

**INTERNATIONAL COURT OF JUSTICE
GABČÍKOVO-NAGYMAROS PROJECT
(HUNGARY/SLOVAKIA)**

COUNTER-MEMORIAL

**SUBMITTED BY THE
SLOVAK REPUBLIC**

**VOLUME I
5 DECEMBER 1994**



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CHAPTER I. INTRODUCTION

1.01 The dispute submitted to the Court by means of the Special Agreement bears fundamentally, if not exclusively, on the application and the possible breach of the 1977 Treaty concluded between Czechoslovakia and Hungary.

1.02 This instrument is and will remain the basis for the solution of the present dispute as Section 1 of this Introduction shows. Hungary attempts to escape from the problems posed by this central, unavoidable fact. It tries to limit the task of the Court and falls back on a contorted legal strategy. This is discussed in Section 2.

SECTION 1. Summary of the Case as Slovakia Sees It

The Case is a "Treaty Case" and the 1977 Treaty is the Central Element of the Dispute and of its Resolution

1.03 Article 2 of the Special Agreement provides:

"(1) The Court is requested 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,

(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;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometer 1851,7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) what are the legal effects of the notification, on May 19, 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph (1) of this Article."

1.04 The 1977 Treaty is thus the central element of the dispute which divides the Parties. The Court is requested to determine whether Hungary was entitled to suspend and

subsequently abandon its obligations arising from the 1977 Treaty and then unilaterally to decide on its "termination". The Court is also asked to determine whether Czechoslovakia was, for its part, legally entitled to secure an approximate application by resort to a provisional solution, Variant "C". And, finally, the Court is asked to decide what the legal consequences are of its findings.

1.05 Not only does the application - or non-application - of the 1977 Treaty constitute the very object of the dispute submitted to the Court but, further, the Parties have agreed that the Treaty forms the essential basis of the applicable law. Certainly, the introductory clause to Article 2(1) of the Special Agreement quoted above does not make the Treaty the exclusive basis for the resolution of that dispute since it also mentions "rules and principles of general international law as well as such other treaties as the Court may find applicable". But this is merely because, 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 part¹."

In this particular case, the 1977 Treaty, which forms one element of a complex of interrelated obligations², can only be applied and interpreted in the light of the law of treaties, the rules of which have, for the main part, been codified in the 1969 Vienna Convention on the Law of Treaties.

1.06 It is nonetheless true that, through the agreement of the Parties in the Special Agreement, the 1977 Treaty constitutes both the principal object of the dispute between the Parties and the very basis of its resolution, which the Court has been requested to provide.

The Main Elements of the Dispute

1.07 Slovakia has set out in its Memorial its analysis of this dispute and the means by which it should be resolved. However, given the ambiguities and contradictions of Hungary's treatment³, Slovakia considers it useful to remind the Court in broad outline of the essential elements of its own case lest they be lost sight of in refuting Hungary's positions.

¹ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 76.

² See, Slovak Memorial, paras. 6.06-6.54, and para. 2.25, et seq., below.

³ See, for example, para. 1.45, et seq., below.

1.08 For the reasons set out above, the point of departure required for any analysis of the case is the 1977 Treaty, on which Hungary has endeavoured to cast a certain suspicion, in particular by means of its constant allusions to pressures allegedly applied by the Soviet Union at the time of its conclusion. Leaving aside the fact that these alleged pressures are entirely theoretical, just as the Court has held in relation to another party in a recent dispute, Hungary "has not however taken this argument so far as to suggest it as a ground for invalidity of the Treaty itself", nor has Hungary "suggested that a new peremptory norm of general international law has emerged which could have rendered the Treaty void"⁴. To the contrary, Hungary accuses Czechoslovakia of having breached the Treaty and has arrogated to itself the power to decide unilaterally on its termination.

1.09 This Treaty, the validity of which has not been contested by either of the Parties, imposes precise obligations of result, the principal of which are contained in Article 1 (describing them) and Article 5 (allocating them between the Treaty parties). In their essence, these obligations consist of the construction of the G/N Project which "shall comprise the Gabčikovo system of locks and the Nagymaros system of locks and shall constitute a single and invisible operational system of works" (Article 1).

1.10 Concerns in relation to the environment do not form the object of the Treaty even if, as Hungary recognises, such concerns were by no means overlooked by the drafters of the Treaty, who - a rare thing for the era - accorded them a place in the Treaty (Chapter VII thereof and Article 15). Furthermore, one of the most important objectives of the Treaty was protection against floods - an essential factor in terms of the human environment in the light of the history of catastrophic floods in the area before the construction of the G/N Project. The Treaty parties also intended to improve navigation conditions - the Project area being one of the remaining bottlenecks hindering the smooth functioning of the Rhine-Main-Danube network (then under consideration) - and to draw additional benefit from their natural resources by development of a renewable and pollution-free source of energy (the G/N Project being conceived to supply the particularly valuable peak production electricity).

1.11 These preoccupations were of course shared by the two Treaty parties. But it is interesting to note that it was Hungary that initiated the negotiations that led to the conclusion of the Treaty⁵; that it was Hungary that was the most enthusiastic party in terms of

⁴ Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, I.C.J. Reports 1994, p. 20.

⁵ See, Hungarian Memorial, paras. 3.02-3.04.

the actual conclusion of the Treaty⁶; and that it was Hungary also who, in spite of Czechoslovakia's reticence, pushed for and achieved the acceleration of the Project provided for in the Protocol of 6 February 1989.

1.12 This last event is of particular importance in that it shows that, at that date, Hungary entertained no doubts at all as to the use, viability and sustainability of the Project: if Hungary had had even the faintest of doubts, it would have abstained from an acceleration of the Project's schedule. It must therefore be concluded that, on 6 February 1989, Hungary formally renewed its 1977 commitments without pressures of any sort. In fact, Hungary made this decision at a time when the means of investigation and evaluation of ecological risks were well known and after the Project had been the object of numerous, precise impact studies conducted both by Hungary and Czechoslovakia.

1.13 Yet this did not hinder Hungary from reconsidering its obligations under the Project on 13 May 1989, that is, only three months later. For on that date, it suspended work at Nagymaros - never to be continued - whilst on 20 July of the same year it extended this suspension to the upper section of the Project, refusing to proceed with final work on the Dunakiliti weir, which concerned the damming of the Danube and, hence, prevented putting into operation the Gabčíkovo section. These decisions were the preliminary steps leading to the purported "termination" of the 1977 Treaty, notified to Czechoslovakia on 19 May 1992.

1.14 It is abundantly clear that no fundamental change of circumstances could have intervened or did intervene between these two key dates - 6 February 1989, when Hungary reaffirmed its commitment to the Project and obtained Czechoslovakia's consent to the acceleration of the schedule, and 13 May 1989, when Hungary began to deprive that commitment of any substance. It is thus necessary to seek the reason for this complete turnaround.

1.15 Doubtless "ecological considerations" played a large role - but not in the sense meant by Hungary. No new ecological factors were discovered in the three month period between February and May 1989; nor, indeed, had any new developments brought the Project into question since 1977. Hungary failed to produce such key evidence before its suspension and subsequent abandonment of works and has not remedied this failure in its Memorial.

⁶ See, Slovak Memorial, e.g., para. 6.08.

1.16 Hungary's position derives not from a "scientific" ecology but from a "political" ecology. The Hungarian Government, overwhelmed with serious economic and financial difficulties, had decided to blame its inability to meet its obligations on supposed environmental obstacles. It did not hesitate to put pressure on scientific bodies, in particular the Hungarian Academy of Sciences, to provide a veneer of truth to its position which, in fact, was inspired by political and economic factors⁷.

1.17 This gave the Hungarian Government the opportunity to "bring on board" the ecological movement, to attribute to Czechoslovakia the reasons for the prevailing discontent, and to lighten its undeniably heavy financial burdens (although, in relation to the Project, these were burdens shared between the two Treaty parties). Once this movement was set in action (and even encouraged), the Hungarian Government was unable and unwilling to resist the further pressures of the environmental activists, whether Hungarian or foreign. No one is unaware of the role played by the environmental movements in the democratic protests against the communist regimes in Central and Eastern Europe and, in particular, in Hungary. Put forward - quite wrongly - as the emanation of the regime then in power, the G/N Project became a symbol to be destroyed. And, although the Hungarian Government knew that the claims against the Project had no scientific basis, it neither could nor wished to oppose the mounting demagogic pressures to which it had delivered itself by agreeing to suspend the works at Nagymaros, then at Dunakiliti, and then by abandoning all works, and finally by purporting to terminate unilaterally the Treaty. Not one of the steps had a credible basis - either in fact, or in law.

1.18 One example of particular significance shows that the so-called motives tied to the defence of the natural environment were no more than a simple pretext with no content. In Hungary's Memorial⁸ it is affirmed that, in October 1989, its Prime Minister, Mr. Németh, proposed to Czechoslovakia that Nagymaros be abandoned and an agreement be reached on environmental guarantees in return for the continuation of works at Dunakiliti (which had been interrupted since July) and the damming of the Danube. This "bargain" was effectively proposed once again in November⁹ - thus showing that Hungary saw no real "environmental" obstacle to the construction of the Gabčíkovo section of the Project. Nonetheless, when Czechoslovakia indicated that it would be prepared to enter into an agreement on environmental guarantees and postpone work on Nagymaros while its alleged

⁷ See, the "Marjai letter", Slovak Memorial, paras. 3.37-3.55 and Annex 56.

⁸ Hungarian Memorial, para. 3.96.

⁹ See, the draft treaty project submitted by Hungary. *Ibid.*, Vol. 4, Annex 30.

environmental effects were being studied, Hungary immediately went back on its offer, showing clearly its refusal to be bound by any of the 1977 Treaty obligations.

1.19 Faced by this fait accompli, Czechoslovakia (then Slovakia) devoted itself to minimising the damages suffered as a result of Hungary's unlawful position. This was its legal duty in virtue of the general rules relating to international responsibility. It also tried to execute the 1977 Treaty in a manner as "approximate" as possible to the original. This was its legal right in virtue of the general principles of the law of treaties.

1.20 Variant "C" responds in all respects to these requirements: it is a provisional solution leaving entirely open the possibility of a full return to the 1977 Treaty. Moreover, without affecting in any way Hungary's territorial sovereignty, Variant "C" represents the partial execution of the Treaty, for it improves navigation on one important sector of the Danube, it permits the production (although not peak production) of electricity at Gabčíkovo and it enhances the preservation of the environment - notably by positively influencing the ground water of the region and by facilitating the recharge of the side arms of the Danube which, before implementation, were slowly drying up. Moreover, Variant "C" allows the partial implementation of already well advanced works which could certainly not be left as they stood if an ecological catastrophe was to be prevented.

1.21 Regardless of these advantages (which, in spite of Hungary's claims to the contrary, are not counter-balanced by any negative factors), the implementation of Variant "C" can only present a partial realisation of the Treaty. In particular, the non-construction of the Nagymaros weir means that there can be no peak production at Gabčíkovo, no electricity production at all at Nagymaros, no improvement in navigation below Sap (Palkovičovo) and no completion of the planned amelioration in flood protection downstream of the bypass canal. Moreover, Variant "C" has demanded from Czechoslovakia (and Slovakia) a further financial undertaking, in addition to that already borne, by having to complete those of Hungary's works relating to the Gabčíkovo section that Hungary had summarily abandoned. Nor can Variant "C" remedy Slovakia's final loss reflecting largely fruitless works in the Nagymaros section.

1.22 Slovakia's losses will also be aggravated as a result of recent steps taken by Hungary since Hungary does not deny that it is preparing to demolish the coffer dam built on the Nagymaros site, which constitutes around 20% of the construction works for the Nagymaros step for which Hungary was responsible¹⁰. If Hungary executes this demolition project, it will present both Slovakia and the Court with a fait accompli and will render the

¹⁰

See, Slovak Memorial, para. 6.131, and Hungarian Memorial, para. 11.14.

resumption of work far more difficult, if not impossible, at the same location for the Nagymaros step.

SECTION 2. Hungary's Litigation Strategy

1.23 Hungary takes all the credit for having brought the dispute to the Court. The self-satisfaction is extreme¹¹. In fact, Hungary impeded the conclusion of a Special Agreement by trying to limit its scope and by trying to use it to hinder Czechoslovakia (and later Slovakia) from putting into operation Variant "C" - the sole means of carrying out, at least approximately, the joint Project.

1.24 Hungary's intentions are quite clear from its Application to the Court filed on 22 October 1992 on the "Diversion of the Danube River", just the day after Hungary declared its acceptance of the compulsory jurisdiction of the Court and at the time when the dissolution of Czechoslovakia had reached its crucial phase. The Submissions in its Application bear solely on the validity of the provisional solution - while the regularity of the unilateral "termination" of the 1977 Treaty is taken for granted - exactly as if the Application was a request for interim measures¹². The aim of the manoeuvre is clear: it was no more than a final attempt to prevent the filling of the bypass canal and the putting into operation of the Gabčíkovo hydroelectric power plant - which was unacceptable to Czechoslovakia, not least because of the serious ecological damage that maintenance of the status quo would have entailed.

1.25 Contrary to the insinuations contained in Hungary's Memorial, it was not prevarication on Slovakia's part that prolonged the negotiations that eventually led to the Special Agreement. Rather it was Hungary's rigid attitude - whether in terms of its attempts to limit the Court's jurisdiction to Variant "C" or to seek conservatory measures. It may be noted that it was Slovakia who moved most rapidly to ratify the Special Agreement¹³.

¹¹ In its Memorial, Hungary goes as far as stating that this "was the first occasion since 1945 that an Eastern or Central European country proposed the submission of a specific dispute to the court" (para. 9.25, fn. 39). This is not so. In 1958, Poland suggested that a dispute between Poland and Canada be submitted to the Court. Canada "declined to respond and the initiative died", Dobell and Wilmore, "John Holmes", 33 International Law Journal (1977-78), p. 104, at pp. 105-106, quoted by Judge Manfred Lachs, Letter to the Editor-in-Chief, 84 American Journal of International Law 231 (1990), at p. 232.

¹² See, paras. 2 and 4 of the Submissions, Hungarian Memorial, Vol. 4, Annex 102 (at p. 230).

¹³ The Slovak Parliament approved the Compromis on 23 April 1993; the Hungarian Parliament approved it four days later.

1.26 Hungary's attitude during the Special Agreement's negotiation is no more than one of the manifestations of its litigation strategy which, in essence, aims to convince the Court of the illegality of Variant "C" whilst disregarding the 1977 Treaty, Hungary's unilateral "termination" of which would not only have erased its existence but also all of its consequences. To meet this objective, Hungary misstates the task of the Court under the Special Agreement.

A. The Task of the Court

Hungary's Attempts to Set Aside the 1977 Treaty

1.27 In conformity with the provisions of Article 40(1) of the Statute of the Court, the Special Agreement indicates the subject of the dispute and, at the same time, defines the task of the Court. As Ambassador Rosenne has recalled:

"Where the case is instituted by special agreement, that indication will be peremptory in the sense that the decision of the Court will formally reply to the specific reference to the Court contained in the special agreement¹⁴."

Nonetheless, both in its Memorial and by its general approach to the dispute, Hungary has attempted to bring into question the Special Agreement's terms:

- It has introduced the notion of the critical date;
- It has developed an untenable line of argument relating to State succession;
- It has neglected the provisions of Article 4 of the Special Agreement relating to the Temporary Water Management Regime (TWMR).

The "Critical Date" Proposed by Hungary

1.28 The concept of the "critical date" is a familiar one, although its utility is

¹⁴ S. Rosenne, The Law and Practice of the International Court, Martinus Nijhoff, Dordrecht, 1985, p. 509.

often questionable¹⁵. Its most common use is to identify the date at which a title - usually to territory - has passed, or been acquired¹⁶; or alternatively, the date at which a dispute has "crystallised"¹⁷, so that a court can fix a point in time at which the rights and obligations can be assessed.

1.29 Hungary seeks to derive from Article 2(1)(a) of the Special Agreement a critical date of May 1989¹⁸, indicating in a footnote¹⁹ - albeit somewhat obscurely - that its use of this date is to exclude prior conduct, but not subsequent conduct. This, of course, is the exact opposite of the normal function of the "critical date". Its use is to exclude evidence of conduct after a particular date, but here Hungary seeks to use it to exclude evidence of conduct before May 1989.

1.30 It is clear that Article 2 of the Special Agreement indicates no such date. The Court is asked to decide on the basis of the Treaty and other rules and principles of general or conventional international law²⁰, on:

- The legality of Hungary's suspension, and later abandonment of its work on the Project (para. (a));
- The legality of Czechoslovakia's proceeding with Variant "C" in November 1991 and operating it from October 1992 (para. (b));
- The legality of Hungary's formal termination of the Treaty on 19 May 1992 (para. (c)).

¹⁵ See, the Argentine-Chile Frontier Case, 38 International Law Reports (1969), p. 10, at p. 80: the Court of Arbitration said it "considered the notion of the critical date to be of little value in the present litigation and has examined all the evidence submitted to it ...". In the Taba Award (Arbitral Award in the Dispute Concerning Certain Boundary Pillars Between the Arab Republic of Egypt and the State of Israel), (29 September 1988) 80 International Law Reports (1989), p. 226, the Court chose not a critical date, but a critical period (the period of the mandate).

¹⁶ As in the Island of Palmas Case, United Nations Reports of International Arbitral Awards, (1928) Vol. II, p. 829, where Huber J. took the date on which sovereignty passed from Spain to the U.S.A.

¹⁷ See, the extensive discussion by G. Fitzmaurice in "The Law and Procedure of the I.C.J." 32 British Yearbook of International Law (1955-56), pp. 28-44. As Counsel for the U.K. in the Minquiers et Ecrehos Case, Judgment, I.C.J. Reports 1953, p. 47 (see Pleadings, Vol. II, pp. 67-68), Fitzmaurice refined the concept further than the Courts have been prepared to go.

¹⁸ Hungarian Memorial, para. 8.08.

¹⁹ Ibid., p. 245, fn. 2.

²⁰ See, paras. 1.03-1.06, above.

Clearly, these events took place at different times, so that there can be no one "critical" date in the classical sense of the term, and hence one finds Hungary's suggestion that May 1989 marks simply the beginning of a critical period. And this highlights the essential purpose of Hungary's submission: it is to exclude evidence of conduct prior to May 1989, including the conclusion and the application of the 1977 Treaty. Even on its face, the suggestion is unworkable. How would it be possible to judge whether Hungary was justified in suspending work in May 1989 without examining the prior events which led up to - and in Hungary's view justified - the suspension?

1.31 This extraordinary suggestion is simply a ploy designed to exclude vital evidence of the conduct of the Parties prior to May 1989. There can be no surprise that Hungary would wish to exclude such evidence, for it is highly damaging to Hungary. As Chapter III of Slovakia's Memorial and Chapter IV of this Counter-Memorial make clear, it was during this earlier period that Hungary first sought to delay the Project, pleading economic difficulties and lack of technical skills, and then sought to speed up the Project in the interests of environmental protection. Czechoslovakia sought to accommodate these changing demands over these early years. The agreed Protocol to speed up completion was signed only on 6 February 1989, so that within a period of just over three months Hungary used environmental arguments first to speed up and then to suspend the Project.

1.32 The inconsistency of this behaviour is obvious, and it is a small wonder that Hungary would wish to exclude it from the Court's consideration. Paradoxically, whilst Hungary is anxious to exclude evidence of its own conduct pre-May 1989, it has no hesitation in invoking, in Chapter 4 of its Memorial, treaties of 1954, 1956 and 1976 in an attempt to prove that the Parties had entered into commitments controlling the way in which the 1977 Treaty must be interpreted and applied.

1.33 Slovakia is confident that the Court will not accept Hungary's line of argument. This is a case in which the "critical date" concept really has no role. This is a case in which a special agreement - a compromis - exists, and the role of that compromis will serve for whatever purpose a "critical date" is needed. The Court will need to look at the whole record of the conduct of the Parties in order to answer the questions posed in Article 2 of the Special Agreement. There can be no basis for an arbitrary exclusion of evidence of conduct prior to a certain date, the primary object of which exclusion is without question to "neutralise" the 1977 Treaty, which is, as presented in the Special Agreement, not only the principal object of the dispute but the principal basis of the applicable law as well.

The Novel "Succession" Argument

1.34 On reading Hungary's Memorial, Slovakia was struck with astonishment and perplexity by the argument - to say the least, unexpected - that Hungary has fashioned from the law of State succession. Hungary seems to attach a very special importance to this argument since:

- It appears as early as the fourth paragraph of its Memorial;
- It is developed at great length and appears throughout its pleading; and
- Hungary even goes so far as to make this new argument part of its formal Submissions, inviting the Court to adjudge and declare:

"that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic²¹."

1.35 Slovakia will not address this argument in detail at this stage of its Counter-Memorial. A careful refutation of Hungary's peculiar argument appears in Chapter III below. It is sufficient here to indicate the outline of Hungary's argument:

- (i) Only Czechoslovakia (not Slovakia) was party to the 1977 Treaty;
- (ii) The dissolution of Czechoslovakia gave rise to two new States, neither of which was the continuation of the pre-existing State;
- (iii) The Treaties concluded by Czechoslovakia with Hungary have disappeared along with Czechoslovakia save in a situation where an agreement has intervened between Slovakia and Hungary;
- (iv) This is not the case for the 1977 Treaty, which thus ceased to exist on 31 December 1992 independently of Hungary's earlier purported "termination";
- (v) Therefore, the 1977 Treaty has never been in force between the Parties to the current dispute before the Court.

²¹ Hungarian Memorial, p. 339.

1.36 This reasoning, which can in no way be sustained²², does not prevent Hungary from arguing that Slovakia is nonetheless responsible through its adoption of violations of the 1977 Treaty allegedly committed by Czechoslovakia. For it is contended that Slovakia is obliged to remedy such breaches by way of damages even though, conversely, Slovakia has no right to any remedy for damages suffered by Czechoslovakia. In order to justify these truly extravagant contentions, Hungary relies on a confused and complex interpretation of the Special Agreement, the essence of which is to place in opposition the first two paragraphs of the preamble, on the one hand, and the two paragraphs of Article 2 of the Treaty, on the other hand.

1.37 The result is hardly convincing. In particular, it is difficult to see how Hungary can affirm that Slovakia is "the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project", but not in respect of the Treaty itself, given that such rights and obligations necessarily have their origin in the Treaty. Similarly, it is extraordinary that Hungary should mean to deny the Court's competence to rule on the validity of the 1977 Treaty between the Parties to the dispute when:

- Article 2(1)(a) invites the Court to decide whether Hungary was entitled to suspend and subsequently abandon works "for which the Treaty attributed responsibility to the Republic of Hungary";
- Article 2(1)(c) refers to "the legal effects of the notification, on May 19, 1992, of the termination of the Treaty by the Republic of Hungary"²³; and
- Article 2(2) requests the Court "to determine the legal consequences, including the rights and obligations for the Parties" deriving from the answers to the questions asked in paragraph 1.

It is absurd to contend that the Court can only acquit itself of its task in the way desired by Hungary, that is by deciding that the Treaty has never been binding on these Parties. The most to be said is that, in a balanced and equitable manner, the Preamble has been drafted so that the Special Agreement in no way pre-judges the responses that the Court is called upon to give.

1.38 Hungary's interpretation of the Special Agreement goes against its clear terms and would deny its having any useful effect; for it presumes that the central question

²² See, Chapters III and X, below.

²³ Emphasis added to Articles 2(1)(a) and 2(1)(c).

before the Court, which relates to the obligations arising under the 1977 Treaty and to the consequences of Hungary's purported, unilateral "termination", is already answered. By excluding one (and, in Slovakia's opinion the sole) possible response, *i.e.*, that the 1977 Treaty is still in force between the Parties, Hungary unduly limits the task of the Court. Thus, it attempts to achieve what it had hoped for by the filing of its Application with the Court - that the Court determine the validity of Variant "C" in isolation and on the basis that the 1977 Treaty had ceased to exist before the provisional solution was even put into operation.

1.39 The whole Hungarian Memorial relies on this hypothesis. Further proof of this is Hungary's insistence on the general law of the environment as the applicable law even though, as Slovakia demonstrates in Chapter IX below, the basic applicable standard is the 1977 Treaty (as completed by the Joint Contractual Plan). This forms a *lex specialis*, which reflects the standards of general international law while containing its own detailed requirements. Article 2 of the Special Agreement makes this *lex specialis* the principal basis of the decision to be rendered by the Court.

The Temporary Water Management Regime

1.40 The very reverse of its restrictive attitude towards the consideration of the 1977 Treaty is Hungary's emphasis on the TWMR. Whilst paying lip service to Article 4 of the Special Agreement, which excludes the TWMR from the Court's jurisdiction, Hungary tries to introduce the TWMR into the case in a highly dubious manner.

1.41 As Slovakia made clear in its Memorial²⁴, the conclusion of a temporary water management regime, to be applied pending the judgment of the Court, is a matter to be agreed between the Parties, and the resolution of problems which may be encountered on the way to reaching an agreement, or which may arise pursuant to such an agreement, are matters to be resolved by the Parties - with recourse to the Commission of the European Communities - and not by the Court.

1.42 Evidently such matters are not referred to the Court for decision. Nowhere in Article 2 of the Special Agreement is there any wording which would suggest that the Court had competence over such matters. Indeed, Article 4(2) confirms that, pending the conclusion of an agreement on a management regime, if either party feels its rights are endangered, the remedy lies in consultation and reference to the Commission of the European Communities and not in application to this Court for an order of interim measures of

²⁴ Slovak Memorial, para. 6.

protection under Article 41 of the Statute. In these circumstances, it is surprising to read in the Hungarian Memorial the following passage:

"... the Court is entitled to take into account the conduct of the Parties under Article 4 of the Special Agreement in assessing their good faith in relation to the resolution of the dispute submitted to it²⁵."

Moreover, in its Chapter 3, Hungary gives a highly tendentious²⁶ account of the negotiations so far with regard to the conclusion of a temporary water management regime.

1.43 But, clearly, the positions adopted by the two Parties with regard to the EC proposals for a temporary water management regime are irrelevant to the issues put before the Court in Article 2. Whatever the merits or demerits of either Hungary's position, or Slovakia's position, as regards EC proposals in December 1993, these must be totally irrelevant to the questions whether Hungary was in breach of the 1977 Treaty in 1989-1990 (suspension and abandonment), or whether a breach arose from Hungary's purported termination of the Treaty in May 1992, or Czechoslovakia's construction of Variant "C" in 1991-1992.

1.44 In short, Hungary's view of the task of the Court is simply a device to introduce extraneous and, Hungary would wish, prejudicial material in the hope that it might colour the Court's approach to the issues actually before it. As such, it should be rejected.

²⁵ Hungarian Memorial, para. 2.12.

²⁶ The word "tendentious" seems appropriate for several reasons. The Minutes of the London meeting on 28 October 1992 are portrayed as "the London Agreement" (Hungarian Memorial, para. 3.191). The purely temporary nature of Czechoslovakia's undertaking (explained in the Slovak Memorial, para. 4.97, *et seq.*) is ignored. So is the fact that the Agreed Minutes (Slovak Memorial, Annex 128) were expressed to be without prejudice to the legal rights of the parties. So also is the fact that the EC Group of Experts saw its task as making recommendations to the Parties, a notion quite incompatible with the idea that they had already entered into binding commitments at the London meeting: *see*, EC Working Group report of 2 November 1993 (Slovak Memorial, Annex 19). The EC "compromise" proposals of December 1993 were based on discharge figures (*i.e.*, average discharge into the Old Danube of 800 m³/s) which were pure compromise between the Slovak and Hungarian proposals, and quite unrelated to any scientific justification. When the five members of the EC Working Group could not come to a common recommendation (because of a failure to agree on the part of the Slovak and Hungarian representatives), the three EC appointed members of the Group simply took the Slovak proposal for 400 m³/s and the Hungarian proposal for 1200 m³/s and, in a quite arbitrary manner, split the difference. Moreover, the Hungarian account fails to disclose that Hungary has not actually taken the measures recommended by the EC Experts, so that the branches on the Hungarian side cannot benefit from the existing flow. It was necessary to impound the waters by means of an underwater weir, thus raising their level so that water could flow into the branches on the Hungarian side. Hungary obviously decided not to do so because, with the recharge system working effectively in the branches, Hungary would lose the evidence of the alleged ecological devastation it needed for the purpose of its case. *See*, para. 8.11, *et seq.*, below.

B. A Curious Conception of Chronology

1.45 Another characteristic of the Hungarian litigation strategy is the total indifference shown to the chronology of the facts of the dispute of which, at best, a scrambled image is given.

1.46 The most striking example of this method is Hungary's presentation of the events surrounding the so-called "unilateral termination" of the Treaty on 19 May 1992. Not daring to advance an argument too conspicuously false in pretending that its decision to "terminate" was the consequence of the so-called "diversion of the Danube" (for the damming took place more than five months later), Hungary attempts to justify its purported termination by the supposed threat posed by the preparations for Variant "C"²⁷. But Hungary has "forgotten" that during this period Czechoslovakia constantly gave its agreement to undertaking joint environmental studies²⁸. Most importantly, Hungary fails to link the preparation for Variant "C" to the preceding events. It was only as a most reluctant response to the hardening of Hungary's position that Czechoslovakia resolved to put Variant "C" into operation - a solution that was more costly and less beneficial in terms of electrical production than the original Project. In other words, the chronology is of essential importance for it was the successive measures of Hungary's suspension and abandonment of works at Nagymaros and then at Dunakiliti that led Czechoslovakia to envisage the implementation of a provisional solution - as is shown by the chronology set out in Illus. No. CM-2. To present the provisional solution in isolation constitutes a grave distortion of the facts.

1.47 This particular example of distorted presentation is not unique. Elsewhere in its Memorial, Hungary affirms that Czechoslovakia's decision to fall back on Variant "C" "cannot have been the appropriate response to the cautious, provisional and partial suspension of works decided by Hungary during the Spring of 1989"²⁹. This too takes no account of the chronology. The simple fact is that the decision to proceed with Variant "C" was not made until 12 December 1991. In the intervening two and a half year period, Hungary had decided on the total abandonment of works in both the Nagymaros section (27 October 1989) and the Gabčikovo section (6 March 1990) and had resolved to terminate the Treaty on 12 December 1990.

²⁷ Hungarian Memorial, paras. 3.154, 3.157 and 10.31.

²⁸ See, Slovak Memorial, para. 4.75, et seq., and para. 5.75, et seq., below.

²⁹ Hungarian Memorial, para. 7.91. Is this first suspension unilaterally taken on 13 May 1989 to be considered "cautious, provisional and partial" because it lasted only a few months before it was converted into a termination?

1.48 Hungary attempts to reason as if the following was the sequence of relevant facts:

- First, Hungary's "cautious, provisional, and partial suspension of works ...";
- Next, the implementation of Variant "C" by Czechoslovakia;
- Finally, termination of the Treaty.

This sequence is seriously wrong in at least two respects. First, the termination of the Treaty preceded, not followed, the implementation of Variant "C" - a step which Slovakia has always stressed as being provisional in nature, and which it is today. Second, it is essential to focus on the progressive hardening of Hungary's position which, by mid-1990, had led to the de facto abandonment of the whole Project. This, in turn, led to the study of various alternative solutions by Czechoslovakia, one of which was eventually implemented, being Variant "C".

1.49 Such indifference to chronology is a constant throughout Hungary's Memorial. To give just one other example, it is quite remarkable that in its table of "the Treaty of 1977 and Related Agreements"³⁰, Hungary takes no account of the dates of the different treaties and agreements that it lists as having been concluded. This leads it to find support in various agreements having absolutely no relevance to the current dispute and to fail to take account of the modifications made by a specific, subsequent agreement to a previous general agreement, thus ignoring the principle of lex posterior priori derogat.

SECTION 3. The Structure of the Counter-Memorial

1.50 This Counter-Memorial is divided into five Parts. In Part I, Slovakia re-examines the 1977 Treaty in the light of Hungary's analyses - both in terms of the individual provisions of the Treaty and its overall significance (Chapter II) and in terms of Hungary's claim that Slovakia did not succeed to Czechoslovakia's rights and obligations thereunder (Chapter III). This Part establishes the 1977 Treaty as the basis of the current dispute and analyses the Parties' obligations thereunder.

1.51 In Part II, Slovakia examines in some detail Hungary's rendition of the background and factual history to this dispute (Chapters IV-VI), whilst Part III is devoted to

³⁰ Ibid., Chapter 4.

an analysis of Hungary's contentions as to anticipated and actual environmental impacts (Chapters VII and VIII).

1.52 Part IV consists of a detailed analysis of Hungary's legal arguments. In Chapter IX, Slovakia considers Hungary's misguided emphasis on environmental law; in Chapter X the attempts in Hungary's Memorial to justify Hungary's breaches are analysed; and in Chapter XI, the lawfulness of Variant "C" is re-examined.

1.53 Finally, in Part V, the defects in Hungary's consideration of the legal consequences of the dispute are explained.

1.54 Slovakia's formal Submissions to the Court are then repeated in the same terms as those set out in Slovakia's Memorial.

