannot be justified under a defence of "ecological state of necessity" apply here, a fortiori, in considering its abandonment[50]. First, there were no prior notice, no discussions and no negotiations over the abandonment of Gabčíkovo - and no agreement. The discussions regarding the Gabčíkovo section of the Project during September-October 1989 were devoted entirely to how long the suspension should last beyond 31 October 1989, and under what conditions; thereafter, until Hungary's abandonment, no negotiations took place between the parties over how or whether to resume work on that section of the Project. Second, it was the alleged absence of adequate study and data concerning environmental and other risks - not the established existence at the time of some "grave and imminent peril" - that Hungary relied on to justify its abandonment of Gabčíkovo by mid-1990, when the contracts for work in that section of the Project had been cancelled by Hungary.

8.52 Third, the Bechtel report was completed and given to Hungary in February 1990. Its findings did not support Hungary's actions to suspend and then abandon Gabčíkovo. Yet, after receiving this report, Hungary proceeded to terminate discussions concerning Gabčíkovo and to abandon that section of the Project - and indeed the entire G/N Project. Moreover, the Bechtel report was kept secret from Czechoslovakia. Thereafter, the conclusions of Bechtel were confirmed in the conclusions reached in the entirely separate, independent study of Hydro-Québec

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49 Slovak Counter-Memorial, Chaps. V and VI.

50 It is important to bear in mind what has been said earlier in this Chapter and in the previous Chapter as to why an alleged "ecological state of necessity" is not a defence against Hungary's breach of the Treaty, and as to the standards to be met in order to plead such a defence. See, para. 7.53, et seq., above.

International (HQI), commissioned during this period by Czechoslovakia and completed in December 1990, at a time when Hungary formally abandoned the G/N Project by Government Resolution.

8.53 Although the discussions during September-October 1989 did not concern abandonment, they did focus on the conditions under which work in the Gabčíkovo section might be resumed. It is here that a pivotal event occurred. Prime Minister Németh proposed during the meeting of 11 October 1989 with his Czechoslovak counterpart that if Czechoslovakia adopted his suggestion of an agreement between them incorporating environmental, water quality and technical guarantees, Hungary would "continue to prepare for the closure of the Danube, and would actually close it after the conclusion of the agreement"[51].

8.54 Czechoslovakia agreed to Mr. Németh's proposal at the Prime Minister's meeting of 26 October 1989. Although, on the next day (27 October), Hungary adopted a Resolution abandoning Nagymaros; it at the same time re-stated the basis on which it was willing to proceed with the damming of the Danube "and the filling of the ... reservoir". This was the "conclusion of an intergovernmental agreement [concerning environmental, water quality and technical guarantees]"[52]. The Hungarian Government stated: "In the event of a Czechoslovak statement of willingness to conclude [such an agreement] ..., the preparatory works on the relocation of the [river] could be continued"[53]. Hungary reaffirmed this commitment once more in its Note Verbale of 3 November 1991[54].

8.55 This event is pivotal in examining Hungary's defence of a "state of ecological necessity". Hungary officially declared its willingness (confirmed on three occasions) to proceed with the work at Dunakiliti under the Gabčíkovo section of the Project if an agreement on guarantees could be reached. It undertook even to start this work if Czechoslovakia said (as it did on 26 October) it was willing to enter into such an agreement on guarantees. This official position directly contradicts the notion that the subsequent abandonment of Gabčíkovo was necessary "to

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51 See, para. 8.13, above. This account of the meeting, of which no official record exists, is based on the Hungarian Memorial, para. 3.96.

52 See, para. 8.16, above.

53 Ibid.

54 Ibid.

meet a grave and imminent danger which threatened an essential interest of the State"[55]. For Hungary was prepared to accept guarantees as an adequate solution to its concerns over environmental, water quality and other risks, thus manifesting the belief that these problems were capable of being resolved under the Treaty.

8.56 Even if Hungary's "reasonable belief" test is considered, in the light of these events Hungary clearly did not believe (not just was not "reasonable in believing") in 1989 that there was a "substantial likelihood of major risks and damages ... from closing the Danube at Dunakiliti (so as to allow for the filling of the [reservoir])". Hungary had proposed proceeding with precisely this work on the basis of an agreement on guarantees - which Czechoslovakia accepted. Hungary's proposal is evidence that it believed that the risks it alleged were manageable and that through a system of guarantees any adverse effects could be avoided or adequately dealt with.

General Principles of Environmental Law: If Applicable, Hungary's Violations

8.57 Were the conduct of the Treaty parties to be judged by reference to general international law, rather than by reference to what they had agreed under the 1977 Treaty (quod non), Hungary's conduct abandoning Gabčíkovo would violate the principles of international environmental law. Hungary's unilateral decision to abandon the Gabčíkovo sector was taken without informing or consulting with Czechoslovakia in advance. This failure was in utter disregard of the principles of prior notification and consultation concerning planned measures that might cause significant harm to other watercourse states.

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8.58 The answer to the second question put to the Court in Article 2(1)(a) of the Special Agreement in respect of Gabčíkovo is clear: Hungary was not entitled to abandon the works on the part of the Gabčíkovo section of the Project for which the Treaty attributed responsibility to Hungary.

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[55] See, para. 7.69, et seq., above.

CHAPTER IX. ARTICLE 2(1)(b): WHETHER CZECHOSLOVAKIA WAS ENTITLED TO PROCEED, IN NOVEMBER 1991, TO THE "PROVISIONAL SOLUTION" AND TO PUT INTO OPERATION FROM OCTOBER 1992 THIS SYSTEM

SECTION 1. Introduction

9.01 The purpose of this Chapter is to examine, in the light of the pleadings of the Parties filed to date, the evidence and applicable law relevant to the two questions put to the Court under Article 2(1)(b) of the Special Agreement in order to demonstrate that Czechoslovakia was entitled to take these actions in relation to the "provisional solution". In framing these questions, the Parties agreed on the relevance of two specific dates:

- The date when Czechoslovakia proceeded to the "provisional solution": November 1991[1];

- The date when Czechoslovakia proceeded to put into operation the "provisional solution": from October 1992, when the damming operation began (on 24 October) and was completed (on 27 October).

9.02 By specifying these dates, Article 2(1)(b) emphasises the relevant time period: long after - and quite separate from - the time when the actions referred to in Article 2(1)(a) took place. For the events and conduct of the Treaty parties relating directly to Article 2(1)(b) concern the period starting in April 1991 (when negotiations concerning the Project were resumed between the parties, after a lapse of almost 18 months) and ending in October 1992, after the "provisional solution" was put into operation[2].

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1 See, Slovak Counter-Memorial, para. 5.88. The work was preparatory to narrowing the size of the reservoir and obviously had no effect at the time on the flow of the Danube and, after damming, no material effect on its flow. It was an entirely reversible measure. See, in this regard, para. 9.24 (and fn. 36), below.

2 By April 1991, almost a year had elapsed since the complete abandonment by Hungary of works on both the Nagymaros section (27 October 1989) and the Gabčíkovo section (end of June 1990) of the G/N Project.

9.03 As Chapters VII and VIII above have shown, Hungary was not entitled to suspend and then abandon its works under the Project in 1989-early 1990. Accordingly, when negotiations resumed in April 1991, Hungary had long before, in breach of the Treaty, ceased to perform its obligations to proceed with the Project[3].

9.04 The Hungarian Counter-Memorial candidly describes the situation in 1991 as seen by Hungary, when negotiations were about to restart. Hungary asserts that it was "self-evident" that the 1977 Treaty was still in effect, but adds that:

> "In 1991, Hungary still saw some chance that the 1977 Treaty could be amended or terminated by mutual agreement and the parties could agree on important related issues ...[4]."

That is to say, Hungary no longer regarded the resumption of the G/N Project in accordance with the Treaty as a possibility. What remained to be settled with Czechoslovakia, according to Hungary, concerned such matters as "assessment and compensation of losses, the fate of the installations already completed, the resolution of the problems of navigation and flood protection, and the rehabilitation of the area"[5]. The only proposal Hungary was prepared to make to Czechoslovakia as a basis for settling their dispute - and Hungary's sole aim in these negotiations - presumed the total abandonment of the Treaty Project by mutual agreement. There is not a shred of evidence that, after it abandoned all construction works on the G/N Project, Hungary ever expressed a willingness to resume the Project jointly with Czechoslovakia.

9.05 It is interesting how faithfully Hungary persists in its Counter-Memorial in following the line taken in its Memorial to try to impute to Czechoslovakia a diabolic plot

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3 Hungary's Governmental Resolution of 20 December 1990 (Hungarian Memorial, Annex 153) officially confirmed Hungary's refusal to perform the Treaty, and it ordered the initiation of negotiations over the Treaty's termination (the prior negotiations of September-October 1989 having been terminated by Hungary on 6 March 1990). Prior thereto (July 1990), the Hungarian Government had conducted a study of the variants to the Original Project being examined by Czechoslovakia; and at a meeting of the Environmental Ministers of both countries, on 5 September 1990, a presentation of these alternatives was made by Czechoslovakia. See, Slovak Counter-Memorial, para. 5.68.

4 Hungarian Counter Memorial, para. 2.49.

5 Ibid.

(even dating back to 1982[6]) to turn the joint G/N Project into a unilateral venture threatening the flora and fauna of Hungary and the drinking water of the people of Budapest. Hungary describes the developments leading to the "provisional solution", the subject of Article 2(1)(b) of the Special Agreement, in these quite remarkable terms:

> "The concept of diverting the Danube at the section where both embankments are under Czechoslovak jurisdiction, and of utilising the joint investment solely for Czechoslovak economic purposes, was the unchanged core of Czechoslovak plans. This amounted to an attempt to exclude the other riparian State from control over the upstream sector of the Project and over the water discharge into the boundary river. No doubt some details of Variant C were only elaborated later ... . But this does not alter the fact that the developments from the first official threat of a unilateral solution in August 1989 until the diversion of the Danube in October 1992 form one barely interrupted continuum[7]."

Yet, as the previous Chapter demonstrates, Czechoslovakia's aim since the suspension of works in July 1989 had been to reach agreement with Hungary so as to permit the damming of the Danube at Dunakiliti to take place, an operation under Hungary's control, and to resume work on the Gabčíkovo section with a view solely to its joint operation.

9.06 Hungary is obviously unable to support such a conspiratorial view of events on the basis of documents placed in evidence by the Parties. It has therefore produced its own "chronology of events", assembled from a pot-pourri of press accounts and unsubstantiated analyses much of which is neither evidence of the alleged events nor relevant to the questions put to the Court concerning the "provisional solution[8]. In both its Memorial and Counter-Memorial, Hungary has attempted, without regard to dates, to jumble the events together so to obscure (i) its breaches of the 1977 Treaty prior to the 1991 negotiations and (ii) the narrow aims of Hungary in those negotiations. In this Chapter, the events directly related to the questions put to the Court concerning Variant "C" will be identified and

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6 See, Slovak Counter-Memorial, paras. 4.15-4.16 (and fn. 6).

7 Hungarian Counter-Memorial, para. 2.93 (fn. deleted - emphasis added).

8 The Court's attention is drawn in particular to Annex 93, on which this chronology heavily depends. It purports to be a "case study" by an organisation with a London address called "East West Environment Ltd.", without any attempt to describe this organisation's qualifications for producing such a review and analysis of events. No reference is made in this "case study" to any supporting documentary evidence of any kind. To offer this sort of paper as evidence is truly remarkable; it cannot be accorded any probative value at all: unsupported assertions cannot be proved by other unsupported assertions by persons having no established qualifications or expertise.

examined; and it will be shown that Czechoslovakia was entitled to proceed with this "provisional solution" in November 1991 and to put it into operation from October 1992.

SECTION 2. The 1991 Negotiations: Hungary's Persistence in Pursuing its Sole Aim of Terminating the Treaty and Formalising the Abandonment of the Project; Its Unwillingness to Compromise; and Czechoslovakia's Attempts to Table Alternative Provisional Solutions for Negotiation

9.07 Before the negotiations of September-October 1989 were abruptly ended by Hungary in early 1990, the issues in dispute were fairly well defined. As seen in the previous Chapter, the resumption of work in the Gabčíkovo section had not been ruled out by Hungary at all, in spite of claimed environmental risks[9]. In fact, Hungary had proposed that if an environmental guarantee agreement could be reached it would resume the damming of the Danube[10].

9.08 Following Czechoslovakia's "Velvet Revolution" at the end of 1989, its new Prime Minister, in his first letter concerning the Project (15 February 1990), proposed that the negotiations be resumed. But Hungary's policy had suddenly and fundamentally changed[11]. The Németh Government now insisted on the complete abandonment of the G/N Project, which occurred de facto by the end of June 1990 with Hungary's termination of all related contracts. The policy statement of the new Hungarian Government, set out in its general political program of 22 May 1990[12], made clear that the abandonment of the G/N Project (calling it a "mistaken project") was also the new Government's policy. It is paradoxical that, contrary to the impression Hungary has tried to give in both its Memorial and Counter-Memorial, the post-revolution Governments of each Treaty party in fact reaffirmed their predecessors' positions concerning the 1977 Treaty and the G/N Project: the new Czechoslovak Government urged a resumption of the September-October 1989 negotiations,

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9 And despite the fact that Hungary had been able to prevent the scheduled damming of the Danube in October-November 1989 through its control of the operation at Dunakiliti.

10 Even after a further condition was added by Hungary in the draft treaty tabled on 30 November 1989 that Czechoslovakia agree to the abandonment of Nagymaros, the parties nevertheless contemplated the damming of the Danube after these agreements had been reached. See, para. 8.19, above.

11 See, para. 8.23, et seq., above.

12 See, para. 16, Hungarian 1992 Declaration, Hungarian Memorial, Vol. 4, Annex 82 (at p. 163).

the new Hungarian Government reaffirmed its predecessor's abandonment of the Project and its aim to terminate the Treaty.

9.09 But what new post-1989 studies of environmental risks had led to the Németh Government's abrupt policy change? The only study commissioned by Hungary - the Bechtel study, completed and handed to Hungary in February 1990, but not made known or available to Czechoslovakia - lent no support at all to Hungary's change in policy. Neither did the HQI report commissioned by Czechoslovakia.

9.10 And what alternative choices were available to the parties in order to reach a compromise settlement? There was apparently no prospect of Hungary's resumption of a jointly operated G/N Project; for it had been totally and irrevocably abandoned by Hungary[13]. Hungary now lays stress on the proposals it made in 1991 to enter into studies on the Project's possible environmental effects - but these were always subject to the condition that Czechoslovakia halt all work on the Project. With these points in mind, the 1991 negotiations can be seen in perspective.

9.11 The results of the negotiations held on 22 April 1991 were set out in a Joint Communiqué, which made clear Hungary's decision that the Treaty had to be terminated[14]. Of the four papers tabled by Hungary, three were proposals to accomplish Hungary's aim; only one was a technical paper directed at supposed environmental and other risks - and as to it, Czechoslovakia was surprised to find that it contained nothing new in the way of scientific facts beyond what was already well known in 1989 and before[15]. Hungary's Counter-Memorial now asserts that in the period 1989-1990, new studies had been conducted by Hungary[16]; but it is curious indeed that the paper tabled by Hungary at the meeting of 22 April 1991 made no reference to any such studies.

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13 Of course, this is now apparent after the study of documents which, in many cases, were not public at the time or known to Czechoslovakia. The new Czechoslovak Government approached the 1991 negotiations hoping that a compromise settlement was possible.

14 Slovak Memorial, Vol. 4, Annex 87. During these discussions, the Hungarian side described the G/N Project as the product of the "megalomaniac and pseudoscientific arrogance" of the former socialist leaders of both Countries.

15 See, Slovak Counter-Memorial, para. 5.72.

16 Hungarian Counter-Memorial, para. 2.37.

9.12 In view of the absence of progress at the 22 April meeting (which followed a Parliamentary Resolution a few days earlier limiting the mandate of Hungary's representatives[17]), Czechoslovakia sent Hungary a Note Verbale on 18 June 1991 taking a forthright position about settling the dispute[18]. It called for another meeting and offered "to debate any definite suggestions submitted by [Hungary] which may lead to a resolution of the situation". This led to the negotiations that took place on 14-15 July[19]. In considering this meeting it is important to recall that, prior to this date, Czechoslovakia had done no more than to conduct feasibility studies into alternative solutions for putting into operation the Gabčíkovo section of the Project[20]. No choice of a particular alternative had yet been made; a fortiori, no work had been begun on any "provisional solution"[21].

9.13 At the 14-15 July negotiations, Czechoslovakia proposed the formation of a trilateral commission to examine variants of the Original Project which each side would

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17 In response to Slovakia's Memorial, the Hungarian Counter-Memorial (paras. 2.50-2.53) contends that its Parliament's Resolution of 16 April 1991 did not, as a matter of Hungarian constitutional law, legally tie the hands of Hungary's negotiators. This is not the view expressed at the time by Hungary's negotiators. See, Slovak Memorial, Annex 70, the Joint Communiqué issued after the 15 July 1991 negotiations. See, also, Hungary's unilateral account of the 14-15 July negotiations (Hungarian Memorial, Vol. 4, Annex 165 (at p. 388)) where it is indicated that agreement to the appointment of a trilateral commission would require the consent of the Hungarian Parliament. But in any event, the Hungarian Government's Resolution of 20 December 1990 had already limited the mandate of Hungary's negotiators at the 1991 negotiations; Hungary's irreversible policy and sole aim were to obtain Czechoslovakia's agreement to the abandonment of the Project and the termination of the Treaty.

18 Hungarian Memorial, Vol. 4, Annex 51.

19 Slovak Counter-Memorial, para. 5.75, et seq. See, also, Hungarian Memorial, paras. 3.134-3.137. It is striking that, in its Counter-Memorial, Hungary all but ignores the 14-15 July negotiations.

20 Slovak Memorial, para. 5.76. The Hungarian Counter-Memorial adds nothing new to the incorrect contentions contained in its Memorial that Hungary had been left in the dark concerning these Czechoslovak studies, a contention already rebutted in the Slovak Counter-Memorial (see, para. 6.07, et seq.). See, also, fn. 3, above.

21 The facts set out in para. 2.52 of the Hungarian Counter-Memorial concerning the approval and start of construction on Variant "C" are totally wrong, as already shown in the Slovak Counter-Memorial, paras. 5.78-5.80. For example, the contention that during the 14-15 July negotiations the Czechoslovak delegate "announced" that construction had started on Variant "C" is not only incorrect and unsupported by any evidence but also ignores that even planning work for Variant "C" had not been authorised until 25 July 1991, after the failure of the 14-15 July negotiations. Hungary's contention is also inconsistent with Article 2(1)(b) of the Special Agreement, which reflects the agreement of the Parties that Czechoslovakia had not "proceeded to" the "provisional solution" until November 1991.

submit to the commission by 31 July 1991[22]. Czechoslovakia offered to turn over alternative proposals for proceeding with Gabčíkovo, none of which included Variant "C"[23].

9.14 The special relevance of this offer is that it was an attempt by Czechoslovakia to have any deviations from the Original Project, as well as the Project's continuation, made the subject of impartial study and negotiation between the Treaty parties. Hungary's response was a complete refusal to enter into any discussion that involved going ahead jointly with the Project, using as an excuse the limited mandate of its negotiators.

9.15 It has to be re-emphasised that at no time after its abandonment of the G/N Project was there the slightest indication that Hungary was prepared to resume work of any kind on the Project. Although Hungary did propose joint (bilateral) studies of the environmental risks of the Project[24], this was not a compromise offer in any sense, for Hungary gave no indication that it was prepared to agree to resume joint performance of work on the Gabčíkovo section if the results of the studies were favourable.

9.16 Furthermore, Hungary's joint study proposed was conditioned on Czechoslovakia's stopping all work on the Project. This was a new condition that, thenceforth, Hungary imposed as a prerequisite to any further studies or the appointment of any commission. It is therefore important to examine Hungary's demand - initially in the context of the July meeting.

9.17 As a general proposition, where two parties are jointly performing a project and a dispute over continuing the project has arisen that requires further study, it may be a reasonable condition that they agree to the suspension of further performance while joint studies are underway - provided, of course, that each party has undertaken to respect the results of the studies. But this was hardly the situation under the G/N Project in 1991; no such

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22 Joint Communiqué issued on 15 July 1991, Slovak Memorial, Annex 90.

23 See, Slovak Counter-Memorial, paras. 5.75-5.79; Hungarian Memorial, paras. 3.134-3.137. Contrary to the Rules of Court, Hungary has not furnished the original version of the report of Hungarian Minister Mádl on which its account of the meeting relies, a translation of which appears as Annex 165, Vol. 4, Hungarian Memorial.

24 See, e.g., Hungarian Counter-Memorial, para. 2.50.

mutual undertaking was envisaged or even possible. Hungary certainly did not bind itself to accept the results or recommendations of such studies.

9.18 It must be emphasised that the Treaty parties were in entirely different positions concerning the Treaty's performance. Hungary had already abandoned the Project and, through its control of the Dunakiliti weir, had unilaterally prevented the damming of the Danube, severely limiting the work Czechoslovakia could perform. Czechoslovakia, on the other hand, had already nearly completed work on the Gabčíkovo section; and it was continuing to carry out such work as it could on both sections of the G/N Project. This was work solely in fulfilment of the agreed Treaty Project and not in any way related to Variant "C" or any other variant[25].

9.19 Moreover, there was no possibility on 14-15 July of damming in October-November 1991, except at Dunakiliti, which Hungary controlled and continued to prevent being completed so as not to allow the damming envisaged under the Treaty to occur. So suspension of work could not be justified on the basis of any imminent threat of damming. And any joint studies could easily have been completed before the next time the damming operation could be undertaken (October-November 1992).

9.20 It is evident, therefore, that there was no justification for Hungary to impose this condition on the commencement of joint research[26].

9.21 Inevitably, the 14-15 July negotiations made no progress toward the settlement of the dispute. Hungary refused to consider Czechoslovakia's proposal of a trilateral commission to study and submit recommendations on the variants submitted to it[27].

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25 No such work had commenced prior to November 1991, when Czechoslovakia (in the words of Article 2(1)(b) of the Special Agreement) "proceeded to the provisional solution". The suspension of work called for by Hungary during the 14-15 July negotiations, as a condition of joint studies, concerned Czechoslovak work on the Treaty Project, not studies into possible variants, which were a purely internal Czechoslovak matter. See, Joint Communiqué of 15 July 1991, Hungarian Memorial, Vol. 4, Annex 165.

26 As will be seen below, Hungary's subsequent insistence on the same condition of stopping work - as a precondition to the appointment of a trilateral commission and the conduct of trilateral studies - similarly lacked any rational basis.

27 Hungary's failure to table any alternative variants is understandable since its sole aim (and mandate) was to secure Czechoslovakia's agreement to total abandonment of the Project.

Czechoslovakia could not accept the condition to stop work on the Project, which it regarded as unjustified in the circumstances and clearly aimed at gaining another year's delay in the damming of the Danube. Hence, the parties did not proceed with joint studies.

9.22 While Czechoslovakia did not table for study by the proposed trilateral commission any variant involving unilateral operation by Czechoslovakia - under which the damming operation would be carried out solely on Czechoslovak territory rather than at Dunakiliti - in a certain sense such an alternative was a silent participant at the 14-15 July negotiations. For the new Czechoslovak Government was trying to induce Hungary to resume performance of its Treaty obligations in the Gabčíkovo section of the Project by showing a willingness to compromise: as Czechoslovakia had shown in the September-October 1989 negotiations when it was prepared to consider a slowing down of the work on the Nagymaros section and to negotiate an environmental guarantees agreement as to Gabčíkovo. It declared its readiness at the July 1991 negotiations to submit alternative proposals for proceeding with Gabčíkovo for study by a trilateral commission. But, at the same time, as Czechoslovakia's internal studies progressed, it became apparent that a variant to the Original Project could be devised under which the Gabčíkovo section could be operated without Hungarian involvement in the damming, thus depriving Hungary of the means of unilaterally preventing the damming of the Danube. With the complete lack of progress in settling the dispute shown at the April and July negotiations, the Czechoslovak Government, on 25 July 1991, approved the first planning activities for Variant "C", and Hungary was formally advised thereof on 30 July[28].

9.23 But it was made clear in Czechoslovak's subsequent Note Verbale of 27 August 1991[29] that these preliminary planning steps concerning Variant "C" did not stand in the way of negotiations aimed at resolving the dispute through a resumption of the Gabčíkovo section on a jointly completed and jointly operated basis:

> "[Czechoslovakia] is of the opinion that such decision [the Czechoslovak Government's approval on 25 July 1991 of financial and logistical planning for Variant "C"] does not preclude the continuation of talks. Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabčíkovo system of locks and a solution of the system of locks

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28 See, Slovak Counter-Memorial, para. 5.80.

29 See, ibid., para. 5.82; Slovak Memorial, Annex 96.

based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution."

SECTION 3. Czechoslovakia Proceeds with the Provisional Solution in November 1991

9.24 The first construction work specifically related to Variant "C" was started by Czechoslovakia in November 1991. It involved the narrowing of the reservoir[30]. Whether Czechoslovakia was entitled to take this action is the first of the two questions put to the Court under Article 2(1)(b) of the Special Agreement[31].

9.25 In judging whether Czechoslovakia was entitled to start construction specifically related to Variant "C" - leaving to one side the catastrophic situation in which it found itself due to Hungary's breaches[32] - there are two aspects of special importance. First, this initial action to proceed with Variant "C" did not lessen Czechoslovakia's attempts to reach a compromise agreement with Hungary for the joint completion and operation of the Gabčíkovo section of the Project. Second, the works started in November 1991, and the subsequent works related to Variant "C", were provisional, temporary and reversible; these works did not prevent a return to the Original Project, and Czechoslovakia pledged that this was so when it proceeded with Variant "C"[33].

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30 See, para. 9.01 (and fn. 1), above.

31 Section 7, below, will focus on the law applicable to answer this question. Here, the factual aspects will be considered.

32 For three years the nearly completed Gabčíkovo section had stood unused - the vast excavations for the reservoir and bypass canal lay empty and their beds and surrounding dikes were starting to suffer damage as a result. (See, Slovak Counter-Memorial, paras. 5.74 and 5.95, describing the pumping operation started in July 1991 to halt this erosion.) The huge structures comprising the dams, locks, weirs and dykes lay exposed - giant slabs of non-functional concrete and machinery. The enormous investment made by Czechoslovakia had not yet yielded any return at all, and the prospects of it ever doing so seemed remote at best as a result of Hungary's total abandonment of work in breach of the Treaty and its refusal to consider any proposal short of termination of the 1977 Treaty. This was an economic disaster for Czechoslovakia of a magnitude equal to the environmental catastrophe created by the continued suspension of the works.

33 The Hungarian Counter-Memorial contests Slovakia's position as to the provisional, temporary and reversible nature of Variant "C", and it proposes as the appropriate test the requirement of literally being able to revert to the status quo ante. See, paras. 2.101-2.104, 3.115-3.122 and 7.08. But the proper test is a functional one: can the Original Project be resumed in spite of the construction carried out in order to operate Variant "C". The answer is clearly, "yes"; and Hungary has not demonstrated otherwise. Hungary's contention, in para. 3.103, that: "Czechoslovakia always maintained that if Hungary returned to the Original Project, it would restore the status quo ante", is supported by no evidence at all and has been demonstrated to be untrue.

9.26 The second point has been fully dealt with in Slovakia's Memorial[34] and will be touched on again in Part III. It is the first point that will be addressed here.

A. Continued Czechoslovak Attempts to Reach a Compromise Agreement

9.27 Czechoslovakia's attempt to negotiate a settlement of the dispute was renewed in the last of the three series of 1991 negotiations, which took place on 2 December 1991[35]. But once again, Hungary proceeded to impose the pre-condition - this time even to the appointment of a committee - that Czechoslovakia stop all work to put the Gabčíkovo section of the Project into operation; and it imposed this pre-condition in a fashion seemingly calculated to be unacceptable, for it took the form of a 10-day ultimatum[36].

9.28 In defence of the imposition of this pre-condition, Hungary asserts:

- "If Czechoslovakia continued its work towards the implementation of Variant "C", the Committee's work would be meaningless[37]";

- Had work been allowed to go on, the "activity of the Committee would have legitimised the unilateral conduct of Czechoslovakia, while at the same time the Committee would have been acting under the pressure of bulldozers[38]", conjuring up images of the damming of the Danube taking place within earshot of the Committee.

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34 Slovak Memorial, para. 5.63, et seq.

35 See, Slovak Counter-Memorial, para. 5.85-5.86 (and fn. 139). Contrary to the Rules of Court, Hungary has not produced the document on which it claims to rely for its account of the 2 December meeting.

36 Slovak Counter-Memorial, para. 5.86. No doubt Hungary's ultimatum was regarded as particularly offensive by the Czechoslovak Government in that Hungary, then in clear breach of its Treaty obligations, had the audacity to impose such an ultimatum on Czechoslovakia, who was seeking to find a compromise solution for going ahead jointly under the Treaty with the Gabčíkovo section of the Project.

37 Hungarian Memorial, para. 3.144.

38 Hungarian Counter-Memorial, para. 2.66.

9.29 But in December 1991 the start of the damming operation could not have begun for another 10 months - the 1991 "window" had been missed[39]. The only work that had taken place up until then was to start to narrow the reservoir, a completely reversible measure, which Czechoslovakia had unequivocally declared to be a provisional move. This did not stand in the way of the resumption of joint operation of Gabčíkovo, including environmental guarantees - and under any variant from the Original Project for doing so that, after evaluation by a trilateral committee, the Treaty parties might agree upon.

9.30 Hungary does not try to explain why, without such a pre-condition, the work of a trilateral committee would have been meaningless; or how the committee's activity "would legitimise" what it describes as Czechoslovakia's "unilateral conduct". Had the commitment in Czechoslovakia's Note Verbale of 27 August 1991 been matched by a Hungarian commitment to permit a trilateral committee to evaluate the alternate proposals of both sides concerning Gabčíkovo[40], and to accept its recommendations, then an agreement to stop work during the time necessary for such an evaluation might have been regarded as a reasonable request[41].

9.31 But Hungary did not make - and was clearly not prepared to make - such a commitment.In spite of this, Czechoslovakia proceeded with its attempts to encourage Hungary to perform its Treaty obligations.

9.32 On 12 December 1991, the Czechoslovak Government took the formal decision to put the Gabčíkovo section into operation through Variant "C", and it so advised

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39 See, para. 8.05 (and fn. 1), above.

40 See, para. 7.22, above. It is important to note that Czechoslovakia was only trying to settle the Gabčíkovo part of the dispute, and was willing to postpone the question of Nagymaros, even though Hungary was equally in breach of this part of its Treaty obligations.

41 Moreover, it is apparent, based on the time required to complete other such environmental studies, both before and after, by Bechtel, HQI, and the EC, that agreement to such a pre-condition would not have put in jeopardy for a fourth year in a row the damming of the Danube, whether at Dunakiliti or by an installation on Czechoslovak territory, if it should turn out that Hungary was only engaged in a dilatory tactic.

Hungary[42]. But this in no way meant the end of attempts to persuade Hungary to perform its Treaty obligations. For in his letter of 18 December 1991, the Czechoslovak Prime Minister:

- Renewed once more the proposal for the appointment of a trilateral committee of experts whose task would be "the assessment of the alternative solutions and professional/scientific questions" presented to it by 31 December 1991[43];

- Repeated Czechoslovakia's position that the question of resolving Nagymaros could be postponed;

- Indicated that Czechoslovakia's position "because of the high state of readiness of the Gabčíkovo plant" was that the Gabčíkovo section should be put in operation;

- Reaffirmed that Czechoslovakia was "obviously willing to participate in the considered solution of ecological problems[44]".

And then came a further sweetener:

> "[Czechoslovakia] declares that it will continue work on the [G/N Project] with the intention of commencing operation of the Gabčíkovo Barrage, while committing itself to not undertake work in the Danube's bed until July 1992[45]."

9.33 This further move toward compromise had no visible effect on the Hungarian Government. On 23 December 1991, it bluntly put an end to discussions of the

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42 Slovak Counter-Memorial, para. 5.90.

43 Hungarian Memorial, Vol. 4, Annex 69.

44 In effect, a renewal of the commitment to environmental guarantees made in October 1989.

45 Slovak Memorial, Annex 99 (emphasis added). Hungary's translation gets the date wrong, indicating June instead of July 1992. See, Slovak Counter-Memorial, para. 5.91 (and fn. 151).

appointment of a trilateral committee[46].

9.34 Yet even this did not deter Czechoslovakia from continuing its concerted effort to reach a compromise. First, in a carefully reasoned letter of 8 January 1992, the Slovak Prime Minister took pains to explain Czechoslovakia's position[47]. He ended by saying:

> "[Czechoslovakia] is willing to take into consideration the conclusions of the work done by [the proposed trilateral committee of experts] in any further procedures regarding the [G/N Project]. It is also known that [Czechoslovakia] is willing to suspend the provisional solution on its own sovereign territory insofar as [Hungary] is able to find an opportunity to enter into a joint solution[48]."

Second, in a letter of 23 January 1992, again carefully explaining Czechoslovakia's position, the Czechoslovak Prime Minister renewed the proposal to appoint a trilateral committee of experts, and made this further offer:

> "Provided [the] conclusions [of the Committee] and results of monitoring the test operation of the Gabčíkovo part confirm that negative ecological effects exceed its benefits, the Czechoslovak side is prepared to stop work on the provisional solution and continue the construction [only] upon mutual agreement[49]."

9.35 Slovakia has already commented on the perverse interpretation given to this letter in Hungary's Memorial[50]. Instead of acknowledging Czechoslovakia's attempt to compromise, Hungary depicts Czechoslovakia as attempting to "put into operation the Gabčíkovo Barrage by all means". But what was Hungary prepared to offer in order to settle the dispute? Absolutely nothing. Hungary was not in fact attempting to negotiate to settle its dispute with Czechoslovakia at all; it was trying to put a halt to Czechoslovakia's

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46 Slovak Counter-Memorial, para. 5.93. In his letter of 23 December 1991, Hungarian Minister Mádl referred to the "unjustifiably inflexible position" of the Czechoslovak Government, a remarkably inaccurate statement in the light of the record. Hungarian Memorial, Vol. 4, Annex 71 (emphasis added).

47 Hungarian Memorial, Vol. 4, Annex 72.

48 Emphasis added.

49 Slovak Counter-Memorial, para. 5.94, and Annex 102 (emphasis added).

50 Ibid., para. 5.95; Hungarian Memorial, para. 3.151.

implementation of the 1977 Treaty through Variant "C", and only that. The settlement of the dispute was possible only if Czechoslovakia accepted the entirety of Hungary's position - complete abandonment of the G/N Project and termination of the 1977 Treaty - and this was not a negotiable issue for Hungary. What was becoming increasingly exasperating for Hungary was that it realised that it was soon going to lose its control over the damming operation and, hence, its ability unilaterally to continue to prevent - to "veto" - the Gabčíkovo section going into operation.

B. The Conditions of EC Involvement

9.36 The Hungarian Counter-Memorial takes a long leap forward from these exchanges of late 1991-early 1992 to the 13 April 1992 letter of EC Vice-President Andriessen, prefacing its interpretation of the letter with the following remark:

> "Hungary was not alone in seeking a commitment from the Czechoslovak party to discontinue work on Variant C pending negotiations[51]."

It would be impossible to place in a more misleading light the respective intentions of Hungary and the EC at this time. For on 24 March 1992 the Hungarian Parliament had adopted a Resolution authorising the Hungarian Government to terminate the 1977 Treaty and all related agreements. Negotiations, even about termination, were no longer of interest to Hungary[52]. Hungary alleges that shortly before Hungary's Parliament adopted this Resolution its Prime Minister had appealed in writing to the President of the EC for help in stopping Czechoslovakia from proceeding to implement the Gabčíkovo section of the Project[53]; but before even receiving the EC's response, the Hungarian Resolution of 24 March was adopted.

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51 Hungarian Counter-Memorial, para. 2.68. This was a reference to the third of three conditions that Mr. Adriessen listed for the EC to participate in and chair a committee of independent experts.

52 Unlike the Hungarian Government's Resolution of 20 December 1991, which authorised the start of negotiations with Czechoslovakia to terminate the Treaty, this Resolution of 24 March 1992 authorised the Government to terminate the Treaty if Czechoslovakia did not cancel all work on the Project "being done in contravention [of the Treaty]" by 30 April 1992 (Slovak Counter-Memorial, para. 5.97). Thus, the stop-work condition had now moved from a pre-condition to the appointment of a trilateral committee to a final ultimatum that if not met would lead Hungary to proceed unilaterally to terminate the Treaty.

53 See, Hungarian Memorial, para. 3.156. Hungary has not placed in evidence this letter of 5 March 1992 in violation of the Rules of Court. For its part, Czechoslovakia made an oral request for EC assistance in helping settle the dispute in discussions with EC President Delors on 10 March 1992. (See, next fn., below).

There is no sense in which Hungary was interested in the formation of such a commission. It was simply moving on all fronts - not to settle the dispute - but to stop Czechoslovakia from putting the Gabčíkovo section of the Project into operation by damming the Danube (the accomplishment of which still lay six months away).

9.37 As to Mr. Andriessen's letter of 13 April 1992 referred to above[54], Hungary has interpreted it as containing a pre-condition that Czechoslovakia should stop all work on Variant "C" prior to a trilateral commission's involvement. Not only is this incorrect, but Hungary also ignores completely other conditions contained in Mr. Andriessen's letter. More fundamentally, Hungary's analysis fails to reflect a proper understanding of the role contemplated to be played by the EC at the time.

9.38 The three conditions to EC participation set out in the Andriessen letter were these[55]:

- That both parties formally request EC participation and define the EC's mandate;

- That the parties agree to accept the outcome of the assessment of the commission (requested to be formed and chaired by the EC) as the "agreed scientific/ecological and legal basis for subsequent decision-making";

- That each Government "would not take any steps, while the committee is at work which would prejudice possible actions to be undertaken on the basis of the report's findings".

9.39 Hungary's pleadings focus on the third condition of the letter and ignore the second. Curiously, no response from Hungary to the letter has been placed in evidence. In

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54 Mr. Andriessen sent an identical letter to Czechoslovakia on 13 April responding to its oral request.

55 Hungarian Memorial, Vol. 4, Annex 78 (emphasis added).

contrast, the official reaction of Czechoslovakia, set out in its Prime Minister's letter of 23 April 1992 to Hungary's Prime Minister, was introduced in evidence in Slovakia's Memorial[56].

9.40 As to the first of Mr. Andriessen's conditions, the Czechoslovak letter of 23 April contained a proposed joint letter of request to the EC. And Czechoslovakia agreed to the substance of the second of Mr. Andriessen's conditions:

> "[Czechoslovakia] is prepared to use the conclusions drawn and the recommendations made by the committee as the starting point for any decisions made in relation to the Project."

And the 23 April letter adds:

> "[Czechoslovakia] is awaiting a similar declaration by the Republic of Hungary."

But no such declaration from Hungary is on record in this case, and Slovakia is unaware of any such commitment ever being made by Hungary. In other words, Hungary may have been happy to see the formation of a trilateral commission as a means to obtain a halt in Czechoslovakia's works in implementation of the Gabčíkovo section, but it was in no way prepared to be bound by the findings of such a commission.

9.41 As to the third condition of the Andriessen letter, Czechoslovakia stated:

> "[Czechoslovakia] has shown sufficient good will and readiness for negotiations but at present can no longer accept procrastinations and delaying tactics of the Hungarian side, and thus cannot suspend work on the provisional solution. ... [T]here is still time until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both states[57]."

In short, there was sufficient time to complete the committee's work before the damming was scheduled to begin. And its provisional character and reversibility had been guaranteed by Czechoslovakia. Hence the continuation of work in these circumstances would not "prejudice

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56 Slovak Memorial, Annexes 108 and 109. A copy of this long and detailed letter, which reflected the intense efforts being made by Czechoslovakia to settle the dispute, was sent to Mr. Andriessen.

57 Emphasis added.

possible actions to be undertaken on the basis of the report's findings", as the third condition specified[58].

9.42 Following receipt of a copy of the 23 April 1992 letter, formally transmitted to him by the Czechoslovak Government, Mr. Andriessen registered no difference of view. The present squabble raised by Hungary as to what the terms "provisional" and "reversible" mean were clearly of no interest to the EC, which had the Czechoslovak Government's specific commitment to abide by the third condition of the letter - and unlike Hungary, to abide by the second condition as well. These commitments were also contained in the proposed joint letter attached to Czechoslovakia's letter of 23 April:

> "Both Governments express their readiness to proceed from the conclusions and recommendations adopted by the joint Committee of experts in taking decisions on the further steps in this issue. The Governments also assume that there will be no preliminary conditions for the work of the Committee.
>
> The Government of the Czech and Slovak Federal Republic undertakes, as a gesture of good will, not to dam the Danube riverbed on its territory before October 31, 1992 and it will thus not take any step which could hinder the implementation of measures recommended by the Committee of experts and jointly agreed on[59]."

By contrast, the EC had no equivalent commitment from Hungary as to either condition, and Hungary never took steps to negotiate a joint request.

9.43 But there is the more general point to make, as well, concerning the Andriessen letter. Hungary's pleadings treat the letter as if the EC had rushed to Hungary's rescue to stop the damming of the Danube. That may have been what Hungary had in mind; but Mr. Andriessen's reaction - even though he may only have received the Hungarian dossier before responding to Hungary's request - was appropriately discreet and avoided requiring as a condition of EC participation that Czechoslovakia stop work on Variant "C" - which is what Hungary had specifically requested. And in all of this the EC was not acting as some supra-national arbitral body; it was merely setting out the conditions under which it was prepared to help the parties settle their dispute at their request.

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58 The letter's third condition was certainly not the same as the status quo ante test which Hungary now advances. See, para. 9.25 (and relevant fn.), above.

59 Slovak Memorial, Annex 108.

SECTION 4. Hungary's Purported Termination of the 1977 Treaty

9.44 The Hungarian Government's decision to terminate the 1977 Treaty was set out in its Resolution of 7 May 1992, stating unconditionally that Hungary "unilaterally terminates" the Treaty effective 25 May 1992[60]. This action was taken without Hungary's attempting first to reach agreement on a joint request to the EC to enlist its assistance.

9.45 Accordingly, in his response of 11 May to Hungary's Resolution, the Slovak Prime Minister stressed the need to "address the question of accepting the offer made by the EC Commission to create a trilateral expert group"[61]. He added that Czechoslovakia was:

> "... convinced about the usefulness and necessity of continued talks with the Hungarian side on the problem of the [G/N Project]. I would like to stress my readiness to discuss with you a possible change in the date of damming the Danube riverbed by the Czecho-Slovak side[62]."

But Hungary nonetheless proceeded with its purported termination of the Treaty, making its announcement on 19 May 1992 and issuing at the same time its Declaration as to the reasons for this action[63].