PART I

DEFECTS IN HUNGARY'S ANALYSIS OF THE 1977 TREATY, RELATED AGREEMENTS AND OF THE STATUS OF SLOVAKIA AS SUCCESSOR STATE

CHAPTER II. THE 1977 TREATY AND OTHER AGREEMENTS RELEVANT TO THE G/N PROJECT

2.01 It appears from the Parties' respective analyses that there is much common ground between them on the subject of the 1977 Treaty¹. Both accept that while the 1977 Treaty is of fundamental importance to the solution of this dispute, the Treaty, as the Hungarian Memorial explains, "was not concluded in a vacuum but was part of a matrix of bilateral and multilateral treaties"². This description is echoed in the Slovak Memorial, which entitled its relevant section "A Closely Interrelated Complex of Agreements".

2.02 Nonetheless, the Parties' analyses differ greatly in certain instances and, in particular, with regard to:

- The nature of the 1977 Treaty;
- The nature and the significance of the Joint Contractual Plan and the other relevant agreements, as well as the link between these agreements and the 1977 Treaty.

SECTION 1. The Nature of the 1977 Treaty

2.03 Slovakia considers in sub-section A below, the Hungarian Memorial's discussion of the general characteristics of the 1977 Treaty³. It will be shown that on certain key points, Hungary's analysis is highly debatable. Even more dubious is Hungary's denial of the territorial nature of the 1977 Treaty. This instrument created rights in rem and not merely rights in personam, as is discussed in sub-section B below.

A. Hungary's Analysis of the 1977 Treaty

2.04 Hungary presents the 1977 Treaty as:

- a vehicle for "socialist integration";
- an integrated project;

¹ Compare, Hungarian Memorial, Chapter 4; Slovak Memorial, Chapter VI, Section 1.

² Hungarian Memorial, para. 4.56.

³ Ibid., paras. 4.10-4.13, 4.21 and 10.73.

- a cooperative project creating a joint investment;
- a framework treaty;
- an international agreement that is consistent with environmental protection.

With the exception of the first point, which offers only a biased and incomplete picture of the Project, Slovakia agrees with this general description. Nonetheless, certain of the justifications offered by Hungary are contested by Slovakia, as are the conclusions it draws from its analysis.

A "Vehicle for Socialist Integration"?

2.05 Hungary chooses to find in the G/N Project a representation of communist ideology and in the 1977 Treaty "a vehicle for 'socialist integration' through COMECON"⁴. This is a reflection of Hungary's litigation strategy, which is aimed at portraying Slovakia as the old-fashioned defender of an outmoded vision, still afflicted by the mentality of the Ancien Régime⁵. It is true that the second paragraph of the 1977 Treaty's preamble recognised that "the joint utilization of the Hungarian-Czechoslovak section of the Danube will further ... contribute to bringing about the socialist integration of the States members of the Council for Mutual Economic Cooperation", but this reference is surely not sufficient to turn the Treaty into "a COMECON Treaty"⁶.

2.06 In actuality, such a reference is no more than the sort of stylistic formality to be found in many treaties that involved some form of economic cooperation between the member States of the former Council for Mutual Economic Assistance ("CMEA"). This sort of language appears in the preambles of many bilateral Czechoslovak-Hungarian agreements on economic, scientific, cultural or technical cooperation⁷.

2.07 In any event, the 1977 Treaty is not significantly different from other agreements between non-socialist States which provide for the common development of rivers forming international boundaries. Generally speaking, such other agreements also relate to integrated projects (the integration often manifesting itself by the creation of an entity, invested

⁴ Ibid., para. 10.73.

⁵ Ibid., para. 3.100.

⁶ Ibid., para. 4.21.

⁷ See, e.g., the agreement of 5 February 1973 on Cooperation in the Sphere of Tourism, of 22 December 1981 on Cooperation in the Sphere of Health and Science, of 22 October 1986 on Cultural and Scientific Cooperation.

with operational functions); they involve a close and continuous cooperation between the parties whose financial and technical obligations are usually shared equally, as are the rights to use and to profits; and, as a general rule, these agreements consist of framework instruments, the completion and implementation of which are envisaged by means of supplementary agreements⁸.

2.08 It must also be stressed that Czechoslovakia's and Hungary's desire to develop their hydroelectric resources and, in particular, the potential of the Danube predates the arrival of communism there⁹. The idea of such development dates back to the Austro-Hungarian Empire and bears no link to any specific ideology¹⁰.

2.09 The Soviet Union did follow the bilateral negotiations that led to the 1977 Treaty (directly or through the intermediary of the CMEA), but only in the same systematic manner as it followed all questions of relations between the Eastern bloc countries. It did not attach any particular significance to those negotiations. In this respect, it is significant that in 1955 the Central Committee of the Soviet Communist Party expressed its complete neutrality in relation to the Project¹¹. The USSR's reticence in entering into financing agreements with Hungary demonstrates, if anything, its relative disinterest¹². The above

⁸ See, for example, the convention between France and Switzerland concerning hydroelectric utilisation of the Emossion, 23 August 1963, Recueil des traités et accords de la France, Paris, 1965, Tome I, p. 44; the convention between France and the Federal Republic of Germany concerning utilisation of the Rhine between Strasbourg/Kehl and Lautenbourg/Neuburgwein, 4 July 1969, *ibid.*, 1969, p. 110; and the Treaty between Brazil and Paraguay concerning the hydroelectric utilisation of the water resources of the Paraná River, 26 April 1973, United Nations Treaty Series, No. 13164, p. 92. In passing, it may be noted that these particular examples, admittedly dated prior to the 1977 Treaty, reveal less concern over environmental protection.

⁹ See, for example, Interview with Prof. Emil Mosonyi, Magyar Tudomány, No. 1/94, Slovak Memorial, Annex 22.

¹⁰ Annex 1, at p.23. This document, known as the Hungarian "White Book", is discussed at para. 5.47, below. It is noteworthy that, at the same time as the ultimate parties to the 1977 Treaty commenced discussions on joint development, Czechoslovakia should have also entered into negotiations with Austria - a country outside the CMEA - with a view to a common project upstream of Bratislava. These negotiations did not, at that time, result in any agreement due to financial concerns of Austria. But they are evidence, if any is needed, of the "ideological neutrality" behind the G/N Project.

¹¹ See, the Report of Comrade Vosahlik on the discussions at the Central Committee of the Soviet Communist Party concerning the water works on the Danube, 25 October 1955, Annex 2 hereto: "In this stage of preparation of the project, the Soviet side is not in a position to formulate [its] advisory opinion ... it was important to start first bilateral talks between Czechoslovakia and Hungary and only after achieving an agreement, the (Soviet) office for economic relations with popular democratic countries could be involved."

¹² Hungarian Memorial, paras. 3.33-3.34.

remarks serve to put into perspective the alleged "Soviet pressure" which Hungary emphasises¹³.

2.10 As for the CMEA, although it manifested a general interest in the Danube's development and was kept informed of the bilateral negotiations, nothing leads to the conclusion that it exercised any "pressure" on either of the parties, and especially on Hungary. Even though the Hungarian Memorial makes this allegation on several occasions, it offers absolutely no proof¹⁴. It is not plausible to interpret the CMEA's recommendations as obligations imposed on the parties from the outside¹⁵: as Hungary itself admits, these recommendations (which in any event were unanimously adopted, *i.e.*, with Hungary's consent) had no obligatory nature until adopted by the Governments of the States concerned.

2.11 In essence, Hungary's persistent attempt to categorise the 1977 Treaty as a "COMECON" Treaty is no more than a stratagem to taint the G/N Project with the widespread opprobrium with which communist ideology is viewed today. To this end, Hungary does not hesitate to rely on the most questionable evidence. For example, it alludes to the fact that in 1951 the President of the Danube Commission (to whom a letter had been addressed in 1951 by the Commission's Hungarian representative) was from the USSR¹⁶. Yet this fact was no more than pure coincidence; the presidency of the Commission rotates amongst its member States and happened at that moment to be held by the USSR. Similarly, Hungary refers to a 1958 Protocol of Tripartite Joint Negotiations (between Hungarian, Czechoslovak and Soviet representatives)¹⁷ but omits to mention that:

"The meeting was called on the initiative and invitation of the Hungarian side¹⁸."

2.12 Hungary's attempts cannot be taken seriously. The 1977 Treaty is not the result of Soviet pressure nor does it reflect an outdated ideology. It simply implements the legitimate desires of two States bordering on a great international river - a stretch of which was not developed - to make use of their natural resources, to avoid the potentially catastrophic

¹³ *Ibid.*, at paras. 1.03, 3.02-3.03, 3.07, 3.10-3.22, 3.27, 3.29, 3.32-3.37, 3.40, 4.06-4.07, 4.21 and 10.73-10.74.

¹⁴ *Ibid.*, paras. 3.12 and 3.40, for example.

¹⁵ *Ibid.*, para. 3.21.

¹⁶ *Ibid.*, para. 3.03.

¹⁷ *Ibid.*, para. 3.15.

¹⁸ *Ibid.*, Vol. 4, Annex 3.

effects of unmanaged watercourses, to improve navigation on the Danube both in their own interests and in the interests of other riparians (as well as other third States) and to reinforce their neighbourly relations. It is these aims that are set out in the very first paragraph of the 1977 Treaty's preamble, which Hungary fails to cite:

"Considering their mutual interest in the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties."

An "Integrated Project"

2.13 At various points in its Memorial, Hungary stresses the "integrated" nature of the Project which, as Article (1) of the 1977 Treaty provides:

"... shall comprise the Gabčíkovo system of locks and the Nagymaros system of locks and shall constitute a single and indivisible operational system of works" (emphasis added);

or, as the Hungarian Memorial describes it, a system:

"combining both upstream and downstream elements in a system of peak power production¹⁹."

2.14 This emphasis is justified. Certainly, in technical terms the Project could be divided into two distinct parts - being the Gabčíkovo and Nagymaros sections. It is this division that is reflected in Articles 1(2) and 1(3) of the Treaty. But in legal and economic terms these two sections were not divisible. In particular, the essential nature of the completion of Nagymaros to the Project must be stressed: on the one hand to enable the production of peak electricity at Gabčíkovo, which was impossible without a downstream weir to regulate flows and, on the other hand, to enable the improvement of the sole remaining sector of the Danube difficult for navigation.

2.15 Hungary, moreover, recognises the vital importance of the construction of Nagymaros to the Project:

"In particular the Nagymaros Barrage was essential to the Original Project, which was, as demonstrated in Chapter 4, conceived as 'a single and indivisible operational system of works'. In concept, in operation and in terms of any possibility of an economic return from this 'joint investment', the Nagymaros Barrage was a key element. Without it, peak power production would not be

¹⁹ Ibid., Vol. 1, para. 10.73. See, also, para. 4.10 or 4.21.

possible, and a principal economic advantage of the Original Project would disappear²⁰."

This puts in its true light what Hungary now calls "the cautious provisional and partial suspension of works" at Nagymaros in May 1989²¹ and renders absurd Hungary's subsequent proposal that Czechoslovakia give up the Nagymaros section of the Project whilst continuing with the Gabčíkovo section²².

2.16 It is, to say the very least, paradoxical that Hungary goes so far as to include, as one of the fundamental changes of circumstance it enumerates, the dissolution of "the single and indivisible operational system" as a result of the suspension of works at Nagymaros²³. Nemo auditur propriam turpitudinem allegans²⁴.

A Cooperative Project Creating a Joint Investment

2.17 Hungary's characterisation of the 1977 Treaty as being at the origin of a "cooperative project, one which required close partnership, continued negotiation..."²⁵, merits a similar observation: the "cooperative" elements in the Treaty are indeed of special importance, yet it has been Hungary not Czechoslovakia (or Slovakia) that has failed to take account of them.

2.18 In this respect, Article 10 of the Treaty deserves particular attention. Paragraph 1 of this Article provides:

"Works of the System of Locks constituting the joint property of the Contracting Parties shall be operated, as a co-ordinated single unit and in accordance with the jointly-agreed operating and operational procedures, by the authorized operating agency of the Contracting Party in whose territory the works were built."

As Hungary correctly points out²⁶, the paragraphs of Article 10 that follow (together with Articles 3, 5, 7, 8, 9, 11(2), 12, in particular, 12(6) and 25) set out the details of this

²⁰ Ibid., para. 10.75.

²¹ Ibid., para. 7.91.

²² See, e.g., para. 5.35, et seq., below.

²³ Hungarian Memorial, para. 10.74.

²⁴ See, para. 10.73, below.

²⁵ Hungarian Memorial, para. 4.11. See, also, ibid., paras. 4.21, 7.07 and 10.73.

²⁶ Ibid., para. 4.11 - 4.12.

cooperation with respect to the sharing of costs and responsibilities, the electricity produced and the profits. And, if it is correct that "the 1977 Treaty did not allow for unilateral operation of the Barrage System by either Party"²⁷, it follows a fortiori that one party acting alone has no right to reshape the system in response to factors not accepted by the other party, or to give into the demands of its own public opinion. As one well known commentator has expressed it, Article 39 of the Vienna Convention on the Law of Treaties "lays down the general rule that a treaty may be amended by agreement between the parties. Clearly, in the case of a bilateral treaty, the agreement of both parties is required"²⁸.

2.19 In this context, Article 27 of the Treaty is particularly significant. In spite of the self-contradictory interpretation contained in Hungary's Memorial²⁹, this provision makes no reference at all to the "revision" of the Treaty. Instead, it sets out in unambiguous terms the means for the settlement of disputes, which is solely through negotiations to be carried out between the parties in a spirit of cooperation. The multiple unilateral decisions taken by Hungary since May 1989 conform neither to the letter of this Article (or the other "cooperative provisions" of the Treaty) nor to its spirit. This is in sharp contrast with the fact that Czechoslovakia and, subsequently, Slovakia - contrary to what the Hungarian Memorial contends - have always been more than ready to pursue the settlement of the dispute that Hungary has claimed to seek.

A Framework Treaty

2.20 On several occasions, the Hungarian Memorial depicts the 1977 Treaty as "a blueprint, and not a rigidly pre-determined scheme"³⁰. But this is inaccurate if, as the Hungarian Memorial frequently suggests, it is intended to deny the obligatory nature of the Treaty. Duly concluded in accordance with the prerequisites of international law, the Treaty binds the Parties to it in all respects. As recalled by Article 26 of the Vienna Convention: "every treaty in force is binding upon the parties to it and must be performed by them in good faith."

2.21 The 1977 Treaty may be seen as a "framework treaty", but in the sense that "many matters had to be resolved by other agreements or arrangements, whether in the

²⁷ Ibid., para. 7.07.

²⁸ I. Sinclair, The Vienna Convention on the Law of Treaties, Manchester University Press, Manchester, 1984, p. 107.

²⁹ Hungarian Memorial, para. 7.92; see, also, paras. 2.22-2.23, below.

³⁰ Hungarian Memorial, para. 4.13; see, also, para. 4.21.

Joint Contractual Plan, or in regulations laid down by the [Plenipotentiaries] or in accordance with the national laws and procedures of one of the parties³¹. The 1977 Treaty may, according to some points of view, be considered a preliminary instrument³². But it is not an empty shell that its signatories could, contrary to the principle of pacta sunt servanda, consider as of no effect, or could modify, or could demand the amendment of, or could suspend, or could terminate unilaterally.

2.22 Hungary is correct in extending the relative flexibility of the Treaty to the settlement of disputes under Article 27, prescribing negotiation as "the *exclusive* means of settling disputes" and in concluding from this that "the hallmark was flexibility"³³. But, of course, this flexibility only existed within the framework of the Treaty: neither Article 27 nor any other provision gave the parties the right to compel the Treaty's revision. Revision might be the eventual conclusion of negotiations; and in agreeing to revise the Treaty at Hungary's instigation in 1983 and later in discussing Hungary's further demands for amendment, Czechoslovakia showed that it did not exclude this possibility. But it was only a possibility - not a right of one of the parties or an obligation of the other. The fact that the Treaty had an element of flexibility did not mean that there was no obligation to fulfil its provisions.

2.23 It is therefore incorrect for the Hungarian Memorial to assert that the obligation to negotiate in good faith under the Treaty in relation to questions of its application, or in case of a dispute, "acquires even more weight ... for Article 27 of the 1977 Treaty refers precisely to revision by joint agreement, either among the [Plenipotentiaries] or the Governments of the Contracting Parties..."³⁴. Article 27 neither calls for, nor even mentions, any such revision. Further, Hungary contradicts itself in the same paragraph when it recognises that "the 1977 Treaty contained no mechanisms for its revision".

2.24 The real nature of this "framework treaty" is properly seen quite differently: the essential rules are formulated, rules that the parties must in all cases respect except in the case of an agreed amendment in accordance with the general principles of the law of treaties (as set out in Article 69 of the Vienna Convention). In terms of its implementation, the Treaty has recourse to related agreements. But, the Treaty is no less binding upon the parties. In other words, the "outcome" is formally prescribed in the Treaty itself - the parties

³¹ Ibid., para. 4.13.

³² See, R.Y. Jennings and A. Watts, Oppenheim's International Law, 9th ed., Longman, London, 1992, p. 1224.

³³ Hungarian Memorial, para. 4.13.

³⁴ Ibid., para. 7.92 (emphasis added).

are bound to realise the joint investment as it is described in the Treaty, whilst the means of implementation are flexible and adaptable. The consequences of this are twofold.

2.25 First, the parties are bound to comply with the obligations that the Treaty itself prescribes; in spite of Hungary's allegations to the contrary, this is especially the case for provisions relating to the time schedule. No doubt the time schedule could be amended by joint agreement: the construction periods laid down in Article 4(4) were in fact modified on two occasions (in 1983 and 1989) and even adjusted on the very day of the 1977 Treaty's signature in the Mutual Assistance Agreement³⁵. But it does not follow that "the timetable laid down for work on the Project had never been treated as a matter of strict legal obligation"³⁶. The very fact that the schedule was modified by formal agreements shows that, to the contrary, the parties clearly intended a "strict legal obligation"; and if it is correct that the "problems caused by the delay could be compensated for", this necessarily envisages the existence of a treaty obligation that has been violated. Moreover, this consequence was expressly provided for by Article 26(2)(c) of the Treaty. Hungary, in asserting that

"...there was never the slightest possibility that the Barrage System would come on line during that quinquennium, and this was not because of fault attributable to one or other party but simply because neither could afford to do so, given their other priorities, and the failure of the promised Soviet economic assistance

³⁷ "

merely tries to place Czechoslovakia in Hungary's own particular situation and to attribute to Czechoslovakia its own attitudes. But the Czechoslovak Government at no stage relied on a Soviet loan and, unlike Hungary, never invoked its economic difficulties to shirk its obligations or to request alterations in the timetable. Further, the "promised Soviet economic assistance" never constituted a condition to the conclusion or application of the 1977 Treaty.

2.26 Second, the reference in the Treaty to other agreements already concluded or to be concluded in no way signifies that on the points in question the Treaty did not create legal obligations. For the pre-existing agreements, this is self-evident: the Treaty limits itself to recording these, and they remain in full force and effect to the extent they are not inconsistent with the 1977 Treaty. But this is no less so for subsequently executed agreements contemplated by the Treaty and necessary to its implementation. It cannot be argued that as to

³⁵ In each case, the amendment was made at Hungary's request, demonstrating Czechoslovakia's evident flexibility.

³⁶ Hungarian Memorial, para. 9.18.

³⁷ *Ibid.*, para. 4.15. To the contrary, Czechoslovakia agreed to further financial obligations on the date of the signature of the 1977 Treaty by means of the 1977 Mutual Assistance Agreement.

such agreements the obligation was merely to consult or to negotiate in good faith; the parties were bound to reach agreement - by a pactum de contrahendo³⁸. Thus, for example, Articles 1(4), 12(2), 14(2), 15(1) and 19, which refer to the more precise provisions to be contained in the Joint Contractual Plan, bind the parties not only to negotiate this agreement but to ensure its conclusion in the light of the more general provisions of the 1977 Treaty³⁹.

A Treaty Consistent with Environmental Protection

2.27 In spite of its attempts to depict the Treaty as the end result of irresponsible ambitions linked to an outmoded ideology, Hungary concedes that this agreement "was consistent with the maintenance of water quality and with environmental protection generally"⁴⁰ and that, "[n]otwithstanding the notorious environmental difficulties of the region, its member States, Hungary and Czechoslovakia included, adhered to a range of commitments seeking to ensure environmental protection of shared resources"⁴¹.

2.28 It is similarly impossible to deny that environmental concerns were taken into account during the pre-Treaty phase - Hungary is unable to do so in spite of its wish to show the indifference of the Treaty parties to this subject⁴² - or to deny that the relevant provisions of the Treaty (in particular Articles 5(5)(a)(5) and 5(5)(b)(13), 15, 19 and 20) meet or indeed exceed the requirements under the general rules of international law.

2.29 As Hungary accepts: "[a]lthough the protection of the environment was not the main purpose of the original drafters, nonetheless provisions were inserted in the 1977 Treaty to protect water quality and to ensure nature preservation⁴³." It follows that these provisions form an integral part of the Treaty and subject the parties to these obligations.

2.30 It is necessary to evaluate correctly the extent of these obligations.

³⁸ Many examples of similar obligations have come before the Court. See, e.g., North Sea Continental Shelf, Judgment, I.C.J. Reports, 1969, p. 3, at p. 47; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports, 1980, p. 73, at p. 95. Note, also, the obligations contained in the 1977 Treaty, e.g., Articles 6 and 12.

³⁹ See, Section 2, below, for the relationship between the 1977 Treaty and the Joint Contractual Plan. On the distinction between the obligation to negotiate and a pactum de contrahendo, see, P. Reuter, "De l'obligation de négocier", Mélanges Morelli, Comunicazioni e studi, Vol. XIV, Milano, 1975, pp. 711-733; and R.Y. Jennings and A. Watts, Oppenheim's International Law, op cit., p. 1224.

⁴⁰ Hungarian Memorial, para. 4.21. See, also, paras. 6.28 and 10.73.

⁴¹ Hungarian Memorial, para. 4.56.

⁴² Ibid., para. 3.31, for example; see, also, Slovak Memorial, paras. 1.60 or 2.14.

⁴³ Hungarian Memorial, para. 10.88.

- First, as Hungary recognises, the 1977 Treaty as a framework treaty fixes the general guidelines and creates the structure for the parties to implement the obligations either by further joint agreements, by national legislation, or by the actual execution of the works;
- Second, the environmental provisions, the legally binding nature of which Slovakia fully accepts, are general, on-going and continuous obligations.

2.31 Hungary is correct in saying that the protection of the environment is not the essential object of the 1977 Treaty. Prior to the Treaty's conclusion, the parties simply took care to reassure themselves that the Project was compatible with the requirements of environmental protection. This is an important point, for it was evident that the implementation of the Treaty would necessarily affect the environment. In full knowledge of this, the parties assumed the resultant risks, considering that the benefits of the G/N System clearly outweighed the potential risks. But, at the same time, the precaution was taken to include the obligation to ensure vigilant attention to the environment. For example, the word "monitoring" ("contrôle" in the French text) and "appropriate measures" appearing in Articles 15 and 20, clearly illustrate that the parties had to ensure the implementation of these provisions by reaching common agreement as to any necessary measures while at the same time maintaining the essential object of the Treaty: the construction and operation of the G/N Project.

2.32 Hungary presupposes the direct opposite of this. It proceeds to substitute the preservation of the environment as the essential object of the Treaty and, what is more, arrogates to itself the right to decree unilaterally what such preservation requires and how it is to be achieved - even though the parties deliberately decided to make this a matter of common concern, to be resolved by on-going consultation and, where necessary, by adjustments in the implementation of the Project.

2.33 To summarise, the 1977 Treaty is the governing law between the parties and constitutes the general framework of their cooperative effort to achieve the Treaty's object and purpose described in Article 1. It imposes on the parties relatively general legal obligations, while at the same time maintaining the Treaty's central object, yet providing the possibility of adjusting the Treaty's implementation as, for example, in regard to protection of the environment.

2.34 Hungary's Treaty interpretation, by contrast, is distorted due to the stress placed on the Treaty preamble and the three short articles, Articles 15, 19 and 20. From the preamble it is argued that the main aims of the Treaty were economic and political (the boosting of socialist integration), while from the three articles mentioned above it is argued that the overriding goals were the protection of water quality and the natural environment. No attention is paid to the inconsistency between these two interpretations.

B. The 1977 Treaty Created Rights *In Rem*

2.35 Hungary goes to great lengths to establish that the "1977 Treaty was not a boundary treaty, deliberately not" since, according to Hungary, "the parties could not agree on the original Hungarian demand that the boundary line be shifted so as to follow the main navigation channel through the Gabčskovo power canal and locks"⁴⁴. This is obviously wrong. The parties had agreed to reject this demand as is quite clear from the Treaty itself, in particular, Article 22(1). The origin of the problem is attributed to Czechoslovakia who, allegedly, "was adamant in its refusal to contemplate" a shift in the borderline. But even the Hungarian Memorial shows that in reality it was Hungary who refused to modify the borderline "because there was no suitable Hungarian territory that could be offered" in compensation for the loss that Czechoslovakia would have suffered as a result of the boundary being shifted to the centre of the bypass canal⁴⁵.

2.36 The reasons for Hungary's insistence on this point are unclear, particularly since it would appear evident that, although it did not, of itself, establish a boundary, the 1977 Treaty established obligations and rights relating to the regime of the boundary and to the use of the concerned territory. This has the same legal consequences, as Slovakia establishes below.

2.37 Hungary's insistence is presumably a tactic destined to introduce its most surprising argument regarding State succession, under which the 1977 Treaty is artificially classified among those treaties creating rights exclusively in personam and not rights in rem. By this, Hungary hopes to "neutralise" the rules relating to State succession and to support the hypothesis, advanced as early as paragraph 1.04 of its Memorial and frequently repeated thereafter, that Slovakia was "never itself a party to that Treaty"⁴⁶. Indeed, this point

⁴⁴ Ibid., para. 4.39. See, also, para. 7.30: "it was intended to establish the Parties' obligations with respect to a Barrage System which was separated from the boundary." See, also, paras. 10.78 and 10.111.

⁴⁵ Ibid., para. 3.37; see, also Slovak Memorial, para. 7.58.

⁴⁶ Hungarian Memorial, paras. 3.116, 6.03, 6.06, 10.108 and 11.20.

appears so important to Hungary that it forms one of its Submissions. These allegations play a fundamental role in Hungary's litigation strategy for they constitute the sole legal basis - if any exists - for the following arguments: first, that the 1977 Treaty is no longer in force, quite independently of Hungary's purported termination of 19 May 1992; and second, that Slovakia while succeeding to no rights and benefits under the Treaty, essentially bears the Treaty's burdens and obligations through "adopting" Czechoslovakia's alleged breaches thereof⁴⁷.

2.38 As Slovakia shows below, these attempts are doomed to failure in the light of the rules on State succession in relation to treaties. In any event, Hungary relies on a thesis that is totally wrong - for the 1977 Treaty creates rights in rem and not simply rights in personam. It must in fact be defined as a "dispositive" or "territorial" or "objective" treaty and, as has been noted: "Territorial treaties should be regarded as including all treaties which affected a territory in one way or another, not only treaties which established frontiers"⁴⁸. " The 1977 Treaty in a certain sense "establishes" or, in any case, confirms the boundary between the Treaty parties and, taken as a whole, affects without any doubt their respective territories.

The Boundary Provisions of the 1977 Treaty

2.39 Article 22 of the Treaty is entitled "Determination of the boundary line of the State frontier". Its first paragraph provides:

"The Contracting Parties have, in connection with the construction and operation of the System of Locks, agreed on minor revisions of and changes in the character of the State frontier between the Hungarian People's Republic and the Czechoslovak Socialist Republic, as follows... ."

This is followed in sub-paragraph (a) by confirmation of the existing boundary and in sub-paragraphs (b) to (d) by certain clarifications and "minor revisions".

2.40 Aside from these provisions concerning confirmation or revision, this is a typical boundary clause. There is no need for the fixing of a boundary to be the principal object of a treaty for the relevant provisions to be qualified as border provisions. This is evidenced, for example, by the Court's recent judgment in Territorial Dispute (Libyan Arab Jamahiriya v. Chad) in which:

- On the one hand, the Court relied solely on Article 3 of the Treaty of Friendship and Good Neighbourliness between Libya and France of 10

⁴⁷ Ibid., paras. 6.04, et seq., 8.04, et seq. and 10.111, et seq.

⁴⁸ R. Ago, Yearbook of the International Law Commission, 1970, Vol. I., p. 169.

August 1955 (and its Annex I), which was not a boundary treaty as such, in fixing the boundary between Libya and Chad⁴⁹; and

- On the other hand, it did so even though by the relevant provision the two parties "recognised" that the boundaries between the French colonies and Libya were those that resulted from previous international instruments in force; thus the Court explained:

"To recognize a frontier is essentially to 'accept' that frontier, that is, to draw legal consequences from its existence to respect it and to renounce the right to contest it in the future⁵⁰."

The same is evident in the present case: by "agreeing" that the segment of the border "shall remain unchanged", the parties implicitly but necessarily referred back to the relevant treaties, and this constitutes one of the possible ways of delimiting a boundary⁵¹. The same follows a fortiori from the revision of other segments of the boundary.

2.41 Hungary insists that "[t]he function of Article 22 was to dissociate the Barrage system from the agreed boundary, while recognising that the navigation channel would no longer follow or be identified with the boundary in this locality"⁵². In reality, if the parties had not taken the precaution to insert Article 22 into the Treaty, an uncertainty would have existed as to the boundary line which was fixed by the Protocol of 11 October 1948 at the thalweg of the river's main navigable bed at the lowest level⁵³. In other words, a tribunal called to settle a hypothetical boundary dispute between Slovakia and Hungary could not base its decision solely on the pre-existing agreements but would necessarily apply the 1977 Treaty, the boundary treaty nature of which would be beyond doubt in the sense that it essentially maintains the existing boundary line by modifying its character and, subsidiarily, provides for its revision in Article 22(1)(d). It must be kept in mind that if "the parties could not agree on the original Hungarian demand that the boundary line be shifted so as to follow" the new main navigation channel⁵⁴, they nevertheless agreed on some minor revisions.

⁴⁹ Territorial Dispute (Libyan Arab Jamahiriya/Chad), ICJ Reports 1994, Judgment, 3 February 1994, p. 3.

⁵⁰ Ibid., at p. 22.

⁵¹ Ibid., at p. 25.

⁵² Hungarian Memorial, para. 4.39. See, paras. 11.11-11.18, below, for a fuller discussion.

⁵³ See Hungarian Memorial, Vol. 3, Annex 6, Supplementary Protocol N° 1 to the Closing Protocol of the Meeting of the Hungarian-Czechoslovak Border Drafting Commission, 11 October 1948.

⁵⁴ Ibid., Vol. 1, para. 4.39.

2.42 Of course, although the revision is provided for in the 1977 Treaty, it is not actually carried out in that Treaty since this was left to be accomplished by a separate treaty to be concluded between the parties (Article 22(2)). Hungary rightly points this out - but its explanations are wrong. It argues that this way of proceeding arises from the desire to separate "the 1977 Treaty from the boundary regime"⁵⁵. This is wrong for at least two reasons.

2.43 First, as Hungary seems to agree, the 1977 Treaty is a framework treaty that the parties systematically refrained from weighting down with excessive detail. It follows that, whereas the new character of the frontier constituted an important element of the Treaty, the minor revisions of the boundary line - which related only to an area of around 10 by 10 hectares - did not. Second, and most important, it was not possible to trace with precision the new boundary line in 1977 - contrary to Hungary's affirmations. The minor adjustment related to the reservoir to be created upstream of the Dunakiliti weir and was to take the form of a straight line. The exact configuration of the reservoir was not fixed by the 1977 (framework) Treaty, which left this detail to the Joint Contractual Plan (Article 4(2)(a)). It was thus not merely logical but inevitable to postpone for a further agreement the definitive fixing of the boundary line.

2.44 Thus, the essential boundary character of Article 22, even if not of the Treaty as a whole, is clear. The attitude of the parties shows that they were well aware of this.

The 1977 Treaty Establishes a Specific Territorial Regime

2.45 However anxious Hungary is to minimise the territorial nature of the 1977 Treaty, it has been obliged to concede that the parties "specified precisely the extent of change that was permissible in the character of the Danube as a boundary river" and that "[w]hat the 1977 Treaty did was to relocate the main navigational channel through the Gabčíkovo canal and locks"⁵⁶.

2.46 This fact alone is sufficient to make the Treaty a "dispositive", or an in rem, or a "territorial" treaty, that is (in the words of the standard definition which O'Connell traces back to Vattel) a treaty "which impresses a permanent and indefeasible status on a

⁵⁵ Ibid., paras. 3.42 and 4.39.

⁵⁶ Ibid., paras. 7.31 and 4.47.

territory"⁵⁷. It is obvious that both this change in the character of the boundary and the confirmation of its layout attach to the territory itself and are quite independent of the persons of the Treaty parties. The Treaty creates rights in rem, opposable to all and invocable by all⁵⁸. Henceforth, as the result of the Treaty, the boundary remains the thalweg of the previous main navigable channel of the Danube.

2.47 Moreover, Hungary's reluctant admission as to the change in character of the boundary fails totally to recognise the overall territorial nature of the Treaty, which is in no way limited to Article 22 or to Chapter IX. In particular, it is striking that Hungary wholly ignores the fact that the very object of the Treaty is the realisation of a Project, one of the essential characteristics of which is to impose a heavy territorial burden on Czechoslovakia (and now Slovakia). For it is on Slovak territory that the bypass canal has, in its entirety, been constructed, and it was Slovak territory that was for the larger part to be submerged by the Dunakiliti-Hrusov reservoir (Articles (2)(a) and (c)).

2.48 The 1977 Treaty provides for the construction and subsequent operation of a multipurpose project aimed to ensure joint management and utilisation of the Danube for both navigational and non navigational purposes in the sector where it forms the boundary between two States and in adjacent areas. The concepts of "joint investment", "joint ownership", "joint operation" and "joint utilisation" characterise the treaty relations between Czechoslovakia and Hungary based on the 1977 Treaty. These encompass a number of obligations relating to the use of the territory of each Treaty party or restrictions upon its use for the benefit of the territory of one Treaty party and corresponding rights of the other Treaty party.

2.49 The rights and obligations concerning use and restriction on use are closely interrelated. Even if not identical on both sides or strictly reciprocal, they are strictly attached to the territories concerned.

2.50 The territorial character of the 1977 Treaty was also recognised by both successor States of Czechoslovakia - the Czech Republic and Slovakia. As a consequence the Czech Republic formally acknowledged that Slovakia was the sole successor State in respect of the 1977 Treaty, formally renounced all property titles related to the joint investment resulting from the 1977 Treaty and accordingly confirmed that:

⁵⁷ D.P. O'Connell, International Law, Cambridge, 1970, p. 373. See, by the same author, State Succession in Municipal Law and International Law, Cambridge, 1967, II, p. 231.

⁵⁸ D.P. O'Connell, State Succession in Municipal and International Law, *op. cit.*, p. 15.

"... all assets and debts relating to realisation of obligations deriving from the 1977 Treaty concern Slovak Republic"⁵⁹."

2.51 Thus, and independently of the imbalance between the parties in terms of their burdens arising from the Treaty, it is clear that the very purpose of the Treaty was conspicuously and, even exclusively, territorial in that the Treaty itself installs a territorial regime within the whole of the region covered by the G/N Project.

2.52 Treaties of the generic type of the 1977 Treaty, that is, "treaties concerning water rights or navigation on rivers" are "commonly regarded as candidates for inclusion in the category of territorial treaties"⁶⁰ and are considered as being "objective treaties" since they are opposable to third Parties.

2.53 The character of the 1977 Treaty as a treaty establishing an "objective regime" as far as the international navigation is concerned is anyway evident. The re-routing of international navigation from the old riverbed (forming the border between two States) into the bypass canal situated entirely within the Slovak territory, as envisaged by the Treaty, constitutes a change in the regime of international navigation. The operation of the Project and opening of the bypass canal to international navigation implied new obligations, on the side of Slovakia, towards third States and corresponding rights of these States to use the bypass canal for navigation under the terms of the 1948 Danube Convention.

2.54 The 1977 Treaty is therefore dispositive in another sense. As O'Connell has explained, "[a] clear distinction exists between treaties which convey benefits for single neighbouring States, and may be insisted upon by them alone, and treaties which create regimes in the international interest"⁶¹. The 1977 Treaty clearly falls into this second category: it aims towards the improvement of the conditions for navigation in a sector of the Danube particularly dangerous and difficult to maintain⁶².

⁵⁹ See Note Verbale of the Ministry of Foreign Affairs of the Czech Republic to the Ministry of Foreign Affairs of Slovakia, 3 March 1993, Annex 3.

⁶⁰ Yearbook of the International Law Commission, 1972, Vol. II, p. 56. See, also, G. Fitzmaurice, "The Jurisdictional Clauses of the Peace Treaties", Recueil des Cours, 1948, Vol. II, pp. 293-295; Lord McNair, Law of Treaties, Oxford, 1961, pp. 658-659; D.P. O'Connell, International Law, *op. cit.*, p. 373, and the majority opinion expressed during the debates at the I.L.C. during discussions of the Vienna Convention of 1969 and the Convention of 1978 on the Succession of States in Respect of Treaties.

⁶¹ D.P. O'Connell, State Succession in Municipal and International Law, *op. cit.*, at p. 233.

⁶² The sector downstream of the bypass canal still remains in such a state due to Hungary's failure to carry out the Treaty in the interest of other riparian States and, beyond that, all European States.

2.55 The Treaty parties were fully aware of this, as was particularly stressed it in the Joint Contractual Plan:

"The barrage system to be built as the common investment of the two countries, fitting well into the comprehensive programme of MEAC [Council for Mutual Economic Assistance] and into the comprehensive utilization of the Danube serves significant international interests in addition to direct Hungarian-Czechoslovak ones. With this construction the obstacles to the development of an international water transport will be removed and the conditions for the creation of an East-West trans-continental water way will be provided⁶³."

* * *

"These benefits will be shared by the different Danubian countries and by other countries linking with the Danube navigation...⁶⁴."

And the debates in the Danube Commission, where marked interest in the Project was shown by States alongside the organisations and enterprises of Western European countries, illustrate that this sentiment was, and is, generally shared⁶⁵.

2.56 For multiple reasons, therefore, there can be no doubt that even if the 1977 Treaty cannot itself be described as a boundary treaty - although Article 22 is without doubt a boundary provision - it is at the least a dispositive treaty, the object of which is to institute a territorial regime. The legal nature of the Treaty, thus defined, has important legal consequences that will be examined in the following Chapters, notably as to whether the doctrine of fundamental change of circumstances may be invoked (Chapter X) and as to the means and effects of State succession (Chapter III).

SECTION 2. The Joint Contractual Plan and Other Agreements Related to the 1977 Treaty

2.57 Hungary devotes pages 121 to 134 of its Memorial to an analysis of the "Relationship of the 1977 Treaty to Other Agreements Between the Parties", while at the same time specifying that there exist many other "multilateral treaties and other instruments of a general character relevant to the dispute"⁶⁶. There can be no doubt as to the importance of these agreements. However, Hungary incorrectly states the relationship between these

⁶³ Hungarian Memorial, Vol. 3, Annex 24 (at p. 289).

⁶⁴ Ibid. (at p. 301).

⁶⁵ See, e.g., Slovak Memorial, paras. 1.48-1.49, 2.83, and 6.145, et seq.

⁶⁶ Hungarian Memorial, para. 4.56, fn. 56. See, also, Slovak Memorial, para. 6.24, et seq.

agreements and the 1977 Treaty (aside from other errors in its analysis). The distortion of the legal realities is particularly marked in the case of the Joint Contractual Plan.

A. Hungary's Erroneous Analysis of the Joint Contractual Plan

2.58 Hungary repeatedly stresses the importance of the Joint Contractual Plan, "the basis for a great deal of the substance of the Project" and "the principal tool for implementing the obligations foreseen" in the 1977 Treaty⁶⁷. This is correct: the 1977 Treaty is a framework instrument, imposing general obligations on the parties, with implementation being left to complementary and derivative instruments. The principal instrument is the Joint Contractual Plan, which according to the 1977 Treaty is to specify:

- "The technical specification relating to the System of Locks" (Article 1(4));
- the "regulations governing the organization and activities" of the "permanent and joint agencies for the performance " of the Plenipotentiaries' functions (Article 3(2));
- the "preparation of the joint investment", that is to say, "the main dimensions of the works of the System of Locks, the technical specifications of technical equipment, the final project work schedule and responsibility for the costs referred to in article 12, paragraph 2" (Article 4(2)(a))⁶⁸;
- the basic data for "(1) Ordering the technical equipment, construction materials, machinery and steelwork for the System of Locks" and "(2) Drawing up the construction plans and specifications" (Article 2(2)(b));
- "the costs of carrying out the joint investment" (Article 5(6));
- the discharge in the water balance (Article 14);
- the means in order to ensure "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" (Article 15(1));
- the means in order to "ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks" (Article 19).

2.59 At the same time as it recognises the importance of the Joint Contractual Plan, Hungary attempts to limit its legal effect, in an attempt to escape its responsibility. And indeed, if the Treaty itself is only a non self-executing framework

⁶⁷ Hungarian Memorial, paras. 4.14 and 6.72.

⁶⁸ See, also, Article 5(a).

instrument and if the Joint Contractual Plan is devoid of any legal effect, the result would be that the Treaty parties accepted no legal obligation for the breach for which they would be responsible. This is clearly an indefensible position.

2.60 Hungary contends that the Joint Contractual Plan is subordinated to the 1977 Treaty (and the 1976 Boundary Waters Management Agreement), which is correct, although not in the sense intended by Hungary. Further, Hungary contends that the Joint Contractual Plan is not a conventional instrument or treaty. This, by contrast, is incorrect.

2.61 According to Hungary:

"The Joint Contractual Plan was not concluded in the form of an interstate treaty, and was not as such an instrument governed by international law, whatever may have been the status of the 1976 Agreement for the drawing up of the Plan. It was subject merely to 'approval' in conformity with national laws and regulations (Article 4(3)), rather than signature and ratification, as in the case of the 1977 Treaty itself⁶⁹."

But this is to overlook Article 11 of the Vienna Convention (which on this point, like many others, is indeed a codification of existing customary international law):

"The consent of a State to be bound to a treaty may be expressed by signature, exchange of instruments constituting a treaty, acceptance, approval or accession, or by any other means if so agreed⁷⁰."

2.62 The Joint Contractual Plan therefore appears to be a treaty in the full sense of the term, and, even, in the narrow sense of Article 2(1)(a) of the Vienna Convention, the Plan is:

"...an international agreement governed by international law and concluded in written form:
between ... States whether that agreement is embodied in a single or in two or more related instruments and whatever its particular designation."

2.63 Although it was not submitted for ratification, the Joint Contractual Plan cannot even be classified as an "accord en forme simplifiée", since, as elaborated in French doctrine, by very definition such an agreement takes effect upon signature, whereas in the

⁶⁹ Hungarian Memorial, para. 4.15.

⁷⁰ Vienna Convention on the Law of Treaties, Article 11. Emphasis added.

present case, the parties added the requirement of a formal approval, thus making the Joint Contractual Plan, *ipso facto*, a "traité en forme solennelle"⁷¹.

2.64 As Sir Robert Jennings and Sir Arthur Watts have written:

"[I]t is suggested that the decisive factor is ... whether the instrument is intended to create international legal rights and obligations between the parties - an element which the International Law Commission regarded as embraced within the phrase 'governed by international law'⁷²."

And, as the Court itself observed in its recent Judgment of 1 July 1994,

"... in the first place, ... international agreements may take a number of forms and be given a diversity of names. Article 2, paragraph (1) (a), of the Vienna Convention on the Law of Treaties of 23 May 1969 provides that for the purposes of that Convention,

'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'⁷³ ...

In order to ascertain whether an agreement of that kind has been concluded, 'the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up' (ibid.)⁷³."

2.65 In the present case, there can be no doubt that these requirements are met:

- As provided for in Article 1 of the 1976 Joint Contractual Plan Agreement, this instrument "shall be the basis for the realization of the construction"⁷⁴;
- Article 1(4) of the 1977 Treaty provides: "The technical specifications relating to the System of Locks shall be included ["seront fixées" according to the UN translation in French] in the joint contractual plan...";

⁷¹ "Where acceptance or approval follow signature their function is closely analogous to that of ratification...". R.Y. Jennings and A. Watts, *op. cit.*, p. 1236; *see also*, P. Reuter, *op. cit.*, p. 56; P. Nguyen Quoc Dinh, P. Daillier, and A. Pellet, Droit international public, L.G.D.J., Paris, 1992, p. 135.

⁷² R.Y. Jennings and A. Watts, *op. cit.*, p. 1202.

⁷³ Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112, at pp. 121-122.

⁷⁴ Slovak Memorial, Annex 3.

- Of particular importance, Articles 25(1)(a) and 26(1)(a) of the Treaty expressly provide for the parties' responsibility, jointly or separately, "in respect of the content of the approved joint contractual plan";
- Finally, this instrument was itself negotiated like a treaty⁷⁵ and drafted and concluded in treaty form⁷⁶.

2.66 In addition, the two Treaty parties have consistently shared the same view as to the legally binding nature of the Joint Contractual Plan. On several occasions, the Hungarian Plenipotentiary complained to his Czechoslovak counterpart of violations of the Joint Contractual Plan⁷⁷. And, characteristically, the Hungarian Memorial does not hesitate to reproach Czechoslovakia for violations of the Joint Contractual Plan⁷⁸, a document which, quite correctly, Hungary has included in Volume 3 of Hungary's annexes devoted to "Treaties and International Agreements".

2.67 Hungary is quite right to describe the Plan as "a management tool" and "the principal tool for implementing the obligations foreseen" in the Treaty⁷⁹, as well as "a means of handling the large amount of detail involved in the Original Project"⁸⁰. Similarly, it is entirely correct that "priority was given to the Treaty ... over the Joint Contractual Plan"⁸¹. But this priority does not have the implications Hungary now claims.

2.68 The 1977 Treaty is the basis of diverse obligations imposed on the parties: to execute obligations, to consult, to negotiate, and also to conclude agreements for

⁷⁵ See, "Summary Report", reproduced as an annex at *ibid.* (at p. 37); see, also, Article 5(3) of the Agreement of 1976.

⁷⁶ *Ibid.* (at p. 34): "Done in Slovak and Hungarian languages, both texts being equally authentic"; and concluded between the "parties" (*ibid.*, at p. 37).

⁷⁷ See, e.g., letter of 29 October 1991, in relation to the pumping of water into the bypass canal, Hungarian Memorial, Vol. 4, Annex 66 (at p. 120): "I therefore hold the continuation of this filling to be a departure from the J.C.P." Similarly, in a letter dated 19 December 1991, the Hungarian Prime Minister complained to the Czechoslovak Prime Minister of several failures, adding that: "This also includes construction which deviates from the J.C.P." *Ibid.*, Annex 70 (at p. 129).

⁷⁸ *Ibid.*, Vol. 1, para. 6.79.

⁷⁹ *Ibid.*, para. 6.72.

⁸⁰ *Ibid.*, para. 6.21; see, also, para. 4.21(5).

⁸¹ *Ibid.*, para. 4.21(5); see, also, para. 4.15(a). It is doubtful that the 1976 Boundary Waters Management Agreement had the same priority over the Joint Contractual Plan as the 1977 Treaty: whilst the Treaty - *lex specialis* in relation to the 1976 Boundary Waters Management Agreement - constitutes the legal basis of the Joint Contractual Plan, to which it continually refers, the 1976 Agreement makes no mention of it at all.

the further implementation of obligations. In this respect, it contains elements of a pactum de contrahendo⁸² and obliges the parties not merely to negotiate but actually to conclude implementation agreements within the framework of the basic Treaty, thus legally connecting the two instruments⁸³. The most important, though not the sole, of these implementing agreements was the Joint Contractual Plan.

2.69 This is not an exceptional legal situation. As Professor Reuter has explained:

"Comme les engagements internationaux se multiplient en s'étendant à des objets de plus en plus vastes, mettant en cause des aspects techniques ardues et délicats, il devient difficile de conclure ces traités en une seule opération et les Etats signent des accords de principe [here: the Treaty of 1977] en renvoyant les mesures d'application à des accords ultérieurs qu'ils s'obligent à négocier [here, above all, the Joint Contractual Plan]⁸⁴."

Translation:

"As international commitments multiply and extend to an ever wider range of objects, touching on complex and technically demanding aspects, it becomes difficult to conclude treaties in one sole operation and States thus sign agreements of principle leaving the measures of implementation to subsequent agreements which they are obliged to negotiate."

He continues, citing Judge Charles De Visscher:

"...the object of the negotiations ... is only to apply in practice principles forming part of a pre-established international regime⁸⁵."

2.70 Professor Reuter has also written:

"Indeed, the main reason behind many treaties is another treaty in respect of which they have an ancillary or supplementary character; such is the case of agreements clarifying, complementing or performing a basic treaty ... in principle these agreements are subordinated to the basic agreement, unless the parties intend them to be autonomous⁸⁶."

⁸² See, R.Y. Jennings and A. Watts, op. cit., p. 1224, and A. Miaja de la Muela, "Pacta de contrahendo en derecho internacional publico", Revista española de derecho internacional, 1968, p. 392.

⁸³ On this point, see, P. Reuter, op. cit., pp. 720-726.

⁸⁴ Ibid., p. 712.

⁸⁵ Ch. De Visscher, dissenting opinion, International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950, p. 128, at p. 188.

⁸⁶ P. Reuter, Introduction to the Law of Treaties, Pinter, London, 1989, p. 100.

This was indeed so in the case of the Joint Contractual Plan, whose obligatory nature stems from the 1977 Treaty, which it makes more precise, completes and executes.

2.71 Yet, at the same time, the conclusion of the Joint Contractual Plan constitutes the parties' carrying out of the obligations contained in the Treaty. It is here that Hungary commits a serious error: for, according to Hungary, the only legal obligations binding upon the parties are those appearing in the 1977 Treaty itself, and the Joint Contractual Plan only illustrates the ways in which these obligations might be carried out - so, it always remains possible to modify such methods, even unilaterally. It is here that Hungary's error lies because the Treaty bound the parties to conclude the related agreement that constitutes the Joint Contractual Plan, establishing its general approach. But once the precise provisions of the Plan have been agreed in the related agreement, the parties are bound to carry them out.

2.72 Certainly, like the 1977 Treaty, or any other treaty, the Joint Contractual Plan could be modified (and in a manner easier than for the Treaty itself). But in the absence of a mutual agreement between the parties to the contrary, the Plan constitutes the law formed between the parties, and any breaches would be internationally wrongful acts entailing international responsibility.

B. Hungary's Erroneous Analysis of the Other Related Agreements and their Relationship to the 1977 Treaty

2.73 Like Slovakia, Hungary accepts that "the 1977 Treaty was not concluded in a vacuum but was part of a matrix of bilateral and multilateral treaties..."⁸⁷. However, unlike Hungary, Slovakia considers that this "matrix" includes agreements concluded both before and after the 1977 Treaty (although these comprise two distinct categories). Slovakia also finds Hungary's analysis of the relevance of these agreements to be odd and selective.

Agreements Prior to the 1977 Treaty

2.74 In line with its utter indifference to the chronology of events, Hungary presents the 1977 Treaty and what it calls the "related agreements" not in order of execution but in terms of their object (as perceived by Hungary). This approach allows it to juxtapose obligations of very different kinds, of which certain are current and valid whilst others are obsolete or without the effect claimed by Hungary.

⁸⁷ Hungarian Memorial, paras. 4.56 and 6.50.

2.75 A typical example of this is Hungary's treatment of the Agreement Concerning the Settlement of Technical and Economic Questions Relating to Frontier Watercourses of 16 April 1954⁸⁸. As Hungary recognises, this was replaced by the 1976 Boundary Waters Management Agreement which entered into force in 1978; therefore this instrument has absolutely no relevance to the current dispute.

2.76 This may be an extreme example, but it is not the only one. In a rather loose way, Hungary compiles references to provisions of treaties and agreements that it finds useful to its basic hypotheses with complete indifference to whether they are still in force. In particular, no attention is paid to the fact that the 1977 Treaty has modified (or clarified) many provisions of these earlier agreements.

2.77 This is the case with the 1947 Peace Treaty. In the first place, it is false to say that this treaty gave "Czechoslovakia (and now the Slovak Republic) territory on the right side of the Danube for the first time"⁸⁹. The Bratislava borough of Petržalka, on the right bank of the Danube, has formed part of Czechoslovakia since independence at the end of the First World War. More importantly, Hungary refers to the demarcation agreement of 11 October 1948 pursuant to the Protocol of 22 December 1947, according to which, "...the border is defined by the thalweg of the River's main navigable bed at the lowest water level"⁹⁰. But it overlooks the fact that this provision, which defines the nature or "character" of the frontier, was modified and rendered obsolete concerning this section by the 1977 Treaty, one of the consequences of which is that the main navigable channel has been moved towards the north into the bypass canal and thus is no longer associated with the frontier⁹¹.

2.78 The same remark may be made for the bilateral Agreement on Certain Issues of Water Management and Cession of Territories Pursuant to Article 1, Paragraph 4, subparagraph (a) of the Peace Treaty of Paris of 9 October 1948⁹², according to which Czechoslovakia agreed not to alter unilaterally the flow in the Mosoni Danube⁹³. Here, the

⁸⁸ Ibid., Vol. 3, Annex 12.

⁸⁹ Ibid., Vol. 1, para. 4.25.

⁹⁰ Ibid., para. 4.26.

⁹¹ See, para. 2.39, et seq., above.

⁹² Hungarian Memorial, Vol. 3, Annex 5.

⁹³ Ibid., Vol. 1, para. 4.27.

1977 Treaty does not derogate from the previous agreement; rather, it constitutes an implementation since, by virtue of its Article 3:

"The Contracting Parties will determine in concord what kind of work can influence the water flow of the Mosoni section of the Danube."

This is exactly what the parties have done in the 1977 Treaty and the Joint Contractual Plan.

2.79 Similarly, the Treaty of Prague of 13 October 1956 Concerning the Regime of State Frontiers is only relevant insofar as its provisions have not been modified by the 1977 Treaty. In fact, its articles 2(3), 13(2), and 19 are all modified by the 1977 Treaty, with respect to the jointly shared Danube section. Contrary to Hungary's assertions⁹⁴, the 1956 Treaty relates solely to boundary issues; it thus has absolutely no relevance to Variant "C", which lies entirely on Slovak territory.

2.80 But the 1977 Treaty is not limited merely to modifying or replacing prior agreements. In certain cases, it implements and carries out their provisions:

2.81 For example, Article 20 of the 1977 Treaty refers to the Danube Fisheries Agreement concluded at Bucharest on 29 January 1958. But this agreement sets out for the parties only the general objectives⁹⁵; and Article 20 of the 1977 Treaty is limited to reminding the parties to take "appropriate measures" to achieve these objectives.

2.82 Similarly, Articles 15 and 19 of the 1977 Treaty constitute the implementation of provisions in the 1976 Boundary Waters Management Agreement. As Hungary recalls, Article 3 of the 1976 Agreement provides:

"1. The Contracting Parties do hereby undertake that they:

a) shall not carry out any water management activities without mutual agreement, which would adversely affect the jointly defined water conditions;

...

d) shall engage in prior negotiations on the effects of water management activities, which alter the water conditions in the sections defined jointly under Article 2.

⁹⁴ Ibid., paras. 4.29-4.32.

⁹⁵ Ibid., paras. 4.49 and 6.28.

2. The Contracting Parties unless they agree otherwise, shall be entitled to one half of the natural amount of water flowing through the boundary waters, and not increased by engineering intervention⁹⁶."

2.83 The 1976 Agreement is, in essence, an accord on the procedures to follow for water management. It fixes the methods to be followed by the parties with a view to defining in common the water conditions in the joint frontier section of the Danube. This is exactly what the 1977 Treaty does, together with the more precise provisions of the Joint Contractual Plan and Article 10(1) of the Agreement as to Common Operational Regulations of Plenipotentiaries⁹⁷. It is also interesting to note that the last text, which refers back to the 1976 Agreement, is itself concerned only with "the procedure for the permission of water rights, water management work, measures for the utilisation of water reserves, protection against the pollution of surface and groundwater, maintenance of the navigational route and provisions thereof with signs, preservation of the Danube's bed, protection against flood and the protection against ice floes...". Contrary to Hungary's contentions⁹⁸, the 1977 Treaty (in particular, its Articles 15, 19 and 20, which impliedly refer back to the 1976 Agreement) and Article 10(1) of the 1979 Agreement (which makes an express reference back) do not set forth basic obligations that are strict and self-sufficient in themselves. They oblige the parties to reach agreement, which they have done in joint instruments and, especially, in the Joint Contractual Plan, which may be modified, but only by joint agreement.

2.84 In this respect, it is important to note here that, as Hungary eventually accepts, neither Czechoslovakia nor Slovakia have ever claimed to have the right to define unilaterally the water management of the joint sector of the Danube, let alone unilaterally to carry out its diversion⁹⁹. They have always understood that the 1977 Treaty and the agreements to which it refers, fixing the procedures to be followed to attain the very general objectives there defined, must be followed.

2.85 The relationship between the 1977 Treaty and such prior instruments is far more complicated than Hungary asserts. Whilst the Treaty implements and carries out certain of these instruments or certain of their provisions, it replaces or modifies others. The "matrix of bilateral and multilateral treaties", which Hungary acknowledges¹⁰⁰, has clearly not

⁹⁶ Ibid., para. 4.35. Emphasis added.

⁹⁷ Ibid., Vol. 3, Annex 26.

⁹⁸ Ibid., Vol. 1, paras. 6.13, 6.20-6.21, 6.22-6.26 and 6.50-6.52.

⁹⁹ Ibid., para. 11.04.

¹⁰⁰ See, para. 2.73, above.

been left untouched by the Treaty's conclusion: in certain cases it clarifies, in others it modifies, the prior undertakings.

2.86 The modifications to the "conventional matrix" have important consequences: first, they hinder parties from relying on the prior agreements to the extent that they are incompatible with the Treaty; second, it cannot seriously be maintained, as Hungary attempts to do, that the 1977 Treaty was terminated in order to reestablish the status quo ante. Even if, merely for the sake of argument, it were admitted that such a claimed termination was valid, quod non, it would be no less true that the prior agreements would not be "resuscitated" as a result. In spite of the ambiguous formulation in Hungary's Memorial¹⁰¹, they nevertheless have remained "in force after 25 May 1992"¹⁰² solely to the extent that they were not modified or replaced by the 1977 Treaty. For as Slovakia has shown above¹⁰³, this Treaty lays down a specific territorial regime; hence, it is a dispositive treaty with not only legal consequences but also, on the ground, irreversible effects that one party - acting unilaterally - can clearly have no right to go back on.

Instruments Post-Dating the 1977 Treaty

2.87 The instruments agreed to after the 1977 Treaty either make more concrete and implement that treaty's provisions or modify them.

2.88 The second hypothesis presents no great problem. It suffices to recall that the Treaty was modified on two occasions: first, by the 1977 Mutual Assistance Agreement concluded the same day as the Treaty, which altered the parties' equal sharing of the workload and, for a limited time, of profits under the Treaty; and second, by the 1983 Protocol, amending Article 4(4) of the Treaty to provide that "the power generation plants will be put into operation during the period 1990-1994" (instead of 1986-1990). As for the Mutual Assistance Agreement, this too was modified twice - by the 1983 and 1989 Protocols, respectively, slowing down and then accelerating the Project at Hungary's request.

2.89 Hungary contends incorrectly that due to the second modification of the Mutual Assistance Agreement, since it was unaccompanied by a parallel amendment of the Treaty, there exists "an inconsistency concerning the legal obligations to complete the Project"

¹⁰¹ See, in particular, Hungarian Memorial, para. 4.54.

¹⁰² Ibid.

¹⁰³ See, para. 2.35, et seq., above.

and that "[t]he contradiction was never resolved"¹⁰⁴. In fact, there is no "inconsistency" or "contradiction" at all. The 1989 Protocol was limited to providing that the construction works were to be finished in 1994, while at the same time modifying the dates of the putting into operation of the various elements of the G/N System. This modification conformed exactly with the requirements of Article 4 of the 1977 Treaty, as modified by the 1983 Protocol, and hence there was no need of further amendment¹⁰⁵.

2.90 The "discretion" employed in the Hungarian Memorial in dealing with the 1983 and 1989 Protocols, to which it devotes only a few passages, is quite remarkable. It is especially significant that it is only in the most roundabout manner that the Hungarian Memorial accepts that it was Hungary who initiated the 1989 Protocol¹⁰⁶ (and that of 1983, of course)¹⁰⁷. Nevertheless, this episode is of extreme importance: it shows that just three months before the suspension of works at Nagymaros, Hungary was pressing Czechoslovakia (who had little choice but to agree) for an acceleration. This hardly fits with Hungary's contentions that the Nagymaros suspension was decided only after long and intensive study. Had this been the case, these studies would have been greatly advanced by February 1989 and, hence, Hungary would surely have abstained from signing the Protocol, for which Czechoslovakia had no enthusiasm, anyway.

2.91 Of course, there are obvious reasons for Hungary's "discretion" in its discussion of these Protocols. They nullify its contentions as to the non-obligatory nature of the 1977 Treaty's time schedule; for if the Treaty had contained no more than helpful guidelines, there would have been no need for these formal amendments.

2.92 In other respects, there are many agreements post-dating the 1977 Treaty that implement the Treaty: notably, the Joint Contractual Plan, the 1977 Mutual Assistance Agreement and the Agreement of 1979 as to the Common Operational Regulations of Plenipotentiaries. The provisions of these agreements were necessary due to the framework nature of the Treaty¹⁰⁸. For the reasons already mentioned in the discussion of the Joint Contractual Plan, they are subordinate to the Treaty and only implement its provisions. In

¹⁰⁴ Hungarian Memorial, para. 3.72.

¹⁰⁵ Hungary is mistaken when it contends that the 1989 Protocol was not published. *Ibid.*, para. 3.73. The fact is that it was widely disseminated and commented upon in the Hungarian and Czechoslovak press. See, for example, *Magyar Hírlap*, 14 February 1989, *Magyar Nemzet*, 22 March 1989, and *Vásárnapi Hírek*, 26 March 1989, Annex 4.

¹⁰⁶ Hungarian Memorial, para. 3.72.

¹⁰⁷ *Ibid.*, para. 3.43.

¹⁰⁸ See para. 2.20, *et seq.*, above.

concluding such agreements, the parties did no more than to fulfill the obligations that they accepted in the basic treaty, the 1977 Treaty, at the same time allowing the necessary flexibility for their possible adaptation - it always being understood that such adaptations could only intervene by mutual accord.

SECTION 3. Conclusions

2.93 Several conclusions may be drawn from the analysis of the 1977 Treaty, which forms the core of the current dispute, and of the instruments that are in various ways linked to it, whether because they were modified by the Treaty, clarified by it, or implemented by it; or because, to the contrary, they are agreements that amended, completed or applied the Treaty. It appears in particular that:

2.94 The Treaty, which contains boundary provisions and lays down a specific territorial regime in the interest not only of the Treaty parties but also of all Danube riparians and even all European States, is a dispositive treaty, creating rights in rem, independently of the legal personality of its original signatories;

2.95 The Treaty cannot be considered independently of the closely interrelated complex of agreements formed by the instruments that pre and post-date its signature;

2.96 It abrogates certain provisions of anterior agreements and is for the parties the means of fulfilling the obligations of certain other provisions;

2.97 As a framework treaty, it imposes legal obligations on the parties; of these certain (notably in relation to the time schedule) are self-sufficient, whilst others find their implementation in later agreements concluded by the parties to define the means of meeting the general objectives on which they were agreed (notably, as to environmental protection);

2.98 One of such implementing instruments, the Joint Contractual Plan, without doubt a conventional agreement, was the chosen instrument of the parties in defining the methods which they intended to use to attain the goals defined in the 1977 Treaty;

2.99 The network of obligations created by this ensemble or complex of agreements, forms an inseverable whole, and the Treaty parties have not the right unilaterally to refuse at will to perform any particular part of what constitutes the integrated G/N Project.

CHAPTER III. SLOVAKIA AS THE SUCCESSOR STATE IN RELATION TO THE RIGHTS AND OBLIGATIONS UNDER THE 1977 TREATY PREVIOUSLY ATTACHING TO CZECHOSLOVAKIA

3.01 There is no disagreement between the Parties as far as Slovakia's status as one of the two successor States of the former Czech and Slovak Federal Republic is concerned. However, the Parties do disagree as to the question of whether the 1977 Treaty by virtue of applicable rules of law of State succession devolved or not upon Slovakia when it assumed responsibility for its international relations (if not lawfully terminated earlier, which Slovakia denies).

3.02 Hungary is no doubt aware of the weakness of its arguments justifying the purported termination of the 1977 Treaty. It therefore tries to escape its treaty obligations in relation to Slovakia by denying the *ipso iure* continuity of the Treaty for Slovakia as a successor State of the former Czech and Slovak Federal Republic, arguing that:

"Even if ... the 1977 Treaty remained in force despite Hungary's termination of it and the unilateral implementation of Variant C, it ceased to be in force as a treaty on the disappearance of Czechoslovakia on 31 December 1992¹."

3.03 Hungary's position in this respect suffers from two major weaknesses. First, Hungary provides an incorrect interpretation of the general rules of the law of State succession to be applied in cases of dissolution of a State; and second, Hungary ignores the specific nature of the 1977 Treaty as a treaty of a localised or territorial character which, in all cases of territorial change, fall into the category of treaties remaining in force by operation of one of the well established rules of law of State succession.

3.04 The continued validity of the 1977 Treaty can be sufficiently demonstrated on this second basis. However, the 1977 Treaty is one of a complex of bilateral agreements concluded earlier between the former Czechoslovakia and Hungary, the continued validity of which is equally important. In view of this, Slovakia will also address the arguments of Hungary concerning the general rules of law of State succession. The two questions will be dealt with separately.

¹ Hungarian Memorial, para. 10.107.

SECTION 1. The Law Relating to Succession in Respect of Treaties in the Event of Dissolution of a State

3.05 The legal position of Slovakia based on the principle of ipso iure succession - in respect of all treaties concluded by former Czechoslovakia and having application to the territory of what is now Slovakia - has been stated on several occasions in the most unequivocal terms and has received the broadest acceptance on the part of other States concerned and international organisations. As further demonstrated below, there is no basis for Hungary's allegation of inconsistency in the practice of Slovakia in this respect².