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60 See, Slovak Counter-Memorial, para. 5.102, et seq., for a detailed discussion of this action. Chapter X, below, examines in detail the legal effects of Hungary's notification of its purported termination of the Treaty.

61 Slovak Memorial, Annex 111.

62 Emphasis added.

63 This action is justified in these terms by Hungary in its Counter-Memorial (para. 5.30):

> "Eventually it became clear that, to avoid any pretext for the diversion, Hungary had no other option than to terminate the Treaty."

This is an argument that runs counter to the contention that Czechoslovakia's proceeding with the provisional solution was a breach of the Treaty justifying Hungary's purported termination, for it suggests that the Treaty in fact provided a basis for the provisional solution and, hence, had to be terminated by Hungary for that reason.

Hungary's rebuff of the last-minute attempt to meet in Vienna with the EC is dealt with in Slovakia's Counter-Memorial, para. 5.109, et seq., which rebuts the contentions set out in the Hungarian Counter-Memorial concerning this meeting.

9.46 Between 19 May 1992 and the start of the damming operation on 24 October, Czechoslovakia continued its attempts to reach a compromise solution:

- On 6 August 1992, the Czechoslovak Prime Minister informed the Hungarian Prime Minister that he was renewing the initiative to ask for assistance from the EC Commission "in seeking a reasonable compromise solution to the present situation"[64];

- On 23 September 1992, the Czechoslovak Prime Minister again wrote to his Hungarian counterpart noting that the EC had indicated by letter of 30 July that it remained ready to assist but "expects our states to agree on the extent of the mandate of the trilateral commission"; he proposed that the two sides meet "to speedily prepare at joint request authorised to the EC Commission"[65];

9.47 On 28 September 1992, the Hungarian Prime Minister finally responded to these urgings and accepted Czechoslovakia's "recommendation that the specialists of our governments prepare, as soon as possible, [a] joint request to be sent to the [EC] and reach an understanding concerning the mandate of the planned trilateral committee"[66]. This led to a meeting of Deputy Foreign Ministers on 13 October[67]. But once again, Hungary reimposed its pre-condition to the appointment of a tripartite commission that Czechoslovakia must suspend all work on the Project. It must be stressed that this was Hungary's pre-condition, not a condition imposed by the EC[68]. It was naturally unacceptable to Czechoslovakia.

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64 Slovak Memorial, Annex 117.

65 Ibid., Annex 121.

66 Ibid., Annex 123.

67 See, Slovak Counter-Memorial, paras. 6.15-6.17.

68 Hungary's incorrect account of this meeting is pointed out in the Slovak Counter-Memorial, para. 6.17. There was no agreed record of this meeting.

9.48 The last attempt at compromise made prior to the start of damming was contained in an Aide-Mémoire tabled at a meeting on 22 October in Brussels in which the EC participated[69]. In this document Czechoslovakia made the following undertaking:

> "...until the completion of the work of the Tripartite Commission [Czechoslovakia] will not divert the flow of the Danube River from its present main riverbed, and all the measures which are now under way on the territory of [Czechoslovakia] will ensure that the whole natural flow of the Danube will pass through the old riverbed[70]."

Hungary never showed the slightest interest in this offer at the time.

SECTION 5. The Purpose of the Filing of Hungary's Application to the Court

9.49 Further evidence that Hungary's sole object, having acted purportedly to terminate the 1977 Treaty, was to stop the putting into operation of the Gabčíkovo section of the Project is provided by Hungary's filing with the Registrar of the Court, on 23 October 1992, an Application against Czechoslovakia entitled: "The Diversion of the Danube River"[71].

9.50 In its Counter-Memorial, Hungary disputes Slovakia's assertion in its Memorial that the Application concerned only the question of proceeding with Variant "C"[72]. Hungary contends that it proposed:

> " ... bringing the complete case [of the G/N Project] in its entirety before the Court and not only with regard to Variant C[73]."

But this is clearly not so. As a mere reading of the Submissions in Hungary's Application shows, the Application was directed at stopping Variant "C". Moreover, Hungary's analysis involves a juggling of documents that is seriously misleading.

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69 See, Slovak Counter-Memorial, paras. 6.19-6.21.

70 Slovak Memorial, Annex 126.

71 Hungarian Memorial, Vol. 4, Annex 102.

72 Hungarian Counter-Memorial, para. 2.84, et seq., referring to the Slovak Memorial, para. 4.85, et seq.

73 Hungarian Counter-Memorial, para. 2.85; see, also, ibid., para. 7.12.

9.51 To begin with, in its Counter-Memorial, Hungary claims that it first proposed "to bring the whole dispute before the Court" in a letter of 6 August 1992 from its Prime Minister[74]. This is incorrect: such a proposition was first made in a letter of 18 August in which the limited objective of going to the Court was clearly spelled out[75]

9.52 In this letter, Hungary confirmed the absence of negotiations so far to settle the dispute:

> "The joint deliberation of the disputed questions has not begun because of the consistent rejection by [Czechoslovakia] of [Hungary's] request for the suspension of the [G/N Project] ... ."

The Hungarian Prime Minister then made this specific suggestion:

> "I therefore propose that [Czechoslovakia and Hungary] mutually agree to submit the dispute over the implementation of Variant C to the International Court of Justice and request a decision[76] ."

This was precisely what the Application of Hungary submitted on 23 October was directed to - not the settlement of the "whole dispute", as Hungary's Counter-Memorial claims.

SECTION 6. Czechoslovakia Proceeds to Put Into Operation the "Provisional Solution" (24-27 October 1992)

9.53 Hungary has attempted to dramatise the damming operation, but it was an event that had been long forecast, and like any damming operation of this kind it called for a strenuous effort over a few days' time. It was no more than the carefully planned step, initiated after Czechoslovakia proceeded to the "provisional solution" in November 1991, to put this system into operation.

9.54 Like the November 1991 action, it was provisional, temporary and reversible and did not prevent a reversion to the Treaty Project in respect to Gabčíkovo, which it anyway closely resembled.

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74 Ibid., para. 2.85. Hungarian Memorial, Vol. 4, Annex 90.

75 Hungarian Memorial, Vol. 4, Annex 92. The 6 August letter contained only an indication that Hungary might have to resort to the Court to halt work on Variant "C".

76 Ibid. Emphasis added.

9.55 Finally, there is one more point to be made concerning the conduct of the Treaty parties up to the start of the damming operation. Why was Hungary's action purportedly to terminate the Treaty not totally in contradiction with the third condition for EC participation set out in the Andriessen letter? Was this not in violation of the condition against taking "any steps ... which would prejudice possible actions to be undertaken on the basis of [the proposed committee's] findings"? The answer must be "yes".

SECTION 7. Conclusions in the Light of the Applicable Law

A. Czechoslovakia's Entitlement to Proceed With the "Provisional Solution" in November 1991

9.56 The legal basis for Czechoslovakia's action in November 1991 to proceed with the "provisional solution" was the 1977 Treaty. This action was the first concrete step taken towards putting the Gabčíkovo section of the G/N Project into operation; and in Article 2(1)(b) of the Special Agreement it was singled out as the first of two actions taken by Czechoslovakia concerning the "provisional solution" on whose legal validity the Court was asked to rule[77]. It is uncontested between the Parties that the Treaty was in full force and effect at the time this action was taken.

9.57 There were four other particularly important factors forming of the context within which Czechoslovakia acted. First, Hungary was (and had long been) in breach of the Treaty as a result of a series of breaches starting on 13 May 1989 and culminating in Hungary's total abandonment of the Project by mid-1990 (given formal recognition in the Hungarian Government Resolution of 20 December 1990).

9.58 Second, the evidence now before the Court reveals that when negotiations resumed in 1991 the exclusive aim of Hungary was to gain Czechoslovakia's agreement to terminate the Treaty and to bring the Project to an end. Czechoslovakia's aim was quite different: it was to induce Hungary to resume work under the jointly agreed plan for completing and putting the Gabčíkovo section into operation. The meeting of Prime Ministers of 14-15 July 1991 put an end to Czechoslovakia's hopes. For Hungary made it unmistakably

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[77] See, paras. 9.01-9.06, above.

clear to Czechoslovakia that its only negotiating aim was to secure an agreed termination of the Treaty and the Project, and it categorically refused to consider whether there were any mutually acceptable ways of proceeding with the Gabčíkovo section on a joint basis.

9.59 This led, thirdly, to the formal approval in the Resolution of the Czechoslovak Government of 25 July 1991 for the financial and logistical planning necessary before putting Gabčíkovo into operation under what became Variant "C". The first activity involving construction work on this variant occurred in November 1991 - and is the subject of the first question put to the Court under Article 2(1)(b). It concerned reducing the size of the reservoir by constructing a new dyke on Czechoslovak territory; but at that stage it obviously had no effect on the flow of the Danube and no impact on Hungarian territory[78].

9.60 The fourth aspect was of a quite different kind. Some of the structures of the bypass canal had started to deteriorate as a result of the two-year delay in the scheduled damming of the Danube and in the filling of the reservoir and bypass canal. This called for emergency protective measures (such as were taken in July 1991 to pump some water from the Danube into the bypass canal[79]) as well as for an immediate, more effective solution.

The Legal Basis for Proceeding with the "Provisional Solution"

9.61 Until the time when Czechoslovakia decided to proceed with the "provisional solution" (in November 1991), there were a number of courses of action legally available to it:

- First, to attempt to resolve Hungary's breaches through negotiations; just such an attempt was made by Czechoslovakia during 1989, but it failed because the negotiations were brought to an end by Hungary in early 1990, who then proceeded unilaterally to abandon the Project by mid-1990;

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78 The November action was followed by Czechoslovakia's approval, in its Government Resolution of 12 December 1991, to proceed to put into operation the Gabčíkovo section under the provisional solution of Variant "C", an event that was not scheduled to begin until the end of October 1992.

79 See, Slovak Counter-Memorial, para. 5.74.

- Second, to terminate the Treaty by reason of Hungary's material breaches and to seek an arbitral or judicial settlement;

- Third, to continue to perform the Treaty as best it could in the circumstances, seeking a negotiated or a judicial settlement of the damages resulting from Hungary's breaches, and attempting in the meantime to mitigate the damages to both sides;

- Fourth, to accede to Hungary's demands to terminate the Treaty and the Project; however, during the 1991 negotiations, Czechoslovakia made it clear to Hungary that this option was not acceptable and that it continued to insist on the performance of the Treaty (and the entire Project) in accordance with the Treaty's terms.

9.62 Thus, the choice to be made came down to the second and third options, and in the circumstances it was, in a practical sense, no choice at all. For during the four or more years required to resolve the dispute if the second option were chosen, not only would the Gabčíkovo section structures, almost completed in 1989, have continued to deteriorate, but also the environmental and economic catastrophe caused for Czechoslovakia by Hungary's abandonment of the Project would have been unacceptably prolonged - with both the Slovak and Hungarian side arms systems continuing to dry up and the navigation hazards and flood risk problems remaining unresolved. Meantime, damages would be mounting astronomically[80]. Moreover, a study conducted by Czechoslovakia revealed the restitution of the site to anything even approaching its pre-Treaty condition not to be technically feasible[81].

9.63 As a consequence, after Hungary's real intentions became clear at the July 1991 meeting, it was apparent to Czechoslovakia that it had to proceed with the

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[80] There was also no certainty, absent any provision in the Treaty providing for a judicial or arbitral remedy, of getting the dispute resolved. There was no reason to believe that Hungary would enter into a compromis giving the Court broad jurisdiction to deal with the entire dispute. See, in this regard, Hungary's Hardi report (Hungarian Memorial, Vol. 5 (Part I), at p. 165), where this high-level committee made it clear that Hungary could force Czechoslovakia to compromise since no international court had jurisdiction over the dispute without Hungary's consent.

[81] See, Annex 3, hereto.

Gabčíkovo section under the "provisional solution", that is to pursue the third option above. This was so not just to deal with the environmental and economic disaster for Czechoslovakia that Hungary's abandonment of the Project had brought, but for essential legal reasons, as well. For once it chose to continue to perform the Treaty rather than to terminate it owing to Hungary's material breaches, Czechoslovakia had to act in accordance with its decision. Czechoslovakia had the obligation, in carrying out its Treaty obligations, to mitigate the mounting damages resulting from Hungary's breaches by not allowing the empty reservoir and bypass canal and the dormant weir structures to further deteriorate and by completing and putting into operation these facilities in order to make a return on the huge investment through the production of electricity[82]. Above all, Czechoslovakia had the right under treaty law to carry out the Treaty and to receive such benefits as it could from the Project in spite of Hungary's abandonment. For an abandonment by a party to a treaty of its obligations thereunder is not to be given the same legal effect as under a valid termination of the treaty; and in the present case, this abandonment occurred even before the purported termination of the Treaty.

9.64 As Chapter VI above has shown, Czechoslovakia's actions were in accordance with the legal concept of approximate application and the obligation of mitigation of damages. To deny Czechoslovakia the right to have so acted would be to deprive it of its right under treaty law to choose to continue to perform the Treaty, rather than to terminate it for Hungary's breaches or simply to accede to Hungary's demands to disregard these breaches and agree to terminate.

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82 The situation of Nagymaros was quite different. Since work there was only in its early stages in 1989, Czechoslovakia had indicated on 26 October 1989 that it could accept a delay in that section of the Project to allow time for impact studies to be carried out, primarily as to peak mode operation. Hence, a delay in proceeding with Nagymaros did not present the huge economic and environmental problems that existed at Gabčíkovo if the work did not proceed. Nevertheless, Hungary has been quick to suggest in its pleadings that Czechoslovakia acquiesced in the abandonment of Nagymaros by not failing to insist on the performance of this part of the Treaty. This confirms the fact that it was legally prudent for Czechoslovakia to proceed with Gabčíkovo after Hungary's refusal to even reconsider the resumption of work was made plain, since at Gabčíkovo it was possible for Czechoslovakia to take over and put into operation this section of the Project without Hungary's participation.

Proceeding With the "Provisional Solution" In No Way Foreclosed the Joint Resumption of the Gabčíkovo Section

9.65 Czechoslovakia's action in November 1991 occurred approximately a year before the narrow "window" of time for damming the Danube would permit the Gabčíkovo section actually to be put into operation (in October-November 1992). Thus, the action to proceed was in no sense a fait accompli so far as the final implementation of Gabčíkovo was concerned. It had no effect on the Danube's flow and caused Hungary no damage. But, at the same time, because of the narrowness of this "window", it was necessary to start works in November 1991, i.e., to proceed with the "provisional solution" at this time in order to be able to put Gabčíkovo into operation before the end of the following year[83]; otherwise the three years' delay already caused by Hungary would have been extended to four years, with all the attendant adverse consequences.

9.66 But throughout the time between proceeding with this step and the final damming operation - a period of 11 months - Czechoslovakia repeatedly sought to induce Hungary to resume joint performance of the Gabčíkovo section of the Project and to participate in negotiations over how this might be achieved under a mutually agreed plan under the 1977 Treaty - the sort of arrangement that in October 1989 Hungary had proposed. No interim studies had been conducted in the meantime that might have altered or affected in any way the understanding of the scientific facts that the Treaty parties had in October 1989, when Hungary formally proposed to go ahead and put the Gabčíkovo section into operation on the basis of agreed environmental guarantees - the subsequent Bechtel and HQI studies providing no scientific support for abandoning the Project[84].

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9.67 Thus, quite aside from all the environmental, economic and practical reasons enumerated above in this Chapter, making it eminently reasonable and a practical

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83 This concerned, basically, the construction of the Čunovo weir upstream of Dunakiliti on Czechoslovak territory, where the damming operation was to take place, the narrowing of the reservoir and other related measures.

84 Indeed, these two studies should have brought the Treaty parties closer to an agreement to proceed with Gabčíkovo.

necessity for Czechoslovakia to proceed with the "provisional solution", Czechoslovakia was also obliged to act then in this manner in order to protect its legal rights. Having chosen to continue to perform the Treaty in spite of Hungary's breaches, Czechoslovakia had the right and the obligation to do so. To have allowed another year to pass before putting Gabčíkovo into operation would have been an abdication of those legal rights and duties that Czechoslovakia had patiently postponed exercising for three years in a row in the interests of finding a solution to allow joint operation of Gabčíkovo to proceed under the Treaty. It must, therefore, be concluded that Czechoslovakia was entitled to proceed with the "Provisional Solution" in November 1991.

B. Czechoslovakia's Entitlement to Put Into Operation the "Provisional Solution" from October 1992

9.68 Between November 1991 and the start of the damming of the Danube, once again no new scientific studies into the environmental effects of the G/N Project, alleged earthquake risk, or any other aspects that might in any way have altered or affected the scientific understanding of the Treaty parties, were undertaken by Hungary. No joint studies either were undertaken by the Treaty parties - due to the pre-condition imposed by Hungary that Czechoslovakia stop its performance of all work under the Treaty before even the appointment of a joint or trilateral commission could be agreed. It has been shown earlier in this Chapter why such a pre-condition was not reasonable or justifiable in the circumstances[85]. Its imposition transformed the ensuing negotiations during this period into a charade. For if Hungary could get Czechoslovakia to agree to stop work, Hungary could succeed in gaining another whole year (due to the "window" that controlled the damming operation), thus postponing the putting into operation of Gabčíkovo until the end of October 1993. In any event, Hungary's only purpose in agreeing to joint or trilateral studies - always subject to (and hence aborted by) this pre-condition - was to wear Czechoslovakia down into finally acceding to Hungary's position and agreeing to terminate the Treaty and abandon the Project (as the Hungarian Counter-Memorial in effect concedes[86]). Unlike Czechoslovakia, Hungary had not

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85 See, para. 9.17, et seq., above.

86 See, Hungarian Counter-Memorial, para. 2.50.

given any indication it was prepared to abide by the findings of any such joint or trilateral studies[87].

9.69 But the event of greatest interest occurring between the time Czechoslovakia proceeded with the "provisional solution" and put it into operation was Hungary's purported termination of the 1977 Treaty announced on 19 May 1992.

The Effect of Hungary's Purported Termination of the 1977 Treaty

9.70 As shown below in Chapter X (where the question of the legal effects of Hungary's notification of termination is examined), one effect of Hungary's 19 May notification was clearly not to cause the Treaty to cease to be in full force and effect, or to release the Treaty parties from their respective rights and obligations thereunder. As a result, one of the main reasons that Hungary claims lay behind its notification of termination - to put an end to Czechoslovakia's work towards putting Gabčíkovo into operation by the end of October 1992[88] - was not achieved. Nor was the legal basis for Czechoslovakia's putting the "provisional solution" into operation in any way weakened or altered. In fact, Hungary's notification of termination was an acknowledgement of the strength of the legal basis on which Czechoslovakia was acting and its need of an approximate application of the 1977 Treaty[89].

9.71 However, Hungary's notification of termination did have an effect that relates directly to the question of Czechoslovakia's entitlement to put into operation the "provisional solution" five months afterwards. For it was unmistakably the definitive, irreversible abandonment of the G/N Project by Hungary. As such, the next logical step for Czechoslovakia could only be to see to fruition its decision to proceed to the "provisional solution" in November 1991. The only development that would have made such a step unnecessary would have been if Hungary, at the end of the day, in the full light of recognition that Czechoslovakia fully intended to put the Gabčíkovo section into operation under Variant "C", would have relented and sought to find with Czechoslovakia a mutually agreed basis for

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87 See, para. 9.15, above.

88 Hungarian Memorial, paras. 10.26-10.31.

89 See, para. 6.03, above.

the joint operation of Gabčíkovo (such as had seemed possible at the end of October 1989). But during the negotiations that followed Czechoslovakia's action of November 1991 - just as during the negotiations earlier in 1991 - there was not a flicker of hope that Hungary would come around to accept its obligations under the Treaty. Hungary's reaction, when it came face to face with Czechoslovakia's determination to proceed with the damming of the Danube, was precisely the opposite - to declare unequivocally and irreversibly its refusal to perform its Treaty obligations through its unilateral notification of termination of the Treaty.

9.72 Thus, having proceeded with the "provisional solution" in November 1991 - an action which it was fully entitled to take - Czechoslovakia had every reason of both a legal and practical character to proceed to take the first step in putting the Gabčíkovo hydroelectric plant into operation by damming the Danube at Čunovo under the "provisional solution"; and by the time Hungary had purported to terminate the Treaty, Czechoslovakia could no longer afford to "sleep on these rights".

Hungary's Inability in Law to Claim, Even in Error, that Czechoslovakia's Action to Put Variant "C" Into Operation Was Itself a Breach of the 1977 Treaty

9.73 Czechoslovakia's "provisional solution" was in all respects the same as the agreed Gabčíkovo section of the Project except where, due to Hungary's breaches, a modification in the agreed plan was necessary in order to put it into operation:

- The place of damming was moved upstream from Dunakiliti onto Czechoslovak territory because of Hungary's abandonment of the works at Dunakiliti (and its termination of related contracts) preventing the damming from occurring on Hungarian territory;

- The size of the reservoir was decreased so as to avoid the need for carrying out work on Hungarian territory, in the light of Hungary's abandonment;

- Putting Gabčíkovo into operation was not an activity jointly shared with Hungary because Hungary had refused at the time to participate in the

Project in any way or even to discuss how the "provisional solution" might be jointly operated.

Thus, the "provisional solution" failed to accord with the agreed plan only to the extent prevented by Hungary's breaches; and Hungary cannot be allowed to claim that Gabčíkovo could only be put into operation on a joint basis when it was Hungary who refused to join in the operation.

9.74 Under Hungary's contentions, these differences from the agreed Project would lead to the absurd result of allowing a party to a treaty, by its own breaches, to prevent the other party, not in breach, from exercising the legal rights given to it under treaty law to continue to perform that treaty. The conclusion must be otherwise: that Hungary, in breach of the Treaty, which it had definitively abandoned, necessarily is unable to claim in law such a breach against Czechoslovakia (and today against Slovakia). For the claim is made under the very same Treaty which Hungary is in material breach of and which, paradoxically, it has also purported to terminate unilaterally; and its purpose is simply to prevent Czechoslovakia from carrying out the Treaty. This legal point has been developed in full in Chapter VI above and in Chapter X below[90].

9.75 Finally, the results of over three years of operation of the Gabčíkovo section have been to bring only benefit to Hungary, not damage, as well as to permit the reaping of at least part of the flood control and navigation benefits envisaged by the Treaty.

9.76 There is no bar - and there never has been - to joint operation of the Gabčíkovo section on an agreed-upon basis. If Hungary agrees to return to the Treaty Project, nothing stands in the way of returning to the original plan for operating the Gabčíkovo section, possibly supplemented by the sort of agreement on environmental, water quality and technical guarantees that the Treaty parties envisaged in October 1989. For from its inception, Variant "C" was adopted as a "provisional solution", as is reflected in the Special Agreement; it is reversible so as to allow the plan of operation under the full Treaty Project eventually to be substituted.

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[90] See, paras. 6.05, et seq., above, and paras. 10.16, et seq., below.

Proceeding With and Putting Into Operation the "Provisional Solution" Did Not Violate Any Other Provision of International Law

9.77 The actions of proceeding with and putting into effect Variant "C", being an approximate application of the Treaty, do not present any different issue here than the carrying out of the Gabčíkovo section under the Treaty Project would have done. Thus, the discussion above in Chapters VII and VIII (as well as the parts of Chapters II and III referred to there) - demonstrating the inapplicability of such other provisions of law and the fact that, even were they applicable, the carrying out of the G/N Project would be fully consistent with them - applies equally here and requires no further elaboration.

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9.78 As a result, Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" (known as Variant "C") and to put into operation from October 1992 this system.

CHAPTER X. ARTICLE 2(1)(c): THE LEGAL EFFECTS OF THE NOTIFICATION ON 19 MAY 1992 OF THE TERMINATION OF THE TREATY BY HUNGARY

SECTION 1. Introduction

10.01 The third question put to the Court under Article 2(1) of the Special Agreement is the following:

> "[W]hat are the legal effects of the notification, on May 19, 1992, of the termination of the Treaty by the Republic of Hungary?"

10.02 The very wording of this question shows clearly that the Parties are in agreement that it was only this notification by Hungary to Czechoslovakia of its intention to put an end to the Treaty that is capable, if at all, of having legal consequences. As a result, the preparatory actions of the Hungarian Government such as the Parliamentary Resolution of 24 March 1992[1] and the Government Resolution of 7 May 1992[2], themselves, have no legal significance for either Czechoslovakia or Slovakia.

10.03 The 19 May notification referred to in Article 2(1)(c) was comprised of three separate instruments: a Note Verbale of 19 May 1992; a Declaration furnished with the Note Verbale dated 16 May (the "1992 Declaration"); and a letter from Hungary's Prime Minister to the Czechoslovak Prime Minister dated 19 May 1992[3].

10.04 One of the undeniable effects of the 19 May notification on which the Parties seem to be in agreement is that, prior to that date, the 1977 Treaty and the related agreements were in full force and effect and the obligations imposed by them on the Treaty parties were required to be carried out by them[4]. Even were the various legal justifications advanced by Hungary for termination (prior breaches of Czechoslovakia, impossibility of performance, fundamental changes of circumstances, "state of necessity", etc.) found to be

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1 Hungarian Counter-Memorial, Vol. 3, Annex 52 (replacing Hungarian Memorial, Vol. 4, annex 156).

2 Ibid., Vol. 3, Annex 53 (replacing Hungarian Memorial, Vol. 4, Annex 157).

3 Slovak Memorial, Annex 113; Hungarian Memorial, Vol. 4, Annex 83.

4 See, Hungarian Counter-Memorial, p. 187, fn. 5.

valid, quod non, they would not apply automatically, ipso jure. Article 64 of the 1969 Vienna Convention aside (emergence of a new peremptory norm of general international law), a treaty - assuming the application of any of the justifications advanced by Hungary - can come to an end only after a precise procedure is followed, as required by Articles 65-68 of the 1969 Vienna Convention - and only then if the parties wishing to put an end to the treaty so notify the other party (or parties)[5]. Of course, whatever its effect, any such notification in accordance with these Articles could operate only as to the future. Thus, the 19 May notification can only be viewed as confirming Hungary's recognition of the validity of the Treaty up until that date.

10.05 But the points of agreement between the Parties stop there. Hungary contends that the termination was lawful, arguing that its 19 May notification put an end to the Treaty. Slovakia, on the other hand, maintains that the notification had no such effect since its real basis was unlawful and since the required procedures were not observed. But in the present case this does not mean that the 19 May notification had no legal significance at all (as will be shown in the next Section). In addition, for purposes of the present argument only, Section 3 will go on to show that even had Hungary succeeded in terminating the Treaty unilaterally - which is certainly not the case - the 19 May notification would not, by itself, resolve all the legal problems resulting from such a purported termination.

SECTION 2. The Irregularity and Nullity of Hungary's Notification of 19 May 1992

10.06 In its earlier pleadings, Slovakia has shown that Hungary's purported unilateral termination of the 1977 Treaty was in violation of its international obligations, for which it may be held responsible[6]. In this Reply, the same point has been made again[7]. It is enough here to recall briefly the reasons why Hungary's notification was obviously null and irregular:

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5 See, Article 65(1), 1969 Vienna Convention.

6 See, e.g., Slovak Memorial, paras. 6.81-6.107 and Chapter VIII; Slovak Counter-Memorial, Chapter X.

7 See, Chaps. IV and V, above.

- The Treaty contains no termination clause, and its very nature makes it obviously impossible to imply a right of termination;

- Therefore, the Treaty cannot be denounced under the rules codified under Article 56 of the Vienna Convention; and it appears that Hungary does not so argue[8];

- As a result, Hungary must find a basis outside the Treaty to support its contentions regarding its purported termination of the Treaty; these can only be found in the rules codified under Articles 60 to 63 of the 1969 Convention;

- At the same time, Hungary has not established that its "termination" was in response to a breach of the Treaty by Czechoslovakia (Article 60), or that there existed the impossibility of performance (Article 61) or an intervening fundamental change of circumstances (Article 62). In spite of the increased tension in the relations between them resulting from Hungary's violations of the Treaty, the two States did not sever diplomatic relations, so that the question of the effect of such a rupture on the Treaty (Article 63) does not arise.

10.07 Accordingly, the 19 May notification lacked any legal basis and had no effect. In fact, as has been said, it is commonly held that "les actes unilatéraux étatiques sont [soumis] au respect des obligations internationales qui s'imposent à leur auteur"[9]. Moreover, the jurisprudence is clear that a State cannot unilaterally modify obligations imposed on it by a treaty[10]. This applies, a fortiori, in the case of a termination.

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8 See, Hungarian Counter-Memorial, para. 5.41.

9 Translation: "[T]he unilateral acts of a State are subject to the same international obligations to which the State itself is subject." Jean-Paul Jacqué, Eléments pour une théorie de l'acte juridique en droit international public, Librairie générale de droit et de jurisprudence, Paris, 1972, p. 162. See, also, Jean-Didier Sicault, "Du caractère obligatoire des engagements unilatéraux", Revue Générale de droit international public, 1979, N° 3, p. 662.

10 See, International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950, p. 128, at p. 141.

10.08 In its Note Verbale of 22 May 1992, Czechoslovakia responded to Hungary's 19 May notification, as follows:

> "Having examined the contents of the above Note and the Declaration of the Government of [Hungary] of May 16, 1992, [Czechoslovakia] reaffirms its position that [Hungary] has no legal grounds to unilaterally terminate the [1977 Treaty] and the treaty documents related to it. Therefore the Note of [Hungary] of May 19, 1992 cannot have any legal effects on the 1977 Treaty and the treaty documents related to it[11]."

Czechoslovakia's position was reaffirmed by its Prime Minister in a letter of 6 August 1992 to the Hungarian Prime Minister[12], as well as several times thereafter[13]. These protests have great legal weight for they immediately deprived the 19 May notification of any legal effect.

10.09 Article 65 of the 1969 Vienna Convention establishes: "Procedures to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty." Paragraphs 1 to 3 thereof provide as follows:

> "1. A party which, under the provisions of the present convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notifications shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
>
> 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
>
> 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations."

10.10 These provisions apply, whatever the reason relied on to terminate the Treaty, to any such notification whether based on Article 56 or on Articles 60 to 63 of the Convention.

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11 Slovak Memorial, Annex 114.

12 Ibid., Annex 116.

13 See, e.g., ibid., Annexes 121 and 125.

10.11 It is true that in its Memorial, recognising the applicability of the procedure prescribed in Article 65 (although for other purposes), Hungary appears to claim that in fact it conformed to this Article, saying that:

> "In late 1991 and early 1992, Hungary gave a series of warnings that unless work on Variant C was suspended it would be forced to consider termination of the 1977 Treaty[14]."

10.12 But, in the first place, this sort of ultimatum is not at all a notification envisaged by Article 65, whose purpose was to inform the other treaty party (or parties) as to the precise reasons for the termination intended in order to allow that party to respond[15]. It is significant in this regard that the sort of "warning" given by Hungary - for example, in the Hungarian Prime Minister's letter of 19 December 1991[16] - contained guarded threats but was far from a notification of the intended unilateral termination of the Treaty.

10.13 Secondly, and most importantly, Hungary cannot reasonably contend that at the end of 1991 and beginning of 1992 it had notified Czechoslovakia of its intention to put an end unilaterally to the Treaty, for throughout this period Hungary had devoted its efforts solely to having its Treaty partner accept the conclusion of an agreement to bring to an end the 1977 Treaty[17] - quite a different matter.

10.14 Nor can Hungary hide behind the supposed "urgency" of the situation, as the Hungarian Memorial tries to do to justify the notification of 19 May 1992[18]. There was no urgency that justified reducing to six days the reasonable time period required to precede the notification and effective date, fixed in Article 6(2), as a minimum of three months. Despite Hungary's ultimatum, Czechoslovakia did not break off the exchanges; the damming

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14 Hungarian Memorial, para. 10.100.

15 See, para. 9.27, et seq., above.

16 Hungarian Memorial, Vol.4, Annex 70.

17 See, para. 9.07, et seq., above.

18 Hungarian Memorial, para. 10.100.

operation could only occur at a period of low flow, that is not for another five months[19]. And eight days before Hungary's notification, the Czechoslovak Prime Minister had indicated (by letter of 11 May 1992) "Czechoslovakia's readiness to discuss ... a possible change in the date of damming the Danube riverbed by the Czecho-Slovak side", which opened the possibility of the postponement for another year[20].

10.15 In reality, what occurred makes it seem that Hungary, anxious to cling to its pretext for acting unilaterally, entirely ignored this 11 May offer. It appears very much as if the Czechoslovak offer in fact hastened the process of decision resulting in Hungary's 19 May notification to Czechoslovakia contrary to the applicable rules.

10.16 But this is not to say that the 19 May notification was without legal significance. In its communication to the Czechoslovak authorities, Hungary confirmed, definitively, that it had no intention of carrying out its obligations under the Treaty. Of course, as already shown in Chapters VII and VIII, by suspending and then abandoning the works successively at Nagymaros and then at Gabčíkovo, Hungary had breached its Treaty obligations and had behaved as if, in its view, the Treaty no longer existed for it showed not the slightest intention of returning to perform the Project, even in part. However, in spite of this, from a strictly legal standpoint, it would still have been possible for Hungary to return to the Treaty. The Project schedule may not have been respected, the problems of compensation may not have been addressed, but the Treaty contained its own system of compensation[21], of dispute settlement[22], and these provisions could have been applied. With the 19 May notification, however, it became clear that Hungary would no longer carry out any of its Treaty obligations and that the door was firmly shut to any arrangements or negotiations based on the Treaty. And this was so despite innumerable gestures of good faith on the part of Czechoslovakia who never had ruled out either a postponement of the date of damming or a possible re-examination of peak mode operation or, obviously, of a return to the original Treaty Project.

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19 See, para. 9.44, et seq., above.

20 Ibid.

21 See, in particular, Article 26, para. 2(c).

22 See, Article 27.

10.17 Thenceforth, following the 19 May notification, any such possibility was completely excluded and Czechoslovakia had no choice but to proceed to put into operation the Gabčíkovo section of the Project under Variant "C". For that was the sole means for Czechoslovakia to obtain the performance - approximate as it only could be - of the 1979 Treaty, which remained valid and binding between the Treaty parties.

10.18 Thus, although the 19 May notification had no effect on the Treaty's validity, it nonetheless constituted the admission by Hungary of its definitive, irreversible breaches of its Treaty obligations. Hungary could not by itself put an end to the Treaty, but by its conduct it revealed in the clearest possible way its intention not to perform the Treaty. Through the simple application of the principle of good faith, the following consequences therefore follow:

- First, Hungary forfeited the right to rely in the future on the Treaty whose applicability it denied (venire contra factum proprium non valat); in particular, it had no right to attack the putting into operation of Gabčíkovo under Variant "C" on the basis that it was supposedly in violation of the Treaty whose applicability from 19 May 1992 onward it had denied (it being noted that the damming of the Danube did not occur until 24 October 1992). Nevertheless, Hungary has not hesitated to make such an argument; it has attacked Variant "C" repeatedly on the basis that it allegedly is in conflict with the terms of the Treaty[23];

- Second, Czechoslovakia was entirely justified, on its part, to draw the conclusion from the conduct of its Treaty partner that it constituted a definitive refusal to carry out the Treaty. But it must be noted that Czechoslovakia acted with the greatest patience so as to avoid bringing about an irreversible situation. And today, Variant "C" in no sense stands in the way of a return to the strict application of the Treaty as soon as Hungary is ready to do so, and Czechoslovakia has consistently stated its intention to do so as soon as its Treaty partner agrees,

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[23] See, e.g., Hungarian Memorial, paras. 7.04-7.43; Hungarian Counter-Memorial, paras. 6.80-6.81.

indicating its readiness "to demonstrate an appropriate forthcoming and flexible attitude"[24].

10.19 Thus, in Slovakia's view, the clear answer to the question put to the Court under Article 2(1)(c) of the Special Agreement is that the notification of 19 May 1992 was without legal effect and that Hungary cannot unilaterally escape from its obligations from the 1977 Treaty (and its related agreements). However, this notification gave rise to a new situation which Czechoslovakia (and now Slovakia) are entirely justified in relying upon. Therefore, in order not to leave any legal stone unturned, Slovakia will examine in the following Section what might have been the effects of the 19 May notification had its object been lawful and if normal procedures had been followed.

SECTION 3. The Hypothetical Effects of the Notification of 19 May 1992

10.20 As shown in the previous section, the notification of 19 May 1992 was null and void and could not have any legal effect on Hungary's Treaty obligations. However, Slovakia assumes here - solely for the purposes of providing a complete answer to the question put to the Court in Article 2(1)(c) of the Special Agreement (and to Hungary's contention) - that Hungary was justified in doubting the continuing validity of the 1977 Treaty under one or more of the bases set out in Articles 61 to 63 of the 1969 Vienna Convention, and that it officially informed Czechoslovakia of its intention so to terminate with the required advance notice (quod non). Were this the case, the 19 May notification itself would not have brought to an end the Treaty (sub-section A below); and in addition, the termination of the Treaty would not, in any event, have had the absolute consequences that Hungary contends (sub-section B below).

A. The 19 May Notification Could Not, in Any Event, Have Put an End to the Treaty

10.21 Even setting aside its intrinsic nullity, the 19 May notification constituted only the first stage of a complex procedure, which remained unfinished and will continue to do so until the Court's Judgment is rendered.

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[24] Slovak Memorial, Annex 115; see, also, ibid., Annexes 121, 125 and 127.

10.22 According to the terms of Article 65(3) of the Vienna Convention, if one party to a treaty has raised an objection to a notification covered by Article 65(1), "the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations". And Article 66 sets out the procedures for judicial settlement, arbitration and conciliation that States are obliged to follow "[i]f, under paragraph 3 of Article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised".

10.23 No doubt the detail of these procedures owes more to the progressive development of international law than to its codification. But it cannot be doubted that the fundamental principles that underlie them are derived from lex lata and are binding on all States, if only because States must settle their international disputes by peaceful means. This has been argued, for example, by the United Kingdom in regard to the rebus sic stantibus doctrine[25] and has been accepted by the Court[26].

10.24 From this, the following points emerge:

- First, the notification itself produces no legal effect if it provokes the objection of the other party to the treaty; and

- Second, in such a case, the termination occurs only if either (i) the parties reach agreement or (ii) a decision in favour of termination is made by a body having jurisdiction to resolve the dispute in such a fashion.

Any other interpretation would have the effect of introducing an "automatic and immediate right of unilateral denunciation" which does not exist under international law, as Sir Gerald

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25 Fisheries Jurisdiction (United Kingdom v. Iceland), Pleadings, Oral Arguments, Documents, ICJ Reports 1973, Vol. I, pp. 147-148.

26 Fisheries Jurisdiction, op. cit., Judgment of 2 Feb. 1973, ICJ Reports 1973, p. 3, at pp. 18 and 21. However, in that case, the 1961 Exchange of Notes specifically called upon the parties to have recourse to the Court. See, also, E. Van Bogaert, "Le sens de la clause 'rebus sic stantibus' dans le droit des gens actuel", R.G.D.I.P. 1966, p. 71.

Fitzmaurice has forcefully pointed out in his Second Report to the ILC on the Law of Treaties as Special Rapporteur[27]. He added that the recognition of such a unilateral right of termination would be incompatible with international policy and, in particular, with the 1871 London Declaration which continues "to be part of the written rules of public international law"[28]. In this regard, the Court will recall that under the terms of this famous Declaration:

> " ... aucune puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties contractantes, au moyen d'une entente amicale[29]."

10.25 In the present case, Czchoslovakia raised an objection immediately after it received the Hungarian Note Verbale of 19 May 1992[30]. The same day, the Czechoslovak Vice-Prime Minister and Minister of Foreign Affairs formally made a request to the Vice-President of the Commission of the European Community for the "assistance and good offices of [the] Commission to contribute to an acceptable solution"[31]. By letter of 6 August 1992 to the Hungarian Prime Minister, the Czechoslovak Prime Minister renewed the formal offer "to discuss the conditions of stopping work on the substitute technical solution" and "to request once again the EC Commission to provide further assistance in seeking a reasonable compromise solution to the present situation"[32].

10.26 These proposals were in conformity with the obligation of the Parties to seek the peaceful settlement of their dispute with respect to the purported termination of the Treaty. However, it was not until 7 April 1993 that the Parties were able to reach an accord on a Special Agreement submitting the case to the Court.

10.27 It is, thus, left to the Court to determine with binding force whether there existed any basis for the contentions of Hungary as to putting an end to the 1977 Treaty.

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27 A/CN.4/107, para. 155. International Law Commission Yearbook, Vol. II, p. 41.

28 Ibid., para. 156.

29 Quoted in Lord McNair, The Law of Treaties, Clarendon Press, Oxford, 1961, p. 497; the learned author adds the following comment: "This is sound doctrine ... ."

30 See, paras. 10.08-10.09, above.

31 Slovak Memorial, Annex 114. See, also, para. 9.43, et seq., above.

32 Ibid., and Slovak Memorial, Annex 117.

If the impossible occurred, and the Court recognised the validity of Hungary's contentions, it would only be starting from the date of the Court's Judgment that the Treaty would cease to be in force.

10.28 There are several reasons for this. First, the principle pacta sunt servanda gives rise to at least a presumption in favour of the Treaty's continuing validity; and it is significant, in this regard, that the ILC, which initially had envisaged the possibility of a suspension of a treaty while the procedure, now set out in Article 65 of the 1969 Vienna Convention, was running its course[33], in the end abandoned that idea. Second, to allow the contrary presumption would envisage a situation - extremely difficult in most cases, and in others, absolutely impossible - of a return to performance of the treaty if, at the end of the judicial proceedings, the termination is found unlawful. But such a sort of "provisional termination" makes no sense at all. Third, this would amount to an admission that a State that advances a reason for putting an end to a treaty can also be the judge of its action, which the customary rules codified in Articles 65 and 66 of the Vienna Convention were precisely aimed at avoiding.

10.29 Hence, even were Hungary's 19 May notification to be found valid - which is not the case, as Slovakia has shown in Section 2 above - it would have begun a process that would come to an end only with the Court's Judgment. During the time it was pending, the Treaty would continue to be binding on the Parties, who would be bound to observe the obligations imposed by it on each of them. Thus, Hungary would have no basis for requiring the benefit of the fait accompli it has tried to create and whose only legal effect was to require the Treaty parties to seek the peaceful resolution of their dispute.

B. The "Termination" Could, in Any Event, Have Had No Retroactive Effect

10.30 No matter on what date it occurred, the termination of the 1977 Treaty could not in any event have had retroactive effect. This customary principle of international law is codified in these terms by Article 70(1) of the 1969 Vienna Convention:

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[33] See, Sir Humphrey Waldock, 2nd Report on the Law of Treaties, Yearbook of the International Law Commission, 1963, Vol. II, pp. 87 and 266.

"1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provision or in accordance with the present Convention:

...

b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."

10.31 Commenting on the initial draft of this article, the ILC's Special Rapporteur, Sir Humphrey Waldock, expressed the opinion that these provisions:

" ...are largely self-evident and their main importance is to underline that the termination of a treaty does not in principle have any retroactive effects on the validity of the acts of the parties during the currency of the treaty nor dissolve rights previously acquired under the treaty. The application of the treaty during the period when it was in force and the legal consequences flowing therefrom are not in any way affected by the treaty's termination[34]."

Article 33(d) of the Harvard Research Draft Convention adopted the same approach:

"The termination of a treaty ... does not affect the validity of rights acquired in consequence of the performance of obligations stipulated in the treaty."

And Lord McNair, who cites this text with approval in the course of examining the practice, proposed to add to it:

"... or the validity of rights acquired in the exercise of powers conferred by the Treaty[35]."

10.32 On the basis of this firmly established principle, Hungary must accept (and draw the consequence from) all that has been done under the Treaty up to the date of its effective termination - even granting the possibility, which Slovakia denies, that the Treaty was in fact terminated by Hungary - that is to say right up to the moment that the Court's Judgment becomes binding, and not the date of 25 May 1992 unilaterally selected by Hungary in its 19 May Note Verbale.

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34 Sir Humphrey Waldock, 2nd Report on the Law of Treaties, Commentary of Article 28, para. 3, International Law Commission Yearbook 1963, Vol. II, p. 94.

35 Lord McNair, op cit., fn. 37, p. 532. See, American Journal of International Law, Oct. 1935, p. 117, for text of Art. 33(d).

10.33 To carry the point a step further, what might the effects have been if the "termination" of the Treaty had in fact taken effect, as Hungary claims, on 25 May 1992? On that date, the following situation prevailed:

- The works on the Gabčíkovo section had almost been completed - the reservoir, bypass canal, the Gabčíkovo step and the Dunakiliti weir had been constructed, with only a few things left to be completed and the actual damming of the Danube at Dunakiliti remaining to be carried out (originally scheduled for October 1989);

- In contrast, due to the considerable delay in carrying out the work at Nagymaros for which Hungary was responsible, and related projects, the construction there was far from being completed;

- Czechoslovakia had undertaken preliminary studies into alternative schemes for putting Gabčíkovo into operation and, beginning in November 1991, had proceeded to the "provisional solution" which, however, was not to be put into operation until the end of October 1992.

10.34 These three aspects of the performance of the Treaty present different problems as regards the effects (or what might have been the effects) of Hungary's purported termination. At the time Hungary claimed to put an end to the Treaty - Nagymaros being only about 20% complete - it might be maintained that, except as to matters of incurred liability, the termination of the Treaty - if valid - would have ended Hungary's obligation to complete the works at Nagymaros for which it was responsible under the Treaty.

10.35 But, as regards the works at Gabčíkovo, the situation was entirely different. There the work to be carried out by Czechoslovakia was about 90% complete when Hungary issued its 19 May notification. Thousands of hectares of former farmland had been appropriated for the Project. It was absolutely out of the question to allow things to remain in that state without creating an ecological catastrophe - real and immediate, not hypothetical - just as it was out of the question to return to the status quo ante, which was technically,

economically and financially not feasible[36]. In this situation, Czechoslovakia (and now Slovakia) had the vested right to see that the remaining work to complete Gabčíkovo was carried out. This consisted largely of the damming of the Danube at Dunakiliti. Due to Hungary's refusal, the damming could not take place at this site. Czechoslovakia's only means of ensuring that its rights were respected - without infringing on Hungary's territorial sovereignty - was to proceed to the implementation of Variant "C", once it was convinced that Hungary would not carry out its obligations.

10.36 The 1977 Treaty had been almost completely carried out so far as Gabčíkovo was concerned (thanks largely to the efforts of Czechoslovakia); and Czechoslovakia could not be deprived of the fruits of its labour by the unilateral decision of Hungary to end the Treaty prematurely. Otherwise, this would be to annul retroactively the performance of the Treaty by Czechoslovakia and hence to give retroactive effect to its termination in violation of the principle set out in Article 70(1) of the 1969 Vienna Convention.

10.37 The same considerations apply to the question of the validity of Variant "C". Czechoslovakia had proceeded to this "provisional solution" in November 1991, as is acknowledged by Article 2 (1)(b) of the Special Agreement. Consequently, despite Hungary's protests, this decision at least was taken under the Treaty, which unquestionably was at the time in full force and effect, as both Parties admit[37].

10.38 It is perfectly clear that it was precisely because Hungary knew that the Treaty provided a solid legal basis for putting into operation Variant "C" that it attempted unilaterally to put an end to the Treaty. Hungary even appears to accept this in its Counter-Memorial: "Eventually, it became clear that, to avoid any pretext for the diversion, Hungary had no other option than to terminate the Treaty"[38]. A contrario, Hungary's position would be that, once the Treaty was no longer in force, Variant "C" would be deprived of a legal justification.

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36 See, Annex 3, hereto.

37 See, para. 10.04, above.

38 Hungarian Counter-Memorial, para. 5.30.

10.39 Such a line of argument is completely invalid for the reasons set out earlier. Putting Variant "C" into operation was for Czechoslovakia (and then Slovakia) the sole means of averting the ecological catastrophe that would have ensued if things were left in the state that then existed, as well as the sole means of exercising its vested rights resulting from the almost completed Gabčíkovo section of the Project.

10.40 Put another way, even if the validity of the unilateral termination of the Treaty by Hungary were to be assumed, nonetheless this could only have legal effects for the future, which could not (and can never) be applicable to Nagymaros. On the other hand, it is certain that Hungary could not deprive Czechoslovakia (then Slovakia) of the rights accruing to it from the almost completed Gabčíkovo works. These are the rights that the putting into operation of Variant "C" preserves in the best way possible, but at considerable cost.

10.41 Up to this point, the discussion has not addressed the questions of liability for breach which materialised before the supposed termination of the Treaty. In this regard, it is evident that since the "termination" had effects only as to the future; it could not "erase" the liability accrued by the Parties up to that time through their non-performance of the Treaty. Hence, the victim of any such breach is entirely justified in demanding reparation. As Sir Gerald Fitzmaurice has observed in his Separate Opinion to the Court's Judgment of 2 December 1963 in the Case concerning the Northern Cameroons:

> " ... it would be quite normal to allege in respect of a treaty that was no longer in force, that breach of it which occurred during its currency had caused damage to the plaintiff State, for which the latter claimed compensation or other reparation[39] ."

The arbitral tribunal presided over by E. Jiménez de Aréchaga, which made the award of 30 April 1990 in the Rainbow Warrior case also applied this principle[40].

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39 North Cameroons, Judgment, I.C.J. Reports 1963, p. 15, at p. 98. See, also, the Judgment itself, p. 34, and the Dissenting Opinion of President McNair in Ambatielos Case, Merits, Judgment, I.C.J. Reports 1953, p. 10, at p. 25.

40 Rainbow Warrior, Revue générale de droit international public , 1990, n°. 3, p. 868, para. 106 and 82 International Law Reports (1990) 499, at p. 551.

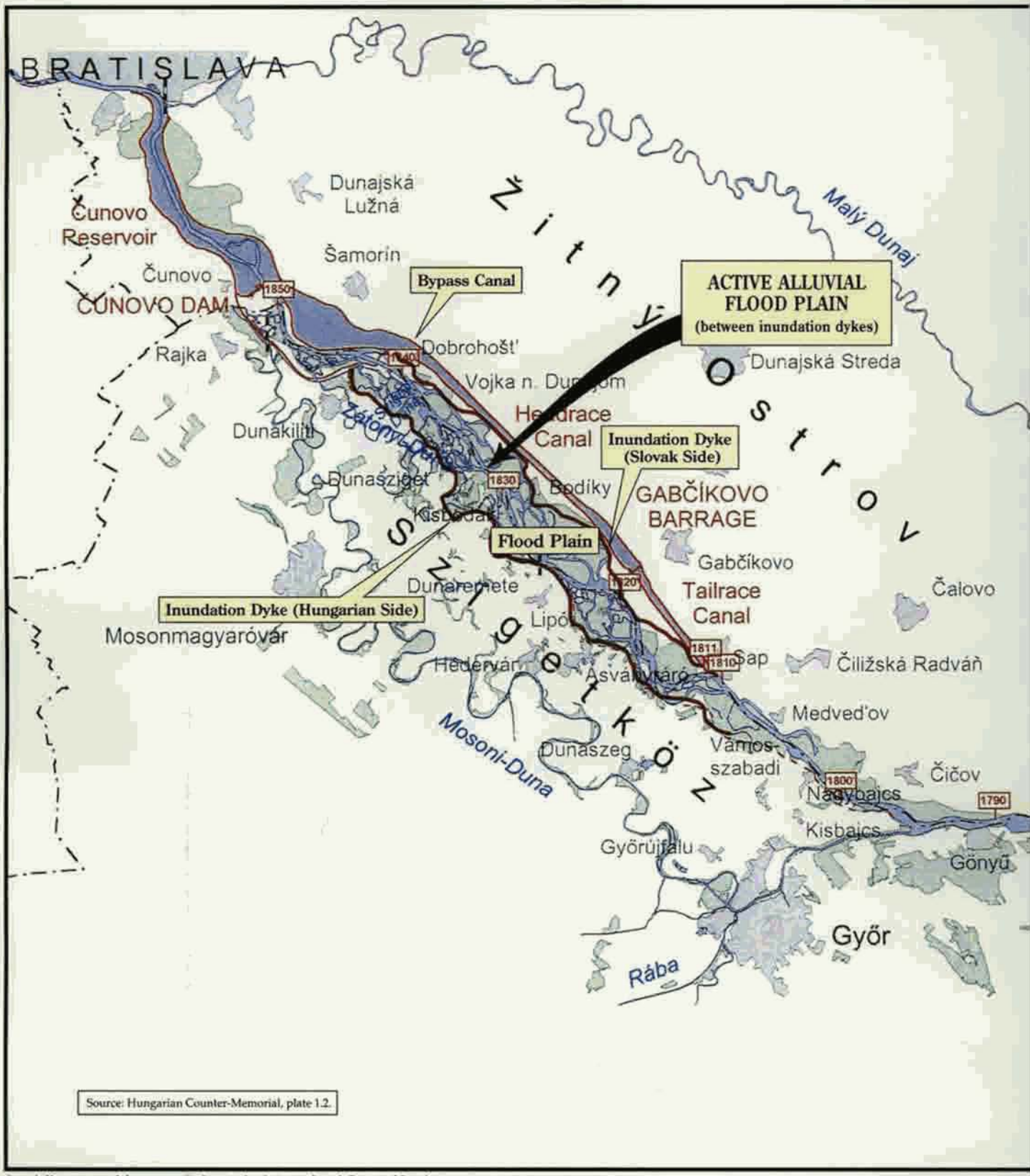
10.42 In this respect, it is appropriate to consider in particular the work schedule imposed by the 1989 Protocol. Under this agreement, all construction was to have been completed in 1994, while the first unit was to be put into operation at Gabčíkovo in 1990 and at Nagymaros in 1992. In other words, since the "termination", if it were to intervene, could in any event not become effective until the Court's Judgment, Hungary would remain fully liable for its refusal to carry out the Treaty up to that moment, and Slovakia would be entitled to demand reparation in accordance with international law[41] for all the unlawful acts resulting from Hungary's refusal. That is to say, specifically, for Hungary's refusal to dam the Danube at Dunakiliti as well as for its non-construction of Nagymaros. And it must be said that this would be equally the case even if, despite the best established rules of international law concerning the termination of treaties, the Treaty were considered to have ceased to be in force on 25 May 1992. For at that time the essential works would have been finished - Gabčíkovo would have been entirely operational and operations at Nagymaros would have begun.

10.43 To conclude, it appears that the discussion concerning the "termination" of the Treaty and the questions of dates and effects are almost completely theoretical. Even if (though clearly not justified) the theory most favourable to Hungary is accepted, according to which the 19 May notification was able to bring out the "termination" envisaged at the date intended, that is on 25 May (six days after the notification), Hungary would not be relieved of liability for the harm caused by its failure to respect the Treaty and its related agreements before that date by not putting Gabčíkovo into operation and by not constructing Nagymaros. This would be the case, a fortiori, if the "termination", according to the applicable rules governing the putting an end to treaties, did not take effect until the effective date of the Court's Judgment.

10.44 But, in any event, this discussion is not only theoretical, it is also without purpose. Hungary had not the slightest legal grounds for putting an end to the Treaty in 1992 nor does it have any such grounds today. The notification is void, first, because none of the justifications based on the restrictive list set out in Articles 60 to 63 of the 1969 Vienna Convention, which were a codification of the customary law on the subject, can validly be relied on here, as Slovakia has once again demonstrated in the preceding Chapters of this

[41] See, Chap. XIV, below.

Reply, and as the Court will surely recognise; and, second, because in any event Hungary did not abide by the reasonable advance notice requirements that are the sine quo non for the validity of such a notification.



Source: Hungarian Counter-Memorial, plate 1.2.

Specially prepared for presentation to the International Court of Justice.

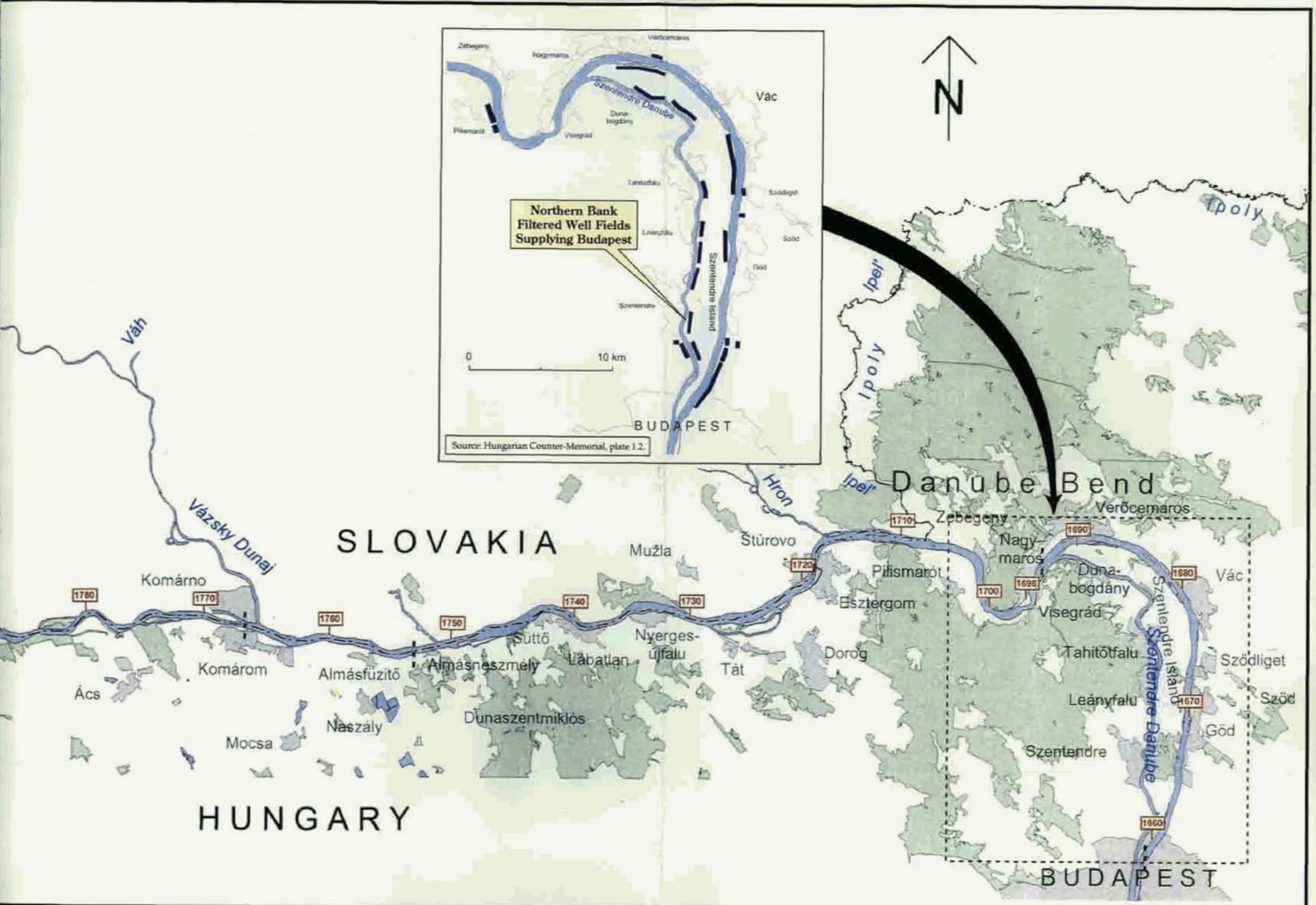


ILLUSTRATION NO. R-4

PART III

CHAPTER XI. INTRODUCTORY COMMENTS ON HUNGARY'S ANALYSIS OF THE SCIENTIFIC FACTS, RELEVANT OR OTHERWISE TO THIS DISPUTE

11.01 The purpose of this Part III is to examine the scientific and technical aspects of the claims put forward at length in Hungary's Counter-Memorial that the Project, whether as originally envisaged or as implemented by means of Variant "C", imposes "unacceptable risks of damage"[1]. Hungary's presentation of evidence in an attempt to establish these alleged "unacceptable risks" has, of course, been submitted astonishingly late, that is, in late 1994. The evidence on which Hungary ultimately relies was clearly not before the Treaty parties when Hungary took the decisions that have led to this dispute, decisions that necessarily required full scientific support to have any validity. And, although Slovakia welcomes the opportunity to examine (at last) Hungary's new scientific material, it must be recalled that this evidence has only been prepared for the purposes of the current litigation: it is thus by no means impartial.

11.02 Moreover, as discussed in greater detail below, the new evidence does not even come close to establishing a verifiable basis for a state of ecological or any other kind of "necessity" or even a quantifiable risk thereof; in fact it does not really purport to do so[2]. Questions must therefore be asked (i) as to what is the relevance of Hungary's new evidence to the specific issues of legal entitlement which the Court is to consider under the Special Agreement, and (ii) as to what Hungary's real aims are in presenting the Court with a Counter-Memorial far more concerned with a contemporary (1994) "scientific" assessment of the

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1 Hungarian Counter-Memorial, para. 1.42. As to the presentation of the scientific and technical case in the Hungarian Counter-Memorial, two long Chapters - 1 and 3 - are devoted respectively to the merits (or alleged demerits) of the Project and Variant "C". These do not focus on the evidence available to the Treaty parties and relevant to a consideration of their legal entitlement as at the dates mentioned in the Special Agreement - 1989, 1991, 1992. Rather their main source of "evidence" is what is called a "Scientific Evaluation", which forms Volume 2 of Hungary's Counter-Memorial. This is a condensation (and sometimes a mere repetition) of various Annexes contained in Hungary's Volume 4 (Parts 1 and 2), written in late 1994 and making up what is essentially Hungary's belated analysis of what an EIA (as defined by Hungary) of the Project (and Variant "C") might indicate.

2 And, as Volumes II and III hereto demonstrate, Hungary's evidence is fundamentally undermined not only by such impartial evidence as is on the record but also by the actual impacts of the Gabčíkovo section of the Project as recorded from the close monitoring of the operation of Variant "C".

Project (or Variant "C") than with an accurate picture of the situation as it existed when Hungary acted unilaterally to suspend and then abandon the Project.

SECTION 1. The Message Underlying Hungary's Focus on "Uncertainty"

11.03 A further confusion has been created by the fact that Hungary at one and the same time argues that the Project is without any merits at all, and that any conclusions as to Project impact are subject to great uncertainty. As to the first, rather surprisingly (given the fact that the Treaty parties clearly thought differently - on the basis of very considerable research - and saw fit to invest by 1989 hundreds of millions of dollars in the Project), Hungary portrays the Project as being without a single redeeming feature. Not only would the Project's impact on the water supplies to the capital cities of the two Parties be disastrous; not only would a unique area of environmental importance be destroyed for ever; not only would agriculture and forestry be radically and negatively affected; not only would human populations in the locality be threatened due to the construction of a barrage system in an allegedly seismically unstable area; not only would fish in the Danube die in large numbers, losing their economic importance and their unusual diversity; but also the Project offered no real benefits[3]. For navigation, it was unnecessary and possibly harmful; flood control could be obtained by alternative means; and the energy produced was quite simply not needed.

11.04 There can be no doubt that the above is what Hungary seeks to prove. But, very confusingly, Hungary's perfectly clear (if wholly incorrect) prediction of negative impact is now accompanied by an emphasis on the overwhelming uncertainty involved in "the assessment of complex risks in a large unimplemented project of this type"[4]. The Court is led to "the leading edge of research" and invited to peer into an abyss in which "no one can be

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[3] A good example of Hungary's tendency to exaggerate environmental impact in the most untenable manner is contained in Plate 1 to its Counter-Memorial. This purports to show the "environmental impact area", but includes vast tracts of forest on which no one has ever claimed the Project would have the faintest impact. Plate 2 then produces exactly the same map for the Variant "C" impact area. This is quite absurd. In fact, as the Hungarian Counter-Memorial appears to accept, the significant impact was limited to the "two main sectors corresponding to the locations of the two main barrages", i.e., Gabčíkovo and Nagymaros. Hungarian Counter-Memorial, para. 1.54. In any event, it is clear from this paragraph and from the whole "Scientific Evaluation" that Hungary only considers as really worth attention the alleged impacts in the Szigetköz area and those to the bank filtered wells downstream of the Nagymaros weir. It is these areas that are highlighted in Illus. No. R.-4.

[4] Ibid., para. 1.44. Of course, the Gabčíkovo section of the Project has been implemented through Variant "C". See, para. 11.15, et seq. ,below.

absolutely certain" and where "levels of uncertainty may be very high"[5]. It is as if Hungary is saying that, correct as it believes its assessment to be, in the event of a challenge from Slovakia (or the EC or any other independent source), all that is demonstrated (and certain) is the uncertainty inherent in the Project, faced with which the Court simply cannot allow the Parties to proceed.

11.05 However, there is no basis in fact for the uncertainty on which Hungary so heavily relies. For example, there is a degree of uncertainty attached to seismic events, events which will always remain to a degree unpredictable[6]. But risks to the environment and to water quality are scientifically different and are not subject to the same uncertainty. If the Treaty parties had put the G/N Project into operation and then totally ignored any monitoring and microanalysis of its effects on the environment and on water quality, it might well be that after 10 years unpredicted impacts would be recorded. However, a river engineering project such as this, which is certain to have many effects (even if mainly good, as Slovakia contends) on the surrounding flora and fauna, agriculture and forestry, as well as on water quality, necessarily requires the microanalysis of these effects through constant monitoring.

11.06 This yields immediate results. It is certain that if, within a short period, even minor adverse effects start to appear, major adverse results will be seen in (and may therefore be predicted to appear) in 10 years - if no preventive or mitigating measures are taken. But if minor adverse effects are detected, such remedial measures may be taken and the impact of these may, in turn, be immediately determined (and the measures altered if necessary). But where no changes of even a minor kind are detected by the constant monitoring, it can be predicted with a sufficient degree of certainty that there will be no long term impacts. It is thus inappropriate to place such a focus on the uncertainty of the environmental and water quality risks allegedly posed by the G/N Project.

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5 Hungarian Counter-Memorial, paras. 1.43 and 1.44. It is noted that, for Hungary, it cannot even be said with certainty that levels of uncertainty are in fact, rather than only "may be", very high. It is as if the G/N Project were a uniquely dangerous project - and not that it is simply one of many thousands of dam projects in the world, amongst which it cannot even be considered as technically "large", as even Hungary admits. See, para. 1.26, above.

6 Although there can be no doubt that, in the case of earthquake risk in the G/N Project region, Hungary has greatly exaggerated both the uncertainties and the likelihood attached to seismic events. See, para. 12.56, et seq. See, also, Vol. II, hereto, Introduction, para. 13.

11.07 But Hungary's focus on uncertainty is not only scientifically unjustifiable; it is also - as Hungary must be aware - of essential irrelevance to the issues raised under the Special Agreement, which require the examination of the legal entitlement to carry out certain specific actions in 1989, 1991 and 1992. Hungary nonetheless claims that the purpose of its after the event "Scientific Evaluation" is to "assist the Court in performing its task"[7]; but Slovakia considers that the real aim is quite different.

11.08 Hungary's underlying message is that the Court cannot order the fulfilment of Hungary's 1977 Treaty obligations, that it cannot find the implementation of Variant "C" lawful, because to do so, today, is not to be considered acceptable due to the alleged uncertainty of the Project's impact on the environment, particularly as "the assets at risk are obviously of strategic national importance"[8]. In other words, the breaches of the Treaty really do not matter because there is no remedy available other than to return to a state of what Hungary considers to be a lesser or less uncertain environmental risk (for Hungary), i.e., the status quo ante. The basic goals behind the 1977 Treaty, so Hungary's message reassures the Court, can anyway be met by other, less damaging means: the energy produced is not even needed so it can consequently be forgotten; the navigation route can be upgraded by traditional methods; and flood control can be achieved by continuing to upgrade the existing dikes. But, for Slovakia, Hungary's new emphasis on uncertainty is no more than an admission as to the lack of real evidence to support its claims of environmental harm and constitutes no more than an attempt to cover up this important lacuna.

SECTION 2. Hungary's Attempts to Portray the G/N Project in the Most Unfavourable Light

11.09 A similar "cover up" attempt is made through Hungary's deliberate confusion of the concepts of environmental and economic impact, and its portrayal of the economic benefits of the Project as being insignificant. This attempt has already been discussed in the Introduction to this Reply, which has shown that certain essentially economic

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7 Hungarian Counter-Memorial, para. 1.49. See, also, Vol. II hereto, Introduction.

8 Hungarian Counter-Memorial, Vol. 2, p. 1. This message is also, in part, behind Hungary's new emphasis on the need for an EIA (as interpreted by Hungary). Effectively, Hungary seeks to deny the possibility of the Project going ahead without a new EIA being carried out. There is, however, no suggestion that Hungary would agree to abide by the findings of an EIA favourable to the Project.

impacts alleged by Hungary are not legally relevant to its case[9]. In Part III, Slovakia will therefore deal separately (in Chapter XII which follows) with those risks that might have legal relevance: risks to water quality and in particular to drinking water supplies; risks to soils, flora and fauna; seismological and earthquake engineering risks. This is followed in Chapter XIII by an analysis of the Project's impacts in areas which do not have a prima facie relevance to the legal obligations of Hungary and Czechoslovakia (as Hungary sees them under the 1977 Treaty and general international law): the issues of agriculture and forestry, which have been incorrectly described by Hungary as areas of economic loss or environmental catastrophe; riverbed morphology; and, finally, the Project's undoubtedly beneficial impact in terms of energy, navigation and flood control, which is nonetheless contested by Hungary.

11.10 In the Chapters that follow, it is shown that Hungary's assessment of risk is either incorrect, or tends seriously to exaggerate impacts accepted by the Treaty parties, or deliberately relies on an outdated conception of the Project which is called the "Original Project". This is essentially the Project as of 1977, i.e., without the remedial measures that developed subsequently. The flow into the old Danube is stated as 50 m^3/s or 200 m^3/s in spite of the evidence that the Treaty parties were willing to increase this to 350 m^3/s, and the direct recharge into the Hungarian side arms is limited to 15-25 m^3/s in spite of the Dunakiliti offtake's capacity of 250 m^3/s. No account is taken of the agreement to construct underwater weirs in the old Danube; nor is account taken of the greatly increased flows - currently 40 m^3/s - which the Project enables to be diverted into the Mosoni Danube for the sole benefit of

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9 See, para. 1.46, et seq., above. In essence, Hungary encourages the Court to adopt an "EIA" approach, that is to weigh up whether, in its view, assessing the Project ab initio today, the Project does or does not constitute a viable "integration of economic and environmental objectives". Hungarian Counter-Memorial, para. 1.20. But economic issues do not have anything to do with the issues of legal entitlement specified in the Special Agreement, and the Court is not and cannot be charged with carrying out an EIA.

Hungary. Further, it is always assumed by Hungary that a maximum peak operation mode would be adopted[10].

11.11 In addition, Hungary devotes a whole section of its Counter-Memorial to a comparison between the G/N Project and other barrage systems, the object of which is to show how uniquely damaging to nature and natural resources the G/N Project is[11]. It is noteworthy that the subject of the section in question is the whole G/N Project; the various allegations are not made in relation to Variant "C"[12]. The implication is that, even for Hungary, Variant "C" (that is, the implementation of the Gabčíkovo section of the Project on its own, without the Nagymaros section) is not an exceptional barrage project.

11.12 In order to establish the uniqueness of the G/N Project, Hungary focuses on two distinctive features, being peak power operation and the low gradient of the river in the Nagymaros section. As to the first of these, Hungary accepts that: "Peak operation of barrage systems is a frequent practice, even on lowland rivers used for navigation such as the Danube and the Upper Rhine[13]." For Hungary, it is therefore not the peak operation mode itself that is insupportable but its extent, for it is alleged that the "Original Project" was "planned to operate

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10 It is noted that the Bechtel report was compiled on the basis of peak operation being a part of the Project. However, it noted "that studies are currently underway to revise these operational criteria". Hungarian Counter-Memorial, Vol. 4(I), Annex 1 (at p. 11). Similarly, as to the discharge into the old Danube, the Bechtel report noted that this "is still being evaluated". Ibid. (at p. 12). Nonetheless, Hungary denies the possibility of Project modifications. See, ibid., Vol. 1, para. 1.55. This is wilful blindness. It may be that in certain cases written amendments had not been made to the Joint Contractual Plan, but as Hungary itself accepts, this was in the nature of the Project. See, para. 2.60, et seq., above. Moreover, Czechoslovakia remained willing to see further remedial measures incorporated even after Hungary's Treaty breaches - as is clear for example, from its willingness to accept an agreement on ecological guarantees, which would inevitably have involved a flexibility as to the issues such as flowrate in the old Danube (on which Hungary now places so much emphasis). See, para. 8.13, et seq., above. Hungary's subsequent failure to complete such an agreement cannot allow it to argue its case now on the basis of a Project version which did not accurately reflect the Parties' intentions at the time of Hungary's Treaty breaches.

11 Hungarian Counter-Memorial, paras. 1.204-1.213.

12 It is alleged that the "difference in water levels at Gabčíkovo, used for energy production", being 16-21.5m, is extreme in terms of the "German and Austrian Danube reach". Ibid., para. 1.207. But step height is not, of itself, indicative of uniqueness or environmental impact - there are literally hundreds of dams in the world with steps of more than 100 m. In terms of the Austrian Danube, the Aschach barrage has a step of 15 m; on the Rhine, the Ottmarsheim and Fessenheim projects have steps of approximately 16m; on the Rhône, the Donzere Mondragou has a step of nearly 21m.

13 Ibid., para. 1.211.

on large scale peaking modes"[14]. Against this, Slovakia points out that no mode of peak operation was fixed in 1989 when Hungary abandoned the Nagymaros section of the Project (and, therefore, peak operation). It was originally "planned" that the mode of peak operation would be tested and agreed upon by the Treaty parties within the framework of the Joint Operating Group. This would result in a concrete operating modes agreement. But this procedure was never followed - because Nagymaros was never built.

11.13 As to the likely contents of such a peak operating mode agreement, it may be that Hungary would have insisted on "large scale peaking modes". But Czechoslovakia, at least, was sensitive to environmental requirements, agreeing in October 1989 to limit or even exclude peak operation if this was justified. Slovakia does not now concede that peak operation is necessarily harmful - even Hungary accepts that this is not the case and that peak operation is "frequent practice" on the Danube and the Upper Rhine. But, at least insofar as Czechoslovakia was concerned, peak operation was to be subordinated to environmental objectives, not vice versa. The whole topic is a false target, a "paper tiger" used to frighten the Court.

11.14 Hungary even asserts that "the decision to build Nagymaros was inextricably related to peak power operation" at Gabčíkovo[15] - presumably to justify its abandonment of Nagymaros on the grounds that, if peak operation could not be allowed, the Nagymaros step served no function. This is clearly not so. Nagymaros was originally (i.e., in the 1950s) conceived as a Hungarian project alone[16]. As such, it would have provided the benefits of energy production on a non-peak basis, greatly facilitated navigation upstream of the weir and improved flood control. As part of the G/N Project, these basic goals remain for the Nagymaros step. And while it is true that the river gradient in the Nagymaros section is low and hence the impounded water section is long, it must be remembered that it is precisely because of this that the impoundment is so important for navigation, allowing for (and being the only means of obtaining) improved conditions along the whole stretch from Sap to Nagymaros. Environmental impact would, at the same time, be limited because the river still

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[14] Ibid., para. 1.206.

[15] Ibid., para. 1.209.

[16] Ibid.

flows within the existing inundation dykes and because the Nagymaros step is a constant flow hydroelectric plant, i.e., the impounded section simply flows like the river used to flow in flood conditions.

SECTION 3. The Relevance of Variant "C" in Terms of Recording Environmental Impact

11.15 Slovakia does not deal with Variant "C" as a wholly separate factual issue in this Part - to do so would merely duplicate a large amount of material. Variant "C" is no more than a variant of the Project that puts into operation the Gabčíkovo section thereof. Its impacts are therefore essentially the same as the impacts of the Gabčíkovo section under the Project and, where these are different, this may simply be explained in the text.

11.16 Hungary, by contrast, alleges that "Variant C differs fundamentally from the Original Project and has aims which are distant indeed from those of the 1977 Treaty"[17]. Its underlying aim here is threefold. First, Hungary seeks to deny the approximate nature of Czechoslovakia's application of the 1977 Treaty through Variant "C"; but it is to be noted that such fundamental differences as Hungary refers to are not so much physical in nature but rather stem from the allegedly "unilateral (rather than joint)" nature of Variant "C"[18]. This last claim is considered at paragraph 6.09, et seq., above. Here it is sufficient to note that whether or not Hungary takes part in the operation of or receives "economic or political benefits" from Variant "C" is a consideration totally apart from the question of its environmental impact in relation to those impacts anticipated for the Gabčíkovo section of the Project[19].

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17 Hungarian Counter-Memorial, para. 3.02. It is not denied that there are differences between Variant "C" and the totality of what Hungary terms the "Original Project" i.e., the Project without remedial measures. The fact that Variant "C" does not (and cannot) implement the Nagymaros section of the Project represents an obvious difference; and the reduced size of the Variant "C" reservoir is significant as it unambiguously means a lesser environmental impact. But the aims of Variant "C" are identical to those of the Project.

18 Ibid., para. 3.03.

19 Ibid., para. 3.07. In fact, a list of the "fundamental differences" between Variant "C" and the Treaty Project never emerges from Hungary's Counter-Memorial. Allegations are made as to the poor construction quality of Variant "C" - and Hungary asserts that the Gabčíkovo shiplocks have been "out of operation for extended periods of time". Ibid., para. 3.08. But leaving aside the inaccuracy and exaggeration of these contentions, neither has any link to environmental impact; and the second contention has nothing to do with Variant "C", per se, for the construction and operation of the Gabčíkovo shiplocks were matters jointly agreed under the Treaty Project.

11.17 Second, in keeping with Hungary's new focus on the EIA, the claim is made that Variant "C" was implemented "without ever being subjected to a proper environmental impact assessment in accordance with relevant international standards"[20]. Hungary's emphasis on the EIA has been considered in greater detail at paragraph 1.24 above. Here it is sufficient to note that this line of argument is meaningless once it is accepted that Variant "C" is no more than a variant of a Project that was subjected to various impact assessments, not the least of which being Hungary's own 1985 EIA[21].

11.18 Finally, the aim is to support Hungary's new emphasis on the concept of uncertainty, which is clearly reliant to a large degree on the absence of actual data. Hence Hungary speaks of the uncertainty inherent in "the assessment of complex risks in a large unimplemented project"[22]. However, as noted at paragraph 11.06 above, the uncertainty is to a considerable degree invented, not least because the Gabčíkovo section of the Project has been implemented starting from October 1992. As a result, approaching three years of information on actual impact is available for analysis - an analysis that has in fact been carried out by more than 40 Slovak scientists and experts and which forms Volume III hereto. And from this available data, scientific conclusions can be drawn with a perfectly acceptable level of certainty.

11.19 Slovakia considers that the evidence of actual Project impacts constitutes the best evidence available. While Hungary's "Scientific Evaluation" also contains some evidence of actual impacts in Hungarian territory, this is regrettably almost valueless as it is based on specifically non-Project operating conditions[23]. But, for the larger part, Hungary's approach has been different and deliberately more theoretical than that of Slovakia. Indeed, Hungary has even gone so far as to question the value placed by Slovakia on monitoring, pointing out that monitoring alone cannot ensure the quality of groundwater: "Water quality

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20 Ibid., para. 3.14.

21 Of course, a wide range of studies were carried out for the specific differences of Variant "C", i.e., relating to the new dimensions of the reservoir and the location of the Čunovo weir. See, Slovak Memorial, Annex 36.

22 Hungarian Counter-Memorial, p. 1.44.

23 As will become apparent in the Chapters that follow, Hungary's refusal to implement the remedial measures incorporated into the Project has inevitably caused environmental harm, but is in no way an indication of anticipated Project impact.

depends on the discharges into the river, flow velocities and other factors, rather than monitoring per se[24]." This is, of course, correct. But monitoring records the impact of those factors such as discharge rates or flow velocities, which are not fixed but are rather easily influenced variables, and enables these to be modified appropriately or for other remedial steps to be taken as necessary.

11.20 Hungary nonetheless claims that it is "a fundamental misunderstanding" to deduce from the "absence of certain large scale changes in two years" that "no significant long-term adverse effects will occur"[25]. But the purpose of monitoring is not to record "large-scale changes". To take an example, for ground water levels and quality alone, 333 different parameters are measured on a constant, weekly or monthly basis at literally hundreds of different sites in Žitný Ostrov[26]. These sites are located in Illus. No. R-5. Changes in the monitoring results, though apparently insignificant to the non-scientific observer, would indeed lead or point to significant long term effects. But Slovakia's position is that from the most closely researched scientific point of view, there are no significant changes - small or large scale - in the monitoring results[27]. And, as noted at paragraph 11.06 above, where there are no short term changes, long term changes cannot magically manifest themselves out of nothing.

SECTION 4. Other Scientific Evidence Relied on By Slovakia

11.21 It is alleged in the Hungarian Counter-Memorial that: "Studies which are available to Hungary do not support the conclusion 'that the Project was sustainable in

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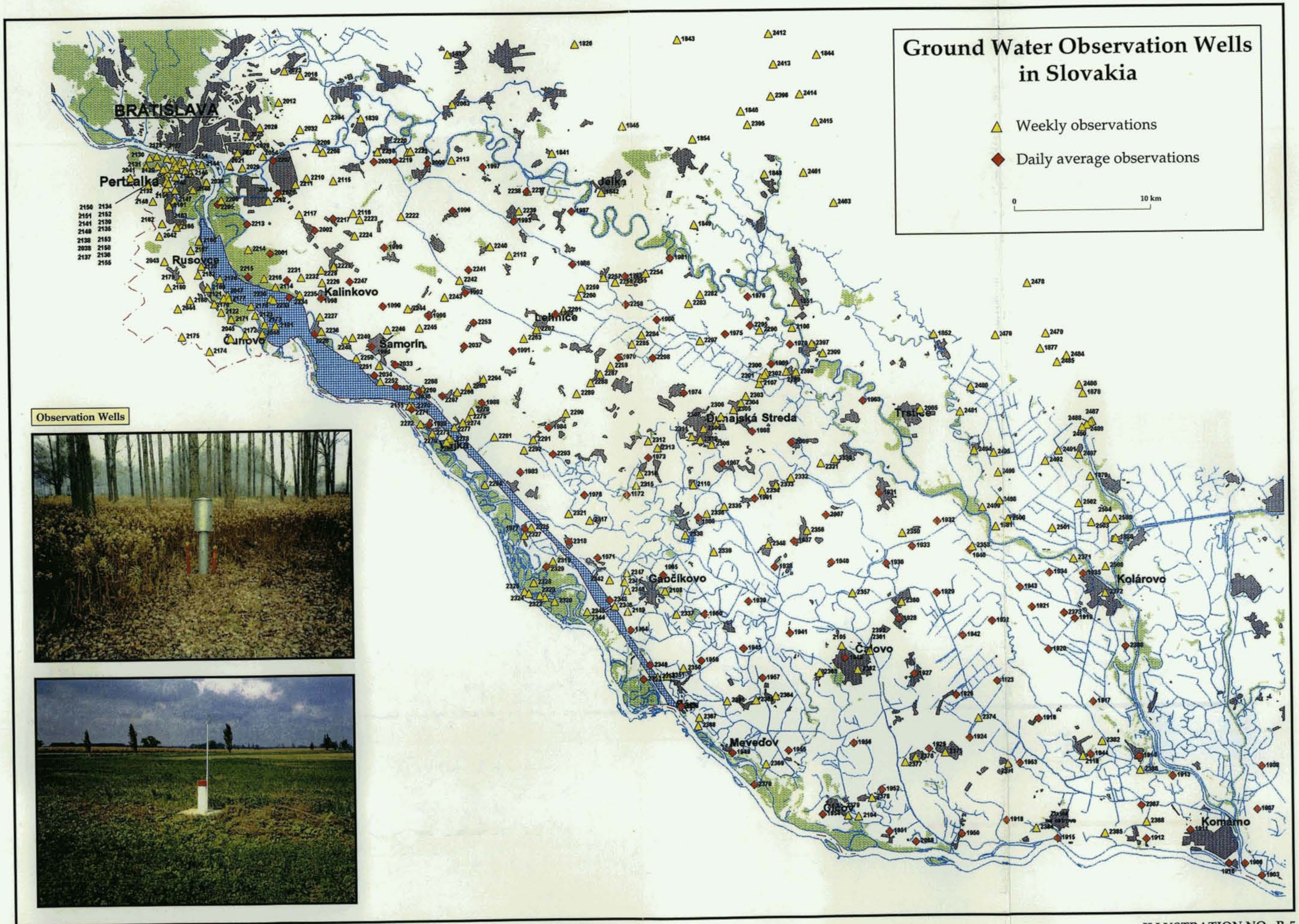
24 Hungarian Counter-Memorial, para. 3.10. It is regretted that Hungary should criticise the quality of Slovak monitoring. Ibid., para. 3.09. This is based on the allegation that the EC Working Group report of 2 November 1993 found the monitoring system in respect (only) of flora and fauna "inadequate". This is simply untrue. This EC report in fact noted that "[a]t present a huge amount of data are collected", explaining how the monitoring system "should be strengthened". Hungarian Memorial, Vol. 5 (II), Annex 18 (at p. 719).