3.06 In fact, there is an evident lack of coherence in Hungary's legal position as far as the law of State succession is concerned. First, there are manifest contradictions between Hungary's previous statements (at the United Nations Conference on Succession of States in Respect of Treaties) and its current position as presented in its Memorial. Second, the Hungarian Memorial is highly selective in its analysis. On the one hand, it promotes an obsolete doctrine denying the possibility of any ipso iure succession in the case of dissolution of a State and, on the other hand, it advocates the ipso iure succession by Slovakia to obligations arising from Czechoslovakia's alleged responsibility to Hungary³, which is a purely speculative doctrine having no basis in contemporary international law.

3.07 Hungary's view that in the event of the dissolution of a State, the fate of treaties - in particular bilateral treaties - is governed by the "clean slate" principle⁴ is contrary to Article 34 of the Vienna Convention on Succession of States in Respect of Treaties of 1978. This provides that:

"1. When a part or parts of the territory of a State separates to form one or more States, whether or not the predecessor State continues to exist:

a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

a) the States concerned otherwise agree; or

² Ibid., para. 10.119.

³ Ibid., para. 8.03.

⁴ Ibid., para. 10.112.

b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation⁵."

The Vienna Convention is not a treaty in force and, as such, is not applicable in relations between Slovakia and Hungary, except when the rules set out in the Convention are rules of general international law. In fact, the Convention codified, to a large extent, the existing customary law. Hungary, nonetheless, asserts:

"Not only is the Convention itself widely regarded as legislative in character and not as a statement of existing general international law, but there is little or no support for Article 34 as being declaratory of general international law⁶."

But, this assertion is not accompanied by any substantive analysis. There are sound reasons for Slovakia to take just the opposite view, in particular, as far as the application of Article 34 is concerned.

3.08 In its commentary to the 1974 draft of this provision (at that time Article 33), the International Law Commission concluded that:

"...although some discrepancies might be found in State practice, still that practice was sufficiently consistent to support the formulation of a rule which, with the necessary qualifications, would provide that treaties in force at the date of the dissolution should remain in force *ipso iure* with respect to each State emerging from the dissolution. The fact that the situation may be regarded as one of 'separation of part or parts of a State' rather than one of 'dissolution' does not alter this basic conclusion⁷."

The key to the Commission's adoption of this position lay in what, in 1972, had been two different articles (Articles 27 and 28) which dealt separately with dissolution of a State when the continuity principle should apply, and separation of part of a State in which event the "clean slate" doctrine operated (because a new State emerging from such a separation had been considered as being in the same position as a newly independent State).

3.09 In their written comments on the 1972 draft, some States raised doubts as to the soundness of this distinction. It was pointed out that the "clean slate" doctrine in the

⁵ For the text of the Vienna Convention, see, United Nations Conference on the Succession of States in Respect of Treaties, Official Records, Vol. III, Doc. A/CONF. 80/31.

⁶ See, Hungarian Memorial, para. 10.116.

⁷ For the text of the 1974 draft articles, see, United Nations Conference on the Succession of States in Respect of Treaties, Vol. III, Doc. A/CONF.80/4.

event of separation of part of a State had been largely based on old precedents and that there was little recent State practice to justify it. The Commission accepted this and amalgamated the two situations, opting for a continuity principle as the uniform rule for both cases (dissolution as well as separation).

3.10 The Commission envisaged only one exception from the continuity principle in the event of separation. This was reflected in paragraph 3 of the final draft of Article 33 which provided that:

"...if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded ... in all respects as a newly independent State."

In other words, only in that situation would the "clean slate" rule apply and not the principle of continuity. As Sir Francis Vallat, the expert consultant, explained to the Conference:

"...from the wording of Article 33 and the commentary to it, it was clear that paragraph 3 was not intended to apply to the case where a predecessor State ceased to exist. Consequently it would not apply to the case of dissolution of a State⁸."

3.11 The International Law Commission's approach was in principle approved by the Vienna Conference held in 1977-1978. The proposals to alter the basic principle of this article were rejected by the Conference⁹. In defending the Commission's approach and in agreement with the prevailing view, the delegate of the United States stated that:

⁸ See, United Nations Conference on the Succession of States in Respect of Treaties, Vol. II, Doc. A/CONF.80/16/Add.1, 48th meeting, para.1.

⁹ An amendment to Article 33 was submitted at the Conference by Switzerland and France (Doc. A/CONF.80/C.1/L.41/Rev. 1). According to the delegate of Switzerland, the International Law Commission in its draft of Article 33 departed from existing international law while:

"... the 'clean slate' rule ... was the basic principle of classic international law concerning the succession of states in respect of treaties ... generally applied in international relations long before decolonization ... [T]he Swiss delegation... associated the 'clean slate' rule with the principle res inter alios acta and not with the principle of self-determination [which] was indeed a political maxim" See, United Nations Conference on the Succession of States in Respect of Treaties, Vol. II, 40th meeting, para. 27-30.

France, nevertheless, stated the difference in its and the Swiss position concerning the place of the "clean slate" principle in classic international law when it recognised:

"... that in customary international law the 'clean slate' principle co-existed with the principle of continuity and that both were found in practice. France had opted for a mixed system applying the 'clean slate' principle to treaties concluded intuitu personae and the principle of continuity to other treaties." *Ibid.*, 40th meeting, para. 44.

The Swiss-French proposal was rejected by the Conference. *Ibid.*, 48th meeting, para. 38.

"...Article 33 accorded with the bulk of international practice... [R]ights freely accorded under a treaty should not be cut off because one State united with another ... or separated into two or more parts The central question for the Conference's consideration therefore, was why the right of reliance should disappear¹⁰."

3.12 The view that the continuity principle was justified, irrespective of whether the dissolution of a State or the separation of part of a State was involved, was shared by the majority of delegations. And there was a near consensus amongst delegations that in the case of dissolution and, in particular, in the case where the constitutive parts which separated had to some extent participated in the formulation of international relations or had been given limited international personality, the continuity principle was based on sufficient State practice¹¹.

3.13 The merits of the continuity principle can be seen from the present case. If after the dissolution of Czechoslovakia it had been the new Slovak Republic which had wished to disown the 1977 Treaty, finding it to be an economic burden, and if it had been Hungary that was anxious to see the entire G/N Project completed, the continuity principle would have quite properly protected Hungary's position. In contrast, the "clean slate" doctrine now advocated by Hungary would have placed Hungary in an impossible position, unable to enforce its rights, even though, in Hungary, nothing had changed. It is due to simple good sense and fairness that State practice has favoured continuity.

3.14 It is also in clear contradiction with the prevailing State practice and doctrine that the Hungarian Memorial declares:

"In respect of bilateral treaties (other than boundary treaties), there is no rule of international law which provides for automatic succession if ... a predecessor State dissolves and several successor States emerge in its place. Whether there is a succession to bilateral treaties in such cases depends essentially on agreement between the successor State and the other party to the treaty ...¹²."

3.15 Further, with this assertion, Hungary contradicts its own statements made at the Vienna Conference. There, an amendment was submitted by Germany which aimed at limiting the application of the principle of *ipso iure* continuity in the event of

¹⁰ Ibid., 41st meeting, para. 16.

¹¹ Ibid., see, the debate at the 40th-42nd and 48th meetings.

¹² See, Hungarian Memorial, para. 10.112.

dissolution or separation to multilateral treaties¹³. The effect would be to leave bilateral treaties in force only if the successor State and the other State party expressly so agreed or, by reason of their conduct, were to be considered as having so agreed. Hungary was among those delegations who raised objections to this amendment and who supported without any reservation the draft of the International Law Commission. According to the Hungarian delegate:

"[The] principle [of *ipso iure* continuity] was in conformity with the interests of the States concerned, as well as those of the international community. He reminded the Committee of the case of his own country which, on the termination of the Austro-Hungarian Empire in 1918, had continued to consider itself bound by the treaties of the Dual Monarchy. He was therefore in favour of Article 33 as proposed by the International Law Commission... ."

At another meeting Hungary underlined that:

"...in considering the possible dissolution of States, the continuity of inter-state relations had to be safe-guarded and the stability of treaty relations maintained in the interests of the community of States¹⁴ ."

3.16 In general, the principle of continuity in cases of separation of part or parts of the territory of a State received strong support at the Conference¹⁵. The role of this principle was further strengthened by the Conference's decision to delete paragraph 3 of Article 33 (establishing the "clean slate" rule for cases of separation in circumstances similar to decolonisation). As Professor Crawford has pointed out:

"The process of evolution towards a general regime of treaty continuity in non-colonial context was, remarkably, completed at the Second Session of the Vienna Conference¹⁶ ."

3.17 The Hungarian Memorial refers to the position contained in the

¹³ Amendment submitted by Germany, Doc. A/CONF.80/C.1/L.52, was rejected by the Conference. See, United Nations Conference on the Succession of States in Respect of Treaties, Vol. II, 48th meeting, para. 39.

¹⁴ Ibid., 40th meeting, para. 54 and 41st meeting, para. 48.

¹⁵ Ibid., 48th meeting, paras. 40-41, 49th meeting, paras. 10-11.

¹⁶ J. Crawford, "The Contribution of Professor D.P. O'Connell to the Discipline of International Law", 51 British Yearbook of International Law (1980), p. 40.

Restatement (Third) of the Foreign Relations Law of the United States¹⁷. The Restatement favoured giving all new States (regardless of whether or not they were dependent colonies) freedom to start afresh¹⁸. But the Restatement became a target of criticism in this respect and was considered inaccurately to reflect the practice of the United States, including that of recent years. Thus, E. Williamson (Legal Advisor to the U.S. State Department, 1990-1993) and J. Osborn find that:

"As a matter of practice, there are equally divergent approaches that have been employed with respect to treaty succession in this century. For purposes of our analysis, however, the Department viewed State practice as falling along a continuum. At one end of this continuum, where a portion of the State breaks away from the primary, predecessor State, the practice tends to support a 'clean slate' approach. At the other extreme, where a State divides into its constituent parts, the practice supports the continuity of existing treaty rights and obligations¹⁹."

3.18 A critical view of the Restatement conclusions was also expressed by Professor Schachter who observed that:

"[I]t seems probable that a general presumption of continuity of the obligations of a predecessor State will be accepted for new states that have come into being by secession or by dissolution of existing States. ... Thus, it is unlikely that the Restatement's rule of a clean slate for all new states will prevail in practice or theory²⁰."

In fact, in a review of the recent cases of dissolution of States in Eastern Europe, the same author comes to the opposite conclusion to that now voiced by Hungary:

"The experience thus far with respect to [these] cases ... supports a general presumption of continuity...²¹."

¹⁷ Hungarian Memorial, para. 10.113.

¹⁸ Restatement (Third) of the Foreign Relations Law of the United States, Sec. 210, comment f (1987).

¹⁹ E.D. Williamson and J.E. Osborn, "A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia", 33 Virginia Journal of International Law (1993), p. 263. Hungary makes reference to this article and, in particular, to its finding in favour of a "case by case review of outstanding agreements". This is extremely misleading. Hungary gives the impression that the authors support its analysis whilst quite the opposite is true.

²⁰ O. Schachter, "State Succession: The Once and Future Law", 33 Virginia Journal of International Law 253 (1993), at p. 258.

²¹ Ibid., pp. 257 and 259.

3.19 The case of the extinction of Czechoslovakia falls, undoubtedly, within the category of the dissolution of a State where the predecessor State has ceased to exist, and not within the category of the separation of part of a State where the predecessor State survives.

3.20 Czechoslovakia was not a union of States, each of which enjoyed distinct international personality. But its constituent republics did enjoy within the Czechoslovak federation a broad right of participation in the establishment of international obligations, the right often quoted in support of the thesis of ipso iure continuity of treaties in the event of dissolution²². Each international treaty, the implementation of which would require measures normally governed by the legislation of the Slovak Republic, was subject to the approval of the competent Slovak authorities, including, as the case may be, approval by the Slovak National Council (Parliament).

3.21 Thus, Article 137 of Constitutional Act No. 143/1968 on the Czechoslovak Federation²³ provided, inter alia, that:

"The Government of the [Slovak] Republic shall decide, as a body, in particular on:

...
d) the approval of international treaties whose implementation is within the jurisdiction of the Republic... ."

And, according to Article 107 of the same Constitutional Act:

"(1) The [Slovak] National Council shall in particular have the [competence]:

...
b) to approve international treaties whose implementation requires an Act of the National Council... ."

3.22 These rights were fully exercised by the Slovak Republic in the process of elaboration and approval of the 1977 Treaty. The Slovak Government gave its consent, prior to the signature of the 1977 Treaty on behalf of the Federation, by its decision 36/1976 of 4 February 1976 and again, after the signature of the Treaty, by its decision 362/1977 of 26 October 1977²⁴. Similarly, prior to the approval of the 1977 Treaty by the Federal Parliament and subsequent ratification by the President of Czechoslovakia, the Slovak Parliament approved the 1977 Treaty by its Resolution No. 35 of 19 December 1977²⁵.

²² See, para. 3.12, above.

²³ For English translation of the Constitutional Act No. 143/1968 and the Constitutional Act No. 125/1970 amending and supplementing the first mentioned Constitutional Act, see, Bulletin of Czechoslovak Law, Vol. 10, Prague, 1971, pp. 101-148.

²⁴ See, Annexes 5 and 6, respectively.

²⁵ See, Annex 7.

3.23 The competent Slovak authorities gave their prior consent also to the conclusion of all other agreements related to the 1977 Treaty concluded after 1 January 1969, the date of transformation of Czechoslovakia into a federation.

3.24 Thus, the case of dissolution of Czechoslovakia meets all the criteria of a type of succession in which the application of the principle of ipso iure continuity is based on an existing customary law. The practical application of this principle is discussed at paragraph 3.40 below.

SECTION 2. The Law Relating to Succession as Regards Treaties Affecting Territory and its Use

3.25 It would be sufficient for Slovakia to base its claim for the ipso iure succession in respect of the 1977 Treaty on the general rule of continuity which applies in the case of dissolution. Nevertheless, the ipso iure succession in respect of the 1977 Treaty is supported still by another, well-established principle of the law of State succession. This is the principle of ipso iure continuity of treaties of a territorial or localised character.

3.26 In its Memorial, Hungary portrays the 1977 Treaty as a common bilateral treaty (except as to its "COMECON" attributes):

"[I]t is clear that the 1977 Treaty is not a boundary treaty... . Nor did the 1977 Treaty create 'obligations and rights ... relating to the regime of a boundary' within the meaning of Article 11 of the Vienna Convention on State Succession with respect to Treaties ... [and] there is accordingly no basis for arguing that the Slovak Republic succeeded to the 1977 Treaty under the rules of general international law relating to boundary treaties²⁶."

3.27 Hungary ignores the specific characteristics of the 1977 Treaty which place it in the category of treaties of a localised or territorial character and, in part, among those creating an "objective regime". Hungary also ignores the existence of a specific rule of international law providing for ipso iure continuity of treaties of this character, irrespective of the type of territorial change.

A. The 1977 Treaty is a Treaty Concerning the Territory and its Use and Establishing an "Objective Regime"

²⁶ Hungarian Memorial, para. 10.111.

3.28 The localised or territorial character of the 1977 Treaty is beyond question and has been fully discussed at paragraph 2.35 *et seq.* above. The character of the 1977 Treaty as a treaty establishing an "objective regime" as far as international navigation is concerned has also been discussed there.

B. The Principle of *Ipsa Iure* Continuity of Treaties Affecting the Territory and Its Use Affirms Slovakia's Succession to the 1977 Treaty

3.29 The existence of the rule of general international law establishing the *ipso iure* continuity of treaties of a territorial character, including those providing for an objective regime, was confirmed by the United Nations Conference on State Succession in respect of Treaties. According to Article 12 of the Vienna Convention:

"1. A succession of States does not as such affect:

a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territory of a foreign State and considered as attaching to the territories in question;

b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States does not as such affect:

a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory ..."

3.30 Article 12 can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law. As the International Law Commission stated in relation to its work on State succession:

"Both in the writings of jurists and in State practice frequent reference is made to certain categories of treaties variously described as of 'territorial', 'dispositive', 'real' or 'localized' character as binding upon the territory affected notwithstanding any succession of States. ... The question ... touches such major matters as international boundaries, rights of transit on international

waterways or over another State, the use of international rivers, demilitarization or neutralization of particular localities, etc.²⁷."

3.31 The principle of ipso iure continuity of localised treaties has been upheld by a largely uniform doctrine. In this sense, Professor Guggenheim asserts:

"Les conventions qui se rapportent à un territoire déterminé, c'est-à-dire qui ont un caractère local ou régional, sont considérées comme étant de nature réelle. Elles autorisent et obligent donc l'Etat successeur²⁸."

Translation:

"Those treaties which attach to a specific territory, that is to say which have a local or regional character, are considered as being of a 'real' nature. They therefore create rights and obligations for the successor State."

Similarly, Professor Pereira concludes that:

"L'examen de la pratique immémoriale oblige à constater que, quel que soit le nom dont on puisse qualifier ce phénomène, la mutation territoriale laisse subsister pour le successeur celles des obligations internationales du prédécesseur qui, étant étroitement liées au territoire faisant l'objet de la mutation, peuvent être désignées par le terme générique d'obligations localisées bien que les auteurs ne soient même pas d'accord sur cette désignation²⁹."

Translation:

"An examination of long established practice leads inevitably to the conclusion that, whatever the name by which the phenomenon is qualified, a territorial transfer leaves in existence for the Successor State those of the predecessor's international obligations, which, being strictly linked to the territory which is the object of the transfer, can be designated by the generic terms localised obligations, although authors are not even in agreement on this designation."

3.32 Perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates is the pronouncement of the Permanent Court contained in its second Order in the case concerning the Free Zones of Upper Savoy and the District of Gex³⁰. This pronouncement was reflected in much the same terms in the Permanent Court's final

²⁷ United Nations Conference on the Succession of States in Respect of Treaties, Vol. III, Doc. A/CONF. 80/4, commentary to Article 12, para. 1.

²⁸ P. Guggenheim, Traité de droit international public, 1er vol., Geneva, 1953, p. 465.

²⁹ A. G. Pereira, La succession d'Etats en matière de traités, Paris, Pedone, 1969, p. 109.

³⁰ Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 17.

judgment in the second stage of the case³¹. The case is, therefore, generally accepted as a precedent in favour of the principle that certain treaties of a territorial character are binding *ipso iure* upon a successor State³².

3.33 The doctrine that certain treaties of a territorial character constitute a special category for purposes of succession of States also appears to be the dominant practice of States³³.

3.34 Treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties, as briefly discussed at paragraph 2.52 above. Among modern precedents cited by the International Law Commission

³¹ Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 96, at p. 145.

³² United Nations Conference on the Succession of States in Respect of Treaties, Vol. III, Doc. A/CONF. 80/4, commentary to Article 12, para. 3.

³³ In British practice there are numerous statements evidencing the United Kingdom's belief that customary law recognises the existence of such an exception to the clean slate principle and also to the moving treaty-frontier rule. One such is the reply of the Foreign and Commonwealth Office to the International Law Association:

"Under customary international law certain treaty rights and obligations of an existing State are inherited automatically by a new State formerly part of the territories for which the existing State was internationally responsible. Such rights and obligations are generally described as those which relate directly to territory within the new State (for example those relating to frontiers and navigation on rivers); but international law on the subject is not well settled and it is impossible to state with precision which rights and obligations would be inherited automatically and which would not be." See, International Law Association, Report of the Fifty-third Conference, Buenos Aires, 1968, p. 619.

A further statement of a similar kind was made by the United Kingdom at the occasion of discussions with the Cyprus Government regarding the interpretation of Article 8 of the Treaty concerning the Establishment of the Republic of Cyprus, Materials on Succession of States, 1967, UN Doc. ST/LEG. SER/B.14, p. 183.

The French Government appears to take a similar view. Thus, in a note addressed to the German Government in 1935, after speaking of what was, in effect, the moving treaty-frontier principle, the French Government continued:

"This rule is subject to an important exception in the case of conventions which are not of a political character, that is to say, which were not concluded in relation to the actual personality of the State, but are of territorial and local application and are based on a geographical situation; the successor State, irrespective of the reason for which it succeeds, is bound to assume the burdens arising from treaties of this kind just as it enjoys the advantages specified in them." See, United Nations Conference on the Succession of States in Respect of Treaties, Vol. III, commentary to Article 12, para. 22.

Canada, again in the context of the moving treaty-frontier rule, has also shown that it shares the view that territorial treaties constitute an exception to it. After Newfoundland had become a new province of Canada, the Legal Division of the Department of External Affairs explained the attitude of Canada as follows:

"...Newfoundland became part of Canada by a form of cession and consequently, in accordance with the appropriate rules of international law, agreements binding upon Newfoundland prior to union lapsed, except for those obligations arising from agreements locally connected which had established proprietary or quasi-proprietary rights..." See, United Nations Conference on the Succession of States in Respect of Treaties, Vol. III, commentary to Article 12, para. 22 and note 200.

is Thailand's rights of navigation on the River Mekong, granted by earlier treaties and confirmed in a Franco-Siamese Treaty of 1926. In connection with the arrangements for the independence of Cambodia, Laos and Vietnam it was recognised by these countries and by France that Thailand's navigational rights would remain in force³⁴.

3.35 Several other cases of treaties concerning utilisation of rivers are quoted by D.P. O'Connell: the case of the Nile River where after initial doubts Sudan accepted to be bound by the Anglo-Egyptian Treaty of 1929; the case of the Chatt-al-Arab in which the succession of Iraq in respect to the 1847 Treaty between Persia and Turkey did not give rise to any dispute; the case of Arnawai Khwar in which Pakistan recognised itself to be the successor State of British India; and the case of Pakchan where Thailand (in general hostile to automatic succession) accepted the devolution to Burma of the 1934 Treaty concluded with British India³⁵.

3.36 There is still another example to be noted:

"...le Tanganyika, en affirmant en 1961 qu'il ne se considérait pas comme lié par le traité anglo-belge de 1921 qui avait concédé à la Belgique certains droits au trafic et à l'utilisation des points de Kigoma et de Dar-es-Salam, n'a pas eu recours à l'argument de la 'clean slate' mais a allégué le défaut initial de validité du traité, lequel aurait été conclu par l'Angleterre ultra vires, par rapport aux termes du mandat: l'intention est nette d'éviter de placer la discussion du problème sur le terrain de la succession d'Etats³⁶."

Translation:

"Tanganyika, in affirming in 1961 that it did not consider itself bound by the Anglo-Belgian treaty of 1921 which conceded to Belgium certain rights of commerce and usage of the places Kigoma and Dar-es-Salam, did not fall back on the 'clean slate' argument but alleged an initial defect in the Treaty's validity which was concluded by England ultra vires of the terms of its mandate: the intention was clearly to avoid placing the discussion of the problem on the level of State succession."

3.37 Among treaties of a territorial character, a special category embraces treaties providing for objective regimes. According to the International Law Commission, the characteristic of the treaties in question is that they attach obligations to a particular territory, river, canal, etc. for the benefit either of a group of States (e.g., riparian States of a particular

³⁴ See, United Nations Conference on the Succession of States in Respect of Treaties, Vol. III, Commentary to Article 12, para. 26.

³⁵ See, D.P. O'Connell, "Independence and Succession to Treaties", 38 British Yearbook of International Law (1962), pp. 84-180, at pp. 151-154.

³⁶ See, A.G. Pereira, op. cit., p. 127.

river) or of all States generally. They include treaties for the neutralisation or demilitarisation of a particular territory, treaties according freedom of navigation on international waterways or rivers, treaties for the equitable use of the water resources of an international river basin and the like³⁷.

3.38 In its work on the law of treaties the International Law Commission did not consider that a treaty of this character had the effect of establishing, by its own force alone, an objective regime binding upon the territorial sovereign and conferring contractual rights on States not parties to it. It took the view that the objective regime resulted rather from the execution of the treaty and the grafting upon the treaty of an international custom. The same view of the matter was taken by the UN Conference on the Law of Treaties. Further, the Vienna Convention does not exempt treaties intended to create objective regimes from the general rules which it lays down concerning the effects of treaties on third States. Nevertheless, in the context of State succession, the International Law Commission recognised that:

"[I]f a succession of States occurs in respect of the territory affected by the treaty intended to create an objective regime, the successor State is not properly speaking a 'third state' in relation to the treaty. Owing to the legal nexus which existed between the treaty and the territory prior to the date of succession of States, it is not open to the successor State simply to invoke article 35 of the Vienna Convention under which a Treaty can not impose obligations upon a third state without its consent. The rules concerning succession in respect of treaties also come into play. But under these rules there are cases where the treaty intended to establish an objective regime would not be binding on a successor State unless such a treaty were considered to fall under a special rule to that effect. Equally, if the succession of States occurs in relation to a State which is the beneficiary of a treaty establishing an objective regime, under the general law of treaties and the law of succession the successor State would not necessarily be entitled to claim the rights enjoyed by its predecessor State, unless the treaty were considered to fall under such a special rule. That such a special rule exists is, in the opinion of the Commission, established by a number of convincing precedents³⁸."

3.39 As the 1977 Treaty is a treaty of a localised or territorial character, and, in certain respects, a treaty providing for an objective regime, its *ipso iure* continuity after 31 December 1992 (the date of dissolution of Czechoslovakia) is based on a generally recognised principle of customary international law. Hungary's claim that the 1977 Treaty, if it remained

³⁷ See, United Nations Conference on the Succession of States in Respect of Treaties, Vol. III, commentary to Article 12, para. 30.

³⁸ Ibid. (emphasis added).

in force after the purported termination in May 1992, ceased to be in force as a result of the disappearance of one of its treaty parties (namely, Czechoslovakia) is not supported by existing customary law.

SECTION 3. The Diplomatic Exchanges between Slovakia and Hungary Since the Independence of Slovakia Do Not Support the Hungarian Thesis

3.40 Slovakia's Ministry of Foreign Affairs has acted in full accordance with the view that the principle of *ipso iure* continuity of treaties, bilateral as well as multilateral, would apply in the case of dissolution of Czechoslovakia. It sent diplomatic notes to international organisations and foreign States as early as December 1992 (the eve of the dissolution of Czechoslovakia) in order to ensure the uninterrupted application of treaties previously concluded with them by Czechoslovakia.

3.41 In these notes a nearly standard wording was used. It contained three main elements, namely:

- that the Slovak Republic, as one of the successor States of Czechoslovakia, would consider itself to be bound by multilateral and bilateral treaties to which Czechoslovakia was a party;
- that the succession would occur in accordance with and to the extent determined by the existing rules of international law;
- that the succession would be effective from 1 January 1993, the date when Slovakia was to assume responsibility for its international relations.

All these elements are contained in the Note Verbale of the Ministry of Foreign Affairs of the Slovak Republic addressed to the Hungarian Embassy in Prague, dated 18 December 1992³⁹.

3.42 In its answer to this note, Hungary did not object as to the substance of any of the three elements contained in the Slovak Note. It merely expressed its readiness:

"... to enter, within the shortest possible time, into negotiations with the Government of the Slovak Republic on questions relating to State succession in respect of treaties⁴⁰."

³⁹ See, Hungarian Memorial, Vol. 4, Annex 109.

⁴⁰ Ibid., Vol. 1, para. 10.118.

3.43 In accepting the idea of negotiations on the questions of State succession to bilateral treaties, Slovakia did not contravene its position according to which the devolution occurred automatically on 1 January 1993. The presumption of an automatic, ipso iure succession to bilateral treaties does not exclude the possibility of negotiations between the parties concerned, for the two States may see the occasion as a useful opportunity to review their treaty relations.

3.44 Automatic succession does not necessarily mean succession to each and every treaty instrument previously in force between the predecessor State and the other party. Article 34 provides for certain exceptions from the principle of ipso iure succession: where the States concerned agree otherwise; where the application of the treaty in the new situation resulting from the dissolution would be incompatible with the object and purpose of the treaty; where the treaty's application was limited to the territory which became part of the territory of another successor State emerging from dissolution.

3.45 It is obvious that, in entering into negotiations, parties are not limited to the discussion of questions of succession stricto sensu. Starting from the presumption of continuity, they can explicitly agree on the termination of a number of treaties that they find obsolete, but which would otherwise not cease to exist automatically by the mere operation of the rule of State succession. This was the main purpose behind Slovakia's readiness to proceed with a general review of the bilateral treaty relations between Slovakia and Hungary as inherited from the former federation. Such an attitude can, in no way, be interpreted as being: "inconsistent with the concept of automatic succession to bilateral treaties contained in Article 34 of the 1978 Convention"⁴¹.

3.46 In the same spirit, Slovakia held negotiations with a number of States. During these negotiations the presumption of continuity was taken as a basis. While for the maintenance of treaties in force no extra procedure was found necessary by the parties, in the

⁴¹ Ibid., para. 10.119.

case of those treaties where the parties agreed on their termination, all formalities required for such a step by municipal law were accomplished⁴².

3.47 The need for negotiations on issues related to State succession has been generally recognised and stressed on several occasions by different international authorities, whose views are quoted by Hungary in its Memorial⁴³. But many of these statements relate to State succession problems in general and not to succession in respect of treaties and bilateral treaties in particular. Thus, these statements can in no way be interpreted as invalidating either the material rule of law of State succession providing for an *ipso iure* continuity of treaties in the event of dissolution of a State, or the rule common to all types of State succession providing for automatic devolution of treaties concerning territory and its use.

3.48 In this regard, Hungary's reference to the opinions of the Arbitration Commission established by the International Conference on the Former Yugoslavia is particularly surprising. It quotes these opinions in support of its thesis that there is no rule of international law providing for automatic succession in respect of bilateral treaties and as to the purely consensual character of any arrangement for their remaining in force between successor State and the other treaty party⁴⁴. The reference in paragraph 10.114 of the Hungarian Memorial to the Opinions of the Arbitration Commission is highly misleading and invites the following comments⁴⁵:

- First, the statement of the Arbitration Commission concerning questions of State succession in general, including succession in respect of treaties, is contained in Opinion No. 9 (which Hungary overlooks), where the Arbitration Commission confirmed its view (already expressed in Opinion No. 1) that: "... the succession of States is

⁴² This has been the position with the termination of treaties on abolition of visas in relation to Federal Republic of Yugoslavia (Serbia and Montenegro), Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Armenia, Azerbaijan, Georgia, Kazakhstan, Kirgistan, Moldova, Tadjikistan and Turkmenistan.

⁴³ Hungarian Memorial, paras. 10.113 and 10.117.

⁴⁴ Ibid., para. 10.114.

⁴⁵ Para. 10.114 of the Hungarian Memorial reads as follows:

"Along similar lines, the Arbitration Commission established by the International Conference on the Former Yugoslavia (the Badinter Commission) referred in its Opinion No. 11 to ... 'the few well-established principles of international law applicable to State succession. The fundamental rule is that States must achieve an equitable result by negotiation and agreement.' The Commission went on to point out that agreements as to succession between two successor States could not bind third States without their agreement."

In fact, the quotation is from Opinion No. 12, Paris, 16 July 1993, 32 International Legal Materials 1586 (1993), para. 1, at p. 1590.

governed by principles of international law embodied in the Vienna Conventions of 23 August 1978 and 8 April 1983, which all republics have agreed should be the foundation for discussions between them."

- Second, Opinions Nos. 11 and 13 of the Arbitration Commission to which Hungary does refer relate to problems concerning State succession in respect of State property, archives and debts and not State succession in respect of treaties;
- Third, and most important, the Arbitration Commission in its series of Opinions only pronounced on the relations of successor States inter se; it is in that context that it insisted on the necessity of agreements in order to reach an equitable result which, for the rest, corresponds to the process followed by Slovakia and the Czech Republic.

Furthermore, Hungary simply overlooks those elements of the Opinions which do not fit its hypothesis. In Opinion No. 11, that Hungary ignores, it is stated, inter alia, that:

"...9. The Commission would point out, however, that the principles and rules of international law in general relating to State succession are supplemental, and that States are at liberty to resolve the difficulties that might ensue from applying them by entering into agreements that would permit an equitable outcome⁴⁶."

3.49 Thus, in sharp contrast to Hungary's assertions, the Arbitration Commission not only recognised the existence of "principles and rules of international law in general relating to State succession", but saw them "embodied" in the Vienna Conventions of 1978 and 1983.

3.50 Hungary also makes reference to the conditions set up by member States of the European Community for the recognition of the Republics of former Yugoslavia and the Soviet Union, requiring that those States "settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes"⁴⁷. This too is of no assistance to Hungary. The requirement was a mere expression of political concern and was not the expression of a view on the content of the relevant rule of law.

⁴⁶ Opinion No. 11, Paris, 16 July 1993, 32 International Legal Materials 1586 (1993), para. 9, at p. 1589.

⁴⁷ Hungarian Memorial, para. 10.117.

3.51 Finally, Hungary's reference to the Council of Europe's practice, whereby the right of participation in treaties concluded under the Council's auspices is, in principle, restricted to its members and thus falls within the exceptions from the principle of *ipso iure* continuity spelled out in paragraph 2(b) of Article 34 of the Vienna Convention of 1978, is also inappropriate.