25 Hungarian Counter-Memorial, para. 3.16. Hungary proceeds to paint a horrific picture - admittedly without a shred of scientific justification - in which impacts acquire a "synergistic character, reinforcing and accelerating each other" so as to eventually "trigger off unforeseen and uncontainable effects". Ibid., para. 3.17. This is too far removed from the real impacts and real issues in dispute in this case to warrant serious comment.

26 For the list of these parameters, see, Vol. III, Ch. 1, Table 2.

27 "Significant" here means no unusual differences that are not comparable with those observed in the pre-dam conditions.



Observation Wells

Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-5

environmental terms' ...[28]." From this, it might be concluded that Hungary has not seen fit to read its own 1985 EIA, which unambiguously concluded that the Project was environmentally sustainable. This aside, the purpose of Hungary's allegation is twofold. First, it is to bring attention to the allegation that certain studies are not "available" to Hungary, in particular the 364 research projects carried out prior to 1974 and summarised in Annex 23 to Slovakia's Memorial. The complaint is not only that the studies "were not annexed", but that "Slovakia has so far refused to provide them to Hungary despite its requests"[29]. This is a totally unwarranted complaint. It is not simply that to annex 364 research papers is inconceivable; but Annex 23 is a joint list, prepared by both Czechoslovakia and Hungary, of those studies carried out by both parties prior to 1974. Simply, Hungary has had the studies since their completion. It is inventing a point of dispute.

11.22 Second, Hungary seeks to undermine Slovakia's interpretation of two particular studies that "are heavily relied upon by Slovakia", that is the Bechtel and HQI reports[30]. Importantly, Hungary does not question the value of these two 1990 reports, nor their impartial nature, nor their basic quality. It simply cites the reports as evidence that, even in 1989/1990, when the documents were produced, "impacts of the Original Project were unknown because of insufficient data and studies". But the carefully selected quotations offered in support show no more than that, in certain limited areas, additional studies could be recommended with a particular view to furthering the Project remedial measures. In no sense were extra studies being proposed to determine whether to complete the Project or not. Thus, taking the Bechtel report, an accurate picture of its findings appears from its overall summary as to the extent of scientific appreciation of Project impact in 1989:

> "The project has used a sound technical and scientific basis to identify impacts and appropriate mitigations. However, several areas should be considered for additional studies or mitigations. These include ensuring that (1) water quality is maintained along the Danube by completion of wastewater treatment plants; (2) archaeological resources that are affected by the project are thoroughly investigated; (3) additional studies are conducted to define biological baseline conditions and appropriate mitigations; and (4) sufficient flow releases into the

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28 Hungarian Counter-Memorial, para. 1.27.

29 Ibid., para. 1.26.

30 Ibid., para. 1.30, et seq.

> old Danube River channel in the Szigetköz will maintain planned ground water levels[31]."

There is nothing here that could possibly justify the abandonment of the entire Project by Hungary (an action taken by Hungary just after the publication of this report[32]).

11.23 Hungary's utilisation of the HQI report is equally misleading. It is recalled that Hungary's basic aim is to show that the Project failed "to satisfy national and international EIA requirements"[33]. To meet this, a long section of the HQI report is quoted, which shows no more than that the 1975-1976 Bioproject was realised after project designs were finalised (although before the 1977 Treaty was signed) and from which is deliberately omitted the one sentence (at the middle of the section quoted) tending to show exactly the opposite of what Hungary is arguing[34]. For the HQI in fact concludes that Czechoslovak studies pre-1977 were precisely in line with international practice at that time. The sentence omitted reads:

> "En ce sens, les études réalisées à cette epoque étaient comparables à celles qui furent effectuées en Amérique du Nord, sur le territoire de la Baie James par exemple[35]."

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31 See, ibid., Vol. 4(1), Annex (at p. 15). It is noted that prime position is accorded to the construction of wastewater treatment plants - which construction was shortly after scaled down by Hungary but which has been continued by Czechoslovakia and then Slovakia. See, paras. 7.15-7.17, above, and Annex 7, hereto.

32 See, para. 8.26, above.

33 Hungarian Counter-Memorial, para. 1.26.

34 Ibid., para. 1.37.

35 Slovak Memorial, Annex 28, (at p. 239 - emphasis added). Translation: "In this sense, the contemporary studies were comparable with those carried out in North America, on the James Bay territory, for example."

This sentence is also omitted from the same section of the HQI report which is quoted at paragraph 6.34 of the Hungarian Memorial[36].

11.24 In the Chapters that follow, Slovakia does not seek to re-examine the findings of these two reports which are already reviewed in Chapter II of the Slovak Memorial. Two general points should however be made. First, Hungary does not, in its Counter-Memorial, rebut Slovakia's analysis of these reports save in the paragraphs considered above. Hungary does not therefore contest the fact that these two reports represent well balanced studies that provide, as would be expected, recommendations as to how to improve remedial measures or to extend the Project data base, but do not in any way call into question the Project's overall viability. Second, and particularly in the case of the Bechtel report, many of the adverse criticisms raised by the authors relate to Project operation modes that were not rigidly fixed in 1989, i.e., a version of the Project was examined by Bechtel that did not incorporate the latest series of modifications then being considered. In particular, Czechoslovakia's formally expressed willingness in the autumn of 1989 to agree to limit or exclude peak operation (as environmental requirements demanded) and to agree to a series of ecological guarantees in respect of the operation of the Gabčíkovo section effectively removes the substance of such adverse criticisms as were raised in the reports[37].

11.25 It is noted also that Hungary does not contest the value of the evidence in the EC Working Group reports from which Slovakia draws in Chapters II and V of its Memorial and Chapters VII and VIII of its Counter-Memorial. Indeed, from Hungary's Counter-Memorial alone, it would be difficult to glean the fact that these important documents exist at all. The Court is respectfully invited to draw the obvious conclusions from this notable silence.

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36 See, also, Hungary's contention (at Hungarian Counter-Memorial, para. 1.79) that the Bechtel report "queried many important aspects of the project and its operating modes" made on the basis of two recommendations as to the carrying out of further studies and a handful of recommendations as to monitoring and modelling. Hungary seems to forget that Bechtel's job was precisely to make such impartial and independent recommendations. But this was not at all the same as calling into question fundamental aspects of the Project. As to "operating modes", the Bechtel report simply notes that these were not rigidly fixed, contrary to Hungary's inflexible concept of the "Original Project". See, fn. 10, above.

37 See, para. 7.29, et seq., and para. 8.13, et seq., above.

11.26 Hungary does, however, focus on the PHARE project - not in terms of its substantive results (which are not yet available), but rather as an admission from the Czechoslovak authorities "that no EIA was performed" for the Project[38]. Hungary returns to this theme time and time again. Yet Hungary's arguments here are misleading as to the nature and purpose of the PHARE program. Quite simply, it is not and was never intended to be an EIA and is not even comparable. The PHARE project is a four year program in no way concerned with providing the information for a political decision as to whether or not a particular project should go ahead. Rather, its aims are as follows:

> "The immediate project objective is to develop, test and transfer an integrated mathematical modelling system including the most important aspects for water resources management in the Danubian Lowland. The ultimate project objective is that the transferred modelling system be used as the technical/scientific basis for future management decisions[39]."

It appears hypocritical (at best) for Hungary, after criticising Czechoslovakia for its alleged indifference to environmental issues in 1989-1992, to attack in its Counter-Memorial the Czechoslovak Government's desire in October 1990 "to ensure the protection of natural and anthropic resources, balanced ecological development, as well as optimised decision making and management" - particularly since Hungary has refused to participate in the PHARE program whose purpose it is to achieve these goals[40].

11.27 As to the basic assertion behind Hungary's focus on the PHARE program - that an EIA has never been carried out in relation to the "Original Project" (nor in relation to Variant "C")[41] - this has been dealt with in the Introduction to this Reply. There was no legal requirement to carry out an EIA in 1977 or 1989 but, nonetheless a great many intensive studies were carried out both prior to and after 1977, including of course Hungary's

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38 Hungarian Counter-Memorial para. 1.39. See, also, e.g., paras. 1.80 and 1.98.

39 PHARE Project No. EC/WAT/1, Danubian Lowland-Ground Water Model, Interim Report, Vol. 1, January 1995, Annex 8, hereto.

40 Extract from Czechoslovakia's application to the EC in relation to the PHARE Project, dated 25 October 1990, and quoted at Hungarian Counter-Memorial, para. 1.39. See, also, Slovak Counter-Memorial, paras. 5.57-5.58.

41 Hungarian Counter-Memorial, paras. 1.41 and 3.14. No mention was made of this quite specific failing either in Hungary's 1992 Declaration or in its Memorial.

own 1985 EIA[42]. And, as the Introduction has shown, the 1985 EIA is accepted as a valuable document even by Hungary's inappropriate 1994 "large dam" evaluation[43]. In sum, the overall emphasis placed by Hungary in its Counter-Memorial on the concept of the EIA is distorted and does not assist the Court in deciding the issues of legal entitlement before it. The environmental impact of the Project has been thoroughly assessed from every angle and there is now available an assessment of the actual impacts of the operation of the Gabčíkovo section of the Project through Variant "C". This assessment is contained in Volume III hereto, the findings of which are considered in the Chapters that follow. A further EIA would not only be completely unnecessary; it would also be highly unlikely to say what Hungary wanted it to say.

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42 The importance of this EIA in relation to the Treaty parties' expression of their commitment to the Project in 1985 should not be underestimated. See, para. 7.06, et seq., above.

43 See, para. 1.26, et seq., above.

CHAPTER XII. ALLEGED PROJECT IMPACTS RELEVANT TO HUNGARYS LEGAL ARGUMENTS

SECTION 1. Water Resources

12.01 In its summary of the grounds for its suspension and termination of works under the 1977 Treaty, Hungary accords prime importance to "the defence of necessity in the context of environmental harm"[1]. And, in terms of the grounds for invoking a state of necessity, the greatest weight is placed on the alleged Project impact on drinking water resources: "But, above all, irreversible damage was foreseen which could affect the drinking water for millions of people[2]." It is therefore to the alleged risks to drinking water supplies that Slovakia turns first[3].

12.02 As Hungary accepts, the water resources in the part of the upstream aquifer which underlies Szigetköz are "largely unexploited"[4]. Therefore, as its primary grounds for invoking a state of necessity, Hungary can only be referring to the bank filtered wells downstream of Nagymaros which supply part of Budapest's drinking water with water received from the Danube (Illus. No. R-4, appearing before Chapter XI above)[5]. The prospect

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1 Hungarian Counter-Memorial para. 5.26. See, also, ibid., para. 1.42.

2 Ibid., para. 5.27. See, also, ibid., para. 1.11, where the greater emphasis is placed on "serious threats to drinking water sources, including both bank-filtered wells and in the longer term to the aquifer". (Footnotes omitted; emphasis added). Hungary of course considers that necessity requires an imminent threat. See, para. 5.08, et seq., above.

3 For Slovakia's discussion of this issue, see, Slovak Counter-Memorial, para. 7.22, et seq., and para. 8.21, et seq. See, also, comments in Vol. II, Ch. 3, and Vol. III, Chs. 1 and 2, hereto.

4 Hungarian Counter-Memorial para. 1.103.

5 As noted in Slovakia's Counter-Memorial (para. 7.24), Hungary tends (or seeks) to confuse the various water resources which it alleges would have been affected by the Project. In particular, it gives the impression that the waters in the Žitný Ostrov/Szigetköz aquifer are somehow linked to the gravel filter layers 150 km downstream (which it confusingly calls "aquifers" also) through which Danube water is tapped to supply Budapest. The reasons for this is simple. Whereas it is possible, if not sustainable, to posit a risk to the upstream aquifer stemming from poor surface water quality, there is not and there never has been any evidence on which to base a claim of "irreversible damage" to the Danube water supplying Budapest. Hungary therefore chooses to be vague as to exactly which resource it sees as threatened, referring generally to the threat to "the drinking water for millions of people" rather than to a specific geographic location from which the threat is alleged to rise.

of "irreversible damage" to these bank filtered wells is now reconsidered in the light of Hungary's latest allegations.

A. The Bank Filtered Water Supplies Downstream of the Nagymaros Section

12.03 Hungary concludes its section on bank filtered water supplies in its Counter-Memorial with the bold assertion that "there is a serious risk of yield reduction and water quality deterioration in the major well fields providing water supply to Budapest"[6]. But there is no basis for such a conclusion in the preceding paragraphs. These offer no more than a general discussion of the particular importance of these water supplies; of the extensive use of bank filtration "on the major European rivers"[7]; of the potential threats constituted by changes in the filter layer or reduction in the hydraulic connection between the river and the wells. There is little if anything here to contest. It is self evident that, where there is a poor hydraulic connection between a well and the source being tapped, there will be a yield reduction (the obvious solution being to achieve a better well placement) and an increased tapping of adjacent ground water (which may indeed be of lesser quality).

12.04 Generalities aside, Hungary's claim relies on two specific examples of well water deterioration which occurred in the early 1980s at the Budapest and Nagymaros waterworks. As an initial point, it must be noted that such deterioration had nothing to do with the G/N Project. Hungary claims that the "adverse changes in water quality" registered in three of the wells exploited by the Nagymaros waterworks are "believed to be a direct result of the Nagymaros coffer dam construction"[8]. This is more than surprising. As to two of the three wells, the "[r]apid water quality deterioration began ... in the early 1980s"[9] - whereas the Nagymaros coffer dam was built in 1988[10]. The remaining well is located 5 km downstream of

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6 Hungarian Counter-Memorial, para. 1.121

7 Ibid., para. 1.113. The European dimension that Hungary alludes to here does not appear to advance its arguments in any way. It may, of course, be added that a further extensive use of "major European rivers" is for the production of hydroelectricity. It would appear that other European States do not consider the two different usages incompatible.

8 Ibid., para. 1.19.

9 Ibid., para. 1.118.

10 Hungarian Memorial, para. 3.63.

Nagymaros: it is not conceivable that it could have been affected by the coffer dam. So this attempt to tie this water quality problem to the G/N Project is obviously invalid.

12.05 Indeed, it is not possible to see the relevance of the examples provided by Hungary. Hungary claims no more than that its own dredging in the 1970s "led to the localised deposition of fine sediment" near particular wells, certain of which suffered a decline in water quality[11]. This shows only that large scale dredging close to bank filtered wells may have an adverse impact. But such large scale dredging was not envisaged by and nor was it carried out within the framework of the G/N Project.

12.06 What little credibility Hungary's claims have is negated by this simple fact. Its contention of "serious risk" is based on the assertion that Project "dredging was to have taken place" downstream of Nagymaros[12]. The Joint Contractual Plan did originally anticipate the dredging of 6 million m^3 from the riverbed downstream of Nagymaros. But Hungary has already dredged some 20 million m^3 from this stretch for industrial/commercial purposes[13]. As recorded in a 1989 study prepared by the Hungarian scientists Somlyódy, et al: "As a result of intensive dredging over the past decades, the water level of the present section complies with that planned for the [G/N project] (VIZITERV, 1985)[14]." No further dredging was envisaged when Hungary suspended and abandoned works at Nagymaros in 1989; it is artificial in the extreme to predict adverse Project impact on the basis of an insistence that additional dredging be carried out in 1994.

12.07 Hungary's 1994 assessments are based on the peculiar assumption that Project impacts are being examined for the very first time. For example, Hungary alleges that it is "an issue of national importance to evaluate the potential risks" to bank filtered water

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11 Hungarian Counter-Memorial, para. 1.117.

12 Ibid., para. 1.121. Hungary also claims that "further bed degradation is expected due to erosion", but offers not a word in substantiation.

13 See, Hungarian Memorial, p. 248, and Hungarian Counter-Memorial, Vol. 2, p. 11.

14 Hungarian Counter-Memorial, Vol. 4 (Part II), Annex 13 (at p. 576). The findings of László Somlyódy, the author of Chapter 3.3 of Hungary's "Scientific Evaluation", which considers water quality, cannot easily be contested by Hungary.

resources[15]. The implication is that research into this aspect of the Project was overlooked by the 1977 Treaty parties - that it had yet to be "evaluated": whereas a specific obligation to carry out further evaluation of this issue was placed on Hungary in the 1976 Joint Contractual Plan Agreement[16]; whereas water quality was constantly monitored by the Joint Boundary Waters Commission (established under the 1976 Boundary Waters Management Agreement) which, in the spring of 1989, had worked out a draft agreement on measures to protect water quality that Hungary refused to sign[17]; whereas a 1980-1985 research and development program by the Budapest waterworks examined Project impact on bank filtered wells[18]; whereas the prime focus of Hungary's 1985 EIA was, equally, Project impact in this area[19]; whereas the findings of the 1985 EIA were reviewed as recently as 1989 by Hungarian scientists Somlyódy, et al., who predicted no threat, merely noting that: "Special attention should be paid ... in order to maintain the present quantity and quality filtration layer[20]." It is not possible to interpret this as a prediction of "irreversible damage".

B. The Water Resources of the Žitný Ostrov/Szigetköz Aquifer

12.08 The underlying theme behind Hungary's assessment of "risks" to the Budapest bank filtered wells is that the communist Governments in Hungary pre-1989 were indifferent to the condition of the water supplies to their capital city. Such an implication is even more extraordinary in relation to the vital drinking water resources underlying Žitný Ostrov and Szigetköz. In its allegation that "the quality of the water in the aquifer is threatened"[21], Hungary effectively implies that the present Slovak Government is content to take a gamble as to the long term contamination of a water resource essential to the population of Bratislava[22]. The Project's alleged impact on this resource - and to ground water quality

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15 Ibid., Vol. 1, para. 1.112.

16 See, Slovak Counter-Memorial, para. 7.68.

17 Slovak Memorial, para. 3.15, et seq.

18 Slovak Counter-Memorial, para. 7.70.

19 Ibid., paras. 7.44 and 7.76.

20 Hungarian Counter-Memorial, Vol. 4 (Part II), Annex 13 (at p. 576).

21 Ibid., Vol. 1, paras. 1.78 and 3.50.

22 Ibid., para. 1.11. See, also, ibid., para. 1.04.

and quantity more generally in Žitný Ostrov and Szigetköz - is now re-examined, giving attention in turn to the reservoir, the old Danube and the side arm system (in both Slovakia and Hungary). Before doing so, it is appropriate to recall the impartial findings of the EC Experts on the expected impact of Variant "C" on surface and ground water:

> "The impacts on the surface water quality are expected to be insignificant."
>
> "The impacts on the ground water quality are in general expected to be insignificant[23]."

The Reservoir

12.09 The importance of the Hrušov-Dunakiliti reservoir to the aquifer is, as Hungary repeatedly points out, that after Project implementation it becomes a main source of recharge due to its large surface area and the increased downwards pressure of its waters[24]. There is no justification, however, for characterising this as "a major harmful impact"[25]. The assumption is that the water in the reservoir that infiltrates the aquifer is of less good quality than the Danube waters in the pre-Project implementation state. This, in turn, assumes that either the surface water in the reservoir deteriorates during its short storage period (due, e.g., to eutrophication or reduced dissolved oxygen content) or that layers of poisonous sediment settle on the reservoir bed, contaminating the good quality surface water as it passes into the gravel aquifer. There are no other possibilities. And neither is the case here.

12.10 According to Hungary, the impact of the Project on eutrophication is a "primary concern"[26]. Of course, eutrophication is a potential problem to be closely studied. The issue of eutrophication is considered in detail in the Slovak Counter-Memorial, where it is

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23 EC Working Group Report of 1 December 1993, Hungarian Memorial, Vol. 5 (Part II), Annex 19 (at pp. 783-784). The Court is also reminded of the findings of the Bechtel and HQI reports, cited at Slovak Memorial, para. 2.95, et seq. In particular, the Bechtel report predicted that "the water quality in the Hrušov-Dunakiliti reservoir will be improved", while the HQI report concluded that the risks of a deterioration in water quality were very low. See, also, Slovak Counter-Memorial, paras. 7.45-7.64, where Hungary's claims as to the contamination of the upstream aquifer are rebutted in detail.

24 Hungarian Counter-Memorial, paras. 1.104, 1.108 and 1.46.

25 Ibid.

26 Ibid., para. 1.94.

pointed out that this is a concern for practically any reservoir project anywhere in the world[27]. Hungary claims that there would be a "near-doubling of algal biomass due to the Dunakiliti reservoir", relying on "recent simulation results" reported in its "Scientific Evaluation"[28]. But Hungary fails to show the necessarily harmful impact of this "near-doubling", and it does not consider the absolute values of algal biomass in question. Finally, Hungary relies on "simulation" tests in spite of the existence of actual data in relation to the Variant "C" reservoir, which has existed for nearly three years.

12.11 Algal biomass is a basic component of the aquatic food chain, being the food supply of microzoobenthos (microscopic aquatic organisms feeding on the riverbed bottom). If the dissolved oxygen content in the water remains adequate, the increase in biomass is not harmful and may be beneficial, depending on the absolute values involved. And, as Volume III hereto shows, the dissolved oxygen content in the Variant "C" reservoir has remained at 8.0-8.5 mg/l, i.e., unambiguously "first class"[29]. In fact, a slight increase in dissolved oxygen content has been recorded over pre-dam conditions[30]. The adverse impact of the "increase by 50%" of chlorophyll-a predicted by Hungary for this reservoir is therefore questioned[31]. Further, the reference to percentage increases is not necessarily useful. In terms of actual values, it is worth noting that the highest chlorophyll-a figure recorded in the reservoir has been 74.1 $\mu g.\ l^{-1}$ (in August 1994). The maximum figure recorded in the Danube at Budapest during the growth periods of the years 1991-1993 are 160, 170 and 130 $\mu g.\ l^{-1}$ respectively, i.e., approximately twice as high[32]. Hungary's claim that "expected eutrophication within the reservoir might require modification of the technology of the surface

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27 See, Slovak Counter-Memorial, para. 7.33, et seq.

28 Hungarian Counter-Memorial, para. 1.95.

29 See, Vol. III, p. 25.

30 Ibid., p. 23. This is probably due to the increased surface area of the reservoir, increasing potential oxygen absorption from the air. As to biological oxygen demand, discussed rather confusingly at Hungarian Counter-Memorial, para. 3.34, this has shown a slight decrease (which is beneficial) but is still 2nd class as in the pre-damming condition. See, ibid.

31 Hungarian Counter-Memorial, para. 3.33.

32 See, Vol. III, p. 26.

waterworks as far away as Budapest" is therefore misleading at best[33]. Not only are maximum chlorophyll-a concentrations at Budapest far higher, but the "expected eutrophication" is exaggerated into a problem that the careful monitoring of the Variant "C" reservoir does not support:

> "The first two years of monitoring of the phytoplankton in the reservoir and of the impact of the Project on the Danube water quality indicate that, in accordance with the prognosis, water impoundment in the reservoir does not result in significant phytoplankton biomass increase in the Danube[34]."

12.12 The other great danger, according to Hungary, is sediment deposition in the reservoir. The sediment "is expected to decay, and may lead to water quality problems"[35]. It is far from clear what Hungary actually means. Reference in support is made to "international experience"[36], and to a "recent sensitivity analysis"; but all that Hungary concludes is that "[p]redictions are highly uncertain" and yet such an occurrence is nonetheless "likely in the reservoir"[37]. What the "occurrence" might be and the nature and conclusions of the recent analysis referred to are not revealed.

12.13 In any analysis of potential impacts, it is essential to recall that the Danube's waters are free from significant concentrations of pollutants which could propagate into ground water by ground water recharge from the Danube[38]. The detailed monitoring

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33 Hungarian Counter-Memorial, para. 3.33. It is noted that the claim that an "algal bloom is inevitable" is confined to a footnote - fn. 51. Of course, algal blooms could and did occur in the Danube side arms pre-damming.

34 See, Vol. III, p. 32. Obviously, these conclusions are valid only within the context of the agreed division of water between the bypass canal and the old Danube. If, as Hungary has wished in the past, the discharge into the old Danube were increased beyond the current average discharge of 400 m^3/s, the risk of harmful eutrophication in the reservoir would increase because the flow rate and velocities would be decreased. In general, the factors inhibiting eutrophication are water turbidity, turbulent flow and flow velocity.

35 Hungarian Counter-Memorial, para. 1.108.

36 As to the irrelevance of such "international experience" - according to Hungary - see, the 1989 study prepared by Somlyódy, et al., forming ibid., Vol. 4 (Part II), Annex 13 (at p. 563): "It should be emphasised that morphologically, the Dunakiliti reservoir differs totally from the riverbed reservoirs of the German-Austrian section, which means that any experience gained there cannot be applied here automatically."

37 Ibid., Vol. 1, para. 1.108.

38 Vol. III, p. 15.

carried out since the implementation of Variant "C" - in accordance with World Meteorological Organisation recommendations - shows that this conclusion as to the absence of pollutants is essentially valid for the sediments that have actually settled on the reservoir bottom. Nutrient content, in terms of nitrogen, phosphorus, potassium and organic matter, was not found to be excessive, while heavy metals were found to be less than basic values (except for copper, which did not however exceed limiting values)[39]. These results confirmed sampling surveys carried out in the Gabčíkovo area in 1993:

> "The research results show that the sediments are not significantly polluted and that they are not polluted by organic contaminants. In spite of higher contents of some heavy metals in sediments ... the authors do not classify the concerned territory as contaminated, because the major part of heavy metals forms a part of stable rock-formation minerals[40]."

12.14 By way of conclusion, it is essential to remember that waterworks close to the reservoir supply drinking water to Bratislava and that, as pointed out in paragraph 11.20 above, surface and ground waters are monitored at around 600 points within a range of more than 300 water quality parameters. Approximately 110 monitoring objects, related to municipal water supply wells, are located near the reservoir and provide the best data as to the area's water quality. The results from the regular sampling (on a continual or weekly basis) in no way supports Hungary's spectre of "direct threat" to the region's water supplies[41]. In fact, certain improvements in ground water quality are noted:

> "The Rusovce village water supply, located in the area close to the Hungarian boundary, is typical for ground water quality on the right side of the Danube. This ground water flows towards the Hungarian territory. Before the damming of the Danube the ground water quality was characterised by high contents of sulphate, chloride and nitrates. After the damming there is continuous decrease of these three components, which indicates the more intensive infiltration of the Danube water into the aquifer. This signifies a general improvement of ground

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39 Ibid., p. 34. The "Holland Criteria", which are applied here, provide for categorisation as to basic, limiting and warning values. The higher concentration of copper is due to its presence in upstream rock formations, not pollution.

40 Ibid., p. 35.

41 Hungarian Counter-Memorial, para. 3.39. The Court is also reminded of the contrary finding of the Hungarian representative to the EC Working Group of Experts:

> "According to the Hungarian Data Report (ref/3/) no significant changes have been detected in the ground water quality." Hungarian Memorial, Vol. 5 (Part II), Annex 18 (at p. 713).

water quality. The changes in the heavy metals concentrations are not significant.

The Kalinkovo waterworks is the system of water supply wells closest to the reservoir. After a comparison of the ground water quality in the periods before and after damming of the Danube, we can state that there are only very small changes. There is a slight decrease in nitrate concentration to the value 7 mg l^{-1}.

The Šamorín water supply well field is in the impact area of the lower part of the reservoir. The measurements show that the changes in the ground water chemistry are not significant[42]."

The Old Danube[43]

12.15 In terms of contribution to water resources, Hungary accords a prime importance to the main channel of the Danube, which it claims "has primarily determined the groundwater recharge and groundwater levels throughout the Kisalföld"[44]. The implication is that to change this situation, and to allow a greater significance to the reservoir and the side arms with regard to ground water recharge, is to interfere with the natural state. But the "main channel" of the Danube has only existed since the 19th Century. In its natural state, the river had no fixed channel and meandered with flows divided into a series of side arms which, as an ensemble, fed the aquifer. In this and other respects, the Danube's main channel does not have the importance ascribed to it by Hungary.

12.16 In terms of water resources, Hungary alleges two types of adverse impact in relation to the old Danube: drops in water quantity and deterioration in water quality. As to the first, it records drops in river water levels by 2.5 - 3m and a corresponding drop in ground water levels "in excess of 3m" in a narrow strip alongside the old Danube, with a total surface area of 3 km^2 only[45]. Putting to one side the fact that this drop in this very small area

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42 See, Vol. III, pp. 15-16.

43 The term "old Danube", used to describe the bypassed section of riverbed from Dunakiliti to Sap (or Čunovo to Sap under Variant "C"), is convenient but slightly confusing. This stretch remains, of course, the boundary between Slovakia and Hungary and is only "old" in the sense that, under present conditions, approximately four fifths of the Danube's waters have been diverted into the bypass canal.

44 Hungarian Counter-Memorial, para. 1.76. The Kisalföld comprises the regions of Žitný Ostrov and Szigetköz.

45 Ibid., paras. 3.25 and 3.43.

was agreed to by the Treaty parties in 1977, even Hungary accepts that this decline is avoidable by the construction of underwater weirs: "The suggestion that water levels in the Danube could be increased by underground weirs is correct ... [46]." Moreover, it is noted that the dramatic "illustration" of the water level drops provided in Hungarian Counter-Memorial Plate 8a is rather deceptive. The photograph, apparently taken on 29 October 1992, shows a dried up river branch - but it is not clear that this is related to the damming, given the areas of dried vegetation and green grass, which could not have flourished in the few days since the damming on 24 October 1992[47].

12.17 As to the ground water level drops that Hungary has recorded throughout Szigetköz[48], it is emphasised once more that these are not due to the reduction of the flow in the old Danube but are rather due to the failure to implement the Project-built direct recharge system into the Hungarian side arms. On Slovak territory, where the Project measures have been implemented, the ground water levels have increased to a state similar to that of 20-30 years ago, before riverbed degradation became problematic[49]. This is considered in greater detail starting at paragraph 12.20 below.

12.18 Hungary's portrayal of adverse impacts on the water quality in the old Danube stretch is limited to the claim of "slight changes" in "chemical and biological quality"

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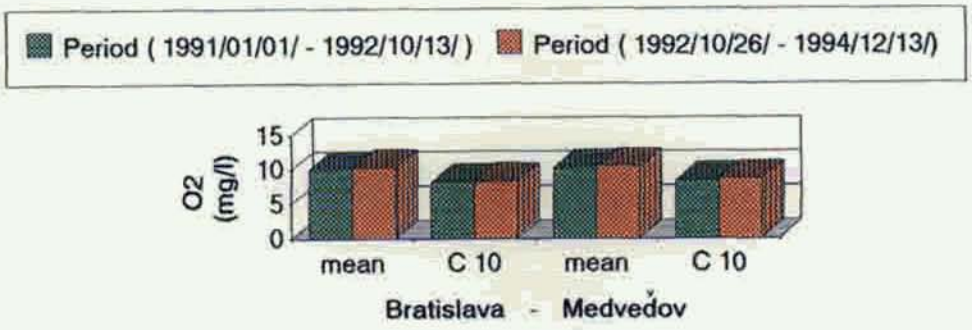
46 Ibid., para. 3.27. The merits of underwater weirs are also considered at para. 12.45, below. Hungary accepts in its "Scientific Evaluation" that underwater weirs "would prevent the degradation of the riverbed". Ibid., Vol. 2, p. 5. As to Hungary's comments on the costs of these weirs (at ibid., Vol. 1, paras. 3.102-3.103), it is evident - as Hungary well knows - that the cost could never be 2.4 billion Cz crowns (i.e., in the region of the overall cost of construction of Phase 1 of the Čunovo weir) and that this was a typographical error in the EC report cited at Slovak Memorial, para. 5.55. Indeed, the whole of Hungary's consideration of underwater weirs within the framework of the TWMR at paras. 3.101-3.114 of its Counter-Memorial now appears irrelevant in the light of Hungary's agreement on 19 April 1995 to construct a partially submerged weir at rkm 1843. Such an action, Hungary claims at ibid., para. 3.114, would be "unacceptable". And yet it has now agreed to do just that.

47 It is noted that Hungary makes various criticisms at ibid., paras. 3.111-3.112, of the photographs of the Slovak side arms before and after effecting the direct recharge program in May 1993 (being Illus. Nos. 36 A-D of Slovakia's Memorial). Hungary claims that these do not compare "the pre - and post diversion conditions". This is correct, of course, although it is very unclear what point Hungary is trying to make. The photographs in question are intended to show the branches pre - and post - implementation of the direct recharge - and nothing else. Regardless of Hungary's confusing commentary, the simple fact is that those side arms photographed (plus many others) were regularly dried up prior to implementation of direct recharge - and now they are not.

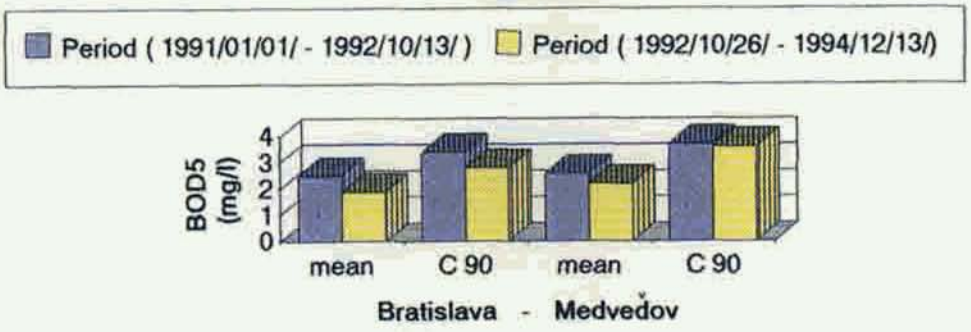
48 Hungarian Counter-Memorial, para. 3.44.

49 See, Vol. III, p. 8. Hungary attributes little importance to the long term decrease of water levels (pre-1992) in the Danube and the related ground water levels. See, ibid., p. 5.

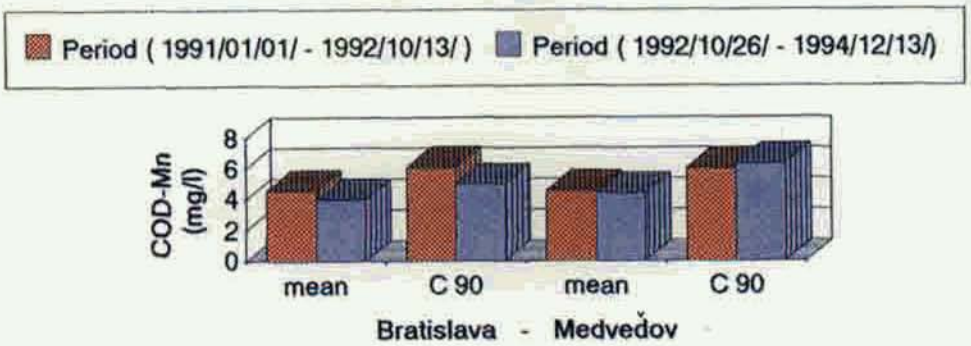
Dissolved oxygen in the Danube



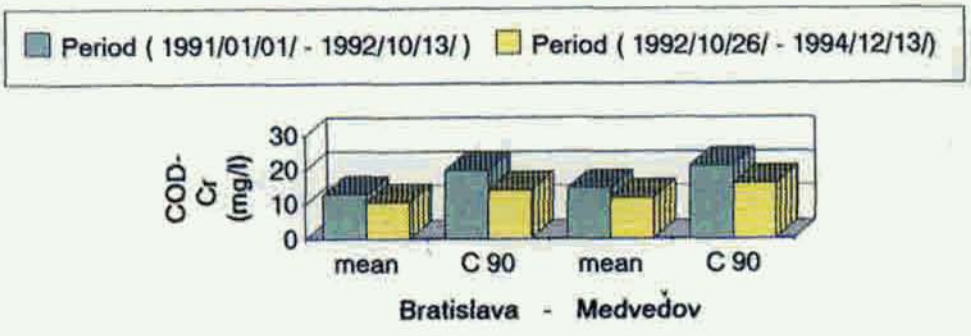
Biochemical oxygen demand in the Danube



Chemical oxygen demand (COD-Mn) in the Danube



Chemical oxygen demand (COD-Cr) in the Danube



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-6

and the attempt to establish a "deteriorating trend" in respect of dissolved oxygen content[50]. There is no evidence of such a deteriorating trend. And if there have been slight changes, these have been positive. This is shown most clearly by Illus. No. R.-6. This depicts a series of comparisons between the dissolved oxygen conditions in the two year periods immediately prior to and immediately after the damming of the Danube, with water quality being measured in terms of dissolved oxygen content (DO), biological oxygen demand (BOD) and chemical oxygen demand (COD)[51]. A comparison is also shown between water quality at Bratislava (upstream of the Project) and at Medvedov (downstream of the confluence between the old Danube and the bypass canal). The illustration shows a slight increase in DO content (which was anyway first class) and a slight decrease in biological and chemical oxygen demand (which is also desirable). As Volume III hereto explains:

> "On the basis of the overall comparison of monitoring results from the period prior to and after the putting of the Gabčíkovo section into operation, it may be stated that no significant changes in water quality occurred. The recorded trend has shown a slight improvement in some parameters[52]."

12.19 Hungary not only gives, in spite of the lack of any supporting data, quite the opposite impression, but also appears to wish to excuse its failure to take active steps to protect the water quality of the Danube through the construction of waste water treatment plants, which formed part of the national investments that the parties were to make within the Treaty Project. Instead, Hungary focuses on BOD values in an attempt to demonstrate that there is no real purpose to waste water treatment along the Project stretch of the Danube, at least insofar as reducing the risk of harmful eutrophication is concerned:

> "Clearly the solution of the eutrophication problem of the Danube stretch does not depend only on waste water treatment along the given reach: it would

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50 Hungarian Counter-Memorial, para. 3.31. Hungary also notes here that "suspended solids concentration dropped markedly" post-damming due to the retention of much of the suspended load in the reservoir. Hungary does not appear to try to depict this as an adverse impact on water quality, however.

51 Oxygen is a particularly useful measure of water quality: the higher the dissolved oxygen (DO) content, the better the quality of the water, whereas the lower the biological and chemical demands (BOD and COD) on the oxygen, the better the water quality.

52 See, Vol. III, p. 24. As to the biological quality of the water in the old Danube section, this is considered in detail at Vol. III, pp. 30-33. No perceptible trends have emerged and there is no perceived threat of an extreme phytoplankton biomass increase, i.e., harmful eutrophication.

require a co-ordinated international programme to reduce the phosphorus in the entire upstream basin[53]."

This is extraordinary . It is unarguable that waste water treatment is necessary to improve water quality and, in terms of public health, is a task of prime and urgent importance. As to a "coordinated international programme", Slovakia and other Danube States (including Hungary) are actively involved in the following projects proposed within the PHARE framework:

- "Present and future role in nutrient removal from surface water by wetlands, floodplains and reservoirs" - approved project (participation: Czech Republic, Slovakia, Slovenia and Romania)

- "Nutrient balances for the Danube countries and options for surface and ground water protection" (participants: Slovakia, Hungary, Austria)

- "Introduction of phosphate free detergents in the Danube basin" (participants: Slovakia, Hungary, Bulgaria).

The Side Arm System

12.20 According to Hungary, Slovakia's "suggestion" that there would be "an increased flow in the Danube side-arms" under the Project "is not quite correct"[54]. This marks a change of opinion on Hungary's part, which noted in its 1985 EIA that the direct recharge into the side arms envisaged by the Project allowed a flow of water "far exceeding their present discharge throughout the entire year"[55]. This 1985 assessment is supported by the 1993 reports of the EC Working Group of Experts[56] as well as by Volume III hereto, which conclusively proves the beneficial impact of the direct recharge into the Slovak side arms at

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53 Hungarian Counter-Memorial, para. 3.34. Similarly, Hungary's "Scientific Evaluation" appears to make the quite remarkable argument that, because waste water treatment along the Danube stretch would not resolve the alleged eutrophication problem, the continued pollution of the Danube from such sources as the Mosoni Danube, into which untreated waste is discharged from, e.g., Győr, is not a serious matter affecting water quality.

54 Ibid., para. 1.84.

55 Hungarian Memorial, Vol. 5 (Part I), Annex 4.

56 Ibid., Annexes 18 and 19.

Dobrohošť[57]. It may be, as Hungary claims, that flow rates will not be equivalent to pre-1960 levels, that is prior to the commencement of riverbed degradation and prior to the isolation of the side arms; but it is not contestable that, with direct recharge, the conditions in the side arms will be superior to the situation in the 1970s, the 1980s and the early 1990s (prior to the damming).

12.21 Hungary also claims that a "small constant supply of water" into the Szigetköz side arms - being 15-25 m^3/s - would be substituted for a "fluctuating supply", thus denying the "important effects of flood flows"[58]. This is wrong. The Dunakiliti offtake (as designed and constructed within the Treaty Project) allowed for a discharge of up to 250 m^3/s into the Szigetköz side arms. Hungary was in no way prevented from utilising this offtake to the extent it desired. Hungary complains that "any extra withdrawal from the reservoir exceeding the guaranteed amounts" would lead to a reduction in the share of the energy produced at Gabčíkovo[59]. But if the only restriction on Hungary in terms of assuring the flow rate it considered necessary was a reduction in its share of electricity production, this could be no more than a self-imposed decision to sacrifice environmental protection for economic benefits. In the face of this, Hungary's comment at paragraph 3.106 of its Counter-Memorial that "the Slovak approach to mitigation" is "driven by the desire to maximise electricity generation" appears hypocritical, at best[60].

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57 See, Vol. III, p. 18.

58 Hungarian Counter-Memorial, paras. 1.84 and 1.88.

59 Ibid., Vol. 2, p. 53.

60 The full comment reads as follows:

> "Moreover, inherent in the Slovak approach to mitigation measures is the assumption that there will be no increase in water discharges to the main riverbed. [Footnote omitted]. This is, of course, driven by the desire to maximise electricity generation."

Of course, Hungary is confusing the specific measures put forward by Slovakia as part of the TWMR with Project remedial measures. The discharge suggested by Slovakia - of 400 m^3/s - in fact marks an increase over the Project discharge. This was "driven" by what might be necessary for ecological reasons and in terms of reaching a compromise with Hungary. Even higher discharges into the old Danube could (except at high flows) lead to eutrophication problems in the reservoir. Moreover, higher discharges are not necessary for ecological reasons in the old Danube and, with this in mind, Slovakia naturally aims to maximise electricity production. The discharge of 400 m^3/s into the old Danube (on a temporary basis) has, of course, now been accepted by Hungary by Agreement of 19 April 1995. Slovakia does not have the intention of producing electricity from underwater weirs in the old Danube as Hungary further implies (at ibid., para. 3.105).