SECTION 4. The Implications of the Special Agreement

3.52 In paragraph 2 of the Special Agreement the Parties recognised:

"...that the Slovak Republic is ... the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project."

3.53 It is obvious that this formula, neutral as to the question of continued validity or termination of the 1977 Treaty, was the only way to describe jointly the situation in which the views of the Parties diametrically differ. While in Hungary's view the 1977 Treaty was terminated prior to the date of dissolution of Czechoslovakia, in Slovakia's view the purported termination of the 1977 Treaty by Hungary was without any legal effect. Thus, the 1977 Treaty was, on the date of State succession, a treaty in force. As such it survived, by virtue of the rules of customary law, the disappearance of Czechoslovakia and continues to govern the relations between Slovakia and Hungary.

3.54 The conclusions that Hungary seeks to draw from the formula chosen by the Parties in the preamble of the Special Agreement are invalid⁴⁸. It was evident to the Parties that the drafting of preambular paragraph 2 of the Special Agreement had to be without prejudice to the questions submitted by them to the Court. The failure to mention specifically that Slovakia had succeeded to the 1977 Treaty cannot be interpreted as an agreement that it was not the successor.

3.55 Whether the rights and obligations relating to the G/N Project, in respect of which Slovakia became the sole successor to Czechoslovakia, are rights and obligations based on the 1977 Treaty or on another ground, depends solely on how the Court will answer the question concerning the lawfulness of Hungary's termination of the 1977 Treaty in May 1992. If the 1977 Treaty remained in force despite Hungary's purported termination, then, in the light of the arguments above concerning the rules of law of State succession, it continues to be in force between Slovakia and Hungary.

⁴⁸ Ibid., para. 6.06.

SECTION 5. The Illogical Nature of Separating Primary and Secondary Rights and Obligations

3.56 While on the one hand Hungary contests the possibility of an *ipso iure* succession of Slovakia to the 1977 Treaty and the primary rights and obligations it established, on the other hand it does not hesitate to assert that Slovakia assumed secondary obligations resulting from alleged breaches of the 1977 Treaty and other international obligations of Czechoslovakia. This is an eclectic approach, which consists of the selection of different doctrinal concepts for different aims. This makes Hungary's position, as far as the law of State succession is concerned, highly inconsistent.

3.57 In Chapter 8 of its Memorial, Hungary, while acknowledging that:

"...Slovakia cannot be deemed responsible for breaches of treaty obligations attributable only to Czechoslovakia, which no longer exists"

immediately continues by saying:

"Nevertheless, Czechoslovakia's breaches of the 1977 Treaty, other bilateral treaties, various multilateral conventions and customary international law created a series of secondary obligations; namely, the obligation to repair the damage caused by the wrongful acts. These secondary obligations were neither extinguished by the termination of the 1977 Treaty nor by the disappearance of Czechoslovakia⁴⁹."

3.58 Czechoslovakia did not commit any "breach of treaty obligations" or any other internationally wrongful act which would have entailed its responsibility towards Hungary. This aside, from a purely doctrinal point of view it is astonishing that Hungary does not consider secondary obligations as being the corollary of primary obligation, but rather as a relatively autonomous body of obligations. In this, Hungary disagrees with the International Law Commission, according to which the secondary obligations are deemed to be consequential on the breach of primary obligations⁵⁰. Hungary fails to explain how it is that there is succession to secondary obligations but apparently no succession to primary obligations.

⁴⁹ Hungarian Memorial, para. 8.03.

⁵⁰ See, the Report of the International Law Commission on the work of its thirty-fifth session, 1983, Suppl. No 10 (A/38/10), Commentary on article 1 of the part II of the topic State responsibility, in Yearbook of the International Law Commission, 1983, Vol. II, Part Two, p. 42.

3.59 The purpose of this artificial separation of primary and secondary obligations is self-evident. Hungary simply attempts to evade the widely accepted thesis of non-succession to delictual responsibility and, in the final result, to advocate the opposite. Hungary is forced by its singular views on succession to treaties to find ways to place obligations upon Slovakia. It asserts the State responsibility of Slovakia by reference to "adoption" of an alleged illegal act of Czechoslovakia. If this is right, sed non Hungary does not need its separate, artificial argument relating to secondary treaty obligations.

3.60 It is useful to recall here the practically unanimous view of the doctrine, according to which:

"Il n'existe pas en droit de gens de règle coutumière ou de principe général postulant le transfert automatique à l'Etat successeur des obligations découlant de la responsabilité internationale de l'Etat prédécesseur... . L'homogénéité que présente la jurisprudence internationale en cette matière ne se retrouve en effet dans aucun des autres domaines où se pose le problème de la succession d'Etats⁵¹."

Translation:

"There exists in law no customary rule or general principle supposing the automatic transfer to the State successor of the obligations resulting from the international responsibility of a predecessor State The homogeneity of the international jurisprudence on this point is not to be found in any other area in which problems of State succession arise."

The analogous conclusion applies (and Slovakia does not deny this) as concerns the rights of the predecessor State deriving from the wrongful act of another State. As the same author says:

"...en l'absence de convention contraire, l'Etat nouveau ne reprend pas les droits appartenant à l'Etat antérieur du fait d'un acte illicite dont il a été la victime⁵²."

Translation:

"... in the absence of agreement to the contrary, the new State does not take up the rights belonging to the predecessor State as a result of an illegal act of which it was the victim."

3.61 In this respect, it is necessary to recall that Slovakia's right to obtain compensation for the losses caused by the delays in construction work on the Hungarian side is

⁵¹ J.P. Monnier, "La succession d'Etats en matière de responsabilité internationale", Annuaire français du droit international 1962, p. 86.

⁵² Ibid.

not based on succession to Czechoslovakia per se, it is a right based on the Treaty. According to Article 26(2) of the 1977 Treaty:

"In consequence of their liability under paragraph 1, the Contracting Parties shall separately and exclusively:

...
c) Compensate the other Contracting Party or a third party for damage resulting from the late or improper performance of work and deliveries carried out by them, from the deterioration of the plant and equipment of the works referred to in paragraph 1, and from operations not in conformity with the approved operating and operational procedures."

3.62 Hungary's obligation to compensate for the damage caused by it prior to 31 December 1992 was created ipso facto, due to the existence of delays, by virtue of a specific provision in the 1977 Treaty. As such, these financial obligations already existed as treaty obligations at the moment of State succession. Compensation for the damage caused by Hungary's behaviour was not a mere "entitlement". Hungary had already acquired a definite financial obligation based on a treaty stipulation and, since Slovakia had become a party to the Treaty, this obligation was owed to Slovakia.

3.63 In addition, Hungary's conduct did constitute an internationally wrongful act, and an internationally wrongful act of a continuing character which extended beyond the date of the dissolution of Czechoslovakia. Consequently, Slovakia, as of 1 January 1993, was entitled to all remedies available to the injured State by the rules of international law governing State responsibility (cessation, restitution, compensation, satisfaction).

3.64 Thus, as a successor State on which the 1977 Treaty automatically devolved by virtue of rules of general international law, Slovakia has the right to obtain compensation both for the damage caused by Hungary's non performance prior to, as well as after, 31 December 1992 (the date of Czechoslovakia's dissolution). The provisions of the 1977 Treaty concerning payment of damages are indivisible from those introducing the "joint investment" and "joint property" concepts, based on the assumption of an integral implementation of the Treaty. Separating artificially one element from another would amount to unjust enrichment of the party in breach of the Treaty.

SECTION 6. Conclusions

3.65 The disappearance of a State party to a treaty as such does not result in the termination of a treaty, unless this event falls within one of those categories of State succession where international law does not provide for the treaty's continuation.

3.66 Such is not the case for the dissolution of Czechoslovakia or for the 1977 Treaty which, above all, is of a territorial or localised character.

3.67 The 1977 Treaty remained in force despite its purported termination by Hungary in May 1992; and after the dissolution of Czechoslovakia on 31 December 1992 the Treaty devolved, by virtue of rules of customary international law, on Slovakia.

3.68 The 1977 Treaty continues to govern the present relations between Slovakia and Hungary and represents the main source of law to be applied by the Court in the present case.

3.69 There is no need to rebut the Hungarian thesis concerning the legal ground for ipso iure succession to the secondary obligations deriving from an internationally wrongful act, because there was no breach of the 1977 Treaty or other international obligations by Czechoslovakia.

PART II

DEFECTS IN HUNGARY'S ANALYSIS OF THE HISTORY OF THE DISPUTE

CHAPTER IV. THE PERFORMANCE OF THE TREATY: THE PRINCIPAL EVENTS FROM 1977 UP TO THE SUSPENSION OF WORKS AT NAGYMAROS

4.01 The aim of this Chapter is to reveal the erroneous analysis in Hungary's Memorial of the events up to May 1989 and, in particular, to show: first, that environmental issues were carefully studied both prior to and throughout the period by both parties to the 1977 Treaty; second, that all the environmental studies up to May 1989 showed that the G/N Project was environmentally sustainable; and third, that the real and well-documented cause of Hungary's suspension of work under the G/N Project was Hungary's attention to considerations of an economic and political nature, not its concern as to the Project's environmental effects.

SECTION 1. The Environmental Research Already Conducted At the Time of the 1977 Treaty

4.02 In its Memorial, Hungary has admitted that the 1977 Treaty was "a treaty which was consistent with the maintenance of water quality and with environmental protection generally"¹. Slovakia accepts this assessment, which shows that at the time of the Treaty's conclusion the parties were fully aware of environmental issues and concerns. The purpose of this Section is simply to review briefly how, in the light of Hungary's further comments in its Memorial, these concerns were manifested. For, although Hungary now concedes that "environmental issues were raised" in the pre-1977 Treaty period², at the same time it contends that there was an indifference to such matters - "for political reasons and because of the low priority given to ecological values at the time in Eastern Europe"³.

4.03 Such claimed indifference is refuted even by the few documents that Hungary itself annexes relating to the pre-1977 period. For example, it was agreed at the joint negotiations of 13-14 November 1967 that: "Efforts should be made so that in the involved

¹ Hungarian Memorial, para. 4.21.

² Ibid., para. 3.40. This conflicts with the claim in Hungary's Declaration of 16 May 1992 (the "1992 Declaration") that in the Project design phase "fundamental research and investigations were neglected and not carried out". Ibid., Vol. 4, Annex 82 (at p. 168):

³ Ibid., Vol. 1, para. 6.47.

territories natural biological conditions are disturbed as little as possible...⁴." The substantial nature of these "efforts" was subsequently pointed out in Hungary's 1985 Environmental Impact Assessment⁵, in which the following comments concerning the environmental impact studies carried out prior to the Project's adoption are found:

"The preparatory works for the complex utilization of the Hungarian-Czechoslovak reach of the Danube started in 1951. The scientific studies covered the agricultural, landscape-aesthetic, ecological and widely meant technical-economic aspects of the Barrage system too, exceeding the up to date aspiration level. Already at that time there were - with the presently used definition - Environmental Impact Assessments under way, which were continued in the 70s, with the involvement of other scientific fields and institutions⁶."

There is just no basis for Hungary's inconsistent assertion in its Memorial that during the Project development phase, "no environmental impact assessment was made"⁷. And, even as to the pre-1977 Treaty period, Hungary's own Memorial in its Appendix 3 provides a list of Hungarian studies relating to ground water and carried out then⁸.

4.04 As to those studies carried out prior to 1977 by Czechoslovakia, these are contained in the detailed list prepared by both parties to the 1977 Treaty that forms Annex 23 to the Slovak Memorial. Not only does this list summarise the contents and findings of each study but it also shows the degree to which such findings were taken into account in the Project design, on the following scale:

- A = application to full extent
- B = partial application
- C = application after supplementation
- D = application as subsidiary material

⁴ Ibid., Vol. 4, Annex 5 (at p. 11).

⁵ See, para. 4.24, et seq., below.

⁶ Hungarian Memorial, Vol. 5 (Part D), Annex 4 (at p. 15) (emphasis added). The Hungarian Memorial ignores the fact that one of the main purposes of the studies carried out in the late 1960s (relating to an alternative scheme) was to explore whether a system that left the Danube in its riverbed to the greatest degree possible might have a lesser impact on the environment. This scheme was, as the Hungarian Memorial accepts, introduced by Czechoslovakia, although Hungary neglects to mention Hungary's negative response to the new proposal: "The Hungarian Party still considers the Gabčíkovo-Nagymaros by-pass canal version as the optimal solution for utilising the shared Hungarian-Czechoslovak Danube section." Ibid., Vol. 1, para. 3.26 and Vol. 4, Annex 5 (at p. 11).

⁷ Ibid., Vol. 1, para. 3.40.

⁸ Ibid., pp. 396-398. 16 studies are referred to.

4.05 The number of studies relating to water quality and environmental issues contained in this list are as follows⁹ :

| | |
|---|----|
| Hydrology | 14 |
| River bedload | 7 |
| Ice phenomena | 13 |
| Water quality, biology, nature protection | 16 |
| Groundwater | 21 |
| Geology and seismicity | 9 |
| Old riverbed | 12 |
| Channel dredging downstream of Nagymaros | 7 |

4.06 It is significant that both parties also carried out extensive environmental impact research immediately prior to entering into the 1977 Treaty. Hungary's Memorial ignores Czechoslovakia's compilation in 1975-1976 of the "Biological project of the territory affected by the construction of the G/N Project" (the "Bioproject")¹⁰. It would be difficult to envisage a more complex or complete examination of the effect of the Project on the environment. The purpose of the Bioproject was to collect research data in relation to surface and ground water, flora and fauna, hydrobiology, ichthyology, hygiene and epidemiology. A synthesis of such data was produced, and a series of proposals to optimise Project impact was formulated¹¹. As noted in the Slovak Memorial, the Bioproject consisted of some 15 closing reports, 21 published volumes, 72 published articles and 17 non-published works, and covered, in particular, the following regions of impact:

- The Dunakiliti-Hrušov reservoir area
- The old riverbed area
- The headwater section of the bypass canal and the Gabčíkovo step
- The tailwater section of the bypass canal and the area downstream of Sap (Palkovičovo)
- The area upstream of Nagymaros (on the Slovak side).

⁹ It must be remembered that these are minimum figures. The list only refers to those studies which were, to some degree, taken into account in the Project design. It should be noted that the list was jointly compiled in 1973, that is long before the parties came into dispute in this area. The studies compiled from 1973 to 1990 are listed in Annex 24 to the Slovak Memorial.

¹⁰ See, Slovak Memorial, para. 2.17, et seq.

¹¹ Ibid., para. 2.20. As to the favourable comparison between the Bioproject and environmental assessments carried out during the same period in North America, see, ibid., para. 2.30.

4.07 The Hungarian Memorial also ignores the existence of a study of the water quality impacts of the Project on Hungarian territory, also carried out in 1976, within the larger context of a United Nations Development Program - World Health Organisation report. According to the Hungarian Academy of Sciences report of 23 June 1989, the "most important water quality problems" concerning the G/N Project had been discussed within this 1976 project¹². And, after the completion of this project and of the Bioproject, both parties pursued on-going environmental study programs, as will be discussed below.

SECTION 2. Events Occurring between the Start of Project Construction and Hungary's Unilateral Suspension of Work at Nagymaros (1977 to May 1989)

4.08 The subheadings chosen by Hungary for its discussion of this period in its Memorial are "Search for Alternatives and Improvements" for the years 1977-1986 and "Construction under Criticism" for the years 1986-1988. These titles are very misleading. In the first period, there was no search for alternatives; the discussion of alternatives had taken place before the 1977 Treaty took effect, and the Treaty had legally established the basic design criteria of the G/N Project. Of course, continual improvements were being made in the light of the on-going environmental study programs. These Project improvements reflected a built-in feature of the G/N Project, which was a "blueprint rather than a rigidly determined scheme", as the Hungarian Memorial explains¹³. The Project was conceived as capable of being updated in the light of scientific and technological advances and the environmental studies conducted by both sides during this period. A more accurate title for the 1977-1986 period would focus not merely on the Project's on-going environmental studies and related improvements, but more especially on the slowdown of the Project during this period due solely to Hungary's economic difficulties. By contrast, the title for the second period should reflect the acceleration of the Project that followed the execution of Hungary's construction agreements with Austrian and Yugoslav contractors and the highly favourable Environmental Impact Assessment of 1985.

¹² Hungarian Memorial, Vol. 5 (Part I), Annex 7 (at p. 134). For a discussion of the study of 23 June 1989, one of two Hungarian papers presented to Czechoslovakia on 26 June 1989, see, Slovak Memorial, para. 4.12, et seq.

¹³ See, however, para. 2.20, above, where this description by Hungary is given only qualified approval by Slovakia.

A. On-Going Environmental Research and Assessment; Mounting Economic Worries for Hungary Lead to an Agreed Slowdown of the Project

Further Environmental Research: General Overview

4.09 The Slovak Memorial provides a detailed list of the new studies carried out by Czechoslovakia after the signature of the Treaty and up to 1990¹⁴. An independent review of these studies appears in the detailed report prepared by Hydro-Québec International (the "HQI report"):

"Entre 1976 et 1986, Hydroconsult était mandaté pour intégrer les propositions fournies par URBION et l'Académie des Sciences. Plus d'une trentaine d'organismes ont aussi collaboré à des mandats sectoriels. A titre d'exemple, l'Institut de recherche sur la fertilité du sol s'occupait de l'aspect de l'exploitation agricole, incluant la problématique de drainage et d'irrigation des sols; l'Institut de recherche en foresterie étudiait la problématique d'exploitation forestière, l'optimisation de la production de bois et l'état de santé des forêts; l'Académie des sciences traitait particulièrement des aspects d'ordre biologique; l'Institut de recherche en hydraulique était chargé de caractériser l'écoulement des eaux du Danube et de ses principaux tributaires. D'autres organismes s'occupaient de monitoring, comme entre autres l'Institut d'Hydrométéorologie chargé du suivi de la qualité des eaux de surface et de la nappe phréatique, ainsi que des données climatiques.

En 1986, une autre étude a été réalisée dans le cadre du bioprojet... La recherche et l'optimisation des mesures d'atténuation se poursuivent encore en 1990...¹⁵."

Translation:

"Between 1976 and 1986, Hydroconsult was charged with integrating the proposals made by URBION and the Academy of Sciences. More than thirty bodies also worked on the individual mandates. By way of example, the Institute for research into soil fertility examined impacts on agricultural exploitation, including the problems of drainage and irrigation of soils; the Institute for research into forestry studied the problem area of silvicultural exploitation, the optimisation of wood production and the state of health of the forests; the Academy of Sciences looked in particular at biological aspects; the Institute for hydraulic research was charged with characterising the flow of the waters of the Danube and its principal tributaries. Other bodies were involved in monitoring, as *inter alia* the Hydrometeorological Institute which was charged with following surface and ground water quality, and also climatic criteria.

¹⁴ Slovak Memorial, para. 2.21, and Annex 24.

¹⁵ Hungarian Memorial, Vol. 5 (Part I), Annex 9 (at pp. 278-279). URBION was the Czechoslovak Institute for Urban and Regional Planning ultimately responsible for the compilation of the 1976 Bioproject.

In 1986, another study was completed within the Bioproject framework... The research and optimisation of mitigation measures are still continuing in 1990 ...

4.10 The impression given in Hungary's 1992 Declaration that few, if any, studies were conducted during this period - and that they all suffered from "serious insufficiencies"¹⁶ - is directly contradicted by this evidence provided with Hungary's Memorial. Furthermore, according to Appendix 3 to the Hungarian Memorial, which deals solely with ground water issues, there were upwards of 25 Hungarian studies devoted to ground water alone carried out in this period¹⁷. Nothing in the review of these studies implies that they were in any sense sub-standard, or subject to any form of political influence¹⁸. And, as will be seen below, Hungary also carried out detailed, environmental examinations of the Project in 1981, 1982, and 1983-1985.

Hungary's Economic Problems Induce it to Seek an Agreed Slowdown of the Project

4.11 Hungary admits that the initial period of the Project was characterised by its difficulties in meeting the major financial undertaking involved in the G/N Project¹⁹. Hence, it was essential to Hungary that Czechoslovakia be willing to delay the schedule in recognition of these difficulties. It was the consent to such a delay that was the object of the 1981-1983 negotiations²⁰.

4.12 Nonetheless, the Hungarian Memorial attempts to explain Hungary's "vital need for postponement" as the result not only of Hungary's economic situation but also of the need to conduct a "further examination of [the Project's] environmental impacts". It alleges that a formal proposal to that effect was made by Hungary's Deputy Prime Minister

¹⁶ Ibid., Vol. 4, Annex 82 (at pp. 158, 159 and 168).

¹⁷ Ibid., Vol. 1, pp. 399-403.

¹⁸ See, para. 4.21, below.

¹⁹ See, e.g., Hungarian Memorial, para. 3.42, where it is alleged that not just Hungary, but Czechoslovakia as well, suffered from a lack of investment resources. In terms of investment into energy production, Hungary fails however, to allude to the fact that its difficulties were to a large degree self-imposed - by its decision to invest major sums in the production of electricity by constructing the large fossil fuel burning power plants at Dunamenti and the large nuclear pressured water reactors at Paks, 115 km south of Budapest on the Danube. See, Slovak Memorial, para. 1.15. The decision to expend its budget in developing electricity by other means could hardly have justified Hungary's failure to perform its obligations under the 1977 Treaty. In any event, evidence submitted with Hungary's Memorial shows that at the time of its abandonment of works in 1989, Hungary considered that it no longer had any need of the electricity that the Project would supply. See, Hungarian Memorial, Vol. 5 (Part I), Annex 8 (at p. 158).

²⁰ See, ibid., Vol. 1, paras. 3.43-3.50.

Marjai during a meeting of the ESTC Committee on 21 September 1981²¹. But Slovakia is not aware of any such meeting of the Committee on that day, and Hungary provides no evidence to support its assertion. There was a meeting that day of the Chairmen of the Committee, the record of which was annexed to the Slovak Memorial²². But there is no mention in this document of a formal proposal for delay being made by Mr. Marjai due in part to the need for an environmental impact assessment.

4.13 In fact, Slovakia produces evidence in its Memorial - in the form of a letter written by the same Mr. Marjai - showing that in the early 1980s the Hungarian Government sought to find environmental arguments to bolster its efforts to delay the Project - a delay sought for entirely financial reasons - and was unable to come up with any valid reasons for delay on environmental grounds²³. This leads Slovakia to make two observations:

- First, Hungary's contention that in 1981 considerations as to the Project's environmental effects induced Hungary to seek to delay the Project is not only unproven by Hungary, but is also not true on the basis of the evidence before the Court;
- Second, this untrue assertion of Hungary is totally at odds with its allegations - equally incorrect - that the environment was virtually ignored until after the political changes in Hungary during 1989-1990.

4.14 Furthermore, the environmental assessments carried out in Hungary in the early 1980s provide absolutely no basis for supposed environmental concerns. Of great interest are the three Project assessments carried out by Hungary in the years 1981, 1982 and

²¹ Ibid., para. 3.43.

²² Slovak Memorial, Annex 41.

²³ Ibid., para. 3.32, et seq., referring in particular to the "Marjai letter" of 19 March 1984. In the Hungarian Memorial, para. 3.43, it is also alleged that in October 1981 two Hungarian bodies responsible for State investment decided in parallel to suspend all Project construction on Hungarian territory, the implication being that they did so for environmental reasons. Once again, no evidence is given. Reference is made there to a letter of 19 October 1981 in which the Czechoslovak Prime Minister rejects the idea of a complete interruption of work on the G/N Project, although suggesting that a schedule slowdown of three years might be acceptable. The letter may be found at ibid., Vol. 4, Annex 10. The impression given is that the Czechoslovak Government rejected the Hungarian proposal to interrupt the G/N Project to allow its environmental effects to be studied. This is a false impression. There is no evidence that any environmental question was then at issue; Hungary's contemporary difficulties were, and were seen to be, entirely economic and financial in character.

1983-1985²⁴. Whilst the 1992 Declaration made reference to the "re-examination" of the Project in 1981, it does not mention the fact that this re-examination, compiled after a six month review by a working committee appointed by the Hungarian Academy of Sciences, praised the standard of previous research work on the Project and concluded that the Project was environmentally sustainable. This 1981 study noted that the Project's "planning and research work had been organised in a uniform and co-ordinated manner"; and it established that full use was made of such research:

"The research, although not showing the same depth on several occasions, met the policies necessary for the implementation of the [GN Project]. The results of the preparatory work and research carried out for several years during the preparations not only served the development of the plans of the Barrage System, but provided results that could be used also by scholars of other fields of science and provided a basis for the plans of other facilities as well²⁵."

This study also revealed Hungary's desire to further its study into possible impacts: it is recommended that Project work continue and that the result of new research be integrated in the form of design development. But, this does not detract from the favourable, overall conclusion:

"The preparation for the Gabčskovo Nagymaros Barrage System took place at such level that it can be unambiguously ascertained that there are no reasons from agricultural and environmental aspects precluding or questioning its implementation²⁶."

4.15 The Hungarian Memorial also mis-characterises the events of this period in its emphasis on the negotiations between the Plenipotentiaries in October and November 1982, during which Czechoslovakia is claimed to have indicated that it was

²⁴ See *ibid.*, Vol. 5 (Part I), Annexes 1 (at p. 1) and 4 (at p. 14), for summaries of two of these studies. Hungary has submitted no document in relation to the 1982 study, though it appears to have been an important work, for the summary of the 1983 position paper annexed to the Hungarian Memorial asserts that the 1982 study constituted the "consideration in detail [of] the ecological impacts and consequences" of the G/N Project. *Ibid.*, Vol. 5 (Part 1), Annex 2 (at p. 5).

²⁵ *Ibid.*, Vol. 5 (Part I), Annex 1 (at p. 2).

²⁶ *Ibid.* (at p. 4). According to Hungary, however, "other researchers of the Academy criticised the report for its lack of comprehensiveness". *Ibid.*, Vol. 1, paras. 3.47-3.48. No evidence is provided. This criticism allegedly led to the formation of a second *ad hoc* committee, which issued a report on 28 April 1982. Hungary has failed to place this report in evidence or to produce an even larger study that allegedly followed it. Slovakia must therefore invite the Court to deduce that, if there are such a report and study, they do not support the assertions contained in the Hungarian Memorial.

"examining the possibility of the unilateral construction of the Gabčskovo Power plant"²⁷. The meetings in question involved tough negotiations over how to compensate Czechoslovakia for the reallocation of work proposed by Hungary in order to reduce Hungary's initial expenditures; and it is conceivable that the possibility of unilateral completion of the Project was mentioned. But absolutely no steps were taken at the time by Czechoslovakia, and Hungary has not so contended²⁸.

4.16 Even were it correct that in 1982 Czechoslovakia was giving some thought to alternative sites for the Gabčskovo power plant - or in fact to any other alternatives - this would be of no consequence. Governments routinely undertake studies based on "worst case scenarios". In the early 1980s, Czechoslovakia was being forced to take on more work than originally planned and to agree to delay the Project. It had good reason to be concerned over Hungary's lack of resolve to proceed with the Project. But this did not mean that the Czechoslovak Government was actually planning at the time to take unilateral action to dam the Danube, as the Hungarian Memorial now suggests. This is a transparent attempt to find an excuse for Hungary's subsequent conduct on the theory, fabricated by Hungary, that it was entitled to take unilateral actions starting in 1989 because Czechoslovakia had clandestinely been planning to adopt Variant "C" all along, even as early as 1982.

4.17 Ultimately, the negotiations resulting from Hungary's economic concerns led to the signature in October 1983 of the two Protocols delaying the G/N Project²⁹. The Hungarian Memorial gives the impression that this delay had been to allow time for the Environmental Impact Assessment that was, in fact, carried out from 1983-1985³⁰. But there is no evidence to show that any factor other than Hungary's economic difficulties led to the four-year delay in the Project agreed to in the Protocols.

The Economic Concerns Reflected in the Hungarian Position Paper
of December 1983

4.18 The Hungarian Memorial points to the position paper prepared by the Hungarian Academy of Sciences at the end of 1983, following the environmental assessments

²⁷ Hungarian Memorial, para. 3.44. Hungary's only evidence for this consists of two internal reports of the Hungarian Plenipotentiary. *Ibid.*, Vol. 4, Annexes 160 and 161. Annex 161 is an internal report alleging why Czechoslovakia abandoned considering such an alternative in 1983.

²⁸ According to Hungary's annexed account, the alternative allegedly mentioned appears in any event to have been quite different from Variant "C".

²⁹ See, Slovak Memorial, para. 3.08.

³⁰ See, para. 4.24, *et seq.*, below.

of 1981 and 1982 referred to above, as confirming doubts concerning the environmental effects of the Project³¹. This is incorrect. The position paper considered political, technical, economic and environmental issues (in that order) and recommended that a comprehensive, two year environmental impact study be carried out. But it did not find that the Project engendered any irremediable risks to the environment. To the contrary, in this paper the Hungarian Academy expressed the view that "the real or supposed environmental damage coming from the [G/N Project] construction can be decreased with a great probability or can be avoided..."³². The focus of the position paper, however, was on the cost of such avoidance.

4.19 In fact, the central concern of the position paper was simply that the Project might not be cost effective, particularly when the additional cost of necessary protection measures outside of the Project was taken into account:

"The 30 billion Forints to be borne by the Hungarian party ... does not contain the unmentioned but unavoidable installation costs (such as the regulation of the Old-Danube, purification of the waste water of the region, etc.) which have the same order of magnitude. It is doubted that such an amount, considering the tight investment resources, can be spent on a barrage system which will optimally provide electricity only in 1993³³."

Thus, while it is true that the position paper recommended the suspension or abandonment of the Project, this was on economic, not environmental, grounds. The paper concluded:

"It is doubtful... that a long term investment, which only consumes and freezes considerable productive forces and financial resources over one and a half decades, is allowable."

4.20 Hungary has claimed that this paper "was completely neglected by the government and by party officials and its publication was simply prohibited"³⁴. This is untrue. The 1985 Environmental Impact Assessment shows that the paper's recommendations, insofar as they related to the environment not the economy, were adopted in the form of a governmental resolution. The Assessment states: "The Economic Committee of the Government in its resolution in May 1984 ... imposed the execution of the tasks formulated in the OKTT (National Environmental and Nature Protection Council) resolution, in the

³¹ Hungarian Memorial, para. 3.48, and Vol. 5 (Part I), Annex 2 (at p. 3).

³² Ibid., Vol. 5 (Part I), Annex 2 (at p. 5). The sentence continues: "... with the help of further investments that are not or only partly in the joint investment budget."

³³ Ibid. (at p. 7).

³⁴ 1992 Declaration, ibid., Vol. 4, Annex 82 (p. 158).

standpoints of the Hungarian Academy of Sciences ... and as such the preparation of the Environmental Impact Assessment according to the mutually agreed programme³⁵." This was clearly a reference to the Academy's 1983 position paper, showing that it was followed up by governmental action which, in turn, led to the commissioning of the 1985 Assessment.

The Economic, Not Environmental, Concerns of the Marjai Letter of March 1984

4.21 The Hungarian Memorial depicts the period in the early 1980s as one during which Hungary increasingly scrutinised the environmental impact of the G/N Project and disagreement over the extent of such impact erupted. The evidence provided in the Slovak Memorial, in the form of the Marjai letter³⁶, shows something quite different. This letter expresses the view that the Hungarian Government, internally, was generally satisfied that the environmental effects had been carefully considered and provided no additional basis for the postponement of the Project, which Hungary sought because of Hungary's economic difficulties³⁷.

4.22 This letter has special importance because it shows that the Hungarian study of 1981, which offered no environmental reasons for a re-examination of the Project, was carried out without political bias in that it came to the opposite conclusion to that apparently sought by the Government. For the letter describes a governmental request to the Hungarian Academy of Sciences in 1981 for evidence to support Hungary in its negotiations for a Project postponement. Mr. Marjai explained the then Government's motivations:

"The reasons were first of all of economic character, but we wanted to refer as well to the need of further research of environmental impacts. Therefore comrade Borbándi addressed you already in March 1981 and demanded such a help of the Hungarian Academy of Sciences which would strengthen our positions during the negotiations.

The Commission of the Academy of Sciences, established on the demand of comrade Borbándi, did not provide such a help."

³⁵ Ibid., Vol. 5 (Part I), Annex 4 (at p. 15 - emphasis added).

³⁶ Slovak Memorial, para. 3.37, et seq., and para. 4.13, above. Letter of 19 March 1984 from the Hungarian Deputy Prime Minister Marjai to the President of the Hungarian Academy of Sciences, Slovak Memorial, Annex 56.

³⁷ This view was supported by the 1981 study conducted by the ad hoc committee created under the auspices of the Hungarian Academy of Sciences referred to in para. 4.14, above. What is known from the evidence of the Marjai letter is that the Hungarian Academy did commission studies - presumably the 1981, 1982 and 1983 studies referred to in para. 4.14, above - at Mr. Marjai's request, in order to try to formulate environmental arguments to support him in his negotiations to delay the Project, but that these studies failed to provide persuasive environmental reasons to support Hungary's economic arguments for delay.

This "Commission", established at Mr. Borbandi's request, was the 1981 ad hoc committee, whose study provided no ammunition to the Government for re-examining the Project on environmental grounds.