12.22 In any event, the flow rate achieved in the Slovak side arms since May 1993 has been neither small nor constant. It has varied between 10 and 90 m^3/s solely as ecological considerations have dictated and there is no sense in which the flow has been insufficient. The claim in Hungary's Table 4 that fluctuation would cease save for 15 days per year is incorrect[61]. Indeed, Table 4 is meaningless in most respects for it is based on the self-imposed flow rates of 15-25 m^3/s and contains multiple assertions that are disproved by evidence already before the Court. The claim that "clogging of most side arms could be expected" is directly counter to the findings of the EC Working Group of Experts, as is the claim of "desiccation of almost all wetlands in the floodplain within a few years except for narrow riparian strips"[62]. Both claims are disproved by the actual impacts of the direct

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61 Ibid., p. 51. See, also, the claim at ibid, para. 1.88 of "the lack of inundations in the floodplain and the lack of water fluctuations generally". Compare, the findings of the EC Working Group of Experts, quoted at fn. 109, below.

62 See, EC Working Group reports of 2 November 1993 and 1 December 1993, Hungarian Memorial, Vol. 5 (II), Annexes 18 and 19 (at pp. 707 and 782-783). And, as noted in the Slovak Counter-Memorial, the EC Experts predicted exactly the same beneficial effect for the Hungarian side arms if equivalent flows to those into the Slovak side arms were discharged into Szigetköz:

> "The river bed in the main branches on the Hungarian side will become sufficiently free from mud, so that good infiltration conditions will exist." EC Working Group report of 1 December 1993, ibid., Annex 19 (at p. 789).

Nonetheless, Hungary alleges at Hungarian Counter-Memorial, para. 3.50 that "clogging of the ... side arms is expected". It is claimed that only the "sudden introduction of a large amount of water through the supply-system to the side arms (which is possible but not practised in Žitný Ostrov, and impossible in Szigetköz due to a lack of water supply) could wash away part of the settled sediment". In contrast, the EC Experts noted that in Žitný Ostrov "a considerable recharge now takes place from the side channels [into the aquifer] ... because the running water has removed the fine material, previously clogging the bed of these river arms". EC Working Group report of 2 November 1993, Hungarian Memorial, Vol. 5 (II), Annex 18. No sudden introduction of water is required, but simply the planned recharge. Any "lack of water supply" in Szigetköz has been entirely due to Hungary's political decision not to take the necessary steps to permit direct recharge into its side arms.

recharge into the side arms as closely monitored on Slovak territory and summarised in Volume III[63].

12.23 Hungary's insistence on the inefficacy of the direct recharge system in the face of all the evidence is simple to explain. It is the basis for its assertion that "decreases in groundwater levels are predicted to exceed 3m and to affect an area of approximately 300 square kilometres on the Hungarian side"[64]. Reference in support is made by Hungary to its Plate 6a. This shows no decreases in groundwater levels in excess of 3m, or even in excess of 2m. And the overall area affected (in the prediction) is only in the region of 130 km^2. The assertion is anyway impossible to square with the finding of the EC Experts that if direct recharge into the Szigetköz side arms is increased to the same levels as on the Slovak side: "Ground water levels on the Hungarian territory are expected to be not lower than in the pre-dam conditions[65]." Needless to say, Hungary can point to the actual impact on its territory of the damming of the Danube in October 1992, which has (apparently) been followed by a decrease in ground water levels on an area covering 297 km^2. But this proves only that the direct recharge system was well-conceived and that it has been wholly illogical not to allow for its implementation. And, once again, on Slovak territory, the effectiveness of direct recharge has been confirmed by EC Experts and by over two years of monitoring of actual impact:

> "The Gabčíkovo hydropower structures, after two years of operation, have led on the prevailing part of the territory to the recovery of water-related conditions to those known in the region a few decades ago. The measured changes in ground water levels in the floodplain area and in the whole region

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63 See, Vol. III, p. 8:

> "The changes in the ground water levels observed in the floodplain area and generally in the whole region confirm the positive impact of the Project, in particular on the upper part of Žitný Ostrov, and the important positive role of the water supply system for the left side floodplain area. The observations support the expectation that, after completion of the water supply facilities for the remaining part of the floodplain area in the vicinity of the tailrace canal (downstream of the Gabčíkovo site) and for the narrow area between Dobrohošť , the headwater canal and the old riverbed (the so-called dry triangle), a positive impact on ground water will occur here too.
>
> The measurements of the ground water levels confirm that there is a general trend towards the re-establishment of the situation known 20-30 years ago, on the greater part of the territory."

64 Hungarian Counter-Memorial, para. 1.104.

65 EC Working Group report of 1 December 1993, Hungarian Memorial, Vol. 5 (II), Annex 19 (at p. 790). This report found that the Hungarian side arm area is similar to that on the Slovak side (at p. 771). As a result, the favourable impacts on Slovak territory of direct recharge will be replicated in Hungary.

confirm the positive impact on the upper part of the area and the important positive role of water supply for the Danube left side floodplain[66]."

12.24 Hungary also alleges the existence of "serious concerns" as to the impact of the Project on ground water quality in the Szigetköz[67], citing an alleged problem of organic decay in the side arms[68]. The only substantiation Hungary offers is in terms of the monitoring of the post-dam situation, it being recorded that "reductive conditions predominate" in sampling wells established in 1994 along the banks of the side arms and canals in Szigetköz. Four points must be made. First, reductive conditions existed in the Hungarian side arm area long before 1994[69]. Second, it is meaningless to take data from wells "established" in 1994 and try to extrapolate a long term trend. There is no evidence to show that the reduction conditions did not exist in these areas prior to the damming. Indeed, the evidence points to quite the contrary, as just noted. Third, it cannot be established that these wells were not dug in areas where reductive conditions might be expected and, hence, the well sites are in no way representative of overall ground water conditions. And, finally, it is obvious that Hungary's failure to implement the direct recharge into its side arms would lead to reductive conditions in certain areas. But this is specifically a result of the non-implementation of the Project's remedial measures. In the Slovak side arms, where a direct recharge has been assured, there are no reductive conditions and careful monitoring has shown that riverbed sediments are not significantly polluted and are not polluted by organic contaminants[70]. Moreover, on the Slovak territory on the right hand side of the Danube, that is just next to the Hungarian border, there has been an improvement in both ground water quality and quantity due to the implementation of Variant "C"[71].

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66 Vol. III, p. 18.

67 Hungarian Counter-Memorial, para. 1.108. Hungary bases this allegation on a reference to "international experience". As noted at para. 12.12 (and fn. 36), above, such experience is not relevant. Hungary also cites the EC Working Group of Experts, which is extraordinary as the EC Experts came to the conclusion that Project impact of ground water quality would be "insignificant". See, para. 12.08, above.

68 Hungarian Counter-Memorial, para. 3.47.

69 See, e.g., Hungary's 1985 EIA and the EC Working Group report of 23 November 1992, cited at Slovak Counter-Memorial, para. 7.39 and related fn.

70 See, Vol. III, p. 35.

71 Ibid. See, also, the results of Slovak monitoring in relation to Rusovce quoted at para. 12.14, above.

SECTION 2. Soils, Flora and Fauna

12.25 The relevance to Hungary's legal case of its presentation of alleged Project impacts to flora and fauna appears to be as follows[72]: Hungary's invocation of necessity is based, in part, on the "severe damage" which was "anticipated" to flora and fauna[73], whilst its suspension of works is justified by the alleged non-fulfilment of Article 19 of the 1977 Treaty "concerning the natural environment"[74].

12.26 But even within the general topic of soils, flora and fauna, the legal relevance of the individual impacts posited by Hungary must be questioned. For example, Hungary sees an adverse impact in the submerging of 20 "islands" and large parts of shoreline in the Nagymaros reservoir[75]. But this inundation was an integral and necessary part of the Project to which the Treaty parties knowingly agreed. In any event, Article 19 of the Treaty cannot be applied to prohibit this result, for to do so would have the effect of preventing an essential object of the Treaty[76]. Nor can "necessity" be invoked for, similarly, this was a known and accepted Project impact: it is self-evident that where water is impounded behind a dam so that its level rises, certain areas of land will be submerged, and the Treaty parties were at full liberty to provide for this[77].

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72 Hungarian Counter-Memorial, paras. 1.139-1.156 and 3.51-3.65. See, Vol. II, hereto, comments to Ch. 4, for a more detailed rebuttal of the alleged impacts; and, also, Vol. III, Chs. 3 - 7.

73 Hungarian Counter-Memorial, para. 5.27.

74 Ibid., para. 4.06. Slovakia considers that alleged impacts to soils fit more easily into the category of risks of a potential legal relevance, i.e., alongside flora and fauna, rather than alongside the areas where economic factors are of prime concern, that is impacts to agriculture and forestry. It is also noted that, in the treatment of the impacts of Variant "C" in the Hungarian Counter-Memorial, soils do not merit a separate sub-section, strongly suggesting an assumption of the lack of any evidence of any adverse impact to soils as a result of the implementation of Variant "C".

75 Hungarian Memorial, para. 1.150.

76 See, para. 3.31, et seq., above.

77 Hungary also refers to the submerging of the "active floodplain" in the Nagymaros section. Hungarian Counter-Memorial, para. 1.150. Hungary accepts that this so-called "floodplain" is "narrow". In fact, it is from as little as a few metres to 100 m wide. It is not to be confused with the active floodplain in the Gabčíkovo section, which is of real ecological significance. See, also, the claim in the "Scientific Evaluation" (ibid., Vol. 2, p. 181): "From the point of view of forestry the impact area ... includes ... the narrow floodplain of the Danube between Gönyü and Szentendre." But the importance of this narrow strip of land inside the inundation dykes is virtually non-existent in terms of forestry and, in spite of the claim quoted above, the "Scientific Evaluation" makes no attempt to assess its significance or the Project's impact thereon.

12.27 But Hungary's real focus in its treatment of soils, flora and fauna is on the Gabčíkovo, not the Nagymaros, section of the Project and, in particular, the alleged impacts to the Szigetköz region. Soil impacts are examined solely in terms of this region and, in terms of impacts to flora and fauna, little more than one paragraph is devoted to the Nagymaros section[78]. The geographical area on which Hungary focuses is very limited and is, in fact, little more than the area of the active floodplain in Szigetköz, as depicted in Illus. No. R-4 (appearing at the beginning of Chapter XI)[79].

12.28 As to the Gabčíkovo section, Hungary's assessment of adverse impact to soils, flora and fauna is almost exclusively premised on the contention that the "Project would have caused a reduction in the water-table"[80]. As the previous Section has shown, this contention has no basis. And in this respect, the emphasis on certain of the provisional findings of the Bechtel report is misplaced[81]. Slovakia does not contest the possibility of adverse impact "[i]n the event that surface water dropped significantly in the side arms" or where there were certain "[c]hanges in the ground water and surface water levels"[82]; it merely points out that such drops or changes in ground water levels were, and are, not an expected Project impact as shown, not least, by the actual impact of Variant "C" to date.

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78 Hungarian Counter-Memorial, para. 1.150, in part, and para. 1.151, in full. The short discussion devoted to Nagymaros is anyway of doubtful relevance. Apart from the legally irrelevant impacts discussed in the preceding paragraph, Hungary points to alleged impacts of peak mode operation even though, as pointed out at para. 11.12 above, Hungary accepts that peak operation is not necessarily harmful to the environment. Moreover, as to peak mode operation, no agreement had been reached and, if environmental considerations so dictated, Czechoslovakia formally stated that it was open to the limitation or complete exclusion of this peak operation.

79 See, also, Slovak Memorial, para. 7. 87.

80 Hungarian Counter-Memorial, para. 1.143.

81 Ibid., at para. 1.140.

82 Extracts from the Bechtel report, cited at ibid. Although, as noted at fn. 11 to para. 11.10, above, the Bechtel report acknowledged the existence of Project remedial measures, it appears to have been commissioned so as to analyse the impacts of the "Original Project", rather as Hungary's 1994 "Scientific Evaluation". This simple fact undermines Hungary's reliance on the Bechtel report at ibid. Of the series of seven potential Project impacts quoted (with relish) by Hungary at ibid., three are not relevant because they are premised on non-existent ground water levels drops and a further three fail to take account of the fact that, through the construction of underwater weirs, fishladders and the establishment of a new inter-connection between the main channel and the side arms, the upper section of the Danube would develop more naturally in ecological terms - see, EC Working Group report of 23 November 1992, Hungarian Memorial, Vol. 5(II), Annex 14 (at p. 418). The seventh potential impact relates to riparian vegetation in the Nagymaros section, considered at para. 12.26, above, where it is shown to have been an impact accepted by the Treaty parties.

12.29 The Hungarian Counter-Memorial is also very critical of what it considers to be the scant attention paid to flora and fauna in the Slovak Memorial[83], but proceeds itself to give the issue little more than a cursory treatment - aimed not at an assessment of anticipated impacts but, for the main part, at an attempt to disprove the fact of the Treaty parties' agreement to incorporate the various remedial measures into the Project[84]. This is indicative of the central role in Hungary's arguments played by its concept of the "Original Project", which largely ignores the remedial measures agreed by the Treaty parties (in part as a response to Hungary's 1985 EIA). Only five paragraphs of Hungary's Counter-Memorial are devoted to alleged "impact" on flora and fauna[85], of which two relate principally to peak operation[86] and two relate to international experience of dubious relevance[87]. The final paragraph is simply an assertion that what has preceded is "sufficient evidence"[88].

12.30 In the discussion that follows, Slovakia bases its conclusions on the detailed scientific research and data contained in Volume III hereto, in particular, Chapters 3-7 thereof. This evidence both supplements and supports the evidence contemporaneous with Hungary's acts in breach of the 1977 Treaty in the period 1989-1992 examined in the Slovak Memorial and Counter-Memorial[89]. It is also emphasised that there is no foundation for

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83 Hungarian Counter-Memorial, paras. 1.139 and 3.54.

84 See, also, ibid., paras. 3.101-3.114, comprising Hungary's sub-section entitled "Mitigation Measures Taken By The Parties". This sub-section considers the impacts of underwater weirs, claiming wrongly that they lead to colmatation if their construction is not coupled with high flows into the old Danube. Given Hungary's agreement to the construction of an underwater weir at rkm 1843 (Agreement of 19 April 1995, Annex 1, hereto), the discussion now appears pointless.

85 Ibid., paras. 1.150-1.154.

86 See, fn. 78 to para. 12.27, above.

87 There is no valid comparison between ecological impacts due to the bypassing of a 52 km stretch of the Rhine, leaving a flow of only 15 m^3/s into the old main channel and without an effective direct recharge system to the side arms, and the bypassing of 30 km of the Danube, with a flow of up to 350 m^3/s in the old main channel and ample direct recharge into the side arms. Hungary's citation from the WWF (to the effect that underwater weirs on the old Danube will be harmful following experience gained on the Rhine - at para. 3.104 of its Counter-Memorial) is therefore inapposite.

88 Hungarian Counter-Memorial, para. 1.154. A further two short paragraphs (eight lines in total) are devoted to impacts on fisheries. Ironically, the prime complaint is the Slovak Memorial's failure to specifically address this topic.

89 See, Slovak Memorial, para. 2.88, et seq., and Slovak Counter-Memorial, paras. 7.78 and 8.35, et seq. Slovakia stands in full by the statement in its Memorial that Szigetköz will benefit from the Project, as quoted at Hungarian Counter-Memorial, para. 1.142.

Hungary's allegation that the treatment of flora and fauna in the Slovak Memorial is inevitably handicapped by the fact that "insufficient biological information existed both in the 1977 and in 1989"[90]. Hungary obviously ignores the existence of the 1975-1976 Bioproject and its 1986 update[91]. As to other biological data collated by Czechoslovakia, the inventory of aquatic fauna in the Danube was established by the Slovak scientist Brtek in 1964 and inventories of the floodplain fauna were gradually established from the 1950s[92]. Current monitoring sites are shown on Illus. No. R-7 A. The documentation and inventory of flora in Žitný Ostrov was completed in 1986 by Bertová et al[93]. And, as Volume III hereto notes:

> "Thus the flora of the Slovak floodplain ecosystems, including the Danube inundation area, can be considered as one of the best defined and best known of Europe. The Slovak scientists have therefore always had and now have a potential to evaluate correctly and objectively the influence of the Gabčíkovo/Nagymaros Project, including its Variant "C", on flora and forests in particular[94]."

The current monitoring sites for floodplain forests are shown on Illus. No. R-7 B.

Soils

12.31 The prime focus of Hungary's assessment of Project impact on soils is on the supply of ground water to the soil layer, which may be drawn up by capillary action for utilisation by natural or cultivated vegetation. It is claimed that 80 km^2 would lose ground water moisture supply on a permanent basis due to the Project[95]. This assessment is once

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90 Hungarian Counter-Memorial, para. 1.144.

91 See, Slovak Memorial, para. 2.17, et seq.

92 See, Vol. III, p. 92.

93 See, ibid., p. 74. The surprising implication at Hungarian Counter-Memorial, para. 3.55, that Slovak scientists have paid insufficient attention to ecology is easily refuted by a simple examination of the Slovak publications in the field.

94 Vol. III, p. 74. As to the current data base, the EC Working Group report of 2 November 1993 concluded (at Hungarian Memorial, Vol. 5 (Part II), Annex 18 (at p. 719): "At present a huge amount of data are collected" - which conclusion appears to be accepted by Hungary in its "Scientific Evaluation". See, Hungarian Counter-Memorial, Vol. 2, p. 3, where reference is made to the "abundance of ... data".

95 Ibid., Vol. 1, para. 1.129. In fact, the figure of 80 km^2 is allegedly only the area that loses sub-irrigation during high water levels in the Danube, i.e., the loss is estimated in an area which anyway only received the sub-irrigation for a few weeks (at best) per year.

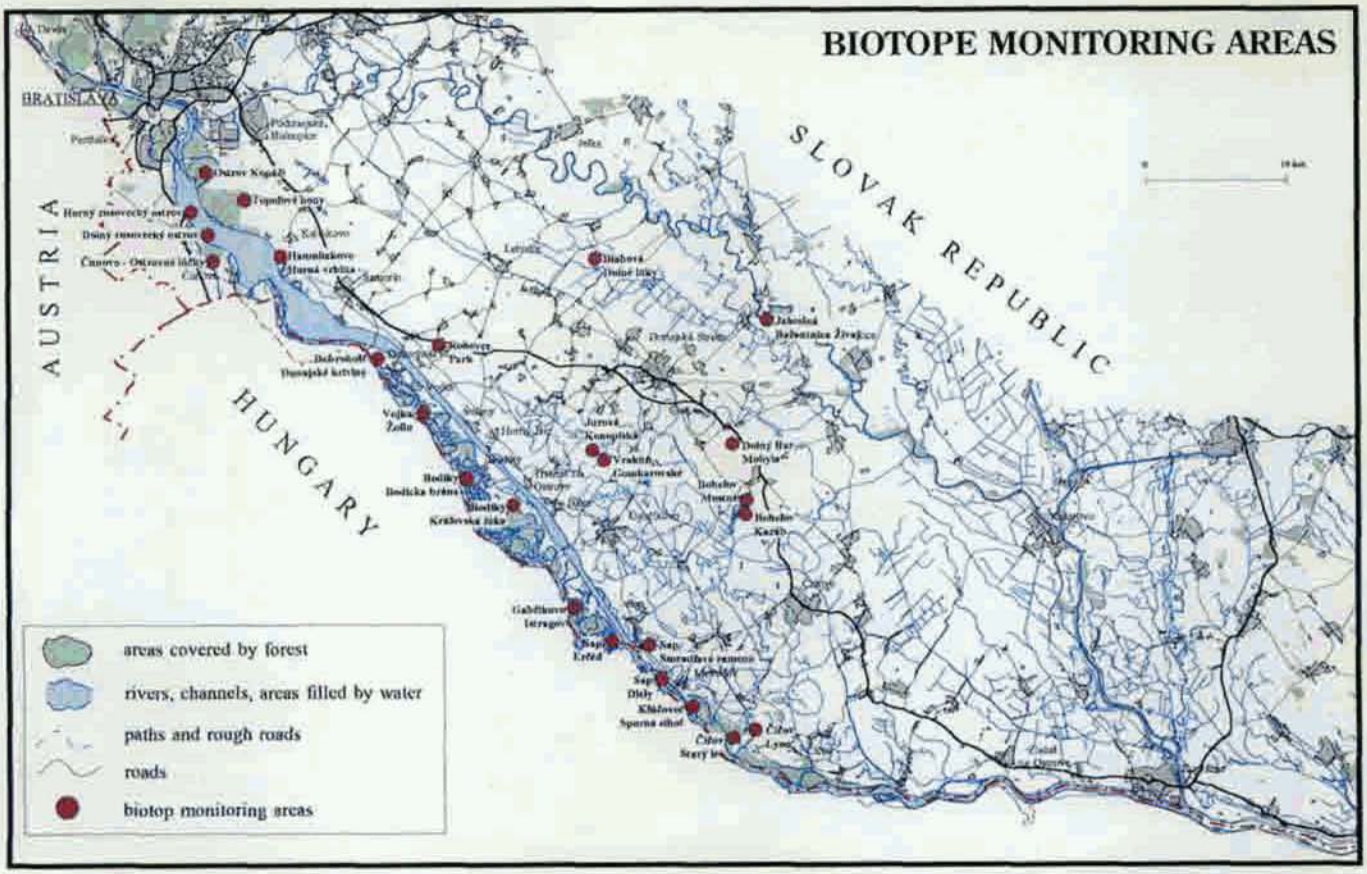

ILLUSTRATION NO. R-7 A

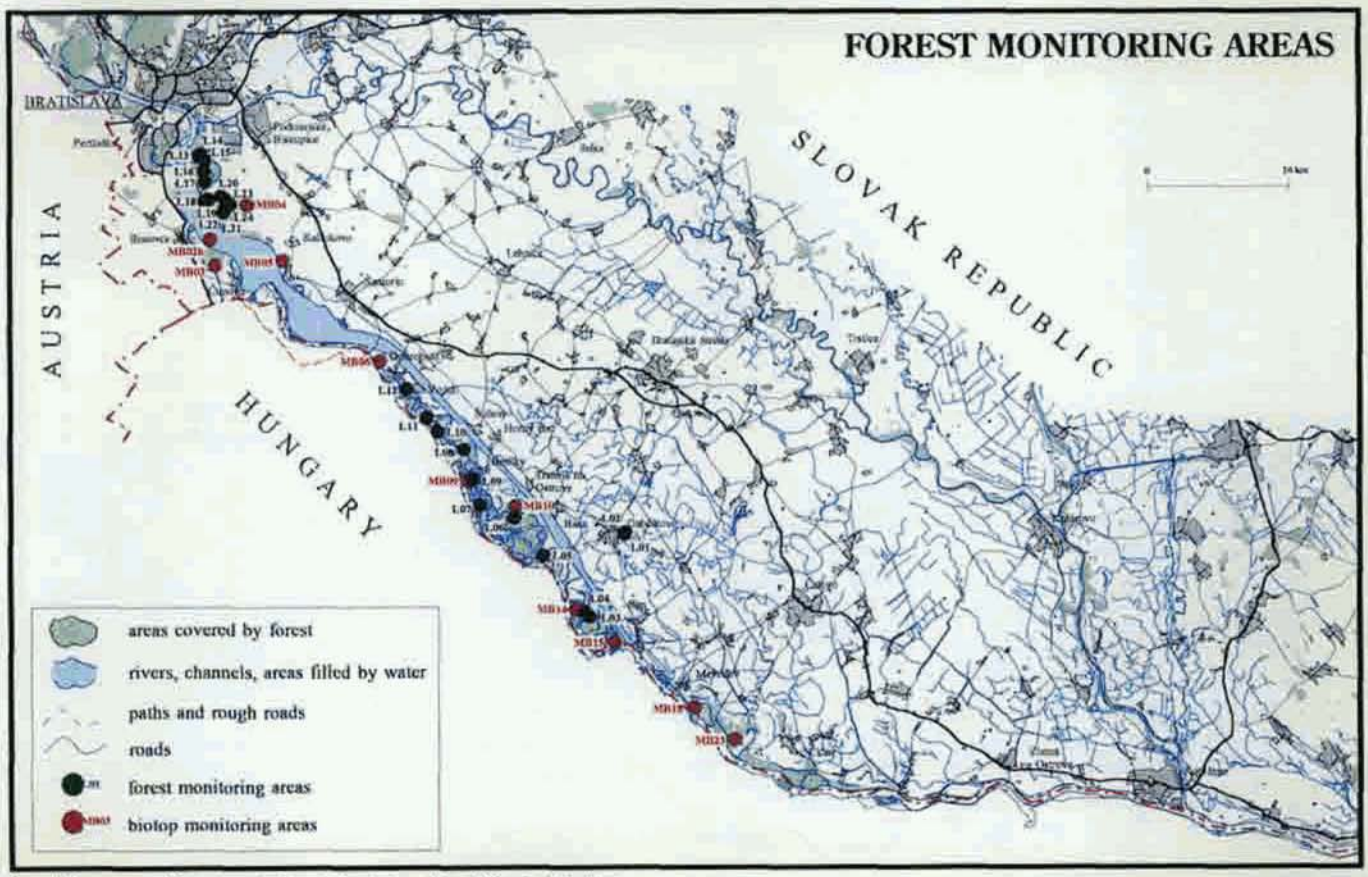

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ILLUSTRATION NO. R-7 B

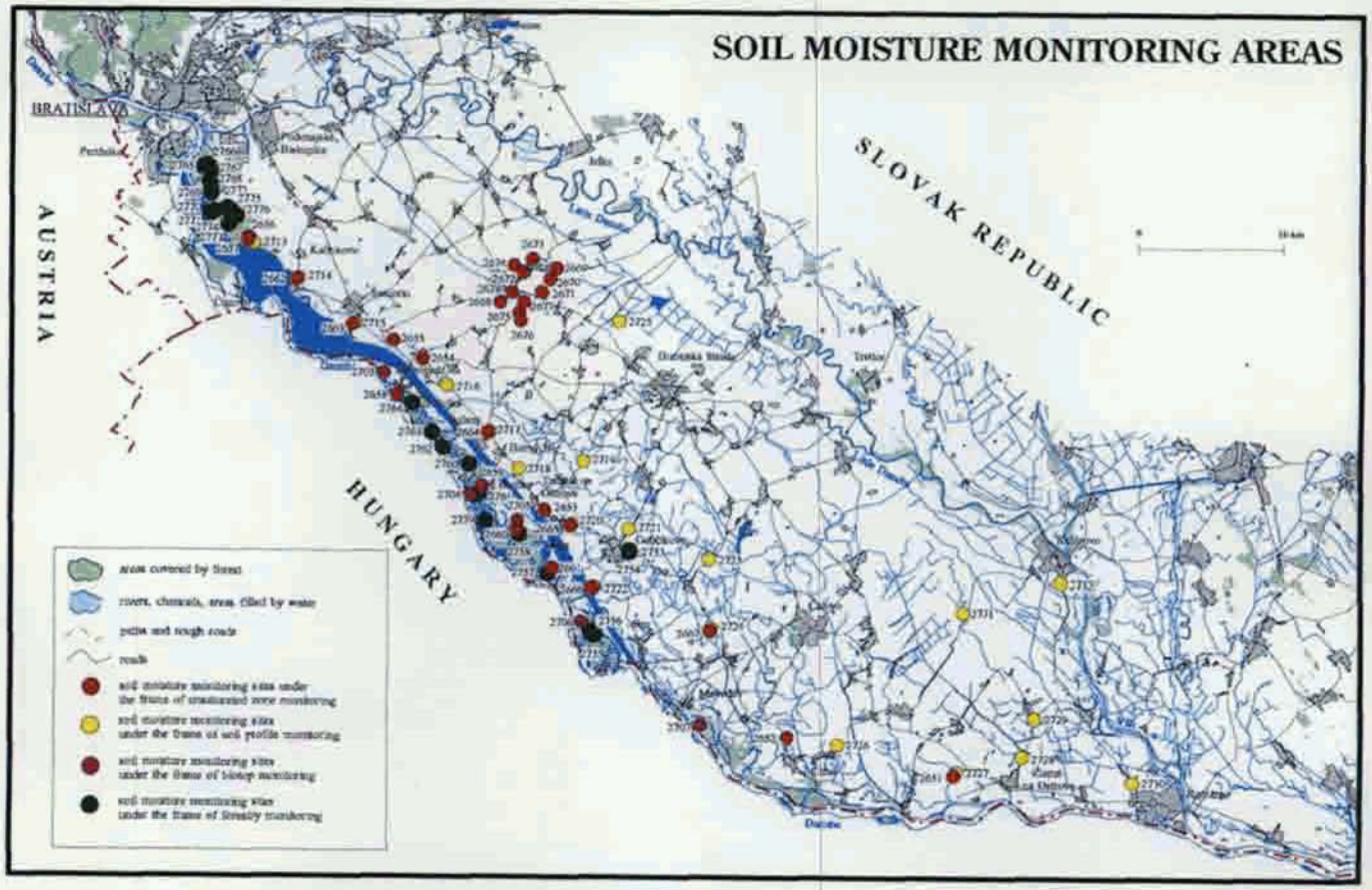

ILLUSTRATION NO. R-7 C

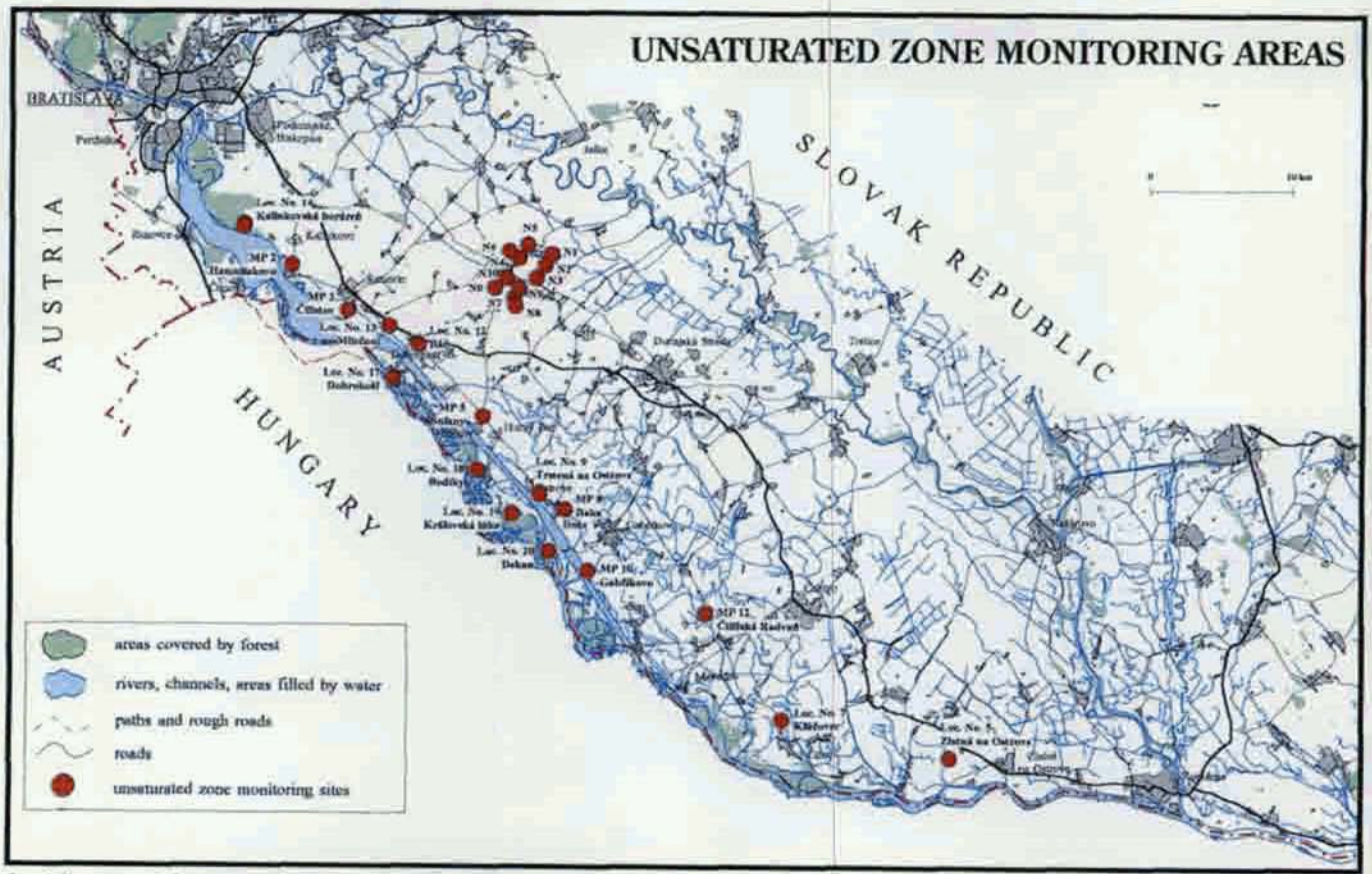

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ILLUSTRATION NO. R-7 D

again based on implementation of the "Original Project", i.e., assuming a minimum flow in the Danube, a minimum flow into the side arms, no account being taken of the additional discharge into the Mosoni Danube, and no allowance being made for the positive impact of underwater weirs. The claim is based on Plate 6b of Hungary's Counter-Memorial. But this Plate shows a reduction in ground water supply to the soil layer where the preceding illustration, Plate 6a, had shown no drop in ground water levels, which is wholly illogical: if there is no drop in ground water levels, there can be no reduction in ground water supply to the soil layer. A reference is also made to Table 3.5 of the "Scientific Evaluation". This is no more convincing: it shows the area "continuously sub-irrigated" prior to Project implementation as 135 km^2 and the area post-Project as 116 km^2, the difference being 19 km^2, not 80 km^2.[96]

12.32 Hungary also claims that there would be "important long term changes" to the chemical regime of the soil[97]. But this prediction again relies on the existence of drops in ground water levels. Such drops would not have occurred if Hungary had not refused to implement the direct recharge into its side arms. Where direct recharge has been implemented - on the Slovak side - there has been no change in the chemical composition of (or water supply to) soils; and, it must be stressed, the soils on the Slovak and Hungarian sides of the Danube are essentially similar.

12.33 In order to illustrate the impact of the Project on capillary transport in Žitný Ostrov, a comparison may be made between the ground water available for the supply to soils in 1962 (prior to bed degradation), in 1992 (prior to the damming) and in 1994 (two years after implementation of the Gabčíkovo section of the Project through Variant "C"). Figures 21-23 of Volume III (Chapter 1) hereto depict this comparison, showing the adverse impact of bed degradation on capillary transport prior to 1992 and the improvement that has followed Project implementation in the whole upper part of Žitný Ostrov[98].

12.34 With respect to the chemical properties of soils, monitoring of soils commenced in 1989 at 20 sites in Žitný Ostrov. The soil monitoring sites are depicted in Illus.

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96 Ibid., Vol. 2, p. 86.

97 Ibid., Vol. 1, para. 1.131.

98 See, Vol. III, p. 12.

No. R-7 C and D. The results at all monitoring sites show that the original soil water moisture regime was preserved (or improved) post-damming, and that the chemical regime is unchanged[99]. There has been no change in the content and quality of humus in the soil (important factors influencing soil fertility), and there is no reason to expect any such change in the future[100]. It may also be noted that within the direct recharge system it is possible to optimise surface water flows so as to maintain and improve soil conditions[101].

12.35 Hungary also devotes one paragraph to the adverse impacts to soils of water level increases[102]. For Hungary, any impact is bad (in spite of the specifically non-natural situation represented by the status quo ante). But this has no sense. First, any increase in the Gabčíkovo section would merely be to the ground water levels of 30 years ago, that is to the more natural state prior to bed degradation. Second, the paragraph in question is lifted directly from the "Scientific Evaluation" - save that the final sentence in the "Scientific Evaluation" has been omitted: "The last problem [salinisation] is not a major problem for the well-drained Szigetköz area, but is a serious environmental hazard on the Slovak side of the Danube, particularly in the low-lying, poorly-drained areas of the Eastern Žitný Ostrov region[103]." Once again, Hungary's only aim is to portray an "environmental hazard", regardless of the fact that it does not exist for Szigetköz and therefore has no relevance to Hungary's legal arguments, and regardless of the fact that salinisation is and has been a long term problem in parts of the Žitný Ostrov and has nothing to do with the Project[104]. In fact, the Project incorporated measures to deal with this problem, allowing for the drainage of the low-lying areas which, coupled with surface irrigation, would lead to the eventual flushing out of excess salt.

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99 Ibid., p. 56.

100 Ibid., p. 55.

101 Ibid., p. 47.

102 Hungarian Counter-Memorial, para. 1.132.

103 Ibid., Vol. 2, at p. 176. Emphasis added.

104 See, Vol. III, p 55.

Flora and Fauna

12.36 Hungary's allegations of adverse Project impact to flora and fauna in the Szigetköz and, in particular, its active floodplain are misleading and greatly exaggerated. A "fundamental change in the original landscape of this floodplain" is predicted[105]. However, the reference to "original landscape" is very misleading for the floodplain referred to was reduced in the 19th Century to a strip along the Danube just 1-5 km wide. Even within this strip, there is no truly original landscape. For example, 64% of the floodplain forest consists of one species type - a hybrid poplar, which is a cultivated and harvested tree, specifically unnatural for the floodplain area. A detailed account of the changes in the flora and fauna in the floodplain as a result of human intervention prior to the damming of the Danube is set out in Volume III hereto, Chapters 4 and 5.

12.37 This is not to say that the flora and fauna of the region, as of 1989 or 1992, were not of great importance. This is not questioned. And precisely because of this importance and its recognition by Czechoslovakia (and now Slovakia) the impacts that Hungary now alleges and, in particular, the imminent "decline in biodiversity" cannot be substantiated[106].

12.38 Once again, Hungary's allegations assume a drop of surface and ground water levels, although a new emphasis is placed on the value of regularly fluctuating water levels and the ecologically harmful nature of underwater weirs[107]. Indeed, Hungary considers that the "determining ecological factor of floodplains is the cycle of flooding and drying", that is surface water fluctuation[108]. Slovakia accepts that fluctuation plays a significant role. But the flooding patterns that existed prior to the implementation of Variant "C" were in no way natural. The creation of the Danube main channel and the construction of flood dykes had led to more frequent and more extreme flooding, which was in turn aggravated by the isolation of the Danube side arms and higher velocities in the main channel.

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105 Hungarian Counter-Memorial, para. 3.63.

106 Ibid., para. 3.60.

107 Ibid., paras. 3.35 and 1.26.

108 Ibid., para. 3.56.

12.39 As the EC Working Group of Experts explained in their last report, sufficient fluctuation for natural ecological requirements can be achieved through the direct recharge system, although this may not allow a duplication of the extreme and un-natural fluctuations in the pre-dam state[109]. This confirms the Group's previous finding that the implementation of Variant "C" allows the floodplain to "develop more naturally"[110]. Indeed, without the G/N Project, it is concluded (in Volume III hereto) that the floodplain forest would have disappeared altogether:

> "Our experience since the end of the 1950s leads us to conclude that due to the decrease of water flows in the side arm system following the regulation of the Danube riverbed, the retention of sediments in the Austrian and German stretch of the Danube and the continuing trend of the Danube riverbed towards erosion, the floodplain forests would eventually have disappeared on the Slovak side of the Danube river. The Gabčíkovo Project and Variant "C" have prevented this regression[111]."

12.40 Furthermore, where direct recharge has been implemented (on the Slovak side), there are signs of a positive increase in biodiversity and of a return to the more natural biodiversity of one century ago due to the multiple succession of new ecotypes. Already, species that had been considered locally extinct have been recorded again - particularly in the shallow areas of the reservoir, the Čunovo and Rusovce side arms, the Biskupicé side arms and in the reservoir seepage canals[112]. For it is not only in the side arm areas that more natural conditions can be restored. The fast flowing main channel of the

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109 See, EC Working Group Report of 1 December 1993, Hungarian Memorial, Vol. 5 (Part II), Annex 19 (at p. 790). "Reestablishing the dynamics of ground water level fluctuations will to [a] large extent be possible downstream the reservoir."

110 See, EC Working Group Report of 23 November 1992, ibid., Annex 14 (at p. 418).

111 See, Vol. III, at p. 87. Hungary contends, nevertheless, that "93% of the tree species in the floodplain ... will with all likelihood dry out as a consequence of Variant C". Hungarian Counter-Memorial, para. 3.75. This claim is wholly without foundation and is considered at para. 13.09, et seq., below.

112 See, Vol. III, pp. 81-86. The conclusion to Chapter 4 of Vol. III notes (at p. 87) that in relation to biodiversity:

> "As to plant biodiversity, there is no proof as to the lowering of the phytogenofund from the experience of two or more years since the damming. To the contrary, new biotopes may appear as a result of the water recharge into the side arm system in the inundation area (Dobrohošť - Palkovičovo) and in the huge limozic and littoral zone around the Hrušov reservoir, leading to a presumption in the favour of increased biodiversity."

Danube in the pre-dam state was not a natural environment and had resulted in the destruction of the main benthic (river bottom) and littoral communities. The typical flora and fauna of the Danube river delta had been preserved to an extent in the side arms, but the communities there were being harmed by lack of water flow. The Project increases flow into the side arms and reduces flow velocity in the main channel by around 30%. This allows the regeneration of the typical inland delta species. The creation of the reservoir both allows the revitalisation of the upstream river branches (at Kopáč, Rusovce and Čunovo - where there has been a rapid regeneration of water organisms) and provides a vast new habitat, of particular importance in the littoral zone[113].

Birds (Avifauna)

12.41 The Hungarian Counter-Memorial and its "Scientific Evaluation" pay little or no attention to avifauna (the fauna of birds), although this constitutes one of the most important indicators of the state of the environment and of changes to it. It is particularly appropriate to test Hungary's "Scientific Evaluation" as concerns fauna in general by examining avifauna: first, due to their mobility, birds are able to react immediately to environmental changes; and second, birds are relatively easy to identify and count. Several Slovak scientists have therefore concentrated on this exercise, counting and observing avifauna and recording any changes in behaviour or habitat. The results appear in the specific data and conclusions to be found in Chapter 7 of Volume III.

12.42 Of most importance to this analysis are the field trips made by bird experts in the region of the Danube where the Gabčíkovo section of the Project is located - including the old Danube, the Slovak side arms, the bypass canal and the reservoir - in the period from January to August 1994[114]. Specifically identified were 52 different species of aquatic birds, on which the survey concentrated, each of which species is detailed in Chapter 7 of Volume III, together with pertinent observations based on the particular sightings. Existing data has also permitted a comparison to be made between the presence and number of species

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113 See, Vol. III, pp. 101-102 and 111-112.

114 It should be noted that the Slovak studies concern only aquatic birds. Although a whole-year cycle is needed to arrive at more definitive conclusions, a number of significant findings were made regarding the impact of the Project on aquatic birds.

before and after damming. In total numbers, as high as 1,800 individual birds in a particular species were recorded in March 1994 - and 17,000 in August. A distinct increase in overall numbers of birds in the region was observed, although a decrease was registered in the old Danube. One interesting observation was the tendency of some species, such as the wild duck, to prefer the reservoir - an attractive source of food for these birds - to the old Danube - as a wintering place and, in some cases, for nesting. Other birds who prefer the reservoir are teals and divers.