4.23 The Marjai letter is also relevant in relation to Hungary's current allegation that Czechoslovakia had greater obligations than Hungary in relation to environmental research³⁸. Not only was Czechoslovakia at no stage prior to this dispute considered as having a greater responsibility for environmental assessment; not only at no time prior to this dispute did Hungary seek to accuse Czechoslovakia of failing to meet its obligations in relation to the study of the environment; but, to the contrary, in his letter of 19 March 1984, Vice-Prime Minister Marjai stated that it could be "asserted with certitude that we have no substantiated claims against Czechoslovakia". Thus, in 1984, there was no evidence that Czechoslovakia had breached obligations in relation to environmental research, there was no evidence that environmental research was being neglected by Hungary, nor, indeed, was there evidence that the Project was in any way environmentally disastrous. The only evidence pointed to Hungary's consistent concern over the economic aspects of the Project.

B. The Environmental and Economic Assessments of the Project in 1985

The Hungarian Environmental Impact Assessment of June 1985

4.24 The tangible result of the Academy's 1983 position paper was the 1985 Environmental Impact Assessment³⁹. In considering the findings of this Assessment, and bearing in mind Hungary's arguments that Project studies might be politically influenced, it must be remembered that the Assessment came about partly as the result of the instructions of the Academy, which openly opposed the Project on economic grounds. If Hungary's arguments as to influence are to be believed, a bias against the Project would certainly have manifested itself in the Assessment. This was not the case.

4.25 The overall task of the Assessment was "the complete discovery of the environmental impacts [of the G/N Project]"⁴⁰. However, the Assessment's more specific terms of reference were to explore the scientific basis of the findings of the Academy's 1983

³⁸ See, Hungarian Memorial, para. 6.31; see, also, para. 10.96, et seq., below.

³⁹ Hungarian Memorial, Vol. 5 (Part I), Annex 4 (at p. 14).

⁴⁰ Ibid. (at p. 16).

position paper and, in particular, to discover whether the Project could satisfy a stringent resolution passed by the Hungarian National Environmental and Nature Protection Council (the "OKTT"). This resolution (No. 3/1983) prescribed, inter alia, that the Project must not "impose danger on the water supply of Budapest". Further, it stated:

"It is necessary to avoid the deterioration of the biological state of the water in the Old Danube and its tributaries and to provide its worthy state as a boundary river... .

The water resources stored under the Kisalföld [Žitný Ostrov/Szigetköz] in the gravel layer [have] to be protected⁴¹."

4.26 In order to verify whether the Project could comply with this resolution, 58 papers relating to previous research were re-examined and 33 new research papers completed. The findings were summarised under nine separate sub-headings as follows⁴²:

- Water quality: a central focus was the impact of the Project on drinking water resources. With regard to the bank filtered supply wells, it was found that water quality problems were "mainly due to the growing pollution coming from the background areas". The Assessment continued:

"The Barrage System has no effect upon the filter layer of the Budapest Waterworks' water resources at the Szentendre Island. The changes in the filter layer are influenced by factors independent from the [G/N Project]."

On a more general level, it was found that "the Barrage System will not cause significant changes in the general water quality relations of the Danube". It was also noted that the Project would secure a water quality improvement in the Szigetköz side arms and the Mosoni Danube.

- Nature conservation areas: it was concluded that the G/N Project did not threaten existing conservation areas (in Hungary).
- Peak operation: it was accepted that the flora on the Danube river banks themselves would be affected but, that aside, no serious environmental risks ensued.

⁴¹ Ibid. (at p. 17).

⁴² Ibid. (at pp. 18-24).

- Agriculture: no substantial changes in soil productivity were anticipated. It was noted that around 1,000 acres of land in Szigetköz would become productive as this waterlogged land would become well-drained. The disappearance of uncontrolled flooding was also found to be a benefit.

- Ground water levels and the side arm system: the Assessment reviewed the plans for maintaining water levels in the Hungarian side arms and in Szigetköz by means of an artificial recharge system, with an intake at the Dunakiliti weir. It noted that this system "was developed on the basis of detailed examinations on the spot, hydrological and hydraulic research... electronic analogous model tests and field research to provide data". As a result of this system, "the distribution of the water resources and the determination of the water levels can be carried out taking into account the soil data and morphological characteristics of the region while considering the up-to-date hydrological and meteorological circumstances". It concluded: "Thus the infiltration system is a good solution which fits to the natural surrounding."

- The floodplain forests: the channeling of flood waters into the old riverbed after the flow into the bypass canal was found to "respond to the characteristics of the processes in natural circumstances". Apart from a 300 m band alongside the Danube where species change would be inevitable, the forests would be sustained unchanged.

- Regional and urban development: only minor developments were anticipated - these being mainly improvements in terms of infrastructure and tourism.

- Protection of water resources: contrary to the allegations contained in Hungary's Memorial, the Assessment did not find support for the view that deterioration of the aquifer underlying Szigetköz could result from the Project. To the contrary, it predicted an improvement in the aquifer's water quality, while once again underlining the importance of reducing the pollution of water supplies by background, *i.e.*, unrelated, man-made contamination:

"The water treasure in the gravel layer of the Szigetköz will receive freshwater supply from the infiltration system being filtered, more clear water, which brings it into better state from the water quality point.

The Szigetköz water treasure is not hampered by the local sedimentation of the Dunakiliti Reservoir. In the water quantity sense the water treasure will not change significantly. However it is very important to reduce, stop or as an immediate task to reduce the growing tendency of the pollution through the diffuse pollution from the communal and agricultural sources probably

increasing and from the shattered areas (gravel mining). Similarly important from the point of view of the Szentendre Island bank filtered water resources the background pollution on the surface of the island."

- The sustaining ability of the region: finally, the Assessment predicted that the Project would lead to some economic growth in the region and to improved opportunities for the commercial fishing of certain species.

4.27 The overall conclusion of the Assessment was unambiguous:

"There will be no significant [harm] done to the biological state of the water and no changes inducing ecological "catastrophes" will occur⁴³."

Thus, there were no environment-related reasons why the Project could not continue:

"The final conclusion of the Impact Assessment is that the Gabčikovo-Nagymaros Barrage System, fitting into the natural-economic surrounding of the region in harmony, can be accomplished according to the system of requirements set forward by the resolution No. 3/1983 of [the National Environmental and Nature Protection Council], the internal resolution of the [Hungarian Academy of Sciences] and the plenary session of the [National Committee for Technical Development]⁴⁴."

The Hungarian Academy's Opinion of June 1985

4.28 While the compilers of the Assessment stressed the unique nature of their achievement and asserted that in Hungary there had "never been such a multifold and complex preliminary investigation carried out", the Hungarian Memorial is dismissive of this

⁴³ Ibid. (at p. 25).

⁴⁴ Ibid. (at p. 27).

work. It claims that the Assessment "became subject to stringent criticism"⁴⁵. Yet the 1985 Opinion of the Hungarian Academy of Sciences referred to in the following paragraph of the Hungarian Memorial (the "Opinion") described the Assessment as "a pioneer undertaking"⁴⁶.

4.29 It is correct that the Opinion recommended that further research be carried out, but this reflected a conclusion contained in the Assessment itself⁴⁷. The Opinion's real significance is that it showed the Hungarian Academy of Sciences responding to the Environmental Impact Assessment by approving the general concept of a barrage system⁴⁸. Although an alternative implementation of the G/N System was discussed and recommended by the Opinion, this was on economic not environmental grounds. For, as the Opinion noted, the System as designed entailed not only the cost of the construction of Nagymaros but also the cost of treating sewage at Győr and at other Hungarian towns, as well as the future cost of dredging deposited sediment upstream of Nagymaros. An alternative scheme, in which the construction of Nagymaros was delayed, was therefore preferred. The benefits of this scheme were very candidly expressed in the Opinion:

- the treatment of the sewage effluents in the city of Győr and on both the left and the right riversides may be implemented at a "normal" rate (the burden on the national economy of this investment, paying for itself slowly, decreases);
- the construction of the Nagymaros Barrage may be rescheduled, and the navigation in the area of the community of Gőnyű may be resolved at lower costs;
- the plants and additional facilities and projects necessary for the subsequent peak-operation may be implemented according to the carrying capacity of the national economy⁴⁹."

This is a clear statement by the Hungarian Academy of Sciences of the priority of economic interests over environmental concerns. The environmental concerns addressed in the Opinion

⁴⁵ Ibid., Vol. 1, para. 3.52. Two lines of criticism of this Assessment are mentioned. First, it is noted that there was no legislation in force for conducting such an Assessment - an irrelevant comment having nothing to do with the merits of the findings of the Hungarian scientists. Second, it is noted that public participation in the conduct of the Assessment had been omitted. But this shows that an effort had been made to keep the study a strictly scientific one and to ensure that the scientific findings were not influenced by outside political influences.

⁴⁶ Ibid., para. 3.53, and Vol. 5, Annex 3 (at p. 10).

⁴⁷ Ibid., Annex 4 (at p. 26).

⁴⁸ Ibid., Annex 3 (at p. 9).

⁴⁹ Ibid. (emphasis added).

did not arise from the G/N Project itself but from pollution caused by sewage effluents at cities along the Danube such as Győr, which required immediate attention if the Project was to go forward on schedule (even as already extended by the 1983 Protocols).

4.30 As in the Academy's 1983 position paper, an anxiety was expressed in the Opinion as to the cost of measures necessary to protect the environment. But there was no question raised whether such measures would be effective. To the contrary, the Opinion predicted that the implementation of the Project alongside the additional environmental protection measures referred to might well lead to a positive improvement in the ecology of the Project region:

"... a possible failure to implement the additional facilities due to misconceived austerity aspects may have fatal consequences. A development of the area accommodating the changed endowments may result in a more favourable situation than the present one, while failing to implement the "extra" projects may cause irreversible processes in an ecological sense⁵⁰."

The Impact on the G/N Project of the On-Going Environmental Research

4.31 Hungary contends that the design of the G/N Project dates back to the 1960s and that only minor modifications since have been incorporated⁵¹. The implication is that in the 1977 Treaty an already archaic design was institutionalised. Aside from being factually wrong, this contention conflicts with Hungary's own Treaty analysis. For the Hungarian Memorial correctly points out that the final Project design was not laid down by the 1977 Treaty, but was contained in the Joint Contractual Plan. As Hungary notes:

"The Joint Contractual Plan had not been concluded when the 1977 Treaty entered into force, as Article 3(2) reveals. The Plan was not even a single document, but more a filing system of specifications, and was of enormous size. Even after the conclusion of the Plan, it was subject to numerous amendments⁵²."

4.32 Hungary's own evidence establishes the evolutionary nature of the Project. The 1981 study of the ad hoc committee approved by the Hungarian Academy of

⁵⁰ Ibid. (emphasis added).

⁵¹ Hungary's claim that the "failure to adjust the plans" constituted an anticipatory breach of the 1977 Treaty (Hungarian Memorial, para. 10.88) is analysed from a legal standpoint in para. 10.93, et seq., below.

⁵² Hungarian Memorial, para. 4.15 (emphasis added).

Sciences, already referred to, envisaged the adjustment of the G/N System plans to take account of the latest research into agricultural and environmental impacts, which would become "an integrated part of the planning documentation"⁵³. Similarly the compilers of the 1985 Environment Impact Assessment noted that its conclusions were being taken into account even during the on-going preparation of its report:

"During the up-to-date examination, all the findings of the research for the Environmental Impact Assessment were continuously taken into consideration"⁵⁴.

4.33 The various modifications to the Project have been summarised in the Slovak Memorial⁵⁵. But there is independent evidence that establishes that various important modifications were made. For example, the HQI report notes that after 1976, the year of the completion of the Bioproject, Hydroconsult was specifically charged with implementing the proposals in the Bioproject and also those submitted by the Czechoslovak Academy of Sciences⁵⁶. A list of the design and operation modifications incorporated in relation to the old riverbed (by 1990) is also given in the HQI report. These constituted the construction of underwater weirs to maintain water levels, and the increase of the minimum flow into the old riverbed from 50-200 m³/s up to 350 m³/s, with a periodic increase up to 1,300 m³/s⁵⁷.

4.34 The detailed designs for the revitalisation of the Slovak side arm system were laid down in 1985 and, in 1986, the plan for the intake into the Hungarian side arms at Dunakiliti was formulated. Also around this time, the planned flow into the Old Danube was increased and the means of increasing river and ground water level through the use of underground weirs was formulated. Thus, at a meeting of the ESTC Committee in May 1986, Czechoslovakia proposed the "updating of [the] technical solution for the bed of the Danube river in accordance with environmental requirements"⁵⁸. The technical solution chosen was a series of underwater weirs and, prior to Hungary's suspension of works in the Gabčíkovo section, this solution was formally adopted by the Plenipotentiaries of the Treaty parties as is recorded in the protocol of the meeting of 8-9 June 1989:

⁵³ Ibid., Vol. 5 (Part I), Annex 1.

⁵⁴ Ibid., Annex 4 (at p. 16).

⁵⁵ Slovak Memorial, para. 2.69, et seq.

⁵⁶ Hungarian Memorial Vol. 5 (Part I), Annex 9, (at p. 278). See, also, Slovak Memorial, para. 2.27, et seq., regarding the report of Hydro-Québec International ("HQI").

⁵⁷ Ibid., (at pp. 295-297).

⁵⁸ Protocol of the 21st Session of the ESTC Committee, 19 May 1986, Slovak Memorial, Annex 49.

"Government Plenipotentiaries agree that, as part of adjustments within the old riverbed of the Danube, the fortification of fords in the old riverbed will be carried out under joint investment⁵⁹."

The Project was also updated in terms of monitoring the various impacts. As Appendix 3 to the Hungarian Memorial notes:

"In accordance with the proposals for environmental impact assessment VIZITERV prepared, in 1985, a plan for the environmental monitoring system, which, with respect to subsurface waters, meant the operation of the existing groundwater level and quality observation system of wells and the expansion of the network (VIZITERV, 1986; Mantuano, 1988).

In the nineteen-fifties approximately 200 observation wells were in operation along the Danube reach of concern, most of which formed part of the national hydrographic network. In the period 1980-86 additional wells were established in the Szigetköz and later downstream of Gőnyű. Some 600 wells were drilled and this proved later to be more than was needed⁶⁰."

4.35 Hungary's Memorial reveals that, like Czechoslovakia, Hungary had its own governmental bodies that reviewed the Project and, at times, insisted on design modifications. To take one example already discussed above⁶¹, in 1983 the Hungarian OKTT (National Environmental and Nature Protection Council) passed a resolution requiring that the Project comply with certain environmental standards. This was incorporated (alongside the recommendations of the Hungarian Academy of Sciences) into a resolution of the Hungarian Government's Economic Committee that formulated a revised workplan for the Project⁶². One of the immediate results of this revised workplan was the compilation of the Environmental Impact Assessment. Thus, the claim in Hungary's 1992 Declaration that, in terms of the compilation of environmental assessments, "official demand had never been expressed to this goal before the end of the 80s" is simply wrong⁶³. There can be no question that the Treaty parties had the administrative independence and flexibility to examine and re-examine the Project, and that they did so⁶⁴. The Project was thoroughly studied by both parties prior to

⁵⁹ Meeting of the Czechoslovak and Hungarian Plenipotentiaries, 8-9 June 1989, *ibid.*, Annex 58.

⁶⁰ Hungarian Memorial, Vol. 1, p. 413.

⁶¹ *See*, para. 4.25, above.

⁶² Hungarian Memorial, para. 5.35.

⁶³ *Ibid.*, Vol. 4, Annex 82, (at p. 168).

⁶⁴ As to the pre-1977 period, it is demonstrably untrue that studies "were done in the context of a centrally-planned undemocratic political system in which it had already been decided from above that

1989 and, where considered necessary, it was updated by common agreement to take account of the latest research and any technological developments.

C. Acceleration of the Project (1986-May 1989)

4.36 It has just been shown that none of the scientific reports, including the full-scale Environmental Impact Assessment, provided environmental reasons to support the Hungarian Government's attempt to delay the Project. It was in these circumstances that a contract for building the Nagymaros section of the Project was awarded to an Austrian Company under particularly attractive terms⁶⁵, and Hungary switched its policy from delay to the acceleration of the G/N Project. Thus, only three years after it had obtained Czechoslovakia's consent to delay the Project, Hungary set about convincing Czechoslovakia to agree to the speeding up of the Project, including the Nagymaros section.

4.37 Hungary's motivations for such an acceleration - just as for the earlier schedule prolongation - were no more than economic and financial considerations⁶⁶. The Austrian group retained for the work at Nagymaros was able to supply both the immediate funding and the technical means that Hungary lacked; and the sooner the work could be completed, the less it would cost overall and the sooner the investment would yield benefits. As early as May 1986, Hungary had modified its own investment plan to reflect the acceleration which Czechoslovakia did not formally agree to until February 1989⁶⁷.

4.38 The Hungarian Memorial observes that during this period the Project itself was proceeding without difficulty: "construction gained momentum"; the Joint Contractual Plan was working smoothly; no major disagreements were noted in the minutes of the Joint Operating Group⁶⁸. The main challenge, according to Hungary, came from the "growing environmental movements". Demonstrations occurred in September and October of 1988; and slogans "identified the Project with Stalinism"⁶⁹. But this development was in no

the Barrage System would be built". *Ibid.*, Vol. 1, para. 4.17. It took 25 years for the original concept of a barrage system to be turned into the reality of the 1977 Treaty. Had a decision really been taken in the manner described by Hungary, the agreements would have been reached and the Project constructed in the late 1950s.

⁶⁵ Long-term credit was provided to be refunded in the future by furnishing electricity generated under the G/N Project.

⁶⁶ *See* Slovak Memorial, para. 3.11. A vague reference to environmental considerations was made by Hungary at the time, in total contradiction to Hungary's current argument that environmental considerations had been a factor in prolonging the Project's schedule.

⁶⁷ Hungarian Memorial, para. 3.56.

⁶⁸ *Ibid.*, para. 3.57.

⁶⁹ *Ibid.*

way based on any newly discovered evidence concerning the Project's impact on the environment or on water quality, or on some suddenly uncovered threat of an ecological disaster; and Hungary has produced no evidence that it was. All that it showed was that, for better or for worse, the Project had become part of the political platforms of the then emerging Hungarian political parties.

The Hungarian Parliament's Strong Support of the Project in Early October 1988

4.39 On 6-7 October 1988, the Hungarian Parliament, following a motion to suspend construction at Nagymaros and possibly to cancel that part of the Project, voted to support the entirety of the G/N Project, including its 15 month acceleration, by an enormous majority (317 for, 19 against, with 31 abstentions)⁷⁰. From an environmental standpoint, this vote was not in the least surprising. It was made in the light of the favourable Environmental Impact Assessment of 1985 and the fact that not a single study conducted by Hungary's environmental and water quality experts had opposed the Project on environmental grounds.

4.40 The Hungarian Memorial now attempts to explain away this overwhelming endorsement of the Project on the ground that nearly all the Parliament's members were at that time no more than political appointees. But this is nonsense. For exactly the same Parliament was free in the spring of 1989, that is before Hungary's change of regime (which did not occur until the spring of 1990), to vote to stop work on the G/N Project⁷¹. Hungary also refers in its Memorial to supposed "important new elements", established on that occasion by the Parliament: that ecological risks be reduced to a minimum with ecological interests being given priority over economic ones; that the water quality of the Danube not be allowed to deteriorate; and that peak operation commence only after the required water treatment plants on both sides of the river had been established.

4.41 But the emphasis placed by the Parliament on environmental protection and maintenance of water quality was hardly "new". These principles had been incorporated

⁷⁰ *Ibid.*, para. 3.63. In a speech to the Hungarian Parliament on 6 October, Mr. Gyula Horn, then State Secretary and currently the Prime Minister of Hungary, strongly criticised the argument advanced by some that the 1977 Treaty could be suspended due to changed circumstances, asserting that such an action would give rise to the legitimate claim by Czechoslovakia of breach of the Treaty with demands for compensation in the "billions". Annex 8, hereto.

⁷¹ Hungary also alleges that the Parliament was simply following the decision already taken by the Government and was not framed in the form of a statute or a formal resolution. *Ibid.*, para. 3.61. But it does not explain why it was unusual not to adopt a statute, given that Parliament had long before formally approved the Project; in fact, a formal decision was taken on 7 October 1988, by the enormous majority mentioned above, approving the eight points specified by the Government in its report, Point 1 of which was that the G/N System must be constructed as originally conceived, including Nagymaros and peak power operation. Parliamentary Resolution, 7 October 1988, *ibid.*, Vol. 4, Annex 145 (at p. 344).

into Articles 15 and 19 of the 1977 Treaty, and water quality had been the subject of continual monitoring and remedial measures undertaken by the Joint Boundary Waters Commission under the 1976 Agreement⁷². As to the linking of peak operation to the completion of the programmed sewage plants, the real significance of this was that it involved a large investment for both Treaty parties to be paid for out of national budgets rather than the Project budget⁷³. It was this financial burden, not protection of the environment or of water quality, that was the added reason that then led the Hungarian Government to turn against the Nagymaros section of the Project.

Hungary's Refusal to Enter Into an Agreement on Water Quality Protection (3 May 1989)

4.42 The Parliament's decision of 6-7 October 1988 is said to have led to demonstrations in Budapest and a number of major cities around the world⁷⁴. It may be that the Project suddenly became unpopular; but this did not mean that it had become unsustainable from an environmental standpoint. The Project did become a symbol and rallying point against an increasingly unpopular political regime; but the more the G/N Project became caught up in a well-orchestrated political campaign, the less attention was paid to whether there was any scientific basis for claims that the Project would have a damaging environmental impact⁷⁵.

4.43 In its discussion of the increased attention given to water quality following the Parliamentary debates of 6-7 October 1988, the Hungarian Memorial gives the impression that the importance of protecting the water quality of the Danube and the importance of the building of sewage disposal plants only became apparent at the end of 1988⁷⁶. But as Slovakia has shown, measures of protection had been taken throughout the

⁷² See, Slovak Memorial, para. 3.13, et seq.

⁷³ See, paras. 4.19 and 4.29, above.

⁷⁴ Hungarian Memorial, para. 3.64.

⁷⁵ Of course, in Hungary, environmental demonstrations had been occurring from the start of the 1980s, though not directed particularly against the G/N Project until the end of the decade. See, Slovak Memorial, para. 3.51, et seq.

⁷⁶ The events of this period were covered in much more detail in the Slovak Memorial. Ibid., paras. 3.13-3.24. Compare, Hungarian Memorial, paras. 3.65-3.69.

1980s⁷⁷. Thus, by 1985, 620 sewage plants had been built on the Czechoslovak side of the joint Danube section; by 1984, 213 sewage treatment had been built on the Hungarian side⁷⁸. Further, plans existed in 1985 for Czechoslovakia to build another 120 plants, and Hungary an additional 83 plants. The 1989 updated report of the Joint Commission showed Czechoslovakia to be ahead of schedule⁷⁹, and Slovakia has annexed to this Counter-Memorial a report bringing the information concerning wastewater treatment plants in Slovakia up to date⁸⁰. The impact of this construction program is beyond doubt: a major improvement in the quality of the water has occurred in the Slovak/Hungarian sector of the Danube since the 1970s.

4.44 The Hungarian Memorial takes no account of this construction program. And its analysis of the meetings that took place from late 1988 up to May 1989 contains a further glaring omission. The meetings of the Joint Boundary Waters Commission during this period, attended also by each Minister responsible for environmental protection and water quality, led to the formulation of a jointly agreed set of recommendations for a program to be adopted by each Government⁸¹. These recommendations were presented in a report dated 8 April 1989 to the Chairmen of the ESTC Committee, and considered by them at a meeting on 3 May 1989⁸². It was contemplated that a special governmental agreement would be entered into to implement these recommendations.

4.45 But the Hungarian Co-Chairman of the ESTC Committee refused to sign the protocol of the meeting. The Hungarian Memorial is completely silent about these fruitful discussions that were to lead to a draft agreement on water quality protection. Nor has Hungary given any explanation why, by refusing to sign the protocol of the 3 May meeting, it aborted the proposed agreement on water quality protection. But the reason may lie in the fact that only 10 days later Hungary announced its suspension of work at Nagymaros. All that can be said is that Hungary's action reveals a blatant disregard for the protection of water quality - a disregard already manifested in the Hungarian Academy's resistance to proceeding with Nagymaros on schedule because that would involve substantial expenditures outside the Project for waste treatment at Győr and other places along the Danube.

⁷⁷ Slovak Memorial, para. 3.13, et seq.

⁷⁸ Ibid., paras. 3.18-3.19.

⁷⁹ Ibid., para. 3.21.

⁸⁰ Annex 9, hereto.

⁸¹ Slovak Memorial, paras. 3.22-3.24.

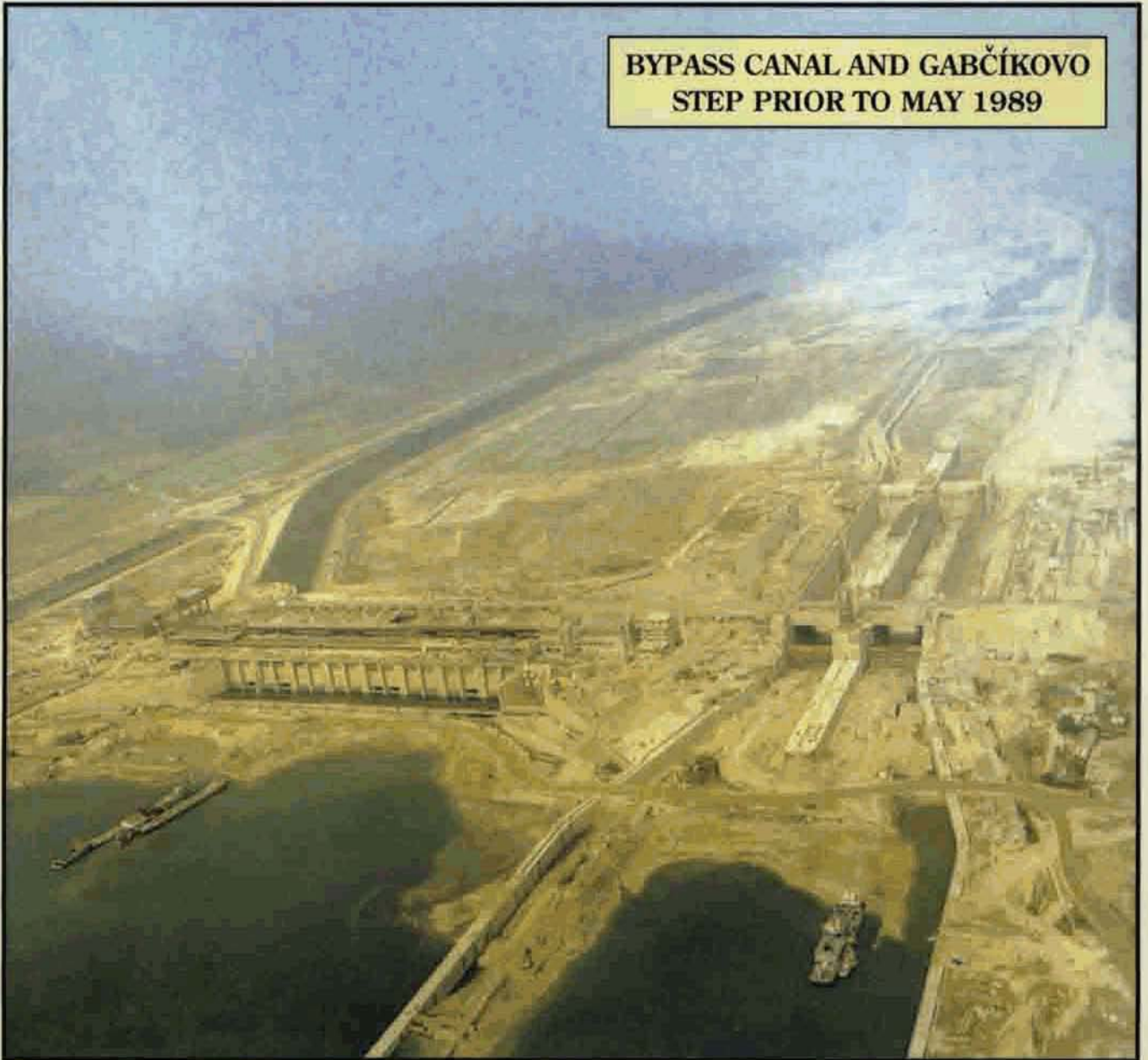
⁸² Ibid., Annex 55 (draft protocol).

4.46 That Hungary should block an agreement on water quality protection scarcely reflects a genuine concern for the environment. And no less embarrassing to its interpretation of this period is the Protocol to accelerate the G/N Project on 6 February 1989. This event is passed over lightly in the Hungarian Memorial, which barely even attempts to explain why a Government with genuine (even if incorrect) environmental concerns in relation to the Project would have given such a clear endorsement to its continuation. Instead, attention is now focused by Hungary on the mounting public pressures to re-evaluate the Project. But this public anxiety was misplaced and reflected an ignorance of the decades of detailed scientific research into the Project. In fact, by 1989, the G/N Project must have been one of the most over-reevaluated Hungarian programs on record.

4.47 In bringing this Chapter to a close - and in order to have a better sense of the situation on the ground prior to May 1989, when Hungary began its series of unilateral acts leading to its abandonment of the G/N Project (the subject of the next Chapter) - Illus. Nos. CM-1A and B, two aerial views of the Gabčíkovo section of the Project, have been placed here. These pictures, which show the almost complete bypass canal and Gabčíkovo step - both entirely on Czechoslovak territory - help to explain the rude shock experienced by Czechoslovakia when Hungary's aim to abort the G/N Project started to unfold, starting on 13 May 1989 with its unilateral act to suspend work at Nagymaros.



BYPASS CANAL AND GABČÍKOVO STEP PRIOR TO MAY 1989



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-1A

**BYPASS CANAL AND GABČÍKOVO STEP
CIRCA MAY 1989**



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-1B

CHAPTER V. THE PERFORMANCE OF THE TREATY: A FACTUAL ACCOUNT OF HUNGARY'S BREACHES OF THE 1977 TREATY FROM MAY 1989 TO MAY 1992

5.01 The aim of this Chapter is to examine the striking contrast between the account of events 1989-1992 contained in Chapter IV of the Slovak Memorial and that to be found in Chapter 3 of Hungary's Memorial¹. Such a comparison shows that Hungary's contention that it - but not Czechoslovakia - was at all times ready to consult and negotiate in order to resolve the dispute cannot be sustained. To the contrary, the evidence shows that Hungary, by 1990, had resolved to abandon the G/N Project and to terminate the Treaty for economic and political reasons, and that the Hungarian Government proceeded to take unilateral actions towards that end. The evidence reveals that Hungary was never prepared to enter into meaningful negotiations to resolve the dispute under the Treaty, except to achieve that end, whilst Czechoslovakia remained open to compromise and sought to resolve the dispute that had arisen under the 1977 Treaty.

5.02 This Chapter also leads to the conclusion, taken up in Chapter VI, that Variant "C" was implemented only as a last resort after Hungary had succeeded, unilaterally, in delaying the damming of the Danube for three years in a row and had gone so far as to purport to terminate the 1977 Treaty.

5.03 In reading this Chapter the Court is invited to remember that, in its Memorial, Hungary has suggested the general standard by which its own conduct of consultation and negotiation should be judged. After pointing out that the 1977 Treaty contained no "mechanism for its revision", Hungary adds that:

"... the criterion for assessing the legality of the Hungarian conduct must be whether Hungary intended and clearly manifested its will to achieve an agreed solution based on good faith negotiations. This general rule stems from the "good faith" principle, as well as common sense and general customary international law²."

To this general criterion, Hungary adds the following:

¹ See, Hungarian Memorial, paras. 3.74-3.223. Parts of Chapters 6, 7, 8, 9 and 10 of the Hungarian Memorial relating to the record of consultation and negotiation during this period are also referred to: i.e., para. 6.70, *et seq.*, paras. 7.92-7.98, paras. 8.11-8.21, paras. 9.01-9.42 and paras. 10.71-10.106.

² *Ibid.*, para. 7.92.

"The pretence of negotiating while at the same time the object of the negotiations is destroyed by unilateral actions show a lack of good faith³."

5.04 Slovakia accepts this as a general statement of the standard of conduct to be applied. However, it is noted that, as has been discussed above in Chapter II, the Hungarian Memorial attempts to modify this statement by a complete misreading of Article 27 of the Treaty⁴; and it seeks to find in the general international law of the environment a special set of rules that should be applied in this case to exonerate Hungary from its conduct in breach of the 1977 Treaty, an attempt that is fully discussed below in Chapter IX and shown there to be invalid. The present Chapter is devoted to an analysis of the events that occurred and the evidence concerning these events produced by both Parties.

SECTION 1. Hungary's Unilateral Decision to Suspend Construction Work at Nagymaros (13 May 1989)

5.05 The Hungarian Memorial indicates that a prime catalyst of the unilateral decision of Hungary to suspend work at Nagymaros was the release in March 1989 of the preliminary report of a study conducted under the auspices of Ecologia, identified in the report as an "environmental consulting firm" centered at the University of Massachusetts⁵. Ecologia had been approached by INFORT (the Hungarian Research - Development Product Company for Information Space Techniques) in June 1988⁶.