12.43 The most abundant species seen in this region were the wild duck, the white swan and the cormorant. But 13 rare species were also identified. Listed below are some of the more interesting sightings of birds:

- In August 1994, a brood of 72 grey heron, and a flight of 15-20 purple heron, were noted in the branch system;

- Also in August 1994, 142 white egret and 68 black stork were sighted; and it was noted that the white stork was a regular inhabitant of the branches and the old Danube, while the white swan appeared regularly in all localities;

- Wild duck were seen in all localities in large numbers; on 3 February 1994, 1,500 wild duck were seen swimming in the bypass canal about 600 metres from the Gabčíkovo hydroelectric plant.

12.44 Photographs of some of these birds as sighted are shown in Illus. No. R-8 A, B, C and D. In the past, the purple heron had seldom been sighted in the region; but during the 1994 field trips an increase in the number of these birds was observed. And a large increase of white swan was recorded - a bird that was quite rare in the 1980s and early 1990s. Four individuals of the relatively rare wading bird, the avocet, were sighted in May 1994. All in all, there has been recorded an increase in total numbers of birds, an increase in numbers of species and an increase in rare species. In short, Hungary's thesis that the G/N Project would drastically affect the fauna of the region is directly shown to be wrong with the respect to avifauna. The main problem for the birds is, in fact, the increased human activity and urban settlements in the region, not the changes brought about under the G/N Project, which has

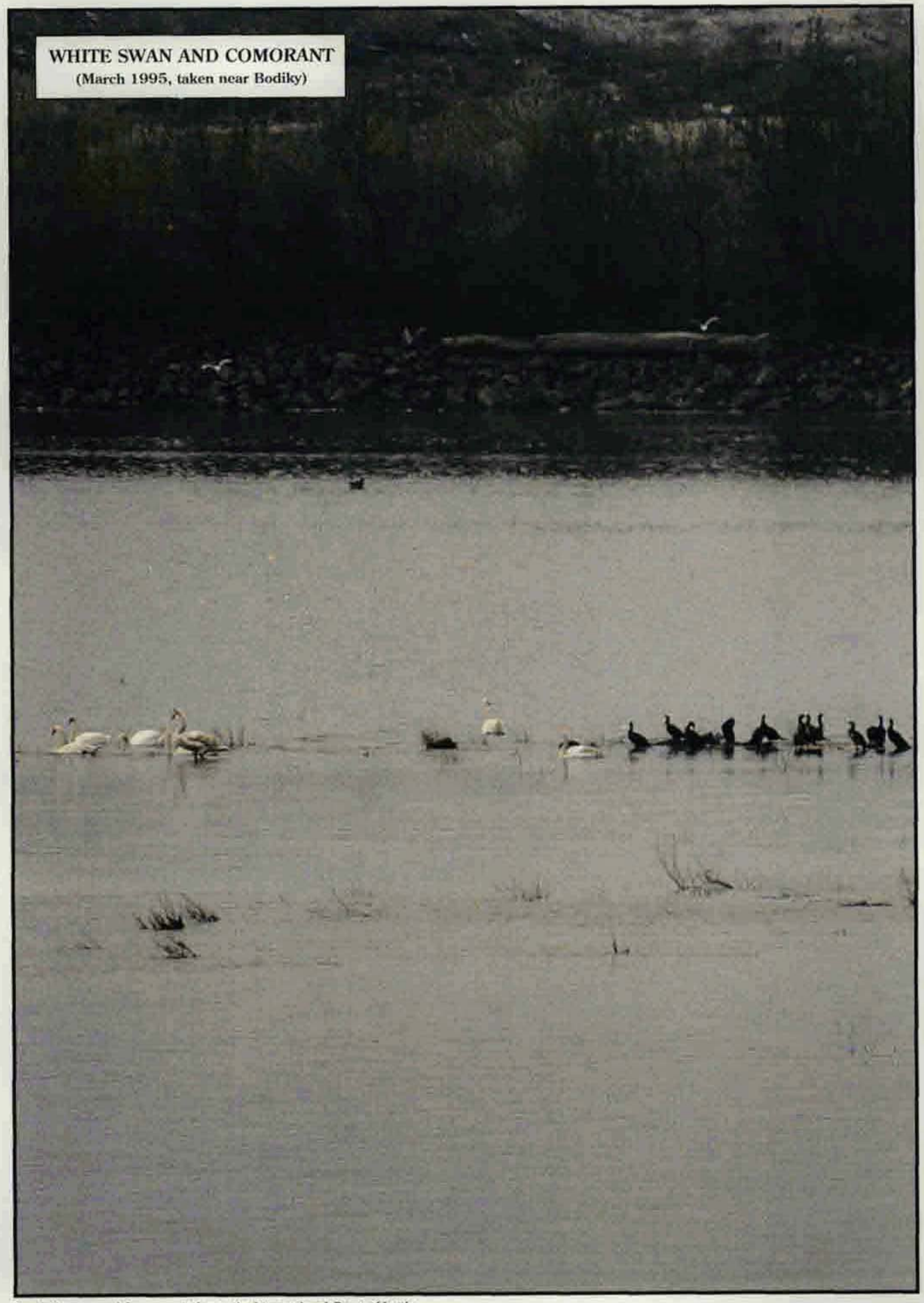
ILLUSTRATION NO. R-8 A

Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-8 B

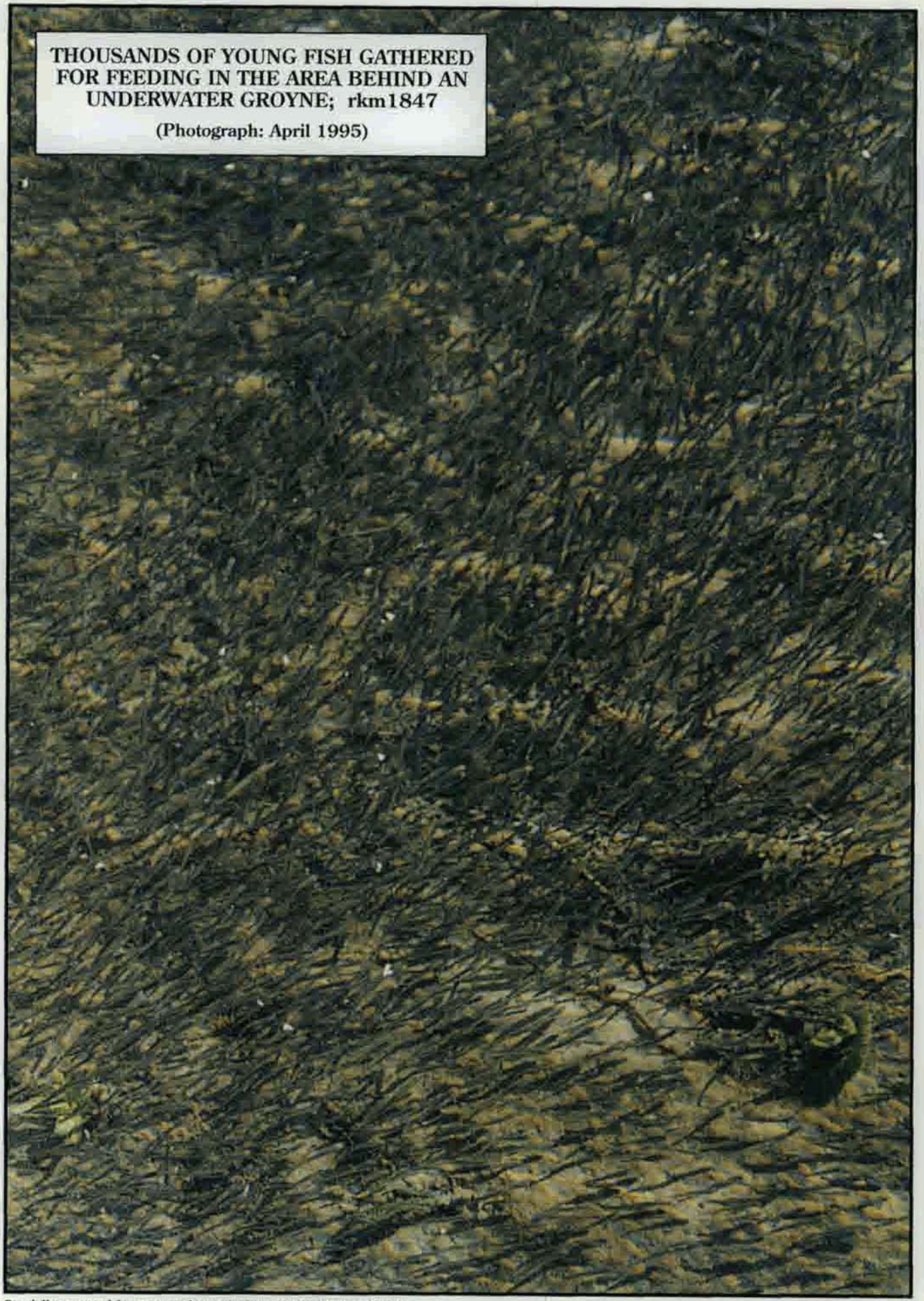
Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-8 C



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-8 D



THOUSANDS OF YOUNG FISH GATHERED FOR FEEDING IN THE AREA BEHIND AN UNDERWATER GROYNE; rkm1847

(Photograph: April 1995)

Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-9

created different habitats favoured by different species. In the downstream part of the Slovak branch system (rkm 1820-1821) a number of winter gathering places have been created away from human activity with encouraging results.

Fish (Ichthyofauna)

12.45 The construction of underwater weirs in the old Danube will also have a long term beneficial impact on fauna and particularly on fish. Weirs certainly do not entail "a loss of natural ecological functioning" as Hungary claims[115], but rather allow for a further increase in habitat diversity by offering an increased variety in water flow rates, water depths and velocities[116]. In areas behind the weirs and close to the riverbank, velocities would decrease. This would provide a favourable habitat for young fish, just as the areas behind the groynes (stone jetties)that were erected in the main channel riverbed for navigation purposes. The suitability of this new habitat is shown in Illus. No. R-9, where large gatherings of young fish - so dense that they look like underwater vegetation - are feeding in the lower velocity area behind a groyne. By contrast, in the centre line of the underwater weir, higher velocities would remain[117]. This variety of velocities and potential habitats is far closer to the river's natural state than the old high velocity main channel. A further advantage is that riverbed degradation

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115 Hungarian Counter-Memorial, para. 1.126.

116 Hungary does not contest the beneficial nature of such variety, which it describes in its "Scientific Evaluation" as forming part of the natural system: "The ever changing system of side branches with the deposition, scouring and transportation of sediment accompanied by a frequently inundated floodplain, is responsible for the very great diversity of habitats that existed and still exist in this river section. Scoured reaches of great depth, shallow fords, dissected river arms, etc., are adjacent habitats. The fluctuation of discharges and water levels was and still is a vital prerequisite for the existence of all types of habitats in the wetlands in this Danube section." Ibid., Vol. 2, p. 7. The creation of the main channel and the isolation of the side arms had destroyed this habitat variety.

117 There is, therefore, no substance to Hungary's claim that underwater weirs would create severe colmatation problems such as to "limit the groundwater recharge function of the river". Ibid., para. 3.104. Hungary's sole substantiation for its assertion is the "effects already observed in the side arm system". But, as noted at para. 12.22, above, these "effects" show precisely the opposite, i.e., that there would be no colmatation in the old Danube due to underwater weirs. This is considered in greater detail in the Slovak Counter-Memorial at para. 7.40, et seq. There it is noted that flows of approximately 50 m^3/s (with flow velocities of less than 0.25 m^3/s) have been sufficient to prevent colmatation in the Slovak side arms and to ensure good recharge into the aquifer (as confirmed by the EC experts), and that there is therefore no reason to suppose that higher flows into the old Danube (with higher velocities, even if underwater weirs are constructed) would lead to colmatation.

will be halted, as Hungary admits[118]. The riverbed will no longer be a smooth, eroded surface, and riverbed bottom irregularities will develop, leading again to an increase in habitat diversity[119].

12.46 Hungary confidently predicts change, disappearance and replacement for the ichthyofauna (fish fauna) of the pre-Project state[120]. The main substantiation for this is a 1981 study by the Slovak scientist J. Holčík[121]. This study had importance in 1981, but less so today, because it was based on the discharge of just 50 m^3/s into the old Danube and no direct discharge into the side arms. Thus its conclusions are based on input data that have changed radically. Hungary also fails completely to take into account the decline in fish numbers and fish species long pre-dating the "decline in fish populations", which it now predicts as a result of Project implementation. The causes of such decline have nothing to do with the Project and have been precisely identified by the Mixed Commission for the application of the 1958 Danube Fisheries Convention (of which Hungary is, of course, a member).

12.47 As stated in the protocol of the 29th session of the Mixed Commission (meeting on 3-10 April 1989):

> "The hydro-meteorological conditions were generally unfavourable in the mentioned period (1987 and 1988). They were characterised by a strong and long winter 1987, short period of inundation with maximum in the last part of April 1988. These unfavourable conditions together with higher pollution influenced negatively [the] reproduction and growth of fish, especially economically important sorts of fishes. The Mixed Commission stated that less

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118 Hungarian Counter-Memorial, Vol. 2, p. 5.

119 See, Vol. II, hereto, Comments to Hungary's "Scientific Evaluation", pp. 153-154. As to Hungary's claim that the EC Experts "acknowledged the danger and futility of building weirs if the Danube were only to receive a small flow" (Hungarian Counter Memorial, para. 1.126), this is simply incorrect. In fact, the EC Experts noted that conditions would be unsuitable for one fish species, the streber. Hungary may not consider this overly significant given that, by the Agreement of 19 April 1995, it has now accepted that an underwater weir be built with a flow into the old Danube of 400 m^3/s, which Hungary would apparently consider to be low.

120 Hungarian Counter-Memorial, para. 1.156. For a more detailed rebuttal of Hungary's claims, see, Vol. II, Comments to "Scientific Evaluation", pp. 187 - 195, and Vol. III, Ch. 6.

121 See, also, Hungarian Counter-Memorial, para. 3.57, and Vol. 2, pp. 143, 144, 190 e.g. It is a distortion to claim that according to Holčík J., "58% of the side arm habitats were to be lost", when Holčík's predictions were limited to habitats for ichthyofauna, not to side arm habitats in general.

> fish was caught in the Panonian basin, especially in the joint Czechoslovak-Hungarian section of the river due to worsened ecological conditions[122]."

The protocol of the 30th session of the Mixed Commission (held on 2-6 April 1991) recorded that:

> "The hydrological conditions were especially unfavourable in the mentioned period (1989 and 1990). They were characterised by low water level and higher pollution, which influenced reproduction and growth of economically important fish species. The Mixed Commission stated that due to [the] ecological situation, the catch substantially decreased ...[123]."

It continued:

> "The Mixed Commission listened to the reports of the Hungarian, Romanian, Czechoslovak and Yugoslav sides on results of fisheries in the Panonian basin and stated that the catch of [the] majority [of] fishes in 1989 and 1990 decreased due to the low water level in the Danube which caused the isolation of branches. The Hungarian side drew attention to the fact that the worsening of conditions for fishes in the Danube was connected not only with worsening of hydrological conditions, but also with the construction of water works on the Danube in Germany and Austria which limited migration and development of higher number of economically important species[124]."

12.48 The Project would act (and Variant "C" has acted) to reverse this decline[125]. First, a huge new habitat is created in the reservoir, where species composition and zooplankton biomass are higher than in the Danube main channel. The abundance of food for ichthyofauna leads to the increased occurrence of economically preferred species of fish. Second, in the reservoir seepage canals the lack of temperature extremes, good water quality and high quantity of submerged vegetation create good conditions for a rich benthic zoocenosis and subsequently an ichthyocenosis composed of about 25 species, including salmonids. Third, in the tailwater section of the bypass canal, similar conditions are created as

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122 Annex 9, hereto.

123 See, Annex 10, hereto.

124 In paragraph 2 of each protocol, the continuing decrease in fish catch was recorded. The total catch in 1987 was 12,849.5 tonnes and in 1988 13,406.1 tonnes. In comparison with the average catch in the years 1985 - 1986, i.e., 14,219.0 tonnes, the catch in 1987 and 1988 was lower by 1,370.2 tonnes and 813.6 tonnes respectively. An even greater decrease was recorded for 1989 (9,983.9 tonnes) and 1990 (just 8,850.1 tonnes).

125 See, Vol. III, pp. 111-117.

in the main channel prior to damming. Fish species preferring higher velocities and deeper waters are established there (24 species in total, in 1994) and acceptable conditions for spawning are provided.

12.49 Finally, the aquatic habitats in the old Danube and in the side arms are improved. In the pre-dam state, the main channel was characterised by a low ichthyomass due to the high water velocity, the constant erosion of the riverbed, the high water turbidity and the low density of food organisms[126]. Post-damming, the old Danube has a lower flow velocity, a more stable riverbed and the fauna of macrozoobenthos (aquatic animals feeding on the riverbed bottom) is richer. The food base is therefore improved and fish conditions generally more favourable. In the side arms, the number of predatory species has increased and, due to the guaranteed water flows, the danger of eutrophication is greatly reduced alongside anaerobic conditions and resultant fish destruction. Further, it is now possible to regulate water flows so that optimum fish conditions prevail:

> "The intake structure of the branch system makes it possible to control water levels in the branches, i.e., to control the flow and length of time (according to water temperature), during which the spawning and early development of young specimens and their nutrition can take place. This is important from the point of view of the phylogenetic adaptation of fishes, in that it develops their food basis and reduces mortality of young specimens especially in the winter period. Thus, the conditions of fishery will be improved in this section of the river[127]."

It is now possible to predict a threefold increase in fish catch alongside the change in species composition in favour of economically preferred species. The huge decrease in "available fish production" claimed by Hungary[128] relate only to its side arm areas which Hungary (prior to the Agreement of 19 April 1995) had, by political decision, deprived of the increased water supply that the Project provided for.

12.50 As to the "considerable fish destruction" allegedly recorded on 30 July 1994 as a result of "a huge volume of water [being] flushed into the bypass canal at

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126 See, ibid., p. 110. As to the improved, current status, see, ibid., p. 94.

127 Ibid., p. 117.

128 Hungarian Counter-Memorial, para. 3.78.

Gabčíkovo"[129], Slovakia must point out that no such destruction was noted on the Slovak side of the Danube, nor was any destruction reported by Hungary to the specialised institutions in Slovakia. Further, there was no huge volume of water flushed into the bypass canal, as alleged by Hungary. The water level on 30 July 1994, as for the days immediately before and after, was stabilised in the reservoir at 129.03-129.17 asl. No huge volume could be flushed down without a corresponding reduction in the reservoir water level[130].

12.51 Hungary's claim that "15 tons of fish perished" is not substantiated and the on-site evidence indicates that it is wrong. Slovak scientists carrying out sampling tests in the old Danube in January 1995 noted shoals of thousands of immature fish (as depicted in Illus. No. R-9): all the rheophile species (those preferring stronger currents) may be observed and were spawned in the summer of 1994. This is a clear indication of favourable fish conditions, inconsistent with any claim of large-scale destruction.

12.52 It is also noted that Hungary pays little attention to the importance of recreational fishing. In the Bratislava region alone, approximately 10,000 people are licensed to fish the Danube for sport and there is no doubt that conditions for recreational fishing have greatly improved due, not least, to the creation of the reservoir, which can be stocked with fish. Along with the profusion of white swans who have gravitated to the reservoir, as well as the teal and the diver, the fishing that the reservoir will provide will enhance this region environmentally for the people of the region.

12.53 Hungary's examination of adverse impacts to fish concludes by reciting the findings of its "Scientific Evaluation". These have been responded to in Volume II hereto. Hungary's erroneous allegations and Slovakia's response - based on detailed monitoring of actual impacts - are given below.

1) Blocking of the branch systems: Loss of floodplain habitats for spawning, nursery, feeding and wintering result in a considerable decrease of fish production. Fishery potential of the Szigetköz area will decline. Lack of large-scale fish recruitment has detrimental effects on the fish populations of the Middle Danube for a few hundred kilometres downstream.

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129 Ibid., para. 3.79.

130 Water discharge into the old Danube was also stable and water temperature was normal. See, Vol. III, pp. 120-121.

This is directly disproved by the experience in the Slovak side arms, which shows that the diversion of the Danube's waters coupled with the direct supply into the side arms has had an overall beneficial impact on fish populations, which will further improve if remedial measures dependent on Hungarian cooperation - such as the construction of underwater weirs in the old Danube - are implemented[131].

2) Changes in flood regime: Subsequent reduction of habitat diversity, loss of species, diminishing productivity at community level due to the switch from the Alpine character flood regime to stable system dynamics.

The flood regime prior to 1992 was far from natural[132]. Monitoring on the Slovak side of the Danube has shown that there has been an increase in habitat diversity (including the new habitats provided by the reservoir and the tailwater canal), large potential increases in productivity and no loss of species[133].

3) Decrease of flow rate: Shifts from rheophilic to limnophilic communities in the side-arms. Changes in flushing rate resulting in accumulation or low dilution of toxic wastes or anaerobic conditions leading to fish mortalities.

The direct supply of water into the side arms ensures an increase in flow rates and the disappearance of anaerobic conditions. Fish losses due to eutrophication in the side arms will decrease. Polluted waters (if any) will be more quickly diluted due to the higher flows in the side arms. The previous high flow rate in the main channel was by contrast excessive and not conducive to a healthy fish population[134].

4) Decrease in suspended silt load: Water transparency is higher. Increase in density of submerged aquatic vegetation leads to an increase in the abundance of phytophil fish. Changes in fish community, that is a reduction in number of the non-visual predators and omnivores. Risk of fish mortality due to anaerobic conditions caused by eutrophication.

The prevalence of non-predator species over predator species (which have a higher economic value) long pre-dated the damming of the Danube[135]. The new habitats provided in the reservoir, the side arms and the tailwater canal will reverse this situation[136].

5) Diversion of water into the bypass canal: The higher discharge in the tailrace canal directs the shoals of fish during their spawning migration to the tailwater of the Gabčíkovo Barrage, which is an insurmountable barrier and the bypass canal is an unsuitable habitat for spawning.

Hungary tries to make a criticism that would be equally (in fact, more) applicable to all the other hydroelectric projects on the Danube. The criticism makes no sense here as the old Danube, the side arms and the tailwater canal (for species who prefer greater depths) all offer good spawning grounds. For good fish conditions it is far more important to re-

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131 Ibid., pp. 111-116.

132 Ibid., p. 9.

133 Ibid., pp. 111-116.

134 Ibid., p. 110-111. As to anaerobic conditions, see, ibid., pp. 24-25.

135 Ibid., p. 111.

136 Ibid., pp. 111-116. As to eutrophication, see, ibid., Ch. 2.

establish the inter-connection between the side arms and the old Danube than a migration route which in any event could go no higher than the next dam[137].

SECTION 3. Seismology and Earthquake Engineering[138]

12.54 Even though Hungary's line of argument based on earthquake risk is not an argument based on environmental risk, many of the same flaws that characterise its arguments based on alleged environmental risk are to be found here:

- Hungary's arguments are based on a sort of "scare tactic" founded on a supposed lack of study of the supposed risks;

- Second, earthquake risk was an issue first raised by Hungary only at the time of its suspension of works at Nagymaros; prior to then, seismology and earthquake engineering had been dealt with through joint study, discussion and agreement in which the various technical means of assessing and, where necessary, reducing any such risks had been addressed in the fashion normal to carrying out engineering projects of this kind, under the modalities existing for carrying out the Treaty;

- Third, although Hungary argues that an unanticipated risk of earthquake damage falls within the concept of "necessity" under international

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137 Hungary greatly (and deliberately) over-emphasises the importance of long distance fish migration. See, para. 6.59, et seq., above. See, also, the EC Working Group report of 1 December 1993, which stated: "Migration can be made possible either through fish passes or through direct flows between the main river and the side branches during some periods." Hungarian Memorial, Vol. 5 (Part II), annex 19 (at p. 780).

138 In responding to Hungary's allegations as to earthquake risk, Slovak has submitted the following:

- With its Counter-Memorial, a study by the VVNP Research Oil Corporation for exploration and production of Bratislava (Mahel, et al., Annex 26, thereto); the extensive list of references that support the findings of this study forms Annex 11, hereto;
- With this Reply: (i) a Geotectonic Investigation of the Central Part of the Danube Basin (Vol. III, Ch. 9); (ii) an Appraisal of the Seismicity of the G/N Project (Vol. III, Ch. 10, Part I) and a Special Assessment of Hungary's allegations concerning the so-called "Győr-Becske" line, first proposed in 1994 by Hungarian scientist Balla in a paper that is part of Hungary's "Scientific Evaluation" (Vol. III, Ch. 10, Part II); and (iii) an Engineering and Geological survey (ibid., Ch. 11).

law[139], there was always more than enough time before either section of the Project became operational to correct any alleged lack of studies and to address any problem revealed[140];

- Fourth, the only concrete problem identified in Chapter 6 of Hungary's "Scientific Evaluation" in respect to Nagymaros did not concern earthquake risk at all and, in any event, was easily remediable[141];

- Fifth, the analysis, in total ignorance (or disregard) of the facts, assumes that the Treaty parties followed 1965 standards for construction to reflect earthquake risk that were soon outmoded and never updated by the Treaty parties;

- Sixth, Hungary's 1994 analysis in the end only concludes that there were:

> " ... reasonable grounds for concern, review and reassessment of risks at the time that Hungary suspended construction works at Nagymaros and Dunakiliti and later terminated the Treaty ... [142]."

But this fails to explain why Hungary never initiated the sort of studies that it now argues were considered necessary in 1989, either alone or in conjunction with its Treaty partner.

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139 Although this is not a basis for treaty termination, as Slovakia has shown above. See, para. 4.07, et seq., above.

140 The time available in which to conduct such studies being approximately five years in the case of Nagymaros; and over 18 months in the case of Gabčíkovo. See, paras. 7.34, 7.57 and 8.35, above. The willingness expressed by Hungary in October 1989 to proceed with the Gabčíkovo section on the basis of environmental and technical guarantees reveals that Hungary at that time considered earthquake risk as something that could be dealt with under the Project and not as a reason for the abandonment of the Project. See, para. 8.13, et seq., above.

141 See, Vol. II, Comment 2 to p. 218.

142 Hungarian Counter-Memorial, para. 1.170 (fn. omitted). After two years of study, "these concerns have still not been alleviated", according to Hungary, because Hungary refuses to accept the evidence that shows its "concerns" to be unfounded.

A. Prior Study; Updated Standards; the Extensive Experience of Czechoslovakia (and Slovakia) in the Construction of Power Projects

12.55 Hungary's notion that the G/N Project was constructed and prepared for putting into operation at the end of 1989 without adequate study of earthquake risk and based on old-fashioned 1965 standards and analyses is totally incorrect[143]. The Czechoslovak and Hungarian scientists and engineers working on the Project kept abreast of the major strides being made in seismology starting in the late 1950s. Deep drilling techniques and other seismic methods of exploration, developed principally by the oil companies who conducted research throughout the area, led to new views about the structuring of the Danube Basin in which the G/N Project is located and to the construction of tectonic maps with the help of oil geologists in 1984 (Mahel), in 1985 (Fusan) and a Hungarian map in 1987 (Füllöp-Dank)[144].

12.56 In 1980, Czechoslovak technical institutions completed the seismic microzoning of the area. In 1982, an assessment was made by Hydroproject Moscow based on the most recent standards, supplemented by an assessment of seismic stability, all as part of the normal engineering process of constructing a project such as this, involving continual adjustments and verifications. All this research was reflected in revised design and engineering norms and in a decision to remove the subsoil under the dykes, as is described in detail in Chapter 11 of Volume III hereto.

12.57 Hungarian institutions, scientists and engineers were fully involved in this on-going process. For example, the determination of seismic load was discussed with Hungarian experts, Polko and Mistéthy[145]. Major Austrian and Yugoslav firms with extensive experience in water projects had been retained. The Skoda Works of Czechoslovakia, one of the world's preeminent engineering companies, was a key member of the technical team, as were Czechoslovak engineers and scientists who had gained extensive experience in the construction and operation of many other river projects.

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143 See, Vol. II, Comment 1 to p. 201.

144 Slovak Counter-Memorial, Annex 26 (pp. 386-387).

145 See, Vol. II, Comment 1 to p. 201.

12.58 Moreover, although Hungary had ample time in 1989 to correct any supposed deficiencies in the study and assessment of earthquake risk before any such risk might arise, no such studies were undertaken, commissioned, or even proposed by Hungary. The Bechtel report that Hungary commissioned in July 1989 contained no earthquake risk or engineering assessment, for Hungary had not requested it[146]. However, the 1989 studies that Hungary commissioned to be prepared by Ecologia contained (in the second report) an engineering assessment of the Project by an American engineer[147]; he praised the high quality of the engineering work, concluding that:

> "The Project as presently designed is sound from an engineering viewpoint. All the studies customarily associated with such a project appeared to have been made[148]."

Certainly a satisfactory appraisal like this would not have been possible if the Project contained such an obvious engineering defect as the failure to take seismic considerations adequately into account.

B. The Flaws in Hungary's 1994 "Scientific Evaluation" of Earthquake Risk

12.59 It has been possible to respond to Hungary's assessment of earthquake risk in the short time allowed (it being remembered that Hungary's contentions were disclosed only with the filing of its Counter-Memorial) because, in the course of the continual updating customary on projects of this kind, additional extensive seismic research had been conducted by Czechoslovakia (and Slovakia) during 1991-1994 to reflect the possibilities opened up by new technology and advances in science[149]. In fact, in its assessment, Slovakia (with some outside assistance from a U.S. company in computer analysis in light of the short time

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146 In contrast, the study commissioned by Czechoslovakia during the period that was undertaken by the Canadian experts, HQI, directly addressed this issue. It is regrettable that Hungary and its experts, by quoting part of the HQI report out of context, have attempted to conceal the fact that the HQI report (i) expressly stated that the preliminary studies of earthquake risk met current international standards and (ii) failed to indicate the slightest reason on account of earthquake risk to delay or modify the Project.

147 Professor Harry Schwartz of Clark University, Worcester, Mass. Hungary's pleadings have cited the Ecologia reports with approval.

148 Hungarian Memorial, Vol. 5 (Part I), Annex 6 (at p. 87).

149 Slovak Counter-Memorial, Annex 26 (at p. 390, et seq.).

available) obtained and processed actual data in the region concerned and constructed 500 different geological and geotechnical models for various geological environments of the area. In contrast, Hungary's analysis has used information obtained in other areas such as Italy and Australia for purposes of extrapolating its theoretical analysis, which relies on inadequate or incorrect data.

12.60 Slovakia's detailed technical analysis is to be found in Volume III hereto; and specific responses to allegations appearing in Hungary's Volume 2 may be found in Volume II hereto. Therefore, only certain examples of major weaknesses and flaws in Hungary's evaluation will be mentioned here. But Slovakia wishes to bring to the Court's attention that it has expended a great deal of the time of its top experts, as well as money, in this review of Hungary's earthquake risk thesis - a thesis that, at the end of the day, can only be described as frivolous.

The Komárno Earthquake of 1763: The New Authoritative Reassessment Ignored by Hungary

12.61 The Komárno earthquake of 1763 is the only recorded major seismic event in the region of relevance to the G/N Project. Hungary bases its evaluation of earthquake risk on the existence of this earthquake and the assumption that it can be established as having had a magnitude (M) of 6.0-6.5 on the Richter scale[150]. Despite all the scientific works referred to in Hungary's earthquake evaluation, nowhere in either the text or the annexed references section is there to be found the authoritative new study of this earthquake published in 1991 by Bune (a Russian), Brouček (a Czech) and Szeidovitz (a Hungarian). This study concludes that the 1763 Komárno earthquake's magnitude and intensity have been overestimated and that, on the Richter scale, it did not exceed M=5.7. This would correspond to an intensity of 8.5 MCS, but this value of intensity would be valid for

150 The validity of scientific calculations of the kind involved in earthquake prediction naturally depend entirely on the correctness of the factual inputs from which they are derived. To simplify a rather technical discussion, it may be said that there are three components to measure in studying an earthquake: (i) magnitude - most widely expressed today by using the Richter scale; (ii) its intensity, expressed either on the MCS or MSK 12-digit scale (conversion from magnitude to intensity can be made approximately for example M 6.5 on the Richter scale = 9 $\pm$1 MCS or 9 $\pm$1 MSK); and (iii) its acceleration, the most important component in determining the seismic load (the key factor in earthquake engineering). "M" is magnitude; "I" is intensity.

Komáron, but not for Gabčíkovo, 45 km away (the extent of distance from an earthquake's epicentre being very significant in this region).

12.62 In earthquake analysis, every decimal point is important; a mere mathematical comparison of figures does not reflect the very substantial differences in magnitude and intensity between, on the one hand, M=6.5 and I = 9 ±1 MCS; and on the other hand, M = 5.7 and I = 8.5. By ignoring the most up-to-date and widely accepted assessment of an earthquake on which its analysis depended, Hungary's analysis is fundamentally flawed from the outset.

Hungary's Greatly Exaggerated Calculation of the Key Factor of Acceleration

12.63 But it is the calculation of the most important component, acceleration, where Hungary's results are most exaggerated - seemingly almost to fit the demands of Hungary's case before the Court. Slovak experts have calculated the accelerograms of expected earthquakes, using most advanced techniques, from which 500 different models were constructed for different sites within the G/N Project. In the locality of the Gabčíkovo step, the accelerograms could be very accurately calculated since situated there is a geothermal well of a depth of 2,582 metres, revealing the details of the subsoil. They also had at their disposal seismic reflection sections. These measurements were reprocessed with the help of a U.S. company. Slovakia's calculations so rendered show Hungary's calculations of accelerations to be in error by a huge margin[151]:

> " ... we present herewith the results of a complex analysis of accelerations and spectral parameters of wave motion carried out, within the whole area of the Gabčíkovo Project, using in the calculations a variety of parameters, epicentral areas and real geologic environment.
>
> These results have shown that the maximum calculated acceleration applicable for the Gabčíkovo Project, and obtained by means of calculation of the MCE [Maximum Credible Earthquake] equals the value 0.0796g, and not 0.3g, as asserted in the [Hungarian Counter-Memorial][152]."

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151 A detailed explanation of how Hungary's calculations are seriously mistaken may be found in Vol. III, Chap. 10, Part I.

152 Vol III, p. 197. Emphasis added.

C. Hungary's Fortuitous "Discovery" in 1994 of a Previously Unknown Fault Line Nearer to Gabčíkovo

12.64 In a report dated September 1994 prepared for the Geological Institute of Hungary by a Hungarian scientist (Z. Balla), a previously unknown fault line (given the name "Györ-Becske fault line") in the region is mentioned for the first time. This timely "discovery" - the calculations to establish its existence have by no means been completed - has the convenient effect of reducing the distance between Gabčíkovo and a "known" fault line from 45 km (the distance to a previously hypothesised fault line passing through Komárno) to 20-25 km[153]. Combined with the flaws in acceleration calculations noted above - and the ignoring of the up-to-date (and decreased) estimate of magnitude of the Komárno earthquake - this distance shortening exercise leads Hungary to conclude:

> "In the worst credible scenarios, therefore, facilities at Dunakiliti, Čunovo and Gabčíkovo would be just within areas of potential liquefaction surrounding the source zone[154]."

This sort of analysis can only be regarded as suspect. In any event, even if such a fault line could be supported by data, it would not represent any increase in the risk of earthquake damage at Gabčíkovo, as has been shown in the recent study by Slovakia appearing in Volume III, Chapter 10 (Part II), hereto.

D. The Assumed Gabčíkovo Fault Line

12.65 Similarly, there is no proof that a fault line runs through Gabčíkovo, although on the basis of various hypotheses its existence has been assumed. If such a fault line exists, there is not the slightest evidence that it is an active fault[155]. In fact, nowhere on the

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153 Obviously, Hungary is hesitant over this "discovery". Fig. 6.2 in Vol. 2 of the Hungarian Counter-Memorial describes what is called the "Györ-Becske line" as no more than a "large topographic step". See, Vol. III, Chapter 10 (Part II) for the reasons why this alleged "fault line" cannot be accepted for *total* lack of any substantiation. It is even more surprising that Hungary now contends that the so-called "Györ-Becske line" is more important seismically than the Komáron-Berhida fault line, for which substantiation exists. See, Illus. No. R-10 appearing at para. 12.72, below, where the three hypothetical source zones proposed by Hungary in the vicinity of the G/N Project are plotted on a map.

154 Hungarian Counter-Memorial, Vol. 2, p. 217 (emphasis added). See, Vol. II, hereto, Comment 8 to p. 217.

155 Neither is there evidence establishing the proposed "Györ-Becske fault line" to be active.

Slovak side of the Danube in the region of the G/N Project have any of the fault lines identified or hypothesised been shown to be seismically active.

12.66 Hungary's "Scientific Evaluation" tries to portray the (so-called) Gabčíkovo fault line as an active fault by means of the following (unacceptable) line of argument:

- First, Hungary contends that the Gabčíkovo step was moved 700 m away from the supposed fault line, in recognition of the belief that it is an active, dangerous fault capable of producing a major earthquake.

  Comment: A shift of only 700 m from an active fault line would quite obviously have afforded no added protection. So this contention makes no sense. In fact, Czechoslovakia merely followed the standard practice of not building directly over a postulated fault line because of the possibility of different rates of settlement of the subsoil layer, if indeed a fault lay beneath the surface.

- Second, since the author of Chapter 6 of Hungary's "Scientific Evaluation" allegedly lacked data about the "Gabčíkovo fault", he felt he was entitled simply to conclude that the "fault" was "an earthquake source" and that "levels of peak ground acceleration greater than 0.3 g may be applicable to Gabčíkovo"[156].

  Comment: In other words, the lack of access to existing data to the author of this Chapter leads Hungary to the startling conclusion that it must be assumed that an earthquake of major proportions will strike Gabčíkovo, having a peak ground acceleration even exceeding 0.3g,

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156 See, Vol. II, hereto, Comment 4 to "Scientific Evaluation", p. 214. The full statement reads:

> "I have not seen the results of the investigations of the fault line in the immediate vicinity of Gabčíkovo, which were carried out by the Slovak side. I am therefore unable to comment on the capacity of this fault and it is possible that this fault should also be considered as an earthquake source. If included, levels of peak ground acceleration greater than 0.3 g may be applicable to Gabčíkovo." (Emphasis added.)

which Slovakia's calculations have demonstrated is 4 times too high for an earthquake occurring at Komárno of M = 5.7 and I = 8.5.

E. Hungary's Refusal to Acknowledge the Evidence of Important Safety Measures Taken

12.67 Hungary's "Scientific Evaluation" ignores important evidence inconvenient to its hypotheses. After the most careful investigation by the Treaty parties, all soil materials in the areas of the dykes and dams prone to the danger of liquefaction in the event of earthquake were removed and replaced by gravels as attested to in the HQI report[157]. Hungary questions this, relying for sole support on: Finta, L. 1990, "Death is lurking at Gabčíkovo", Reflex, Nos. 2-5. Komárno - a reference to a non-scientific article appearing in the popular press, not in a technical journal. The facts concerning materials' removal and replacement of potentially liquefiable materials are well known to Hungary who participated in this work, and these safety measures were verified by HQI. The irrefutable evidence has been presented to the Court[158].

F. Conclusions: The G/N Project is Located in a Region that is Neither Seismically Active Nor At High Risk of Damage from Earthquakes

12.68 In its "Scientific Evaluation", Hungary eventually concedes that the region of the G/N Project is not seismically active:

> "Despite the difficulties with completeness of the historical record, it is evident that the present rate of energy release is relatively low when compared to more active regions of the world. In regions of low rates of energy release it is extremely difficult to assess a tectonic framework with certainty, and this uncertainty will be carried forward in the assessment of seismic hazard[159]."

In other words, there is a lack of data on which to make an assessment of earthquake hazard because there has not been much seismic activity in the region. Nonetheless, in its Counter-

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157 See, Vol. II, hereto, Comment 6 to "Scientific Evaluation", p. 204.

158 The report concerning these measures appears in Vol. III, Chap. 11. Two copies of extensive technical documentation have been furnished to the Court.

159 Hungarian Counter-Memorial, Vol. 2, p. 207

Memorial, Hungary seems to portray the region as being active seismically, mentioning a series of earthquakes centred in the region of Komárom[160] and concluding that:

> "This frequency of damaging earthquakes contrasts with the quiescence of the region portrayed in the Slovak Memorial[161]."

12.69 The Slovak Memorial states something quite different referring, inter alia, to the seismic activity near Komárno, and concluding that:

> " ... seismic activity is not of a degree sufficient to pose a threat either to the large cities that have been built up in this region or to the G/N System structures which had of course been designed to withstand seismic movements."

This conclusion is confirmed by the 1990 HQI report which, on the basis of a review of the stability of the G/N Project structures (including a review of the verification by the Treaty parties in 1982 of the stability of the dykes if they were exposed to various degrees of seismic shock) and of the parties' calculations of maximum acceleration (which it reported followed several methods including a method generally used in North America) concluded that "such [seismic] phenomena were not to fear, as indeed the historical data indicated"[162]. The Slovak Memorial also refers to four independent studies verifying that the maximum seismic intensity applied, which the Project structures were designed and built to withstand, provided adequate security[163].