5.06 According to Hungary, following the first "preliminary" Ecologia Study, a reconsideration of the Project was begun. This culminated in a meeting on 3 May 1989 between the Prime Minister and his "Advisory Committee of independent experts", allegedly to

³ Ibid., para. 6.80.

⁴ See, para. 2.22, et seq., above.

⁵ Hungarian Memorial, para. 3.74. This report and the second "interim report" issued in May 1989 have been examined in the Slovak Memorial (being referred to there as the "Massachusetts Study"). Slovak Memorial, para. 2.23, et seq. See, also, para. 7.05, et seq., below. Apparently, there was no report described as "final", only "preliminary" or "interim". Since preparing its Memorial, Slovakia has attempted to find out more about Ecologia, but apparently it no longer exists. Nor is it listed in the customary data bases for these sorts of environmental studies or recorded in the directories of environmental reference services. It seems that these reports are the sole publications of Ecologia, giving one the distinct impression that these reports were principally intended as proposals for follow-on contracts that the group (on an ad hoc basis) hoped to be awarded in the area of region-wide landscape planning, which would explain the presence of a lawyer in the group.

⁶ INFORT was formed the year before as a pioneer organisation in the field of space information and monitoring, having acquired considerable computer technology from abroad. However, it had no special scientific or technical background or competence in respect either to the G/N Project or to environmental matters. Yet INFORT appears as co-author of the second Ecologia report. The expert groups in Hungary that would appear to have been the appropriate bodies to commission a serious outside environmental study, other than the Hungarian Academy of Sciences itself, were VIZITERV, the Hungarian Consulting Company for Water Engineering, or VITUKI, the Hungarian Research Centre for Water Resources Development, or OVIBER, the Hungarian organisation in charge of engineering and construction. INFORT ceased to exist as an entity in 1992.

examine a cost-benefit analysis prepared by the Government and to hear the views of the Hungarian environmental group that had been the most vigorous in opposing proceeding with the G/N Project, the group known as the Danube Circle⁷. The Government's cost analysis had apparently concluded that the Project would not be profitable for Hungary⁸.

5.07 The Hungarian Memorial alleges that at the 3 May meeting the Prime Minister's Advisory Committee recommended the abandonment of Nagymaros in the light of environmental and economic factors⁹. It is curious indeed that such a recommendation could have been based in part on environmental factors when its only support appears to have been a preliminary report released in March 1989 by Ecologia, which had recommended three types of action:

- First, and foremost, proceeding with sewage treatment upstream of and within the Project area;
- Second, delivering more water to the existing Danube than contemplated under the Project and reducing peak power production; and
- Third, as only a "most radical" alternative, the total abandonment of Nagymaros and peak power operation¹⁰.

5.08 In fact, it appears that by early May 1989 the Hungarian Government wished to abandon Nagymaros and peak power operation on economic grounds, and it sought environmental arguments to support such a decision¹¹. Having been unable - throughout the entire period from 1977 to 1989 - to obtain support on scientific grounds from its own experts, first, to delay the Project and, later, to eliminate Nagymaros¹², Hungary had brought in the Ecologia group through INFORT; and on the basis only of its preliminary report, which considered abandoning Nagymaros as a "most radical" path to take, the Hungarian

⁷ Hungarian Memorial, para. 3.74. See, Slovak Memorial, para. 3.54, as to the Danube Circle.

⁸ Hungarian Memorial, para. 3.73.

⁹ Ibid., para. 3.74.

¹⁰ Ibid., Vol. 5 (Part I), Annex 5 (at p. 60).

¹¹ The situation closely resembled the attempts in the early 1980s by the Hungarian Government, then unsuccessfully, to come up with environmental reasons that would bolster the economic reasons for delaying the Project. See, Slovak Memorial, para. 3.37, et seq.; see, also, para. 4.11, et seq., above.

¹² See, discussion of Hungary's 1983-1985 Environmental Impact Study at para. 4.24, et seq., above.

Government decided it had adequate environmental support for the decision it wished to take for economic and political reasons and in the light of Hungary's energy needs at the time¹³. It is of particular interest to note that the Ecologia studies were not provided to Czechoslovakia¹⁴.

A. The Hungarian Government's Resolution of 13 May 1989

5.09 The momentous decision leading to the present dispute was taken on 13 May 1989 when the Hungarian Council of Ministers adopted a Resolution "Regarding the Suspension of work at Nagymaros"¹⁵. The Hungarian Memorial states that the Resolution "only envisaged the suspension of the works at the Nagymaros site" and that construction at Dunakiliti and elsewhere was not affected. The attempt is to give the impression that this was only a temporary act. However, an examination of the Resolution shows that the Hungarian Government actually envisaged the abandonment of Nagymaros - as had been recommended at the 3 May meeting of the Prime Minister's Advisory Committee. Thus:

- (i) No length of time for the period of suspension was specified in the Resolution, i.e., it was of indefinite duration¹⁶;
- (ii) The Ministers were ordered to commission further studies -

"... in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment";
- (iii) These studies were to include an examination of the various consequences "of the eventual stopping of the Nagymaros investment"¹⁷, including how to replace the energy lost and minimise claims for compensation;

¹³ Hungary has not seen fit to submit any evidence concerning this 3 May meeting. Slovakia does not know who was on this Advisory Committee or who the so-called "independent experts" were or what were the specific environmental reasons that supposedly led the Committee to conclude that the "most reasonable choice" was the abandonment of Nagymaros. But it is interesting to note that they favoured the Project's abandonment, not merely its suspension during the study of environmental impact, confirming that the adverse cost-benefit analysis was the reason behind the recommendation.

¹⁴ See, para. 5.17, below.

¹⁵ Hungarian Memorial, para. 3.75, and Vol. 4, Annex 147. The title of this resolution is misstated in para. 3.75 to have been "On the suspension of operations at Nagymaros" (emphasis added).

¹⁶ See, paras. 5.32 and 5.73, below.

¹⁷ Emphasis added.

- (iv) Parliament was requested to authorise the Government to enter into preliminary negotiations with Czechoslovakia regarding the amendment of the Treaty;
- (v) It was proposed that Parliament also authorise the Government "not to fulfil its duties as defined in October 1988 with relation to the continuation of the investment";
- (vi) Discussions were to be opened with the Austrian companies and institutions concerned regarding the possibility of redirecting to other Hungarian investments the "resources which may be freed as a result of the eventual stopping of the investment".

5.10 There can be little 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. The studies to be commissioned were aimed at amending the Treaty; and in the light of item (v) above it is clear that the sole reason for amending the Treaty was to terminate Nagymaros. Item (v) was a reference back to the Parliamentary Resolution of 7 October 1988 and to the eight points set out in the Government's report (approved by the Parliament). Point 1 in the Government's report was the following:

"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 damage¹⁸."

Thus, item (v) of the Resolution was in effect a request to Parliament to approve the elimination of Nagymaros from the Project. This, in turn, called into question the viability of the Project as a whole from the Hungarian standpoint, for as stated in item (v), without the "full implementation" of the Project, the purpose behind this enormous investment could no longer be achieved. The Hungarian Memorial explicitly concedes that it was the view of Hungary that Nagymaros was a key element in terms of "any possibility of an economic return"

¹⁸ Hungarian Memorial, Vol. 4, Annex 145 (at p. 344). See, para. 4.39, fn. 71, above.

from the Project¹⁹. Thus, in adopting the 13 May Resolution, the Hungarian Government knew it was nullifying the Project.

5.11 There was nothing in the Resolution of 13 May that indicated, as Hungary's Memorial seems to suggest, that the alternative of suspending work pending further investigations was being considered in the sense that the work at Nagymaros might be resumed if these investigations led to such a conclusion. Everything points to the fact that the first step to the termination of Nagymaros had been taken by the Hungarian Government²⁰. There is also no evidence to support the statement in the Hungarian Memorial, either in the 13 May Resolution or elsewhere, that the Hungarian Government had at the time "expressed the firm intention to refrain from any irreversible unilateral step"²¹. By its 13 May Resolution, the Hungarian Government had unilaterally acted to take the initial step in its planned termination of Nagymaros²². And it had done so without the slightest attempt to consult with Czechoslovakia before taking this action.

5.12 The Hungarian Parliamentary Resolution of 2 June 1989 confirms this interpretation²³. It granted the Government an exemption under Point 1 of its decision of 7 October 1988, thus permitting the Government to eliminate Nagymaros from the Project²⁴. Further, the Parliamentary Resolution made no mention of the study and evaluation of ecological or seismic risks; it was entirely focussed on the amendment of the 1977 Treaty and its international, legal, economic and technical consequences, and it authorised the

¹⁹ Hungarian Memorial, Vol. 1, para. 10.75.

²⁰ This apparently was how the Slovak environmental group mentioned by Hungary interpreted the decisions of the Hungarian government. See, Hungarian Memorial, para. 3.77.

²¹ Ibid., para. 3.76. According to Hungary:

"Prime Minister Németh announced on 8 March 1989 that no irrevocable steps would be taken in connection with the Nagymaros barrage before Parliament reviewed the entire project in May 1989." (para. 3.70)

But this alleged announcement of Mr. Németh would seem to have related to the Project acceleration of February 1989, rather than to the subsequent decision to stop the construction work at Nagymaros. Furthermore, no evidence is provided as to what Mr. Németh actually said. Nor is evidence given as to the Parliamentary review, if such was indeed carried out. Nor is it explained why the Hungarian Prime Minister should be announcing that there should be no irrevocable steps just one month after signing a formal agreement that accelerated the Project by 15 months and directly affected the pace of work at Nagymaros.

²² The second report of Ecologia (this time an "interim" report) issued in May 1989 (and apparently after the 13 May decision) recommended suspension of the entire Project "during this period of national dispute", revealing a political rather than a scientific perspective. It hardly seems possible that this bit of political advice from a group in Massachusetts should have influenced the Hungarian Government. But, see, ibid., para. 3.77.

²³ Ibid., para. 3.80, and Vol. 4, Annex 148.

²⁴ See, para. 5.10, above.

commencement of preliminary negotiations regarding the "conditions for the amendment" of the Treaty. Hence, the evident purpose of the suspension at Nagymaros was to allow time to induce Czechoslovakia to amend the Treaty to terminate the Nagymaros section of the Project, not to conduct new ecological or seismic evaluations.

5.13 The extraordinary way in which this radical change of position of the Hungarian Government was made known to Czechoslovakia, and the ensuing developments, are described in the Slovak Memorial²⁵. The Hungarian Resolution of 13 May was not furnished to the Czechoslovak Government at that time. Nor was it furnished at the subsequent meeting between Prime Ministers on 24 May.

B. Hungary's Failure to Advance Any Valid Scientific Basis for its Decision of 13 May 1989

5.14 There is no agreed record of the meeting of 24 May 1989 between Prime Ministers, a meeting that has added significance because Hungary now implies that Czechoslovakia in some way assented to the suspension of Nagymaros at this time. The Hungarian Memorial bases its claims on a report of the Hungarian Prime Minister to his Government and a 26 June Statement of the Czechoslovak Plenipotentiary²⁶. The report has not been furnished by Hungary and the Statement (dated not 26 June but 13 July) by the Czechoslovak Plenipotentiary does not contain anything to confirm Hungary's account of the meeting. It merely shows that the first time Czechoslovakia received an indication of the alleged reasons for Hungary's 13 May decision was when it received two documents from Hungary at the 26 June meeting of Plenipotentiaries²⁷.

5.15 The Hungarian Memorial also claims that the "agreement reached" at the 24 May meeting was reflected in the protocol of the 9 June meeting of Plenipotentiaries²⁸. This document, which Hungary has not furnished in support of such a contention, was annexed

²⁵ Slovak Memorial, para. 4.07, et seq.

²⁶ Hungarian Memorial, para. 3.78. No date is given for the report. The Hungarian Prime Minister's Report was not annexed or furnished by Hungary at the time of filing the Memorial.

²⁷ See, Slovak Memorial, para. 4.12, et seq., for a full account of this meeting and the documents then and subsequently exchanged. The Czechoslovak Statement of 13 July (Slovak Memorial, Annex 64) made it clear that Czechoslovakia had been striving, unsuccessfully, ever since Hungary's 13 May decision to obtain specific, documented scientific data on which Hungary based this decision. It found the two Hungarian papers finally handed over on 26 June as providing nothing new in the way of scientific data to justify such a decision. If the Ecologia reports were an instigating factor leading to the 13 May decision concerning Nagymaros, it is strange indeed that they were not given to Czechoslovakia when it immediately requested scientific justification for Hungary's unilateral suspension. See, paras. 5.05-5.08, above.

²⁸ Hungarian Memorial, para. 3.79.

by Slovakia to its Memorial²⁹. It indicates that at the 24 May meeting it had been agreed to establish a joint group of experts to assess the ecological, seismic and other aspects of Nagymaros, and that up to then Czechoslovakia had been shown no scientific basis for the 13 May decision to suspend work.

5.16 Czechoslovakia vigorously protested Hungary's unilateral suspension of work at Nagymaros as a violation of the 1977 Treaty. This protest was set out in a "position paper" read and given to the Hungarian Ambassador in Prague by the Czechoslovak Minister of Foreign Affairs on 15 May 1989, in which it was pointed out, inter alia: first, that the decision had been taken by Hungary "without any discussions with the Czechoslovak side"; second, that this action "infringed the provisions of the [1977] Treaty"; and third, that Czechoslovakia considered that the act of suspension put the whole Project in jeopardy and insisted on its completion in accordance with the Treaty, reserving the right to claim compensation³⁰. This event is confirmed in detail by an account appearing in the newspaper Rudé Právo the following day³¹. This article also indicates that on 15 May the "Government of [Slovakia] discussed also [at] its extraordinary session on May 15 the situation which has arisen as [a] consequence of the decision of the Government of [Hungary]", expressing surprise at such a decision being taken just after the decision to speed up the Project had been mutually agreed and in the light of the more than 20 years of study and work that had been devoted to the Project. Nevertheless, in its "position paper", the Czechoslovak Government stated that it was "prepared to open talks with [Hungary] with the aim to find common grounds for the successful completion of the [G/N Project]".

5.17 Czechoslovakia persisted in its request to be informed of the scientific basis of the 13 May decision of Hungary. It was not until receiving the two papers furnished by Hungary at the 26 June meeting - 44 days after its unilateral decision had been taken - that Czechoslovakia received Hungary's response. Curiously, the preliminary report of Ecologia, completed in March 1989 and hence readily available to be given to Czechoslovakia, was not furnished. In its 13 July Statement, the Czechoslovak Government commented on these

²⁹ Slovak Memorial, Annex 58.

³⁰ Annex 10, hereto.

³¹ Annex 11, hereto.

26 June papers, and during 17-19 July experts on both sides met to consider these documents and exchange views³².

SECTION 2. Hungary's Extension of Suspension of Work to Dunakiliti and its Termination of the Construction of the Nagymaros Section of the Project

A. Hungary's Resolution of 20 July 1989

5.18 By Resolution dated 20 July 1989 - that is the day following the 17-19 July meeting and before either Government could have even started to digest the results of the discussions - Hungary acted to extend its initial unilateral decision of 13 May³³:

- The Nagymaros suspension was said to have been "extended" to 31 October 1989³⁴;
- The suspension of work by Hungary at Dunakiliti until 31 October 1989 was ordered, which had the effect of postponing the damming of the Danube for one year (directly affecting the schedule of the entire Project, including the work to be performed by Czechoslovakia)³⁵.

Thus, the meeting of 17-19 July was shown to have been a mere charade; and once again there had been no consultation with Czechoslovakia prior to the taking of these actions.

5.19 The Hungarian Memorial attempts to camouflage the unilateral character of these actions by suggesting that Hungary's decision accorded with the "tenor of

³² These events, and the contents of the documents, which were fully discussed in the Slovak Memorial, are only briefly dealt with by Hungary. Compare: Slovak Memorial, paras. 4.12-4.34; Hungarian Memorial, paras. 3.83-3.84. Both accounts bring out the total disagreement between the experts of both sides in these discussions, which embraced the environmental effects not just of the Nagymaros section but of the whole Project. In substance, the Hungarian side took the position that a lot more time was required to study these effects before proceeding with the Project; Czechoslovakia, on the other hand, pointed out that these effects had been carefully studied before 1977 and had been the subject of continual review and joint studies since then, and that Hungary had not come up with a single adverse environmental consideration that had not been known and taken into account under the Project.

³³ Hungarian Memorial, para. 3.86, and Vol. 4, Annex 149.

³⁴ This, of course, was not accurate since, as seen in para. 5.09, above, the initial Nagymaros suspension of work was of indefinite duration.

³⁵ The Hungarian Memorial never mentions the fact that the damming of the Danube could only take place during a short period, normally in late October-early November, when optimum hydrological conditions for this operation prevailed - that is, when the probability of a high flow was at its lowest. See, Slovak Memorial, para. 4.02. As will be seen below, this is a key factor in analysing the events of 1989-1992, including the decision to put Variant "C" into operation.

the negotiations" between Prime Ministers at their meeting on that day - that is, on 20 July. This is untrue, and no evidence has been produced by Hungary in support of such an inference³⁶. At the meeting, the Hungarian Prime Minister made two alternative proposals, and the Czechoslovak Prime Minister undertook to give them careful study³⁷. But the so-called extension of the Nagymaros suspension to 31 October and the new decision to suspend work at Dunakiliti were not among the matters proposed by Hungary for discussion at the meeting. Czechoslovakia was simply informed of these decisions, which had been incorporated in the Hungarian Government's Resolution adopted that very day. This is clear evidence of the unilateral character of these decisions³⁸.

5.20 In retrospect, the Hungarian Government - and now Hungary's Memorial - have made an attempt to explain away Hungary's unilateral acts as to Nagymaros by claiming Czechoslovakia's acquiescence. This is entirely contrary to the facts, and it indicates how vulnerable Hungary realises its case to be in respect to Nagymaros. The Czechoslovak Government at once vehemently protested in the most formal way the decisions as steps taken unilaterally and in violation of the 1977 Treaty³⁹. The Hungarian Memorial quotes extensively from the Hungarian Note Verbale of 1 September 1989 to show that Hungary disputed Czechoslovakia's immediate accusation that the 20 July decisions were taken unilaterally⁴⁰. The Note Verbale argued that at the 20 July "negotiations" the Czechoslovak party "acknowledge[d] the extension of the suspension⁴¹ and made no objection specifically to the suspension of the preparatory operations for closure of the Danube at Dunakiliti".

5.21 But the Czechoslovak Government had made its position unmistakably clear on 15 May, two days after Hungary's unilateral decision; if the Czechoslovak Prime Minister did not repeat the official Czechoslovak position presented to Hungary on 15 May rejecting Hungary's suspension of work at Nagymaros, when he was informed at the meeting

³⁶ There was no agreed record of the meeting, and the report of 22 July advanced in support of this conclusion by the Hungarian Memorial has not been annexed or furnished. This document was one of those cited in the Slovak Agent's letter to the Registrar of 3 June 1994. In the response of the Agent of Hungary, it is said that the document referred to was an "oral report"; but fn. 115, p. 52, of the Hungarian Memorial indicates that it was a written document "(in Hungarian)" dated 22 July 1989.

³⁷ See, Slovak Memorial, paras. 4.35-4.39.

³⁸ Hungarian Memorial, Vol. 4, Annex 149. The Resolution of 20 July 1989 refers to a report that day by the Hungarian Prime Minister of his meeting with Czechoslovakia and sets out the alternatives proposal by him at the 20 July meeting. It is clear from the Resolution that these two actions to suspend work were not part of the proposed alternatives but had already been decided unilaterally by Hungary.

³⁹ See, para. 5.16, above.

⁴⁰ Hungarian Memorial, para. 3.88, and Vol. 4, Annex 24.

⁴¹ Clearly a reference to Nagymaros.

of its "extension" to 31 October, this could not magically transform the avowedly unilateral suspension of work at Nagymaros into an agreed one. Czechoslovakia's protest was formally on record. As to the extension of the suspension of work to Dunakiliti, the Czechoslovak Government immediately, vehemently and repeatedly denied any agreement to Hungary's taking this unilateral step⁴².

5.22 In any event, the 20 July meeting cannot be described as "negotiations". What Hungary's Prime Minister had to say about the Project was presented in a speech formally setting forth Hungary's official position. It was hardly possible for the Czechoslovak Prime Minister to have given his official response on the "spur of the moment", let alone negotiate in any meaningful sense. However, there was nothing "spur of the moment" about the Hungarian Government's adoption of a Resolution containing the new decisions on the very same day. Clearly, the Hungarian Government was not at all concerned over whether these decisions met with the approval of the Czechoslovak Government. They were as unilateral as the initial decision to suspend work at Nagymaros, and they were taken without prior consultation.

5.23 Even had there been a misunderstanding on the part of the Hungarian Government at the 20 July meeting, Czechoslovakia's series of repeated denials, starting with the Aide-Mémoire presented by the Czechoslovak Ambassador in Budapest five days after the meeting⁴³, would have compelled the Hungarian Government - if it had genuinely intended not to act unilaterally - to rescind these decisions pending further discussion between the Treaty parties.

5.24 There is one other point to make here. Hungary's argument proceeds on the false assumption that the Nagymaros section of the Project was uniquely Hungarian. But this section consisted of much more than the Nagymaros step; it extended along an area of the Danube of some 100 km in length, where a substantial part of the work was to be performed by Czechoslovakia on its own territory, as shown by Illus. No. 31 appearing in the Slovak Memorial⁴⁴. As will be discussed again below⁴⁵, there is no better evidence that

⁴² See, Slovak Memorial, paras. 4.36 and 4.38, indicating the outraged reaction of Czechoslovakia to the attempted deception by the Hungarian Government concerning the 20 July meeting.

⁴³ Slovak Memorial, para. 4.36 and Annex 66. This document indicates that at the 20 July meeting the Czechoslovak Prime Minister requested that Hungary's alternative proposals be put in writing so he could study them.

⁴⁴ See, Slovak Memorial, para. 3.25, and Illus. No. 31. See, also, Illus. No. CM-9, appearing at para.8.01, fn. 2, below. The green lines show where protective measures were to be taken as part of the Nagymaros section of the Project.

⁴⁵ See, para. 5.53, below.

Czechoslovakia (and now Slovakia) never accepted Hungary's abandonment of Nagymaros than the fact that Czechoslovakia continued to perform its obligations in respect to the Nagymaros section after Hungary had abandoned this section and, indeed, the whole Project. This work involved protective measures along the Váh and Hron Rivers necessary to the completion of Nagymaros and, thus, the continuation of this work presupposed the construction of the Nagymaros step. Czechoslovakia continued this work in spite of Hungary's abandonment.

5.25 The Hungarian Memorial gives the false impression that during the summer of 1989 there were negotiations over Nagymaros and Dunakiliti and the damming of the Danube that year. The documentary evidence shows that, as far as Hungary was concerned, the decisions had been taken; the only matters for discussion were their consequences. It was in these circumstances that Czechoslovakia first mentioned the possible need to take "temporary measures" because of the advanced status of construction work⁴⁶.

5.26 Instead of rescinding its decisions of 13 May and 20 July, in the light of the heated protests from Czechoslovakia, the Hungarian Government continued to insist that Czechoslovakia had acquiesced in these decisions at the 20 July meeting⁴⁷.

5.27 The Hungarian Memorial mentions a meeting of Deputy Prime Ministers on 9 September⁴⁸. According to the agreed record of this meeting, Hungary firmly shut the door to any reconsideration of its unilateral suspension of work at Dunakiliti up to 31 October, thereby preventing the damming of the Danube for a whole year, an action which Czechoslovakia rejected⁴⁹. Hungary's Deputy Prime Minister also denied that Hungary bore any obligation to pay damages as a result of its actions, contending that ecological risks were a shared danger, and the enforcement of ecological requirements was a joint task. In response, the Czechoslovak Deputy Prime Minister insisted that Hungary had acted unilaterally in violation of the Treaty, and he elaborated on the kind of provisional solution that Czechoslovakia might be forced to take if Hungary did not agree to continue the construction of the G/N Project in accordance with the Treaty.

⁴⁶ This possibility was first raised informally at a meeting of representatives of the Ministries of Industry (Hungarian) and Fuel and Energy (Czechoslovak) on 21-22 August 1989. See, Hungarian Memorial, para. 3.88, and Vol. 4, Annex 21. In a letter dated 31 August 1989, the Czechoslovak Prime Minister then more formally mentioned such a possibility. Slovak Memorial para. 4.38 and Annex 71.

⁴⁷ See, Hungarian Note Verbale of 1 September 1989; Slovak Memorial, para. 4.39 and Annex 72.

⁴⁸ Hungarian Memorial, para. 3.90, and Vol. 4, Annex 25.

⁴⁹ See, para. 5.18 and fn. 35, above, and Slovak Memorial, para. 4.02.

5.28 As part of its "acquiescence" argument, Hungary has attempted to stress areas of agreement between the parties' scientific experts. For example, Hungary has placed in evidence the record of the meeting of scientific experts in late September 1989 at which the water quality and ecological implications of filling the Dunakiliti-Hrušov reservoir were considered⁵⁰. The meeting involved essentially an exchange of views. Hungary's Memorial emphasises five relatively minor points of agreement rather than the main conclusion stemming from the meeting - that there was a fundamental disagreement between the parties over whether enough was known about possible ecological effects to proceed with the Project⁵¹.

B. The Hardi Report

5.29 In any event, it is wholly incorrect to emphasise the closeness of the parties' positions in September 1989 when, as is clear from the evidence that Hungary has now placed before the Court in the form of the Hardi report, at this very time Hungary was deciding not only on the abandonment of central elements of the Project but also planning a step by step strategy for handling the likely dispute with Czechoslovakia⁵². The Hardi report was not at all an environmental study conducted by what Hungary calls an "expert committee"⁵³. Mr. Hardi held the position of Vice-President of the Hungarian Society for Political Sciences, and the composition of the other committee members reveals that the committee was a high-level policy group appointed for the purpose of advising the Government how to proceed in order to minimise the consequences to Hungary of abandoning the G/N Project - with or without the consent of Czechoslovakia⁵⁴. And that is just what the Hardi report did: it set out a blueprint

⁵⁰ Hungarian Memorial, para. 3.92, and Vol. 4, Annex 26.

⁵¹ Of course, this was the very same question studied and restudied by Hungary's scientists ever since the early 1980s, culminating in the 1983-1985 Environmental Impact Assessment, which strongly supported going ahead with the Project.

⁵² Hungarian Memorial, para. 3.95 and Vol. 5 (Part I), Annex 8.

⁵³ It will be recalled that at this time a genuine environmental study was being undertaken on behalf of Hungary by the well-established American consulting Group, Bechtel Environmental Incorporated of California. See, Slovak Memorial, para. 2.27, *et seq.*, and para. 7.16, *et seq.*, below. In July 1989, the Hungarian consulting company for Water Engineering, VIZITERV, furnished Bechtel with extensive Project documentation for this study. The commissioning of this study is additional evidence that the Ecologia reports furnished in March and May of 1989 were not regarded by the Hungarian experts as adequate, a conclusion further confirmed by the fact that these reports were never furnished to Czechoslovakia at the time in support of its abandonment of work. As noted in para. 7.09, below, the Hungarian experts had already made a devastating critique of the first Ecologia report. See, also, Slovak Memorial, para. 2.24. The Bechtel report, issued in February 1990, decisively refuted the new arguments advanced by Hungary to support the stopping of the Project. Hungary never provided the Bechtel report to Czechoslovakia. But in the meantime, relying on the Ecologia and the Hardi reports, the Hungarian Government went ahead with its decisions to stop work on the Project without awaiting the results of the truly independent and expert scientific study conducted by Bechtel.

⁵⁴ See, para. 7.10, below, for further details concerning the Hardi committee report.

for the Hungarian Government in unilaterally terminating the Project, which was faithfully followed.

5.30 The Hardi report's conclusions point to a lack of good faith on Hungary's part and show that the subsequent negotiations were, for Hungary, a charade. The following strategy is laid down in the report for Hungary's handling of the dispute:

"Should the Hungarian Government opt for the latter solution [the cancellation of Nagymaros], it could initiate negotiations about the amendment of the inter-governmental agreements It could indicate the cancellation of the Nagymaros Barrage and the postponement of the change of course [of] the [Dunakiliti-Hrušov reservoir] as the objective of the negotiations. Should the other negotiating party be unwilling to accept such amendments, the Hungarian Government could pass a unilateral decision about the termination of construction operations at the Nagymaros Barrage and the postponement of the change of course, while referring to the mutual violation of certain contractual obligations and the emergence of an environmental emergency⁵⁵ ."

In terms of the resultant legal dispute, the report considers that Czechoslovakia would be "in a situation where it is bound to make a compromise". Further, "the lengthy legal dispute [would] release [Hungary] from any immediate or short-term payment obligation"; and due to the parties' membership in the CMEA, Hungary would be "obliged to honour obligations to pay damages only to the extent and in the form acknowledged" by it. Accordingly, the Hardi report concludes that:

"As regards the financial consequences of dropping the Nagymaros hydro-electric station ... the Hungarian Government will be straddled by financial obligations only to the extent it acknowledges them. No-one can compel the Government to satisfy Czechoslovak demands it does not recognise as justified. With respect to international relations, states with financial obligations are in a better negotiating position than those with claims⁵⁶ ."

5.31 This focus on economic issues in the Hardi report's recommendations reflects the earlier finding of the Prime Minister's Advisory Committee referred to above,

⁵⁵ Hungarian Memorial, Vol. 5 (Part I), Annex 8 (at pp. 165-166 - emphasis added).

⁵⁶ Ibid. (at p. 166 - emphasis added).

which had concluded in May 1989 that the abandonment of Nagymaros would be the most reasonable choice, largely from an economic point of view⁵⁷.

5.32 One further interesting fact revealed in the Hardi report was that the contract with the Austrian company performing the work at Nagymaros, unless the suspension was lifted, expired six months after the 13 May suspension (on 13 November), with all consequent termination charges. There was, thus, no option to extend the suspension of work, and the Hardi Report recommended that this contract be terminated in November 1989 rather than reactivated.

C. The Negotiations of September-October 1989

5.33 It is in the light of the Hardi report that what appeared to be a hopeful move towards a settlement of the dispute in the autumn of 1989 must be judged. Now that it has seen the Hardi report, Slovakia realises that Czechoslovakia's expectations at the time had been entirely one-sided, for Hungary had had no intention of reaching a compromise. It is not possible to accept Hungary's statement that in October 1989 the Treaty parties "made serious efforts to settle the dispute before the scheduled date for the closure of the Danube"⁵⁸. Such efforts were made by Czechoslovakia, but certainly not by Hungary.

5.34 Aside from the Hardi report, the letter of Hungary's Prime Minister of 4 October 1989⁵⁹ shows that the Hungarian Government had two objectives firmly in mind: (i) the postponement of the damming of the Danube; and (ii) the abandonment of peak power operations and, thus, the Nagymaros section of the Project, objectives to be imposed by the Hungarian Government through its unilateral acts - not through consultation and negotiation with Czechoslovakia.

5.35 So during the September and October negotiations Hungary attempted to mislead Czechoslovakia into agreeing to the abandonment of Nagymaros by offering that,

⁵⁷ Ibid., Vol. 1, para. 3.74. See, paras. 5.06-5.07, above. In terms of navigation, the Hardi report concludes: "Due to the composition of her fleet, Hungary's interest in it is negligible." In terms of production of electricity, it concludes that the Project is also not beneficial: "it has become evident that there is absolutely no need for increases in Hungary's energy network up till 1995 because of the reserves already available." This analysis leads into the most substantial sections of the report, which are entitled "Economic analysis" and "International legal implications". Hungarian Memorial, Vol. 5 (Part. I), Annex 8 (at pp. 157-158).

⁵⁸ Ibid., Vol. 1, para. 3.96.

⁵⁹ Ibid., para. 3.93, and Vol. 4, Annex 27.

in return, Hungary would resume work at Dunakiliti⁶⁰. Two things must be noted about this offer. First, it was not a proposal to discuss whether or not to abandon Nagymaros: that step was made a precondition. Second, the suggestion of the Prime Minister of Hungary that, if this precondition were not met, Hungary's suspension of construction would continue until "environmental requirements were met", is shown by the Hardi report to have been deceptive: the contract relating to the construction of Nagymaros, allowed for no extension beyond 13 November 1989, only reactivation or termination⁶¹. The bizarre nature of this proposal must be noted. In effect, it was this: if Czechoslovakia agreed to accept Hungary's breach of the Treaty in respect of Nagymaros, Hungary would agree not to breach the Treaty as to its other obligations.

5.36 These negotiations culminated in a meeting between Prime Ministers on 26 October 1989 during which the respective positions of each party were stated⁶². Czechoslovakia's reaction to Hungary's position was accommodating and flexible, and it was conveyed only four days later in a Note Verbale of 30 October 1989⁶³. Czechoslovakia was willing to agree to delay work at Nagymaros (by cancellation of the 1989 Protocol accelerating the work there by 15 months) in order to allow time for further study of the effects of peak power operations⁶⁴; it accepted the idea of an intergovernmental agreement containing the requested environmental guarantees on condition that work to dam the Danube during 1989 (which at that late date required very prompt steps to be taken) was promptly resumed; and it proposed that immediate agreement be reached on the principles to be incorporated in the intergovernmental agreement.