12.70 The Hungarian Counter-Memorial gives the false impression that allegedly active faults running within 20-25 km of Gabčíkovo must be assumed to be capable of producing earthquakes of the magnitude of the 1763 Komárno earthquake[164]. There is no

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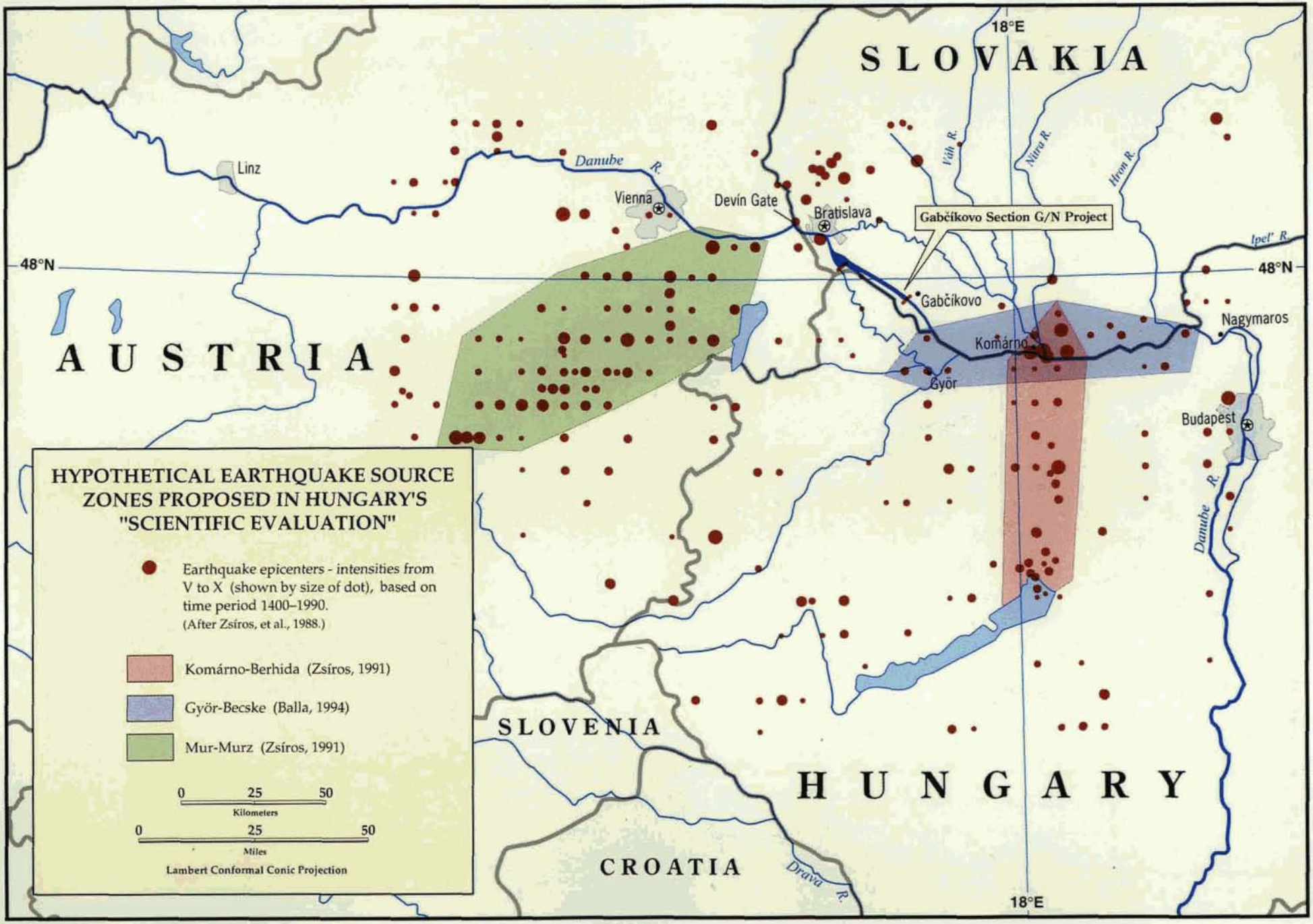
160 Ibid., Vol. 1, para. 1.164. The only important earthquake in the Komárno area occurred in 1763; but Hungary's "Scientific Evaluation" attempts to confuse the picture by referring to "several hundred earthquakes" in the Komárno region, relying on Balla (1994), who was the Hungarian scientist who in 1994 also "discovered" the new fault line mentioned in para. 12.64, above. It is only the 1763 event that figures in Hungary's calculations (see, para. 12.61, above, as to how the magnitude of this earthquake has been over-estimated by Hungary by ignoring the most recent authoritative study on the matter).

161 Referring to the Slovak Memorial, para. 2.60.

162 Ibid., where the relevant portion of the HQI report is cited.

163 Ibid., paras. 2.63-2.64.

164 Hungarian Counter-Memorial, para. 1.165.



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-10

scientific basis whatsoever for such a conclusion, nor indeed for concluding that any of the various faults, imaginary or real, are active[165].

12.71 The only important historical earthquake near to the region was the 1763 event with its epicentre near Komárno, connected with the Komárom-Berhida fault line some 45 km from Gabčíkovo. A worst case scenario would envisage an earthquake of M = 5.7 and I = 8.5 occurring again along this fault line. Its probable effects at Gabčíkovo can be determined by calculating its acceleration, which Slovakia has shown would be 0.079g - approximately four times less than the figure erroneously calculated by Hungary - well within the safety standards incorporated into the G/N Project in the construction of its dams, dykes and other constructions. It is also completely incorrect scientifically to assume that such an earthquake might occur anywhere else in the area.

12.72 The source zones postulated by Zsíros (1991), with the addition of the "Györ-Becske source zone" postulated by Balla (1994), have been plotted on Illus. No. R-10, and overlaid on a map of the region to the same scale. This map shows how the entirely hypothetical "Györ-Becske fault line" (and source zone) - only "discovered" in 1994 - has the effect of moving a postulated earthquake zone some 20 km closer to Gabčíkovo as well as even closer to Nagymaros. However, the dots representing earthquake epicentres, based on historical date between 1400 and 1990 (after the Hungarian study Zsíros, et al., 1988) show clearly that the Gabčíkovo section's reservoir and bypass canal and the Nagymaros step lie far away from the most active area - within a region generally considered as having relatively low seismic activity.

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165 In this regard, Hungary makes this incorrect assertion:

"It is accepted as correct practice that, in establishing the worst case scenario, the maximum credible earthquake is assumed to act anywhere within the source zones identified." Ibid.

CHAPTER XIII. PROJECT IMPACTS NOT RELEVANT TO HUNGARY'S LEGAL ARGUMENTS

SECTION 1. Allegedly Adverse Impacts on Agriculture and Forestry

13.01 Slovakia has shown in the Introduction to this Reply that certain of the adverse Project impacts alleged by Hungary are not relevant to its legal arguments, regardless of whether they can be proved: for example, if the 1977 Treaty parties chose to exchange receipts from hydroelectricity production for the less important economic benefits from agricultural and forestry production (quod non), they were at full liberty to do so. From this it naturally follows that the impacts alleged by Hungary to agriculture and forestry do not have a legal linkage to its claims of an ecological "state of necessity", or to alleged breaches by Czechoslovakia of the 1977 Treaty. Hungary does not claim that the adverse impacts here were unknown in 1977. Hence, it is difficult to see how these same impacts could suddenly create a state of necessity in 1989[1]. And there is no provision in the 1977 Treaty relating to agriculture or commercial forestry. Hungary's arguments in relation to Articles 15 and 19 cannot be applied here. Hence, agriculture and forestry are treated separately from the other adverse "environmental" impacts alleged by Hungary[2]. However, regardless of the above, it is stressed that the Project as it developed did not have adverse impacts on agriculture and forestry production.

13.02 Four other introductory points should be made in relation to Hungary's treatment of impacts to agriculture and forestry in its Counter-Memorial. First, its treatment is noticeably insubstantial. As to the impacts of the "Original Project", Hungary devotes just three paragraphs to agriculture and two paragraphs to forestry[3]. This almost appears as a recognition of the dubious legal relevance of its allegations. Second, the claimed impacts are

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1 See, para. 5.08, et seq., above.

2 It might also be logical to consider Hungary's allegations as to commercial fisheries at this juncture. Although the commercial fishing of the Danube is de minimis in comparison to the importance of agriculture and forestry in Žitný Ostrov and Szigetköz, it is nonetheless a commercial activity which involves the deliberate modification of the natural environment, i.e., by the introduction of economically valuable species, by the stocking of preferred species, etc. Thus, alleged damage to commercial fisheries is not of the same legal significance as alleged damage to the natural icthyofauna. It is more "economic" than "environmental". However it would have been too confusing to consider impacts to commercially valuable and non-valuable fish separately.

3 Hungarian Counter-Memorial, paras. 1.134-1.136 and 1.137-1.138.

founded on the assumption that the "groundwater-table could have been reduced in much of the Szigetköz if the Original Project had been implemented" and that this would have resulted in "changes to soil and water quality"[4]. It has already been demonstrated above that Hungary's reliance on the concept of the "Original Project" is artificial and that the Project would not and has not caused negative changes to soils and waters[5]. Third, the geographical area considered by Hungary is very limited. No adverse impacts are alleged for the Nagymaros section: it is only the Project impact on Szigetköz that concerns Hungary and, in terms of forestry, the area of key importance to Hungary is simply the active floodplain, as depicted in Illus. No. R-4 (appearing at the start of Chapter XI)[6].

13.03 Finally, and in particular with regard to its treatment of the impacts on agricultural production of Variant "C", Hungary goes to great and wholly unrealistic lengths to show that somehow it was prevented from using the direct recharge system that would have maintained ground water levels and would have avoided any adverse impacts to agriculture. It is argued that the Dunakiliti offtake could not be used because of "low upstream water levels"[7]. But this offtake was designed for use in conjunction with the Project damming of the river (at rkm 1843), which damming was expressly prevented by Hungary. The inability to use the Dunakiliti offtake resulted solely from Hungary's own actions.

13.04 Moreover, now that Hungary has finally agreed to the construction of the underwater weir at 1843, the Dunakiliti offtake can be put into operation and all the adverse impacts to agriculture which Hungary alleges to have recorded as a result of Variant "C" will disappear. This decision was taken by Hungary in April 1995[8]. But at the time of writing its Counter-Memorial, Hungary still argued against the construction of such an underwater weir - on the wholly unrealistic ground that it engenders "the loss of the Danube

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4 Ibid., paras. 1.134 and 1.138.

5 See, paras. 11.10, et seq., and 12.08, et seq., and especially 12.31, et seq. above. See, also, Slovak Counter-Memorial, para. 7.92, et seq., and generally, Chap. 7, Sec. 2.

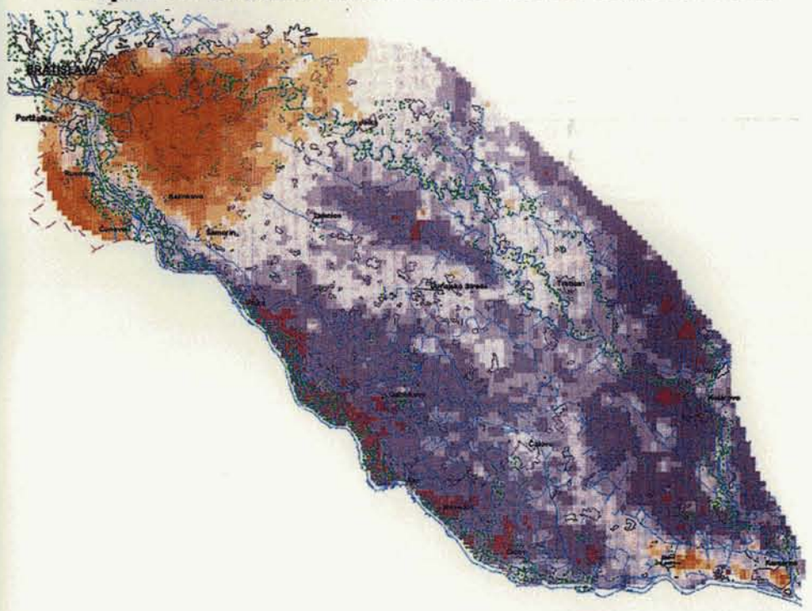
6 See, also, Slovak Counter-Memorial, para. 7.87, and Illus. No. CM-8.

7 Hungarian Counter-Memorial, para. 3.66.

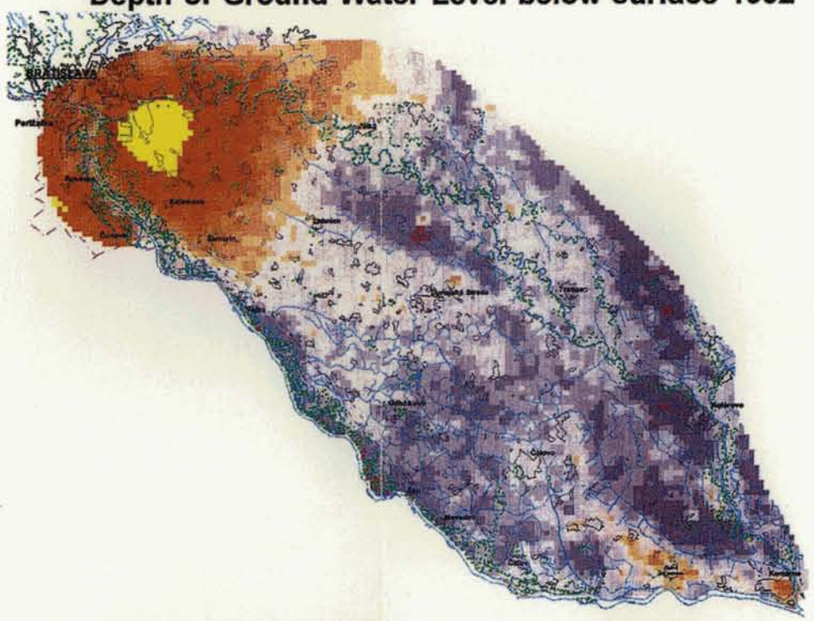
8 Annex 1, hereto.

DISTANCE BETWEEN GROUND WATER LEVEL IN SUBSOIL AND SURFACE

Depth of Ground Water Level below surface 1962



Depth of Ground Water Level below surface 1992



Depth of Ground Water Level below surface 1993/94

Ground Water Depth
in meters bellow surface

- more than 8
- 5.5 to 8
- 5 to 5.5
- 4.5 to 5.5
- 4 to 4.5
- 3.5 to 4
- 3 to 3.5
- 2.5 to 3
- 2 to 3
- 1.5 to 2
- 0.5 to 1.5
- 0 to 0.5

0 5 10 15 20 25
Kilometers

0 5 10 15 20 25
Miles

Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-11

for international and local navigation"[9]. It is as if the bypass canal did not exist and that navigation had not actually been transferred to the canal. Crucially, however, Hungary does not seem to question, in its Counter-Memorial, the fact that use of the direct recharge system would prevent any drop in agricultural production. It simply complains that the "trade-off for the rise and stabilisation of ground water levels" would be the loss of the Danube for navigation: "The other alternative [to underwater weir construction] is to endure significant losses to agriculture[10]." Slovakia notes that Hungary has, if belatedly, decided against this second alternative.

A. Agriculture

13.05 As noted above, Hungary's discussion of Project impacts to agriculture is premised solely on the existence of a decrease in ground water levels[11]. It is explained that in the pre-dam period 53% of Szigetköz had sufficient ground water available for natural sub-irrigation[12]. This means that approximately one-half of the Szigetköz farmland did not have sufficient ground water available and could therefore be subject to no impact at all from the Project - other than a beneficial one[13]: even Hungary's failure to implement the direct recharge system could not have affected negatively the yield of the crops cultivated on this farmland. However, implementation of the direct recharge system may affect ground water levels to a positive extent for, as shown in Illus. No. R-11, it brings to a halt the long term deterioration in ground water levels and creates more favourable conditions for agriculture:

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9 Hungarian Counter-Memorial., para. 3.67. The possibility of continuing to use the old Danube for navigation depends on discharge rates and the design of the underwater weirs - in other words, navigation is far from being excluded. Hungary does not explain why international navigation vessels should wish to use the old Danube in the face of the greatly superior conditions offered in the bypass canal.

10 Ibid., para. 3.68.

11 See, generally, Vol. III, Ch. 3, Sec. 2.

Hungary does refer to the loss of 390 hectares "due to construction activities" (Hungarian Counter-Memorial, para. 1.135), but these were irretrievably lost prior to Hungary's suspension of works in 1989 and have never been cited as a reason therefor. Also, in comparison with the loss of Slovak land for construction of the reservoir, the bypass canal and the Gabčíkovo step, this loss to Hungarian agriculture is very small.

12 Ibid., para. 1.134.

13 In fact, Hungary alleges that due to the drop in ground water levels in Szigetköz since the damming, sub-irrigation has been lost on one fifth, not one half, of arable land. Ibid., para. 3.69.

"The influence of the long-term trend of ground water levels decrease before the operation of the Gabčíkovo dam ... and the unfavourable changes after the operation of the structure prognosticated by some authors are not evident during the balanced monitoring period (two years before the operation, one year of transition and two years after the damming). No negative changes of the water content in the zone of aeration occurred. On the contrary, the monitored courses of the water content in the zone of aeration in the upper Žitný Ostrov sites, on the left-side area of the bypass canal and downstream of Gabčíkovo are showing the increasing trend[14]."

13.06 As Hungary accepts, "irrigation may compensate" for some of its (self-imposed) "losses"[15]. It alleges, however that the sources of irrigation water have been adversely affected, 18% of boreholes in Szigetköz becoming unusable. But this is perfectly normal. With the drop in ground water levels resulting from Hungary's refusal to implement the direct recharge of its side arms, certain shallow wells necessarily became "unusable" or at least less efficient. But the underlying aquifer has a depth of hundreds of metres, so water is abundant; the only question lies in the siting of the wells and their depth. One solution is therefore simply to excavate deeper wells (as Hungary itself acknowledges[16]). A more constructive approach, eventually chosen by Hungary, is to increase ground water levels by the implementation of the direct recharge system.

13.07 Volume I of Hungary's Counter-Memorial does not indicate the percentage losses in crop yield which, according to its "Scientific Evaluation", can be attributed to Variant "C". But it calculates that approximately one fifth of yield reduction in Szigetköz agricultural production in 1993 was due to reduced ground water levels[17]. The more important factors were found in the "Scientific Evaluation" to be (i) that 1993 was a very

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14 See, Vol. III, p. 44. Hungary accepts that ground water levels dropped around 1m since the 1960s. See, Hungarian Counter-Memorial, para. 1.101. See, also, the EC Working Group report of 1 December 1993: "due to the increase of ground water tables on the Slovak territory an increase in the capillary water supply for the Slovakian agricultural areas has taken place." With an equivalent water recharge (40-50 m^3/s) into the Szigetköz side arms, the same beneficial impact was predicted for Hungary by the EC Working Group: "Due to the increase of ground water tables on both the Slovakian and Hungarian territory an increase in the capillary water supply for agricultural as well as forestry areas can be expected." Hungarian Memorial, Vol. 5, (Part II), Annex 19 (at pp. 785 and 791).

15 Hungarian Counter-Memorial, para. 3.70.

16 Ibid., Vol. 4 (II), Annex 20 (at p. 778).

17 Ibid., Vol. 2, p. 179.

dry year (i.e., low precipitation) and (ii) the low usage of fertilisers due to changes in agricultural management practices. It would seem that either Hungary has little confidence in the surprisingly precise calculations contained in its "Scientific Evaluation"[18], or that it considers that the calculated figure is rather low and does not fit easily with the extremely adverse impact on agriculture predicted in its Memorial[19].

13.08 Insofar as Hungary's conclusion - "that there has been a significant loss in productivity attributable to changes in groundwater levels"[20] - is correct, Slovakia must point out that these changes were specifically non-Project impacts, that the Project provided for the design and construction of the Dunakiliti offtake with its ample capacity of 250 m^3/s, that Hungary now accepts that its use would prevent any adverse impacts to agriculture, and that Hungary has, in part for this reason, now signed an agreement allowing for this intake to be put into operation[21].

B. Forestry

13.09 Hungary introduces its brief section on the impacts of the "Original Project" on forestry by emphasising the high productivity of the forests in the active floodplain, that is their high economic value. This is also the prime focus of the consideration of impacts to forestry in Hungary's "Scientific Evaluation"[22]. It is certainly true that forests in the active

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18 Hungary accepts: "The impact of the diversion of the Danube is however difficult to predict as other factors influence annual agricultural yields." Ibid., Vol. 1, para. 3.71. See, also, Hungarian Memorial, para. 5.121. In the face of this, the estimation in the "Scientific Evaluation" of a 22.2% reduction in yield due to diversion cannot be accepted.

19 See, Hungarian Memorial, para. 5.71

20 Hungarian Counter-Memorial, para. 3.71.

21 For the beneficial impacts to agriculture recorded on the Slovak side of the Danube, see, Vol. III, Ch. 3, Sec. 2. With particular regard to soil moisture and agricultural conditions in the upper part of Žitný Ostrov, the following has been recorded (at p. 53):

> "From the point of view of the global conditions for agricultural production, the changed situation (the increase of the ground water levels to 2-3 m below the surface) should be considered as positive. It has resulted in a significant increase in the high quality ground water storage available for irrigation and the recently increased ground water level (3-2m) is already accessible for deep-root plants. This new situation in the soil water regime overall in this region creates more favourable conditions for harvest stabilisation."

22 Hungarian Counter-Memorial, Vol. 2, pp. 181-187.

floodplain on both sides of the Danube have a high economic value and that, in spite of the intensive cultivation of these forests, they remain valuable overall. But Hungary has often sought to portray its active floodplain area as something close to a natural wilderness, which is clearly not so. In fact, as Hungary admits, some 64% of the floodplain forests are made up of one hybrid poplar type[23]. These forests are planted in cultivated areas[24]. To replace trees, which is no more than to harvest and plant new species, does not, as Hungary implies, mean the destruction of a "complex web of population, with several hundred macroscopic components, not to speak of thousands of microscopic ones". It is, and has been for many decades, a near daily activity in the active floodplain on both sides of the Danube[25].

13.10 There is, in any event, absolutely no basis to the claim that "more than one-half of the trees of the Szigetköz would have decayed or dried out within 15 years of the Original Project"[26]. Nor is there any sense to the claim that the "93% of the tree species in the [Szigetköz] floodplain" which are dependent on sub-irrigation "will with all likelihood dry out as a consequence of Variant C"; nor is there any need to replace the prevalent hybrid poplar species "with more drought tolerant species"[27]. The remedial measures provided within the

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23 Ibid., p. 183.

24 It is not the adverse environmental intervention that Hungary claims to provide, as did the Joint Contractual Plan, for changes in species composition in response to changed ground water regimes. Ibid., Vol. I, paras. 1.138 and 3.76.

25 Some background to the development of current forestry practice in this area is useful. The forests in the Danube inundation area have been strongly influenced by man in the 150 years prior to the damming. Growing conditions have been largely determined by the inundation dykes built against floods in the last Century. Originally, the floods covered large territories, but the flood water was shallow. At that time, excellent conditions existed for tree species of hardwood floodplain forests, such as *Quercus robur L., Fraxinus excelsior L. and Ulmus sp* (oak, ash and elm). After the dyke building, the floods became more frequent and intensive, and the growing conditions for the hardwood tree species deteriorated to such an extent that hardwood tree species were displaced from the area. On the other hand, very good growing conditions were created for the fast-growing poplar species (demanding excellent nutrient and moisture conditions).

A change in species composition followed (mainly after 1939): the sylviculture became concentrated on monocultures of poplars with high wood production (the highest wood production in Slovakia and, it seems, Hungary) and a short cutting cycle. The poplar monocultures now cover 80% (perhaps slightly less in Hungary) of the stand area; their existence depends on the permanent intervention of the forester - no natural afforestation or regeneration is possible. From the ecological point of view, the shrub storey (layer) is the only stable component of these forest ecosystems; the shrub storey composition is usually natural and autochtonous species prevail.

26 Hungarian Counter-Memorial, para. 1.138. It is noted that no document supporting this claim has been placed in evidence by Hungary.

27 Ibid., paras. 3.75-3.76.

Project were adequate; and this has been proved by the monitoring of their implementation in the Slovak floodplain as part of Variant "C"[28]. Indeed, the only area in which an adverse impact on forestry has been recorded is in the small triangle just upstream of the Dobrohošť intake where it has not been possible to effect the direct recharge[29].

13.11 Hungary claims to have observed reduced tree growth[30]. In fact, the measure used (monitoring of reduced tree circumference increment) is not a reliable tool for measuring short term impacts[31]. More reliable measures are the leaf area index (surface area of leaves per hectare of tree stand) and the growth season leaf loss (that is the leaf loss recorded in sample trees on a given date - August 15 - before the autumn). The monitoring results show no significant changes in the leaf area index in the Slovak inundation area since the diversion and no increased leaf loss (save for in the area just upstream of the Dobrohošť intake). In some areas, accents a positive trend in leaf loss has been recorded:

> "The greatest part of the area is represented by the permanent monitoring plots, where no significant changes in the leaf area index have occurred ... . "
>
> "On permanent monitoring plots which represent the majority of the territory ... the loss of leaves is relatively small and the differences between the respective years are not significant. ... The loss of leaves here is 10-15% and only very seldom is higher than 20%. ... This parameter documents also the stable, unchanged, healthy state of trees on the majority of the permanent monitoring plots, as well as the stable state of the trees' physiological activities.
>
> Despite the small number of observations (4 vegetation periods), the positive trend in loss of leaves can be documented on permanent monitoring plots MB02b and MB03 in years 1993 and 1994. This is without any doubt the result of the better growing conditions in the area caused by the increase of the ground water level in the locality (Píšút, 1994).

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28 The monitoring parameters commented on Ch. 3 of Vol. III are based on direct measurements of tree species on the permanent monitoring plants of the forest and biota partial monitoring systems. Monitoring was performed in the vegetation periods in 1990-1994. It therefore evaluates the pre and post-damming state. The forest stands' structure has been evaluated in September and October, the leaf area index in the time of maximum growth (June, July) and the loss of leaves by August 15 (the date of forest health monitoring as accepted by all European countries).

29 See, Vol. III, pp. 64 and 82-83. This has been due to Hungary's refusal (until April 1995) to allow the construction of underwater weirs in the old Danube.

30 Hungarian Counter-Memorial, para. 3.75.

31 See, Vol. III, p. 67.

> Decrease of the loss of leaves, which is, however, still relatively high, can be observed on other permanent monitoring plots in the upper part (where there has been the raising up of the ground water level); especially on MB04 and MB05. Here the values in 1993 and 1994 document the significant improvement of the health state of trees. ... Positive changes, i.e., obvious tendency towards the decrease of leaf loss have been registered on the following permanent monitoring plots in the upper part: L14, L15, L16, L18, L19, L20, L21, L23 ... [32]."

13.12 In terms of the overall structure of the tree and shrub layer, on the great majority of permanent monitoring plots (on the Slovak side of the Danube) no significant changes were observed in the years 1993 and 1994. Species composition, biosociological structure, thickness and height have changed only (very slightly) in harmony with the growth laws of the respective forest ecosystems. On one permanent monitoring plot a more intensive growth pressure was recorded as a result of the ecosystem revival. These changes have a positive character and show how the Project benefits not just forestry, but the more natural shrub layer[33].

13.13 Hungary's allegations as to "negative impacts" on Slovak forests are either wholly incorrect or very misleading[34]. As to the "drowning" of trees - the permanent flooding of the bases of willows - the conditions of willow trees has (amongst others) been recorded by means of leaf area index and leaf loss at four different monitoring plots in the inundated area. There have been no significant changes in leaf area index: claims that large numbers of willow trees have died or will die are simply wrong. As to leaf loss, there is no significant change between monitoring results for 1991-1992 (pre-damming) and 1993-1994 (post-damming). Hungary's allegations are wholly disproved by the evidence based on data compiled from actual observation[35].

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32 Ibid., pp. 65-67. Emphases added. For the location of the monitoring plots, see, Illus. No. R-7 B. appearing at para. 12.30, above.

33 Ibid., p. 64.

34 Hungarian Counter-Memorial, para. 3.73. See, also, ibid., Vol. 2, p. 156: "Willow trees are having clear physiological problems since their bases are permanently flooded."

35 See, Vol. III, pp. 64-68. It is noted that Hungary neglects to mention the undoubtedly beneficial impact to its willow stands along the Mosoni Danube, which will now thrive as a result of the greatly increased water flow into this main branch of the Danube.

13.14 As to adverse impacts "in the riverside zone along the main channel", these have indeed been recorded on the Slovak side of the Danube and these are due to "water-table decreases" along the old Danube, as Hungary points out[36]. However, these impacts are, once more, due to specifically non-Project conditions. One of the prime purposes of the underwater weirs to be constructed in the old Danube was to raise the river surface water level and hence the ground water levels in this narrow riparian strip that is not affected by the direct recharge into the side arms. It is Hungary who has prevented the construction of the weirs and who is largely responsible for the negative impacts to Slovak trees that it cites.

13.15 Finally, Hungary cites as a "further adverse affect of Variant C" the "virtual elimination of floods on the Hungarian floodplain"[37]. But the effects of inundation can be created through the Dunakiliti offtake. Moreover, the floods of which Hungary speaks were not even annual events. As shown on Illus. No. R-12 (on the next page), the total inundation of the side arms was a rare event in the period 1970-1990. As to the transport of nutrients to the floodplain, nitrogen and phosphorus are not, as Hungary's "Scientific Evaluation" claims[38], blocked in the reservoir. Volume III hereto confirms the absence of a deteriorating trend in the presence of these elements in the Danube by comparing water upstream and downstream of the reservoir[39]. The "adverse effects" to forestry of Variant "C" cited by Hungary have no scientific basis.

SECTION 2. Hungary's Arguments Based On Riverbed Morphology

13.16 The Hungarian Counter-Memorial places special emphasis on riverbed morphology both in its first volume (where it is addressed in primary position, even before the

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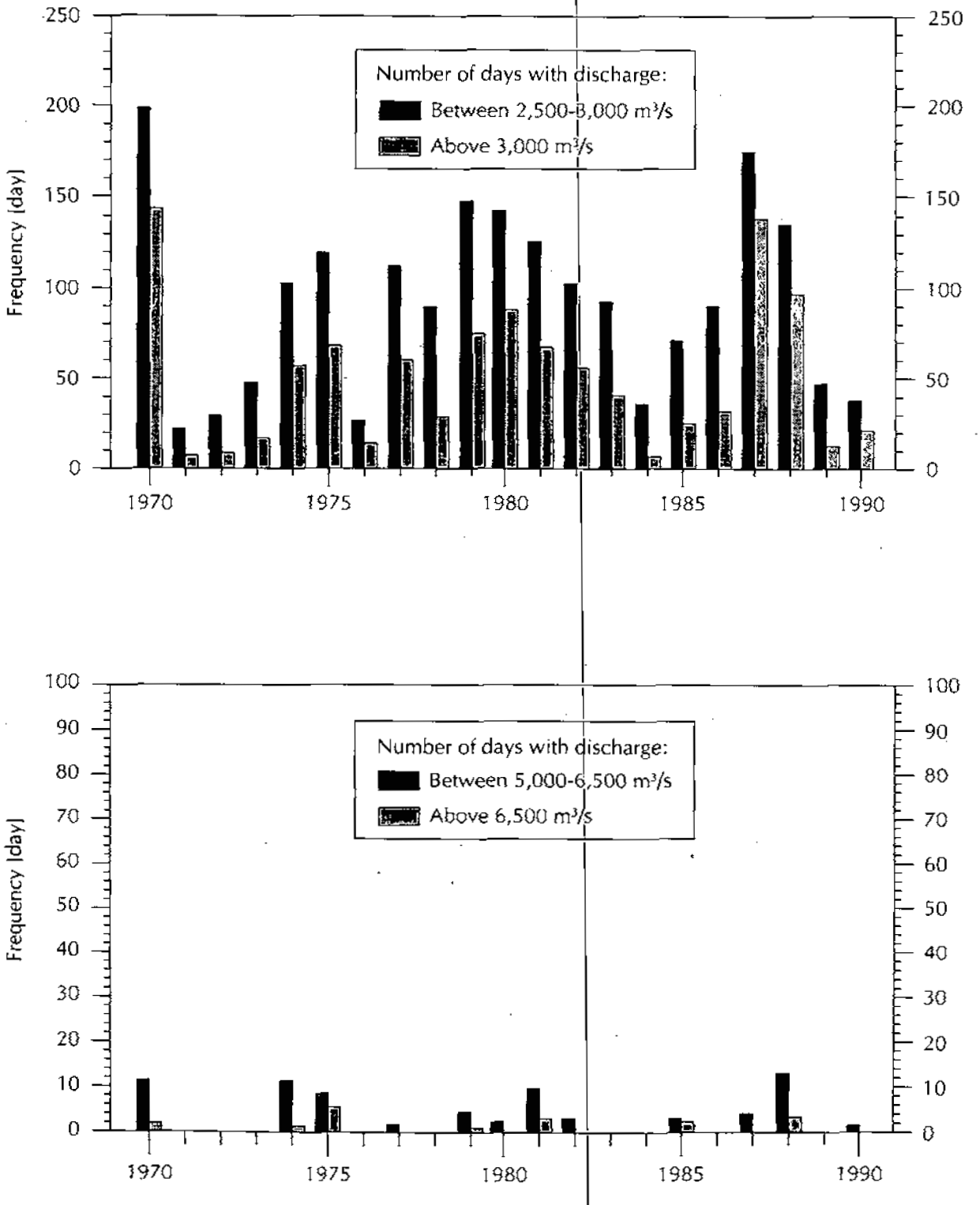
36 See, Vol. III, pp. 67 and 83.

37 Hungarian Counter-Memorial, para. 3.74.

38 Ibid., Vol. 2, p. 137.

39 See, Vol. III, p. 34 and Figs. 2.10 and 2.11. As to the retention of sediment that would otherwise carry nutrients to the floodplain, the impact of this in terms of the G/N Project stretch of the Danube may not be great. Data from the 1950s, that is before the isolation of the side arms and when the flooding regime was closer to natural conditions, show only a minimal difference between supplies of humus in flooded and unflooded area of forest. In other words, the transport of nutrients by flood waters was not overly significant.



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-12

issue of water quality) and in its "Scientific Evaluation"[40]. The technical aspects of this subject - in response to Hungary's analysis - are dealt with in detail in Volume III hereto[41]. This section briefly reviews these technical aspects but, first, considers the overall aims and relevance of Hungary's consideration of a topic that was totally absent from the Hungarian Memorial.

13.17 Hungary bases its new emphasis on riverbed morphology on an allegation as to the "justification" for the "Original Project" contained in the Slovak Memorial[42]. Slovakia, it is claimed, contends that flood control and navigation measures led to the lowering of the level of the Danube downstream of Bratislava and, in turn, to the reduction of the ground water table, resulting in a harmful impact on the environment as well as on agriculture and forestry. From this, Hungary argues that Slovakia's reasoning is based on three assumptions: (i) that measures to improve flood control and navigation had to be taken; (ii) that these measures necessarily led to the reduction in the ground water table; and (iii) that only the 1977 Treaty could solve the three problems of flood control, navigation and the reduction of the groundwater level (and in so doing also solve the environmental problems of the region)[43].

13.18 Of the above three assumptions, the second is said by Hungary to be "critical" because of the linkage between "works portrayed as essential for the region's survival and prosperity" (i.e., the measures related to navigation and flood control) and "the environmental problems ... which result from the drop in the ground water table"; and Hungary contends that, if it disproves this linkage, "much of the reasoning collapses" on which Slovakia supposedly based its "justification for the Original Project"[44]. However, Hungary's initial premise is false. Slovakia does not seek to justify the G/N Project. The Treaty parties formally committed themselves to carry out the Project, one of the declared aims of which was

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40 Hungarian Counter-Memorial, paras. 1.56-1.75 and 3.18-3.23, and Vol. 2.

41 Vol. III, Ch. 12. In addition, the discussion of navigation and flood control in Section 3, below, also deals with some of Hungary' arguments under this heading.

42 Hungarian Counter-Memorial, para. 1.56.

43 Ibid., para. 1.57.

44 Ibid., para. 1.58.

to improve flood control and navigation by the means jointly established under the G/N Project. There can be no need for further justification.

13.19 Hungary's stated goal to disprove the "linkage" between (i) the Treaty's flood control and navigation measures and (ii) the "environmental problems entailed by those works" is anyway thoroughly perplexing. Hungary's main technical thesis is that the measures for flood control and navigation, even alongside the retention of sediment and bedload in the barrage systems upstream in Austria, were not the cause of the reduction of the level of the Danube downstream of Bratislava: rather, the principal cause was industrial dredging; and the facts are presented so as to imply - quite incorrectly - that Czechoslovakia somehow got an excessive share of the dredged gravel. But the question remains: even were this true, what are the relevant consequences for this case? The carrying out of the G/N Project pursuant to the Treaty cannot be made to depend on whether industrial dredging by both 1977 Treaty parties, pursuant to annual agreements - and which was largely halted by 1984 - was or was not "primarily responsible" for drops in the ground water level in the upper part of the Project region.

13.20 Yet, surprisingly, the Hungarian Counter-Memorial argues that:

> "The issue of degradation of the riverbed, causing the drop in surface water level and the groundwater table, technical though it may be, occupies a central position in this dispute. ... It is the remedying of these impacts, rather than anything actually stated in the 1977 Treaty, which constitute (sic) [Slovakia's] main aim[45]."

It must be made clear that this is a total mis-statement of Slovakia's aim in this case, which is that Hungary return to the performance of its obligations under the 1977 Treaty. This is no more than an obvious attempt by Hungary to shift the Court's attention away from the Treaty and on to the grounds of a re-evaluation of the G/N Project and a determination whether it was the best way to solve problems relating to ground water level, navigation and flood control. As Slovakia has already made clear earlier, this is not at all the task which the Parties have called on the Court to perform.

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[45] Ibid., para. 3.18.

13.21 Hungary states that the purpose of its discussion of river morphology and river hydraulics is to show the following[46]: that navigation and flood control measures were not "primarily responsible" for the reduction in the groundwater table prior to 1977; that there were other solutions for dealing with this problem; and that the "Original Project" would have increased river morphological problems. These contentions are largely incorrect from a scientific and technical standpoint. A detailed rebuttal of them appears in Chapter 2 of Volume II hereto, relying on the scientific and technical study forming Chapter 12 of Volume III hereto. Some of the principal defects in Hungary's "Scientific Evaluation" on river morphology are now summarised:

- Hungary's analysis overemphasises the effects of commercial dredging; this was only one of a number of factors affecting riverbed morphology in this stretch of the Danube, which included also: (i) the reduced bedload effect of upstream dams and river regulation in Austria; (ii) the effects of river regulation on the velocity of river flow; (iii) the fundamental change in gradient occurring in the vicinity of Sap; and (iv) the decrease in bank erosion due to fortification of river banks.

- Hungary's calculations based on river flow rates are fundamentally flawed for they assume an "Original Project" that was significantly modified by 1989, with considerably higher flow levels planned for the Old Danube. Its calculations are also fundamentally flawed as to the stretch of the Danube between Gabčíkovo and Nagymaros because they are based on an assumed maximum level of peak mode operation that was never agreed between the Treaty parties[47].

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46 Ibid., para. 1.59. Its aims are also to show that "adequate flood protection mechanisms" were in place in 1977, independently of the Project; and that even though the Project would have solved the existing navigation problems, "the relative importance of the navigational improvements offered by the Project was limited and is now even more limited". Ibid., para. 1.60. These last two items, concerning flood control and navigation, are taken up in Section 3 below.

47 See, para. 11.12, above.

- Hungary generalises the effects of riverbed degradation predicted at certain short stretches of the Danube, giving the erroneous impression that a far larger area of the Danube would be affected.

- Hungary ignores the data produced and analysed after three years of monitoring the operation of the Gabčíkovo section, which shows no further degradation of the Danube riverbed as a result of the operation of the Gabčíkovo section[48]. And Hungary's whole discussion of possible future riverbed degradation in the old Danube is rendered irrelevant by the fact that the Parties are in agreement that the installation of underwater weirs - as agreed under the G/N Project - would entirely resolve the problem[49] in the old Danube.

- It fails to emphasise that downstream of Sap, due to the change in river gradient, there is an area of riverbed aggradation; and fails to point out that the environmental impact of bed degradation further downstream, i.e., beyond Žitný Ostrov and Szigetköz, would, in any event, be quite different to its impact upstream. This is so because (at least on the Hungarian side) the Danube flows along a valley instead of on top of an alluvial cone. The floodplain here is also very narrow and does not have the environmental importance of the floodplain in the upstream section of the Project. However, serious navigation problems continue to exist downstream of Sap, as shown in Section 3 below.

- Finally, such riverbed degradation problems (causing a drop in water levels) as exist in the Nagymaros section, would immediately be remedied by the construction of the Nagymaros barrage, leading to increased river water levels in the impounded section upstream.

13.22 Three further, more specific points should be made. The first concerns the amounts of commercial dredging and where this activity occurred. As Plate 5 of Hungary's

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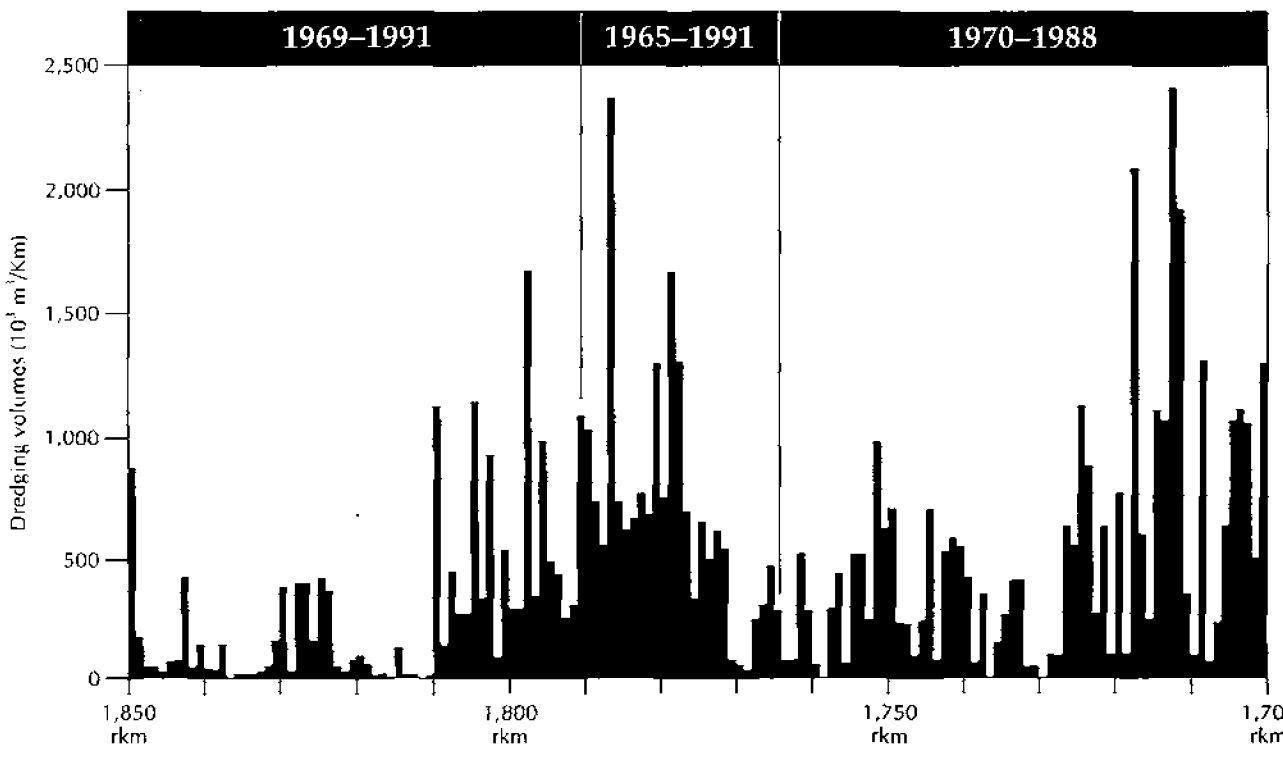
48 See, Vol. III, p. 241.

49 See, Hungarian Counter-Memorial, Vol. 2, p. 5.

Counter-Memorial clearly shows (reproduced here in part as Illus. No. R-13), by far the greatest amount of dredging has occurred in the Nagymaros section of the Project - that is downstream of the end of the bypass canal near Sap (rkm 1811), being an area of river aggradation. Yet it is not in this region that any resulting drop in ground water level is of serious concern to the environment; it is the upper floodplain region of the Gabčíkovo section, upstream, where the environmentally vulnerable region lies. It is on bed degradation in this section alone that the Slovak Memorial focused. A Slovak 1991 study shows that while in the years 1976 - 1989, 48.3 mil. m^3 of gravel was excavated between rkm 1880 and rkm 1709 (the end of the joint Slovak-Hungarian river stretch), between Čunovo and Sap - that is, in the Gabčíkovo section where the floodplain lies - only 3.5 mil. m^3 of gravel was extracted[50]. Thus, it is difficult to see what relevance Hungary's industrial dredging argument has to the stretch of river that is important in terms of riverbed degradation and related environmental impact.



Source: Plate 5, Hungarian Counter-Memorial

Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-13

50 Slovak Counter-Memorial, Annex 24 (at p. 309).

13.23 Second, as to the old Danube, Hungary reaches certain untenable conclusions on the basis of a scientific paper submitted in 1992 by the Slovak scientists J. Kališ and M. Bačik. Citing this paper, it claims that, in spite of the Gabčíkovo section being put into operation, severe riverbed degradation of the old Danube is to be expected:

> "Without arriving bedload from upstream, degradation could be expected even with only a few discharges per year. Erosion up to 3 metres could have been caused to some sections after 50 years of operation[51]."

Kališ and Bačik in fact predicted: "Sedimentation by the bedload transport in the reservoir of Hrušov-Dunakiliti isn't expected to cause serious problems ...[52]." Hungary quotes neither this nor the following conclusion of these two Slovak scientists: "The obtained results showed that the Old Danube channel deformations will be relatively small". Indeed, Figure 2.6 of the "Scientific Evaluation" shows this to be so, with both increases and decreases in the level of the riverbed and a decrease of 3m in only one specific location (at the bend in the river at about rkm 1813 just before connecting with the downstream end of the bypass canal). In any event, as Hungary admits, riverbed deformation can be cured by constructing underwater weirs[53].

13.24 Finally, in the recent Slovak examination of riverbed morphology carried out in the light of Hungary's "Scientific Evaluation", it is shown and illustrated that:

> " ... the generally prevailing sinking of the levels of low regulation and navigation water in the period 1957-1994 had not substantially changed even after suspension of industrial dredging[54]."

This conclusion is based on an examination of actual data, and refutes Hungary's assumption that if the Danube were just left alone it would return to its former condition.

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51 Hungarian Counter-Memorial, para. 1.69, citing Bačik and Kališ (1992). See, also, ibid., Vol. 2, p. 21.

52 Ibid., Vol. 4, Annex 5 (at p. 359).

53 Ibid., Vol. 2, p. 5.

54 Vol. III, hereto, pp. 237-238.

13.25 What Hungary's extensive technical discussion of riverbed morphology seems intended to obscure is the well-conceived concept by which the G/N Project located the bypass canal - which passes through the area where there was the greatest flood risk and the worst navigational bottlenecks - entirely outside of the floodplain. As a result, the specific problem of bed degradation in the stretch from Bratislava to Sap may now be addressed without this problem being subordinated to navigational or flood control concerns.

SECTION 3. The Allegedly Unnecessary Benefits: Energy, Navigation and Flood Control

A. Energy

13.26 The Hungarian Counter-Memorial devotes a surprisingly long sub-section to a consideration of the Project's benefits in terms of electricity production, the basic purpose of which is to show that the amount of energy to be produced was at best rather small and, in fact, even unnecessary. The justification for this expanded treatment - even though Hungary accepts that the "[b]roader issues of energy policy are not before the Court in this case" - is that there were in "the Slovak Memorial's pejorative references to Hungarian energy policy". Hence, Hungary argues there is a need "to put into perspective the value of power generation through the Original Project and through Variant C"[55].

13.27 But the Slovak Memorial can be searched in vain for any such "pejorative references"[56]. Slovakia merely noted that Hungary did not exploit the hydroelectric potential of its rivers[57]. As Slovakia explained, the sole purpose of its focus on this issue was to explain that, whereas in 1977 Hungary had agreed to develop its hydroelectric potential in the joint G/N Project with Czechoslovakia, since that date Hungary has invested in other forms of energy so that, in 1989, its need for the electricity to be generated under the G/N Project was not the same. In its Counter-Memorial, Hungary fails to respond to this allegation. Indeed, Hungary now admits that, at the time of its Treaty breaches, it did not

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55 Hungarian Counter-Memorial, para. 1.193.

56 There is, by contrast, no doubt that Hungary's Counter-Memorial is full of pejorative references as to Slovakia's "expansive energy policy" and the "continued inefficiency" of its production. Ibid., paras. 1.196 and 1.201.

57 Slovak Memorial, para. 1.52.

consider the energy to be produced by the Project as necessary - thus substantiating Slovakia's belief that Hungary's reasons for ceasing its investment into the Project had an economic rather than environmental basis:

> "Political changes in the region after 1989 led to the dissolution of old industrial structures and the collapse of trading relations. As GNP was dramatically reduced, there was a considerable decline in energy demand in the region, with excess production capacity. This period of general decline coincided with the planned final phase of construction of the Original Project[58]."

13.28 Moreover, Slovakia considers that there is no need "to put into perspective the value of power generation" from the Project. The "value" of this power does not touch on the questions before the Court in this case. As explained in the Introduction to this Reply, the Court has not been, and could not have been, asked to weigh up the economic benefits to be received by the Treaty parties and to assess their value against (alleged) environmental impacts. Further, Hungary's attempt to show that there was no need for the energy to be produced by the Project is both economically unsound and wholly unsubstantiated. It is claimed, for example, that there were in the pre-1989 period "ever-expanding energy imports from the Soviet Union ... projected to continue to be inexpensive and inexhaustible"[59]; but why then did the Treaty parties decide in 1977 to invest hundreds of millions of dollars to obtain the energy produced from the G/N Project? It is claimed that there is an excess of production capacity in the region; but why then do Slovakia, Hungary, Austria, the Czech Republic and Ukraine all import electricity?

13.29 Hungary writes as if, in the 1950s, the Treaty parties had decided to invest heavily in the production of, say, black and white television sets, for which there was no longer a market in the late 1980s. But the electricity that the parties agreed to produce at the time of signing the Treaty in 1977 still has a high value today and has not been made redundant by technological advance. To take a second analogy, Hungary writes as if a car building State has no right to build a new car factory if it already has sufficient capacity to supply the internal market[60]. But, electricity is a readily marketable and exportable commodity in Central Europe

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58 Hungarian Counter-Memorial, para. 1.195.

59 Ibid., para. 1.194.

60 Hungary completely ignores the fact that production at Gabčíkovo enables older, less efficient (and more polluting) plants to be exploited less.

as elsewhere - and a sizable portion of the electricity actually produced at Gabčíkovo is, in fact, exported to Hungary. The fact that Hungary, today, considers that the G/N Project would only account for approximately 5% of its internal demand[61] does not alter the fact that the electricity currently produced at Gabčíkovo is worth - and nets - in excess of US$ 100 million per annum[62].

13.30 Hungary's approach is all the more astonishing in that Hungary needs extra energy and is currently seeking to extend its imports of electricity. It is therefore difficult to understand the comment that Gabčíkovo serves no purpose[63]. The electricity produced by the Project is not only of great economic value but it also enabled the Project to be self-financing. The benefits offered to the Treaty parties in terms of navigation, flood control and the environment could only be afforded because the Project was devised as an integrated project providing the Treaty parties with both the basis for an overall water management scheme and the means of paying for this.

B. Navigation

13.31 One of the obligations imposed on the Parties to the 1977 Treaty concerned navigation: "to maintain these sections of the Danube in a navigable condition for river-going vessels" and "to carry out the works necessary for the maintenance and improvement of navigation conditions" (Article 18). Both Treaty parties also had obligations concerning navigation stemming from the 1948 Danube Convention and from the 1976

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61 Hungarian Counter-Memorial, para. 1.199. Hungary uses percentages to show that the production or current production at Gabčíkovo is low. Slovakia considers this approach irrelevant but, in any event, Gabčíkovo's contribution of 10% of Slovakia's energy needs is substantial. It is not understood how this can be categorised as "rather low". Ibid., para. 1.192.

62 In spite of Hungary's comments at ibid., para. 1.200, Slovakia has always accepted that Hungary has some right to a share in the receipts from the current energy production at Gabčíkovo. It also points out that approximately 40% of the electricity goes directly to Hungary (mainly to Győr) and is therefore of great benefit to Hungary. Although Hungary currently pays for the energy it receives, it is far more economical for Hungary to import electricity from just across the border at Gabčíkovo than from other sources (electricity is transported at high voltages and a significant loss is incurred both in voltage conversions and in the resistance of the wires over long distances). See, Vol. III, Ch. 13, Figs. 3 and 4.

63 Hungarian Counter-Memorial, para. 1.201. The "independent report" which Hungary cites here is a report prepared by the environmental group Equipe Cousteau, which has a record of opposing the G/N Project on environmental grounds. As to the value of the energy produced at Gabčíkovo and the functioning of this plant since October 1992, see, Vol. III, Ch. 13.

Boundary Waters Management Agreement (Article 13(1))[64]. However, the details for improving navigation in the stretch of the Danube between Bratislava and Budapest existed under the agreed plan of the G/N Project, comprising a reservoir, bypass canal and an upper and lower river step, combined with certain riverbed regulation and dyke reconstruction downstream of Sap. As already noted above in discussing riverbed morphology[65], it is a novel legal argument to try to escape - as Hungary does - from specific Treaty requirements on the basis that there were alternative ways of achieving the Treaty's broad objectives[66].

13.32 These measures to improve navigation addressed problems in a stretch of the Danube that was, in 1977, one of several serious navigational bottlenecks remaining along the Danube. The sector of the river passing along the joint Czechoslovak-Hungarian stretch contained some 15 shallows sections; and the stretch of the river between Bratislava and Budapest was navigable on average only 120 days per year[67].

13.33 In proceeding with and putting into operation the Gabčíkovo section of the G/N Project through Variant "C", Czechoslovakia eliminated the bottlenecks from Čunovo to the end of the bypass canal; in contrast, by abandoning Nagymaros and then the entire Project, Hungary has not permitted the measures to be taken under the Project to eliminate the navigational problems downstream of the bypass canal - and this sector of the Danube today is the only remaining area along the entire river that continues to present serious problems to the flow and safety of navigation. In particular, in a number of areas it fails to meet the Danube Commission's low discharge depth standard of 2.5m and width standard of 150m[68].

13.34 The agreed concept of the G/N Project (reservoir, bypass canal located outside of the floodplain, and an upstream and downstream step) indicated how the Treaty

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64 See, Slovak Memorial, para. 6.143.

65 See, para. 13.20, above.

66 On the municipal plane, it is rather like a contractor charged with the erection of an apartment building complex attempting to defend his failure to perform the contract on the basis that his own studies had established, to his satisfaction, that the complex was ill-conceived and that a large caravan park on the outskirts of town would suffice.

67 Slovak Memorial, para. 1.38; Slovak Counter-Memorial, para. 7.115.

68 See, generally, Slovak Memorial, para. 1.35, et seq., for a full discussion of these navigational problems.

parties had decided to deal with the measures necessary for navigational improvement as an integrated part of the Project's provisions for flood control and energy production. Whether this was the only (or the best) way of dealing with the navigational measures required to be taken was not the issue in 1977; nor is it today[69].

13.35 Hungary does not deny outright an obligation to conform to the Danube Commission's standards in the light of the provisions of the 1976 Agreement and the 1977 Treaty - aside from just as a matter of comity as one of the Danube States - but it seeks to evade the obligation by contending:

- That navigation along the relevant stretch is not "necessary from a economic point of view"[70], faulting Slovakia for not producing statistics to prove its profitability;

  Comment: *In Part III (Chapter 14) there is such an economic analysis correcting Hungary's flawed analysis. What it reveals is that the war in Yugoslavia and related UN sanctions are the major reason for a fall off in commercial use of the Danube in this sector. This is nowhere mentioned by Hungary*[71]. *Normally, river navigation is economically attractive; otherwise, the Danube commission would not be so keen on its improvement.*

- That in the first years of operation under Variant "C" there have been accidents blocking navigation for limited periods;

  Comment: *It does not seem to matter to Hungary that one accident related to a Project design failure at the Gabčíkovo lock (for which Hungary as joint participant in the Project, was equally responsible);*

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69 Hence, Hungary's claim that "studies have shown that problems affecting the Nagymaros reach can nonetheless be resolved by traditional means" is not only wrong, it is wholly irrelevant. Hungarian Counter-Memorial, para. 1.187.

70 Ibid., para. 3.86.

71 The Court may well question the worth of a "Scientific Evaluation" of navigation that entirely omits from its economic assessment the key relevant factor.

and that the second was due to the negligence of a ship captain. Equally, Hungary fails to mention that delays as a result of accidents occur on all major rivers, including the Danube.

13.36 Hungary's pleadings continue to undervalue the combined efforts of the Danube States to achieve good navigable links - and the (recently completed) German engineering achievement, at huge expense, of connecting the North Sea (and, soon to follow, the Baltic) to the Black Sea by the Rhine-Main-Danube canal[72]. This European waterway and the potential additional waterways which Hungary continues to obstruct as a result of its abandonment of the G/N Project, are shown on Illus No. R-14. It may be that Danube traffic is economically less interesting to Hungary than it is to Slovakia (which has important shipbuilding facilities at Bratislava and Komárno); but Hungary's slanted economic analysis of the benefits of future Danube traffic, and its own lack of a shipbuilding industry, are hardly a justification for its abandonment of the G/N Project.

13.37 Aside from the glaring omission of the war in ex-Yugoslavia from its economic analysis of the future of Danube traffic, Hungary makes a seriously misleading statement of fact (which appears almost verbatim in two different parts of its pleading) concerning where in the reach between Bratislava and Budapest the bottlenecks have been and aiming at the devalorisation of the bypass canal in the Gabčíkovo section of the Project. The statement is this:

> "The more difficult section of the river affected by the Original Project was the Nagymaros reach, and this is reflected in the recommendation of the Danube Commission as to the Vienna-Budapest sector, which identified Nagymaros (but not Gabčíkovo) as one of 4 sectors requiring attention[73]."

13.38 It is simply incorrect to state that the "more" ("most" in the second version) difficult section of the relevant river stretch between Bratislava and Budapest was the "Nagymaros reach", that is the stretch downstream of the present bypass canal, relying on the Danube Commission as authority. First, the river stretch to which the Danube Commission originally devoted particular attention, by the establishment of a special "River

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72 See, Slovak Memorial, para. 1.11, and Illus. No. 11, showing the completed or planned waterworks projects along this inter-European waterway.

73 Hungarian Counter-Memorial, paras. 1.1.88 and 3.89. Footnotes omitted.

Source: United Nations Publication, November 1994

Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. R-14

Administration", was the stretch Rajka (rkm 1848) to Gonyü (rkm 1790), that is the stretch of the Gabčíkovo section of the Project[74]. The problems here (or, at least, upstream of Sap - rkm 1810) have now been solved by the putting into operation of the bypass canal. Second, no evidence in support of Hungary's contention is contained in the statement relied on[75]. Hungary refers to a 1992 estimate by the Commission of the investment needed to remedy the existing bottlenecks between Vienna and Budapest - but based on an assumed project of four dams (Hainburg and Wolfsthal in Austria; Gabčíkovo and Nagymaros). However, in terms of estimating this investment - at approximately US$ 1 billion - the Commission did not include Gabčíkovo, as this was already largely complete[76]. From this, Hungary has magically produced the conclusion that the Gabčíkovo reach of the Danube, whose navigational problems have now been totally solved by the reservoir and bypass canal under Variant "C", was not so important.

13.39 Finally, Hungary cannot be excused its abandonment of Nagymaros, or relieved of any future obligations as to this section of the Project, on the basis that it does not share the faith of the other Danube States that the Danube will become increasingly important commercially and economically now that the extraordinary engineering feat of the Rhine-Main-Danube canal has been completed, with other canal projects in the planning stage or under way.

C. Flood Control

13.40 In its Memorial, Hungary ignored the important issue of flood control. The Hungarian Counter-Memorial notes the emphasis placed on flood protection in the Slovak Memorial and, by way of response, admits that the "Project would have provided additional security to the region"[77]. But such a positive conclusion could not be acceptable to Hungary. It therefore continues:

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74 See, Vol. III, p. 227.

75 Hungarian Counter-Memorial, para. 1.181.

76 Ibid. The specific statement is as follows: "The investment required was estimated in 1992 at US$ 1 billion (not including Gabčíkovo)".

77 Ibid., para. 1.72.

> "But flood control was certainly not a 'principal' concern of the Treaty. On the contrary it was a benefit that could have been achieved in other and cheaper ways[78]."

This assertion ignores the integrated aspect of the G/N Project, picking out flood control as if it were a problem to be dealt with in isolation; and then Hungary formulates the entirely irrelevant claim that the Treaty parties exercised poor judgment by not finding cheaper ways of dealing with flood control[79].

13.41 Hungary's assertion is contradicted by its own past recognition of flood control as a prime aim of the G/N Project: for example, in the 1977 Summary of the Joint Contractual Plan[80]; in the Hungarian Academy of Science's Opinion of 1985[81]; the official 1988 Hungarian brochure: "Gabčíkovo-Nagymaros: Environment and River Dams"[82]; and the official Hungarian brochure issued by OVIBER to describe the Project[83]. And even when Hungary moved to abandon the G/N Project, Prime Minister Németh in his letter of 6 March 1990 reassured the Prime Minister of Czechoslovakia that Hungary would complete flood control work[84]. It is interesting to quote a few passages from the OVIBER brochure (circa 1977) describing the situation at that time[85]:

> "On the reach of the planned river barrage system, and especially on the upper part of it[86], the situation of the flood-prevention becomes worse year by year ... .

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78 Ibid. (fns. omitted).

79 See, paras. 13.20 and 13.31, above, as to the irrelevance of the same line of argument as to riverbed morphology and navigation, respectively.

80 Hungarian Memorial, Vol. 3, Annex 24. See, also, Vol. II, hereto, Comment 1 to "Scientific Evaluation" p. 16, where the pertinent section of the 1977 Joint Contractual Plan Summary is quoted. See, also, fn. 91, below.

81 See, Slovak Counter-Memorial, para. 7.118.

82 Annex 5, hereto.

83 Slovak Memorial, Annex 29.

84 Hungarian Memorial, Vol. 4, Annex 35.

85 OVIBER was the Hungarian Institute principally charged with carrying out the construction responsibilities of Hungary under the G/N Project.

86 I.e., in the Gabčíkovo section. Emphasis added.

> The combination of the [G/N Project] ceases the danger of inundation and makes safe the run off of the floods ... . In the case of the Gabčíkovo River Barrage, conditions improve by the fact ... that the run off of the flood is divided between the power canal and the old Danube riverbed[87]."

13.42 Hungary does not deny that the Treaty Project "would have improved existing flood protection in the region", but rather contends that this would "merely have added additional security to what was otherwise a secure flood protection system"[88]. This is put more bluntly in Hungary's "Scientific Evaluation":

> "As far as flood protection is concerned there was and is no need for the G/N Project. The Szigetköz problems were solved by reinforcement of the dyke systems in the 1960s and 1970s, providing a 100-year flood protection which complies with international standards[89]."

Of course, this is directly contrary to the 1977 Summary of the Joint Contractual Plan, the OVIBER brochure and the other sources cited above. A second element in Hungary's scientific arguments concerning flood control is the claim that Variant "C" has given rise to flood control problems. Hungary's allegations in this regard are taken up, in turn, below.

The Agreed Need for Additional Flood Control

13.43 Hungary's entire analysis of flood control - as the underlined portion of the passage quoted above shows - is concerned not with what the Treaty parties agreed to but with what Hungary believes would provide adequate protection for Hungary only[90]. This is a strange attitude for Hungary to take (as a Treaty party) towards the problem of flood control that by definition requires the combined efforts of the States on both sides of a jointly held stretch of river, and particularly so where, as under the G/N Project, a joint endeavour was formulated in relation to the needs of both States.

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87 Slovak Memorial, Annex 29.

88 Hungarian Counter-Memorial, para. 1.177.

89 Ibid., Vol. 2, p. 5 (emphasis added).

90 And only in one particular part of the Hungarian territory, i.e., Szigetköz. Hungary focuses on this region alone because further downstream, that is in the Nagymaros section of the Project, its territory slopes down to the territory (for the larger part) and therefore there is a natural protection against floods.

13.44 Before the Gabčikovo section of the Project went into operation under Variant "C", this section (upstream of Sap) was the part of the river stretch between Bratislava and Budapest most exposed to flood risk (at least for Hungary). This was so because the riverbed of the Danube in this stretch rises above the surrounding land on both sides[91]. The flood risk here has now been dealt with through the approximate and partial application of the Treaty under Variant "C". However, downstream of Sap (where the bypass canal ends), the flood control problem has not been resolved. For it is here that the river's gradient becomes markedly less steep and sediment deposition occurs, acting as a brake to the flow and causing the river to attempt to meander. The impoundment of water in the stretch behind the Nagymaros weir was intended to solve this problem (along with some dredging and dyke reconstruction). Moreover, downstream of Komárno, the Hungarian side of the river is elevated, providing increased natural protection against floods. On the Slovak side in this sector, however, the terrain is not elevated, remaining more vulnerable to flood risk. Once again, the works related to the Nagymaros section of the Project would have dealt with this problem, providing for substantial new dykes and dyke reconstruction, particularly on the Slovak side. This section, as with the stretch downstream of Sap, remains vulnerable to flood due to Hungary's abandonment of Nagymaros.

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[91] See, Slovak Memorial, para. 1.22, and Illus. No. 14. See, also, the 1977 Summary of the Joint Contractual Plan, describing this region and its susceptibility to flood, Hungarian Memorial, Vol. 3, Annex 24 (at p. 302):

> "The present conditions of flood control are getting worse year by year, because owing to the sudden slope change at Palkovičovo gravel settles in the bed, and consequently the bottom of the bed and the water levels keep on rising. The flood levels increased 150 cm between 1901 and 1950 which caused a higher groundwater level over the surrounding area, and less security of the levees during floods and ice gorges. The planned solution is advantageous from the flood control point of view, because the most difficult and most dangerous Hrušov-Palkovičovo stretch is by-passed by a diversion canal. ...
>
> The discharge capacity of the diversion canal and the abandoned riverbed after the construction of the barrage along the stretch above Palkovičovo jointly provide the necessary security even against the occurrence of a 10 000 year flood. The levees along the downstream stretch ensure the required security against the occurrence of a 1000 year flood.
>
> With respect to all these facts the conclusion can be drawn, that with the construction of the planned Gabčikovo - Nagymaros Barrage system the requested level of flood protection of the entire surrounding area will be provided, therefore the value of the watershed area, considering the continual development of the agricultural production, industry and municipalities, will be constantly rising." Emphasis added.

In the light of the above (being extracts from a jointly prepared document contemporary with the 1977 Treaty) and, in particular, the underlined passages, Hungary's assertion that "[i]t was acknowledged by both sides that the appropriate design standard was the 100-year flood" is quite untenable. Hungarian Counter-Memorial, para. 1.175.

13.45 The concept of the G/N Project, as mentioned above in relation to navigation[92], was to provide an integrated solution to the problems of flood control and navigation, and to meet the needs for electrical energy (not only for domestic use but also as a means of paying for the G/N Project)[93].

13.46 Hungary's argument is that by 1977 it had built its dykes so as to protect the territory of Szigetköz to the safety standard of the 100 year flood and, therefore, it needed no more flood protection. But this is both deceptive as well as being contradicted by all Hungary's past assessments[94]. The essential element of flood safety in the Gabčikovo section of the G/N Project was to divide the flood waters between the bypass canal and the old Danube. The starting point adopted by the Treaty parties in assessing flood risk was not the 100 year flood but the 1,000 year flood[95]; and the Project's agreed operating regulations provided for the diversion of the 1,000 year flood (waters having a discharge of 13,000 m^3/s) in such a way that the dyke systems built along the old Danube to the 100 year flood standard were adequate, as the table below illustrates:

Probability	Number of Years	Quantity in cubic metres per second (m^3/s)
0.01	10,000	15,000
0.1	1,000	13,000
1	100	10,600
2	50	9,550
5	20	8,750
10	10	7,900

Then the method of dividing the waters was arrived at in order to calculate the safety standard for the various structures, as shown below:

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92 See, para. 13.34, above.

93 To have attempted to deal adequately with the enormously expensive measures required for navigation improvement and flood control would have been prohibitive is the view of the Treaty parties, without the means of financing provided by producing electrical energy.

94 See, para., 13.41, above.

95 See, Vol. III, p. 247.

Structure	Safety Standard (m^3/s)
Weir on the bypass canal	1 400
Weir in inundation	6 200
Hydroelectric power plant	3 160
Navigation locks	1 840
Withdrawals and losses	320
Total	13 000

13.47 This is where Hungary's deceptive reference to the 100-year dyke structures comes in. In the event of the 1,000 year flood, the total discharge of 13,000 m^3/s would be divided, so that the discharge down the old Danube would not exceed 7,680m^3/s, thus allowing its dykes to be built only to the 100 year standard (a discharge of up to 10,600 m^3/s). In other words, to the extent Hungary's dykes met the 100 year standard, Hungary's side of the river was safe against the 1,000 year flood - but only provided the Gabčíkovo section of the Project had been put into operation dividing the flood waters. That is not at all the same thing as saying that the G/N Project was not necessary to afford adequate safety against floods, even as to Hungary alone.

13.48 The flood risk in the Project's Nagymaros section - that is, downstream of the bypass canal to the Danube's confluence with the Ipel' river - does not feature in the Hungarian Memorial for this is a risk felt for the larger part by Slovakia alone. The dyke reconstruction on the Slovak side was completed after Hungary's abandonment of the Project[96]. But these dykes formed part of an integrated flood control system, comprising pumping stations and other protection measures that cannot be implemented without the construction of the Nagymaros weir. Thus, the Slovak side is still exposed to flood risk in this region, as a result of Hungary's breach of its Treaty obligations in respect to Nagymaros.

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[96] In Vol. 2 of Hungary's Counter-Memorial (at p. 5) surprise is expressed that Czechoslovakia continued this work "after Hungary had suspended works at Nagymaros". Perhaps the author of this part was unaware that Czechoslovakia had also work to perform in the Nagymaros section - and that its side of the river in this section was more exposed to flood risk than the Hungarian side.

Hungary's False Accusation that Variant "C" Has Caused Flood Risk Problems

13.49 The Hungarian Counter-Memorial starts off its "evaluation" of the engineering aspects of Variant "C" in terms of flood control by pointing to the difficulties of such a task "due to the almost total lack of information concerning" these aspects[97]. This does not deter Hungary from proceeding to make an engineering assessment, anyway.

13.50 Hungary criticises the Project's alleged faulty engineering standards said to have been based on COMECON regulations. But in 1989, in the study that Hungary commissioned by Ecologia, the US engineer who evaluated the engineering aspects of the G/N Project for the study, Professor Harry Schwartz, was complimentary as to the engineering standards followed[98]. In any event, Hungary's allegations are conclusively disproved by Chapter 11 of Volume III hereto, which examines the engineering of the Project and Variant "C" in detail.

13.51 In sum, Hungary's consideration of what it regards as examples of the malfunctioning of "key elements of the Original Project and Variant C" is very unconvincing and appears to be intended as a diversionary tactic (away from the issues of importance in this case)[99]. The incident mentioned where an unassembled flood gate was washed away at the Čunovo weir while the Gabčikovo section was being put into operation under Variant "C" was not the result of faulty work at all; it happened because of the very unusual occurrence of a major flood during the construction of the inundation weir. These and the other allegations made here by Hungary have already been dealt with fully in the Slovak Counter-Memorial[100]; and annexed in Volume III .is a detailed technical analysis of the unusual flood event in November 1992 that caused this as yet unassembled flood gate to be washed away. No

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97 Hungarian Counter-Memorial, para. 3.82. Once again, Hungary pleads the lack of information as to Variant "C" due to Czechoslovakia's (and Slovakia's) refusal to cooperate. See, Slovak Counter-Memorial, para. 6.07, et seq., for a rebuttal of this incorrect contention.

98 See, para. 12.58, above.

99 Hungarian Counter-Memorial, para. 3.84, et seq.

100 Slovak Counter-Memorial, para. 8.51, et seq.

indication of faulty design, bad workmanship or negligence is revealed by the incident, and no harm was caused to Hungary[101].

13.52 Similarly, both the Slovak Counter-Memorial and Volume III hereto respond in full to Hungary's contention that a "worrying aspect of design and construction is the increase in flood risk produced by Variant "C"[102]. What Slovakia's responses reveal is that Hungary has simply produced a flood risk of its own by using the wrong figures concerning the flood management operations of Variant "C".

13.53 In its Volume 2, Hungary's Counter-Memorial faults Variant "C" in its handling of ice conditions on the basis that at times navigation may be blocked[103]. Apparently, the person preparing the critique was unaware that severe ice conditions normally do interrupt navigation for relatively short periods. The discussion of ice release in Chapter 11 of Volume III hereto explains how Variant "C" operates here in an entire satisfactory and routine fashion[104].

13.54 It is regretted that Hungary, who has abandoned the Project and failed to carry out all the flood control work for which it was responsible, should construct an argument blaming Czechoslovakia (and Slovakia) for exposing it - Hungary - to flood risk - when the truth of the matter is that after the implementation of the Gabčíkovo section through Variant "C", the Szigetköz region of Hungary (above Sap) is now protected against even the 1,000 year flood.

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101 Vol. III, pp. 249-250.

102 Hungarian Counter-Memorial, para. 3.85. See, Vol. III, hereto, Ch. 12, Sec. 2. See, also, Vol. II, hereto, comments 1 and 2 to "Scientific Evaluation" pp. 32-33.

103 Hungarian Counter-Memorial, Vol 2, pp. 34-35.

104 Vol. III, hereto, pp. 250-257.

PART IV

CHAPTER XIV. THE REMEDIAL POSITION

14.01 The Hungarian Counter-Memorial begins its discussion of "The Remedial Issues" in Chapter 7 by asserting that the Parties are agreed that, in this first phase of the case, the Court is confined to dealing with "the substantive questions ... in Article 2(1) of the Special Agreement, leaving consequential issues ... for a possible subsequent phase ..."[1]. That is true in as much as, in Slovakia's view, the Court should in this first phase confine itself to issues of liability, and postpone quantification of damages to a later phase. The reason why, in its Memorial, Slovakia attempted a provisional quantification of its losses was simply to enable the Court to see why, given the huge losses anticipated, Czechoslovakia (followed by Slovakia) had no option but to implement the 1977 Treaty Project unilaterally so far as possible.

14.02 But Hungary sees the "consequential issues" as including not merely quantification of damages but also what it terms "the modalities of implementation of the judgment"[2]. Whatever this may mean to Hungary, it cannot mean that the Court may in due course turn to the modalities of implementing a Temporary Water Management Regime[3]. Nor can it mean that the Court's judgment on liability will, of itself, be without practical consequence, and that it will be for a later judgment to deal with the "modalities of implementation".

14.03 If, as Slovakia believes to be the case, Hungary is found to be in breach of the 1977 Treaty, certain consequences flow from the finding of breach as a matter of law. Those consequences are not suspended until some later judgment should spell out the obligations of Hungary. The immediate consequence is that the obligation of cessation of the

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1 Hungarian Counter-Memorial, para. 7.01.

2 Ibid.

3 See, above, para. 1.39, et seq.

unlawful act operates forthwith. It is the very first of the obligations spelt out by the International Law Commission in the following terms:

> "Article 6/Cessation of wrongful conduct
>
> A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred[4]."

Where the obligation in breach is an obligation to do something (obligation de faire), such as an obligation to perform a treaty as in this case, as contrasted with an obligation not to do something (obligation de ne pas faire), the duty of cessation becomes an obligation to cease the breach and perform the treaty. In the words of the Special Rapporteur of the I.L.C.:

> "The State injured by the violation of an obligation de faire would thus have an alternative. It may insist upon the discharge of the obligation, namely, by a claim of cessation of failure to discharge (a claim that, without prejudice to reparation, is covered by the 'primary' rule); or it may, circumstances permitting, invoke Article 60 of the Vienna Convention of the Law of Treaties for 'terminating the treaty'...[5]."

14.04 In the present case, the option for Czechoslovakia of terminating the 1977 Treaty because of the material breach by Hungary was wholly impractical, as demonstrated above in Chapter IX, and in consequence Czechoslovakia, and now Slovakia, is entitled to insist upon performance. That right follows by operation of law upon the finding that Hungary is in breach. It is not a matter to be postponed, perhaps for years, until a subsequent phase of the case concerned with "the modalities of implementation", as Hungary implies.

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4 Report of the I.L.C. on the Work of its 45th Session (1993) G.A.O.R. 48th Sess., Suppl. No. 10 (A/48/10), p. 130.

5 Preliminary Report on State Responsibility by Arangio Ruiz, Yearbook of the International Law Commission, 1988, Vol. II, Part 1, p. 16, para. 44.

SECTION 1. Judicial Remedies

14.05 In a rather curious section[6], Hungary castigates Czechoslovakia for adopting what it terms a measure of self-help, that is Variant "C", which it says is of a permanent character rather than a temporary measure pending resolution of the dispute. Coming from a Party which has authorised large expenditures for the demolition of the coffer dam, with a view to ensuring that the Nagymaros barrage will never be built, the accusation is difficult to take seriously; but it is, in any event, misplaced for at least two reasons.

14.06 First, Variant "C" is not self-help. It is justified as the best and most feasible approximation to the Treaty that could be achieved given Hungary's refusal of any cooperation by Hungary[7]. Second, Variant "C" is reversible[8] for Variant "C" is simply the provisional dyke and the new dam at Čunovo. The costs of removal are estimated to be 30% of the costs of construction. Assuming Dunakiliti is built and operated as planned under the Treaty, the gates at Čunovo could simply be left open so control over the river's flow would shift to Dunakiliti. It should be clear that, for Slovakia, "reversibility" means a return to the Treaty. It is clear that for Hungary "reversibility" means a return to a state of nature, with the total destruction of all the structures completed under the Treaty, such as the Gabčíkovo step and barrage, the bypass canal and the reservoir. In Hungary's Memorial the Court is asked to determine that Slovakia is obliged:

> "(a) to return the waters of the Danube to their course;
>
> (b) to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution ...[9]."

It cannot be supposed that Hungary expects Slovakia to remove only the temporary Variant "C" structures, leaving intact the structures lawfully built according to the original 1977 Treaty scheme. The ecological (not to say economic) disaster of a vast, empty reservoir; an empty bypass canal; and an idle, useless power station and locks at Gabčíkovo through which water

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6 Hungarian Counter-Memorial, paras. 7.03-7.09.

7 See, Slovak Memorial, Chapter VII.

8 See, Slovak Counter-Memorial, Annex 24 (at p. 282).

9 Hungarian Memorial, para. 11.20.

no longer flowed is too horrific to contemplate. So it has to be assumed that Hungary expects Slovakia to demolish all these structures, too. In short, "reversibility" for Hungary means total abandonment of the Treaty and the destruction of everything built pursuant to the Treaty.

14.07 The argument that because Variant "C" is a permanent structure it is per se unlawful is nonsensical. The permanent or "non-reversible" features of what Hungary chooses to term Variant "C" are precisely those structures planned under the 1977 Treaty. These are the reservoir, the bypass canal, locks and hydroelectric power plant. Hungary's argument is tantamount to saying that the performance of the Treaty is per se unlawful.

SECTION 2. Responsibility for Unlawful Conduct

14.08 Slovakia has no disagreement with the proposition that "A State which engages in unlawful conduct must be taken to have assumed the risks and burdens of that conduct"[10]. This should, in a later stage of these proceedings, translate into the responsibility of Hungary for all damages which are the direct and foreseeable consequences of Hungary's unlawful breach of the 1977 Treaty.

SECTION 3. Remedies in Relation to the Exploitation of Shared Natural Resources

14.09 Hungary's argument here[11] appears to be that the waters of the Danube are "shared natural resources" (correct); that the principle of permanent sovereignty over natural resources is part of jus cogens (irrelevant because that principle applies to national, not "shared", resources); that therefore a State's sovereignty over such resources is inalienable (irrelevant for the same reason[12]); and that therefore "a fortiori, no treaty or other arrangement should be interpreted as involving any such alienation"[13] (equally irrelevant). The whole Hungarian argument is misconceived precisely because it is via agreements such as the 1977

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10 Hungarian Counter-Memorial, para. 7.11.

11 Ibid., paras. 7.13-7.16.

12 This extraordinary proposition would mean that any inter-State treaty for the joint exploitation of a shared natural resource, of which there are many examples, would be invalid.

13 Hungarian Counter-Memorial, para. 7.15.

Treaty that States normally develop and utilise shared natural resources. In addition, Hungary's arguments are irrelevant to the question of remedies.

14.10 It is noteworthy that Hungary just stops short - but only just - of arguing that the 1977 Treaty was invalid as a treaty violating a rule of jus cogens. Hungary suggests that the principle of permanent sovereignty affects the way the Court should interpret the 1977 Treaty. But in fact, under the law of treaties, a plea of jus cogens goes to the validity of the treaty[14], not to matters of interpretation, so if Hungary really wishes to invoke jus cogens it must be prepared to argue that the 1977 Treaty was invalid from its inception.

SECTION 4. The Quantification of Losses

14.11 Both Parties are agreed that this is a matter to be dealt with in a subsequent phase of the case. There are, however, some observations by Hungary which merit comment even at this stage.

14.12 Hungary expresses surprise that Slovakia claims the construction costs of Variant "C" in the years 1991-1992, but not in the years 1989-1990[15]. The answer is simple enough, and even the most cursory reading of the Slovak Memorial will give it. The 1989-1990 costs were the costs of work performed under the Treaty. The first stage of Variant "C" involved the completion on Czechoslovak territory of those works for which Hungary assumed responsibility under the Treaty, but failed to complete. This first stage began only in 1991-1992[16].

14.13 Then Hungary asks why the Treaty's cost-sharing formula was not applied to Variant "C"[17]. If this is meant to imply that Hungary was prepared to contribute

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[14] See, Article 53 of the Vienna Convention. A plea of jus cogens can also go to termination of a treaty where the rule of jus cogens emerged subsequent to the treaty. But Hungary cannot intend that, since Hungary invokes General Assembly Resolution 1803(XVIII) which was much prior to the 1977 Treaty.

[15] Hungarian Counter-Memorial, para. 7.18.

[16] Slovak Memorial, para. 5.28.

[17] Hungarian Counter-Memorial, para. 7.18.

half of the cost of Variant "C", then the observation scarcely merits a serious answer. Moreover the observation has nothing to do with remedies.

14.14 Then Hungary complains that Slovakia has appropriated the fruits of 15 years of work by Hungary on Slovak territory[18]. As part of the completed Treaty project, Slovakia is fully prepared to acknowledge that Hungary has all those rights of co-ownership to which Hungary was entitled under the Treaty. But it is unrealistic for Hungary to assert a Treaty entitlement to structures built by Czechoslovakia when Hungary purports to have terminated the Treaty and, by its breach, has denied to Slovakia its half-ownership of structures - like Nagymaros - which in breach of the Treaty Hungary has failed to build.

14.15 As to the remainder of Hungary's comments, which question the calculations of losses to the Czechoslovak navigation authorities, these raise matters of proof and, at the appropriate time, Slovakia will present such proof.

14.16 But what Hungary describes as "the real remedial context" amounts simply to this. It is Hungary's contention that the Court cannot allow Variant "C" to continue, and cannot contemplate the remedy of restitutio in integrum because to do so would be to resurrect a "dinosaur", a scheme which Hungary alleges is out-of-date, contrary to current legal trends, and environmentally unacceptable to Hungary[19].

14.17 The allegation of severe environmental harm to Hungary, of course, has not been proved. No one doubts that some environmental impacts can be shown: this is equally true in Slovak territory, just as it would be true of any development scheme of this size. But in 1977 both Parties agreed a scheme which each knew had some drawbacks: it was not a scheme which had all advantages and no disadvantages. Nevertheless, weighing the advantages against the disadvantages, including those in the environmental field, they had no doubt in 1977 that the scheme should be implemented, and they recorded their agreement in the most solemn form known to the law, an international treaty.

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[18] Ibid., paras. 7.20-7.22.

[19] Ibid., paras. 7.25-7.38. The emotive use of terms like "dinosaur" is not a substitute for real proof; and in the discussions in the Danube Commission, or the EC Group of Experts or the Hydro-Quebec or Bechtel reports there is no suggestion that the Treaty project used outdated technology.

14.18 The Hungarian thesis makes a mockery of the norm pacta sunt servanda which represents a basic value in international society. It is a thesis of anarchy, in which any party, on the basis of changes in political mood, advances in science and technology, or evolution in the law, can simply set aside a binding treaty, even a treaty of recent origin, not yet fully implemented. If this thesis were to triumph, the damage done to inter-State relationships and the law on which they are founded would be truly catastrophic.

SUBMISSIONS

On the basis of the evidence and legal arguments presented in the Slovak Memorial, Counter-Memorial and in this Reply, and reserving the right to supplement or amend its claims in the light of further pleadings, the Slovak Republic

Requests the Court to adjudge and declare:

1. That the Treaty between Hungary and Czechoslovakia of 16 September 1977 concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks, and related instruments, and to which the Slovak Republic is the acknowledged successor, is a treaty in force and has been so from the date of its conclusion; and that the notification of termination by the Republic of Hungary on 19 May 1992 was without legal effect.

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributed responsibility to the Republic of Hungary.

3. That the act of proceeding with and putting into operation Variant "C", the "provisional solution", was lawful.

4. That the Republic of Hungary must therefore cease forthwith all conduct which impedes the full and bona fide implementation of the 1977 Treaty and must take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty.

5. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary is liable to pay, and the Slovak Republic is entitled to receive, full compensation for the loss and damage caused to the Slovak Republic by those breaches, plus interest and loss of profits, in the amounts to be determined by the Court in a subsequent phase of the proceedings in this case.

(Signed).....
Peter Tomka
Agent of the Slovak Republic

LIST OF ANNEXES