D. Hungary's Prevention of the Damming of the Danube by Continuing to Suspend Work at Dunakiliti; its Termination of Work at Nagymaros

5.37 As just noted, the 30 October Note Verbale of Czechoslovakia was submitted just four days after the meeting of Prime Ministers (on 26 October) and was a response to Hungary's position set forth at the meeting. However, only one day after that

⁶⁰ The document adduced in support of Hungary's account of the meeting of 11 October 1989 at which this proposal was made, according to Hungary (*ibid.*, Vol. 1, para. 3.96), has not been placed in evidence by Hungary.

⁶¹ See, para. 5.32, above.

⁶² See, Slovak Memorial, para. 4.46-4.47, for the details of Hungary's position.

⁶³ See, *ibid.*, paras. 4.48-4.49.

⁶⁴ Czechoslovakia was not privy to the terms of the contract with Austria and was unaware that a further extension of the Nagymaros suspension was not possible.

meeting and without prior consultation or notification to Czechoslovakia, the Hungarian Government by Resolution dated 27 October took the following unilateral decisions⁶⁵:

- To eliminate peak power operations;
- To abandon construction work at Nagymaros;
- To impose as a condition of filling the Dunakiliti-Hrušov reservoir the conclusion of an intergovernmental agreement to minimise the environmental risks and the establishment of a system of guarantees.

5.38 The Hungarian Memorial fails to mention a fourth element of this Resolution: "In the event of a Czechoslovak statement to be willing to conclude such an intergovernmental agreement, the preparatory work of the damming up of the river-bed at the reservoir can be continued⁶⁶." This condition was more than met by the 30 October Czechoslovak Note Verbale⁶⁷. But Hungary failed to observe its own Resolution and continued to suspend work at Dunakiliti, letting the time pass by during which the damming operation was possible in 1989 as contemplated under the agreed schedule of the G/N Project. It would be difficult to categorise this as "good faith"⁶⁸; and it reveals that Hungary did not take seriously Czechoslovakia's statements at the time that it might be required to resort to provisional measures if Hungary persisted in its breaches of the Treaty.

5.39 The Hungarian Memorial refers to the Czechoslovak Note of 30 October as containing "new elements" and as expressing a willingness to conclude an agreement on environmental guarantees. Nonetheless, it makes the following comment:

"But it was conditioned on Hungary preparing forthwith for the closure of the Danube and gave no hint of the eventual content of the guarantees. It also failed to address two of the most important Hungarian goals: the abandonment of the Nagymaros Barrage and the suspension of the closure of the Danube for

⁶⁵ Hungarian Memorial, Vol. 4, Annex 150. The Resolution confirms the Government's "preliminary standpoint" set out in a Resolution of 22 September, a document not placed in evidence by Hungary.

⁶⁶ The Hungarian translation into English of this passage in its Annex 150 is flawed. The quotation in the above text is based on an accurate English translation appearing in the Hungarian Note Verbale of 3 November. Slovak Memorial, Annex 77. See, also, Hungarian Memorial, Vol. 4, Annex 29.

⁶⁷ See, para. 5.36, above.

⁶⁸ See, para. 5.03, above.

at least one year, while investigations of the environmental issues could be made⁶⁹."

This explanation is, at best, confusing. The Hungarian Government had, by its Resolution of 27 October 1989, formally approved its earlier offer to continue the damming operation if Czechoslovakia was willing to accept environmental guarantees. On 30 October, Czechoslovakia committed itself to such guarantees, linking them to Hungary's commitment to continue work on damming the Danube. As to the claim that the Czechoslovak Note failed to "address" the issues of Nagymaros and suspension of the closure of the Danube, the Note did indeed address them: it rejected the abandonment of Nagymaros and accepted Hungary's offer to proceed with damming the Danube by agreeing to accept environmental guarantees to be negotiated.

5.40 The Hungarian Memorial asserts that there then occurred a failure of the negotiations, blaming it on Czechoslovakia's different perception from Hungary of the historic changes taking place in Central Europe, with the "ancien régime in Czechoslovakia... deeply rooted in the mentality and priority system of the CMEA period"⁷⁰.

5.41 This is no more than rhetoric. It is now apparent that once Hungary had achieved its objective of postponing the damming of the Danube for a year - for the time during 1989 when the damming could have been accomplished had passed - Hungary lost all interest in pursuing its offer to restart work at Dunakiliti. Hungary's other prime objective naturally related to Nagymaros: to obtain Czechoslovakia's agreement to amend the 1977 Treaty so as to convert the decision to terminate Nagymaros contained in the 27 October Resolution (and implemented in November by terminating the Austrian contract) from a unilateral act to an agreed amendment of the Treaty. Thus, by Note Verbale of 30 November 1989, Hungary presented a draft of proposed Treaty amendments⁷¹.

5.42 The Hungarian Memorial, intent on demonstrating a failure of negotiations for which the Czechoslovak Government should be blamed, asserts that there was no reply from Czechoslovakia to the 30 November Note Verbale forwarding proposed Treaty amendments. This is seriously misleading. It overlooks the fact that Czechoslovakia's response to Hungary's position stated at the 26 October meeting was already contained in its 30 October Note Verbale. It overlooks the fact that on 27 October, without waiting for

⁶⁹ Hungarian Memorial, para. 3.99. Of course, the abandonment of Nagymaros was no longer a Hungarian "goal"; it had been decided by the Hungarian Government on 27 October.

⁷⁰ Ibid., para. 3.100.

⁷¹ Ibid., para. 3.103. See, Slovak Memorial, para. 4.50.

Czechoslovakia's response after the 26 October meeting, Hungary unilaterally decided (i) to terminate Nagymaros and (ii) not to dam the Danube in 1989. In any event, Czechoslovakia could hardly have been expected to reply at once to the 30 November Note Verbale for it was in the throes of the "Velvet Revolution", and on 10 December a new Government was installed in Prague⁷².

E. Hungary's Termination of Negotiations

5.43 According to the Hungarian Memorial, the letter of 10 January 1990 from Hungary's Prime Minister, Mr. Németh, to the Czechoslovak Prime Minister, informed Czechoslovakia of:

"...Hungary's decision to abandon the Nagymaros Barrage, to terminate the private law construction contracts and to suspend works at all Project sites pending negotiations on the future of the Barrage System as a whole⁷³."

Thus, Hungary shut off any discussion of Nagymaros. This decision was irrevocable: according to the 10 January letter, Hungary took the "measures to dissolve and terminate any contracts in private law which serve to further the construction of the Nagymaros Barrage"⁷⁴.

5.44 However, the Hungarian Memorial fails to mention other important aspects of the letter⁷⁵. For it informed Czechoslovakia that Hungary had decided to suspend all construction work on the Project, preserving only the existing status quo. Hungary also recommended halting the negotiations that had begun in September-October 1989 and, instead, to conduct joint studies with the involvement of international scientific organisations to examine the environmental aspects of all parts of the Project. Once these studies had been assessed, Treaty amendments could be considered. Conveniently, Hungary's offer to continue work at Dunakiliti in return for Czechoslovakia's agreement to environmental guarantees had been omitted.

⁷² In a Note Verbale of 11 December 1989 Hungary said it "fully understands" the failure of Czechoslovakia to respond to its 30 November proposals and that "at the present time [Czechoslovakia] cannot be expected to deal with matters relating to the [G/N Project]". Hungarian Memorial, Vol. 4, Annex 31. In the same Note, Hungary sought to take advantage of the situation in Czechoslovakia by postponing the "hitherto uncommenced negotiations" to a time more suitable for both parties, while still "maintaining the validity of the initiative for the modification of the [1977 Treaty]". (Of course, the negotiations had indeed commenced and had reached a hopeful stage in Czechoslovakia's view.) Significantly, Hungary did not repeat its offer to resume work at Dunakiliti.

⁷³ Hungarian Memorial, Vol. 1, para. 3.105 and Vol. 4, Annex 32. It was not until May 1990 that the change in Government in Hungary occurred; hence, Prime Minister Németh headed his Government during the October-November 1989 negotiations and it had also been Mr. Németh's deputy who had signed the Protocol of 6 February 1989 on behalf of Hungary, speeding up the Project.

⁷⁴ Ibid., Vol. 4, Annex 32.

⁷⁵ See, Slovak Memorial, para. 4.55, et seq., where the 10 January letter is discussed in full.

SECTION 3. Hungary's Unilateral Termination of All Construction Work on the Project by 30 June 1990

5.45 The Hungarian Memorial misinterprets Czechoslovakia's response dated 15 February sent by Czechoslovakia's new Prime Minister, claiming that he did not take issue with the statements in Mr. Németh's letter⁷⁶. But, Czechoslovakia's total disagreement with Mr. Németh's suggestion to postpone the negotiation of Hungary's 30 November proposals was clear. The 15 February letter politely ignored the suggestion and, instead, urged the immediate renewal of negotiations so that Gabčikovo could be put into operation in 1991, which meant damming the Danube during October of 1990 and the resumption of work by Hungary at Dunakiliti.

5.46 Mr. Németh responded on 6 March 1990⁷⁷. The Hungarian Memorial omits the main messages conveyed in this letter: (i) that Hungary had decided not to proceed with any further work on the Gabčikovo section of the Project (except where necessary for conservation and flood protection and unless Hungary subsequently elected to do so after an examination of the scientific studies which it proposed be undertaken); and (ii) the "recommendation" to halt negotiations made in his 10 January letter had become a Hungarian decision not to continue the negotiations. In other words, in the 6 March letter, Hungary informed Czechoslovakia that it had, for an indefinite period, put a stop to all construction work on the Project and to the negotiations that had started in 1989. Once again, these were unilateral decisions of the Hungarian Government, a fact illustrated by Mr. Németh's invitation in the 6 March letter to Czechoslovakia to do likewise.

5.47 It must be stressed that, at the time of this unilateral decision to stop all work on the Project, Hungary had just received (in February 1990) the Bechtel report, which undermined the main environmental arguments against the Project, such as the environmental risks described in the Hardi report. It may be for that reason that in his 6 March letter Mr. Németh described the Project as a "gigantic investment fiasco" rather than as a serious threat to the environment. The recently compiled Hungarian "White Book"⁷⁸ - composed of the opinions of a number of Hungarian experts formerly closely associated with the Project - indicates that this view of the Project was by no means universally shared in informed circles in

⁷⁶ Hungarian Memorial, para. 3.107. For the text of the 15 February letter, see, Slovak Memorial, Annex 80.

⁷⁷ Slovak Memorial, Annex 81.

⁷⁸ A copy of the Hungarian "White Book" has been furnished to the Court. Extracts referred to in this Counter-Memorial are annexed in translation as Annex 1, hereto.

Hungary, for it was considered to be based on an incomplete, one-sided economic analysis⁷⁹. Moreover, Hungary's actions show that, aside from suppressing the Bechtel report, it had no interest in commissioning further studies into environmental aspects of the Project; its decision to stop work on the Project was based on economic - financial considerations. The environmental arguments were, as had been the case all through the 1980s, thrown in to support this decision; but fears of environmental impact were not the reason behind Hungary's decision.

5.48 The final episode in the cessation by Hungary of work on the Project took place in June 1990. For it was then that the remainder of the contracts with Austrian and Yugoslavian companies for construction at Dunakiliti and elsewhere were terminated, putting into effect the intention expressed by Hungary in Mr. Németh's 6 March letter (and indeed in his 10 January letter) to bring to an end all construction work under the G/N Project⁸⁰.

5.49 Not one of these acts, starting with the suspension of work at Nagymaros on 13 May 1989, was agreed to by Czechoslovakia. Each one of these acts was taken by Hungary without prior consultation with Czechoslovakia, let alone agreement, and, hence, was taken unilaterally in violation of the 1977 Treaty.

5.50 Taking its argument that Czechoslovakia had acquiesced in the abandonment of Nagymaros a step further, the Hungarian Memorial goes on to claim that Czechoslovakia officially accepted termination of the Nagymaros section of the Project. The sole support for this contention is a document dated 10 January 1990⁸¹. It is a unilateral report of the Hungarian State Secretary of the Ministry for Environment and Water Management concerning a meeting said to have been held on 10 January 1990 with the newly appointed Slovak Minister for Forest Management, Water Management and Timber Industry⁸². The document furnished by Hungary as an Annex to its Memorial is an English translation of this account of the meeting, described as a "frontier meeting" on 10 January 1990

⁷⁹ Ibid. (at pp. 15-22).

⁸⁰ The statement in para. 9.06 of the Hungarian Memorial that "the formal decision to abandon work at Gabčíkovo was taken in October 1991, and became effective at the end of 1991" is misleading. The purpose of the letter of 6 March 1990 was to inform Czechoslovakia that Hungary had decided to stop all construction work on the Project. Hungary effectively abandoned all such work when it terminated the contracts with Austrian and Yugoslavian companies prior to July 1990.

⁸¹ Hungarian Memorial, para. 3.106, and Vol. 4, Annex 163 (not Annex 32, as referred to in fn. 137, p. 63).

⁸² The Slovak Minister was not a Minister of the central (federal) Government but of the regional Government.

between the two Ministers during a visit to Czechoslovakia by the Hungarian Environmental Minister⁸³.

5.51 This Hungarian account of the meeting shows that:

- The main purpose of the meeting was for the two Ministers to become acquainted: the Slovak Minister had held his post for only one month;
- It was an informal talk instigated by the Slovak Minister;
- A number of aspects of frontier water relations between the two countries were surveyed, leading to a discussion of the G/N Project, which is summarised in this way in the Hungarian report:

"The latter [the Slovak Minister] announced the Slovak position accepting the Hungarian Parliament's decision not to build the Nagymaros Barrage, thereby eliminating peak power load operations. He also declared a readiness to conclude the agreement on environmental protection."

5.52 It is remarkable that the Hungarian Memorial should advance such an important contention - that Czechoslovakia had formally accepted the termination of the Nagymaros section of the Project (an argument not even advanced in Hungary's 1992 Declaration) - on the basis of such flimsy evidence. It is perfectly clear from the evidence now before the Court that, neither then nor later, did Hungary believe that Czechoslovakia had agreed to the termination of the Nagymaros section of the Project. Nowhere in the record of diplomatic exchanges between the Treaty parties can any reference be found to such an alleged agreement by Czechoslovakia on 10 January 1990. That Hungary clearly understood Czechoslovakia's position is reflected in Hungary's Aide Mémoire of 30 October 1989 and Notes Verbales of 3 November 1989 and 30 November 1989, in which the Hungarian Government sought Czechoslovakia's agreement to amend the Treaty so as to terminate Nagymaros⁸⁴. Not only did Hungary's 1992 Declaration nowhere mention Czechoslovakia's alleged acceptance of the termination of the Nagymaros section of the Project, but also the

⁸³ Contrary to the Rules of Court, no copy of the original document has been furnished by Hungary, so the accuracy of the document and its translation cannot be checked. Thus, in its present form, this evidence is inadmissible. But setting this point to one side for the moment, it is evident that the report is not an agreed record of the meeting but a unilateral record by the Hungarian participant, and thus of very limited evidentiary value. Slovakia has not been able to find any record of the meeting.

⁸⁴ The Hungarian Aide-Mémoire of 30 October 1989, which is not referred to in the Hungarian Memorial, appears as Annex 75 to the Slovak Memorial (where it is incorrectly called a Note Verbale). The Notes of 3 and 30 November 1989 appear as Annexes 29 and 30 to the Hungarian Memorial (Vol. 4).

Application filed with the Court by Hungary on 22 October 1992 is totally silent on the matter⁸⁵.

5.53 Hungary's argument based on this document of 10 January 1990 is as weak as the document itself. It is not possible to accept that the clear decision of Czechoslovakia, rejecting the suspension of work at Nagymaros on 13 May 1989 and insisting that the Project be carried out in accordance with the Treaty⁸⁶, formally made known to Hungary on 15 May 1989, could be reversed in such a manner. Aside from the evidence, just discussed, showing that Hungary did not at the time believe that Czechoslovakia had formally accepted the abandonment of Nagymaros, Czechoslovakia's own conduct in continuing to perform the work assigned to it concerning the Nagymaros section of the Project works is clear evidence that Czechoslovakia continued to insist on the completion of the entire Project, including Nagymaros⁸⁷. Work continued on protection measures during the years 1990-1994, involving a substantial investment by Czechoslovakia (and Slovakia). This work was required when the Nagymaros section would be put into operation and was entirely unrelated to Variant "C".

SECTION 4. Events Following Hungary's Termination of All Construction Work on the Project (mid-1990 to the end of 1992)

5.54 The Hungarian Memorial argues from the premise that negotiations between the two Treaty parties to resolve the dispute began only after the new Governments were formed in both countries; and it divides these negotiations at the "intergovernmental level" into three phases: (i) the 22 April 1991 discussions; (ii) the meeting of 15 July 1991; and (iii) the meeting of 2 December 1991⁸⁸. Hungary's premise is baffling and incorrect.

5.55 As shown in the previous Section, intergovernmental negotiations began at the meeting of Prime Ministers on 20 July 1989. These negotiations continued at the highest level of both Governments into October 1989, and were then terminated by Hungary in its Prime Minister's letters of 10 January and 6 March 1990. Between that time and the end of June 1990, when the remaining construction contracts were terminated, the Hungarian Government unilaterally acted to terminate all construction activities under the G/N Project. Therefore, the next phase of negotiations concerned whether Czechoslovakia was willing to absolve Hungary of fault for these faits accomplis in violation of the 1977 Treaty.

⁸⁵ Hungarian Memorial, Vol. 4, Annex 83 and Annex 102.

⁸⁶ See, para. 5.16, above.

⁸⁷ See, para. 5.24, above.

⁸⁸ Hungarian Memorial, paras. 3.121-3.145.

5.56 At this stage in the account of events, it is important to observe that the changes in the Governments of both countries had little material effect on the 1991 negotiations or on the development of the dispute. Czechoslovakia maintained the same position regarding the G/N Project both before and after the change in its Government in December 1989 and the elections of 8-9 June 1990; and all the unilateral actions of Hungary in violation of the 1977 Treaty were decided and had been taken before the Németh Government was replaced in May 1990⁸⁹.

A. Hungary Fails to Participate in the EC PHARE Program Study on Water Quality

5.57 During the rest of 1990, while political changes were taking place in both countries, bilateral talks concerning the G/N Project were not resumed. However, one event to be noted took place in October-November 1990; it concerned Hungary's failure to join in the EC's PHARE Project for a joint study of the surface and ground water of the Danubian lowlands directly affected by the Project. This failure is mentioned in both Memorials⁹⁰. It is of particular importance because Hungary's papers presented in June 1989 and the Hardi report of September 1989 made much of the supposed threat of the Project to the quality of surface and ground water; yet when it came to entering into a serious joint study of the question, Hungary backed away. This reflected Hungary's consistent indifference to any serious, independent study of water quality and the environment.

5.58 The Hungarian Memorial's explanation for this refusal to participate is that the study was only aimed at the Slovak part of this region⁹¹. This is patently incorrect. The study was narrowed down to Slovak territory only after Hungary had declined to participate; the invitation extended to Hungary was clearly aimed at covering both sides of the Danube⁹².

⁸⁹ It is important to note that it was the same Hungarian Government under Prime Minister Németh that participated in all the key decisions during this period: the Project's acceleration in February 1989; the suspension of Nagymaros in May 1989 and its subsequent abandonment in October 1989. It was the Németh Government that participated in the September - October 1989 negotiations and then reversed its position, putting an end to these negotiations in Mr. Németh's letters of 15 January and 6 March 1990, thus signaling the abandonment of the G/N Project by the end of June 1990, when the final construction contracts were terminated by Hungary.

⁹⁰ Slovak Memorial, paras. 4.02 and 4.63, and Annex 57; Hungarian Memorial, para. 3.113.

⁹¹ Hungarian Memorial, para. 3.113.

⁹² The invitation to participate refers to the "Danubian lowland, both in Hungarian and Slovak territory". Slovak Memorial, Annex 82.

B. Hungary Prevents the Damming of the Danube for a Second Year (October 1990)

5.59 The most important event of 1990 affecting the Project is not mentioned in the Hungarian Memorial. For the second year in a row, the damming of the Danube at Dunakiliti was not carried out during the short time in 1990 when this was possible. Hungary controlled the work at Dunakiliti; and by the end of June 1990, without consultation (let alone agreement by Czechoslovakia), Hungary had cancelled all private contracts covering this work. The definitive nature of this termination action is seen from this statement in Hungary's 1992 Declaration:

"As to the work done by Austrian and Yugoslav companies, the related private contracts were terminated in November 1989 and June 1990, respectively. The parties agreed in the financial consequences of the termination⁹³."

The schedule of other work on the Gabčokovo section of the Project was necessarily dependent on the damming of the Danube. Thus, the whole Project was again seriously set back by Hungary's unilateral act.

C. Hungary's Moves to Terminate the 1977 Treaty

5.60 As both Memorials observe⁹⁴, there were indications of progress in late 1990 towards broadening the bilateral talks among experts to a trilateral format to include the EC. Although the Hungarian Prime Minister's letter of 14 December 1990 contained the proposal to conduct negotiations, enlarged to include the EC, this was coupled with proposals to amend the 1977 Treaty⁹⁵. Further, the Hungarian Memorial offers evidence in the form of an unpublished Resolution of the Hungarian Government of 20 December 1990 that shows there was no new hope of resolving the dispute, with or without EC involvement except on Hungary's terms, that is by terminating the 1977 Treaty⁹⁶. The Resolution directed the responsible Ministers and the Plenipotentiary to:

"... start negotiations with [Czechoslovakia] on the termination of the 1977 Treaty by mutual consent and on the conclusion of a treaty addressing the consequences of the termination." (Emphasis added).

⁹³ Hungarian Memorial, Vol. 4, Annex 82 (at p. 162).

⁹⁴ Slovak Memorial, paras. 4.66-4.67; Hungarian Memorial, Vol. 1, paras. 3.114-3.116.

⁹⁵ Hungarian Memorial, para. 3.118. See, Slovak Memorial, Annex 86.

⁹⁶ Hungarian Memorial, para. 3.115, and Vol. 4, Annex 153. It is important to note that the suggestion in the Hungarian Prime Minister's letter of 14 December 1990 (*ibid.*, Vol. 1, para. 3.114) had been to prepare an amendment to the Treaty; the Resolution of 20 December was aimed at the termination of the Treaty, a major shift in emphasis.

5.61 The official position of the new Czechoslovak Government was set out in its Prime Minister's letter of 15 January 1991, replying to the Hungarian Prime Minister's letter of 14 December 1990⁹⁷. Czechoslovakia interpreted this letter as a good faith proposal to renew the negotiations begun at the end of 1989 but abruptly cancelled by Hungary on 10 January 1990. The Czechoslovak Prime Minister's reply was: (i) to agree to talks "on the comprehensive solution of problems of the [G/N] system of locks at the level of government delegations", and (ii) to appoint a delegate to organise "international assistance in considering the ecological problems posed by the [G/N Project]"⁹⁸.

5.62 But a basic difference existed between the Treaty parties, as emerges clearly from a statement of principles that the Hungarian Plenipotentiary proposed to his counterpart on 15 February 1991 to "serve as a basis for the international treaty which we proposed"⁹⁹. It was a totally uncompromising proposal that took no account of Czechoslovakia's conciliatory approach. The two parties were to agree:

- That construction and operations of the G/N Project would "initiate irreversible ecological process" with grave consequences for the environment, the drinking water, etc.;
- Accordingly, that the G/N Project should not be constructed and a treaty to this effect should be concluded that also settled the investment to date; and
- Finally, that the 1977 Treaty and all related agreements should be terminated.

These proposals did not appeal to the new Government in Czechoslovakia any more than they had to the former Government. They were proposals that faithfully followed the blueprint laid down in the Hardi report in September 1989 and adopted by the Hungarian Government at the time, and their implementation was not to be negotiated but imposed.

⁹⁷ In its letter of 14 December 1990, Hungary proposed not only to conduct negotiations, expanded to include the EC, on proposals to amend the 1977 Treaty, but also to move the discussions to a higher level than the Plenipotentiaries by appointing a joint intergovernmental committee.

⁹⁸ Slovak Memorial, Annexes 85 and 86.

⁹⁹ Hungarian Memorial, Vol. 4, Annex 45. In the Hungarian Memorial (Vol. 1, para. 3.120), the content of this letter is misdescribed: it did indeed set out the proposed principles.

D. Approval by Czechoslovakia of Initial Investment and Logistical Planning for Variant "C" (25 July 1991); Hungary is Informed of the Elements of Variant "C"

5.63 The several meetings and exchanges that took place until April 1991 are presented in the Hungarian Memorial in such a way as to give the false impression, first, that there had been new environmental studies supporting Hungary's view, and second, that Czechoslovakia seemed to be moving towards acceptance of termination of the Project as inevitable¹⁰⁰. The reports furnished by Hungary were the same prepared lists of articles that had been furnished before, offering nothing new. The only new, independent study, also commissioned by Hungary, the Bechtel report, once again passes unmentioned in the Hungarian Memorial¹⁰¹, just as it never was mentioned in the exchanges and meetings between the Treaty parties.

5.64 From April 1991 up to the end of that year, there took place the discussions that Hungary has portrayed in its Memorial as three series of negotiations. How these events are grouped together is, in itself, of no consequence; what does matter is what the negotiations were about.

5.65 The negotiations, high level as they were, did not concern terminating Nagymaros, or whether or not to dam the Danube in 1991, or whether Hungary should resume the construction activities on the G/N Project. Those matters had already been unilaterally decided by Hungary. Nor were the negotiations about whether Hungary's actions could be justified by the threat of irreparable environmental harm: that position, too, had been taken unilaterally by Hungary (in total disregard of the scientific evidence). The only possible subject of negotiations was on what terms to terminate the 1977 Treaty and, with it, the G/N Project. But here an obstacle existed for Hungary: for Czechoslovakia had made it plain that it was not prepared to abandon the G/N Project and had mentioned that it might be forced to seek a provisional solution if Hungary persisted in its course in violation of the 1977 Treaty. Such a provisional solution would enable the Project to be partially implemented without the need for Hungarian participation and, hence, outside the scope of Hungary's unilateral decisions and acts.

¹⁰⁰ Ibid., Vol. I, paras. 3.111-3.120. The implication that the Czechoslovak Plenipotentiary might have been ready to discuss the Treaty's termination if agreement was reached on compensation, suggested in the last sentence of para. 3.117, has no support in the record of the meeting set out in Annex 41, which does not reveal any such subject as having been raised by the Czechoslovak Plenipotentiary.

¹⁰¹ A study prepared at Hungary's request by the Floodplain Institute under the auspices of the World Wildlife Fund for Nature (WWF), referred to in the Hungarian Memorial at para. 3.117, has not been placed in evidence by Hungary, and Slovakia has no copy of it.

5.66 As the Hungarian Memorial acknowledges, by its Resolution of 16 April 1991, the Hungarian Parliament gave the Government the authority only to proceed with negotiations to terminate the 1977 Treaty, and to conclude a new treaty aimed at settling the consequences of the abandonment of the G/N Project¹⁰². Thus, the Hungarian Government had no mandate to negotiate to settle the existing dispute between the Treaty parties; negotiations were restricted to terminating the Treaty and ending the Project. The Resolution also ended investment in the Project, including related national investments such as reducing the pollution from such sources as the industrial wastes being poured into a tributary of the Danube at Győr.

5.67 Hungary's Memorial states that it was at this stage in the dispute that Hungary "learned that the Slovak Government had approved the plans" for Variant "C"; and it goes on to contend that requests for information from the Hungarian Government were not answered. Hungary's Memorial refers to various indications that the start of work on Variant "C" had been approved by the Czechoslovak Government on 2 February 1991¹⁰³. This is not so; the evidence establishes that even the approval of initial financing and planning for Variant "C" did not occur until 25 July 1991¹⁰⁴. By then, a great deal of study into alternative provisional solutions and their effects on the environment and on water quality had been undertaken¹⁰⁵.

5.68 These studies were not conducted by Czechoslovakia in secret. The Hungarian Memorial refers to a meeting between Environmental Ministers, as early as 5 September 1990, where the various alternatives being studied were presented to Hungary¹⁰⁶. But the Hungarian Government already was well aware of these alternative variations for, in July 1990, its Plenipotentiary commissioned an evaluation of these variants to be carried out within the following six months¹⁰⁷. The Hungarian Memorial also produces evidence that, at the discussions between the Academies of Sciences of the two countries on 13-14 February 1991, the Czechoslovak delegation informed the Hungarian delegation "of the technical details

¹⁰² Ibid., Vol. 1, para. 3.121, and Vol. 4, Annex 154.

¹⁰³ Ibid., Vol. 1, para. 3.122.

¹⁰⁴ Slovak Memorial, Annexes 91 and 92: English translations of Resolution No. 384 of the Government of the Slovak Republic and of Resolution No. 484 of the Czechoslovak Government.

¹⁰⁵ Ibid., paras. 5.14-5.25.

¹⁰⁶ Hungarian Memorial, para. 3.123, and Vol. 4, Annex 164.

¹⁰⁷ See the report dated 9 October 1991 of an interview in the Hungarian newspaper Magyar Hirlap with Ms. Adrienne Hájossy, counsellor of the Hungarian Ministry for Environment. Annex 12, hereto.

and ecological aspects" of Variant "C"¹⁰⁸. In the summer of 1991, Hungarian officials visited the site "to see what was happening"¹⁰⁹.

5.69 In describing the alternative provisional solutions, the Hungarian Memorial gives the impression that what became Variant "C" (then called Variant "B") contemplated the abandonment of Nagymaros¹¹⁰. This is not true. Variant "C" only concerned a provisional solution without Nagymaros and peak power operation since, as a practical matter, that was the situation that Czechoslovakia faced after construction work at Nagymaros had been stopped by Hungary. Czechoslovakia never abandoned Nagymaros; nevertheless, it had to take into account its abandonment by Hungary in order to devise the mitigating measures reflected in a provisional variant¹¹¹. Hungary's contention that Czechoslovakia failed to give serious study to the other provisional solutions¹¹² is also untrue; as shown in the Slovak Memorial, they were thoroughly studied¹¹³.

5.70 At both the intergovernmental meetings of 22 April and 15 July 1991, the question of proceeding with Variant "C" or some other alternative was discussed by the Treaty parties, as conceded by Hungary in its account of these meetings¹¹⁴. No complaint was registered at the time by Hungary that it was being inadequately informed. Hungary's single-minded purpose was to try to stop any sort of work on the Project from going forward, including the provisional solution.

5.71 Hungary places great emphasis on the meeting of 22 April 1991 in its Memorial. But neither at this meeting, nor in the papers presented there, did Hungary offer anything new to Czechoslovakia - for it now had literally nothing to offer as a result of the Parliamentary Resolution of 16 April 1991 that limited the mandate of its negotiators. Hungary had taken matters into its own hands and had effectively put a stop to the Project.

¹⁰⁸ Hungarian Memorial, Vol. 4, Annex 43.

¹⁰⁹ See, Magyar Nemzet, 8 October 1992, interview with Ferenc Mádl, Hungarian Minister without Portfolio, who at the time was the responsible Minister for the G/N Project. Annex 13, hereto.

¹¹⁰ Hungarian Memorial, para. 3.123.

¹¹¹ See, e.g., paras 5.16, 5.22-5.24 and 5.50-5.53, above.

¹¹² Hungarian Memorial, para. 3.124.

¹¹³ See, para. 5.67, above, and fn. 105.

¹¹⁴ Hungarian Memorial, paras. 3.125-3.137. However, contrary to what is implied in para. 3.125, the "preparatory work" on Variant "C" carried out by Czechoslovakia consisted only of studies.

5.72 At the 22 April meeting, Hungary presented a total of four papers¹¹⁵. Three of the papers were proposals, the fourth was a statement of the views of the Hungarian Academy of Sciences, essentially a repetition of its earlier paper of 26 June 1989¹¹⁶. There is no agreed record of the 22 April meeting, but Hungary has referred to a unilateral account by Hungarian Minister Mádl, although not producing the relevant document. With its Memorial, Slovakia has furnished its own account of the meeting, together with the short joint declaration issued by the parties at its conclusion¹¹⁷.

5.73 The Hungarian Memorial describes the second Hungarian paper as proposing that both parties "suspend construction until 30 September 1993, and refrain from unilateral steps until after that date"¹¹⁸, which would entail Hungary's agreement not to "begin restoration of the Nagymaros area". This description is wholly at odds with the paper's translation annexed to the Hungarian Memorial. In fact, the paper proposed the suspension of work "still in progress commenced on the basis of the [1977 Treaty]". This would have had no application at all to Hungary, for Hungary had already suspended all construction work on the Project. Restoration at Nagymaros, in effect involving the demolition of preparatory works, would not, in any event, have fallen within the proposal since it was not work in progress pursuant to the Treaty. Any notion that Hungary offered to halt the restoration work at Nagymaros if Czechoslovakia stopped construction work on Variant "C" is wrong for another reason - no construction work on Variant "C" had yet been started in April 1991. But it is interesting to note that the paper reveals that when Hungary suspended work at Nagymaros by its unilateral decision of 13 May 1989 it "simultaneously began the reinstatement of the region", confirming the fact that the 13 May decision was intended by Hungary as the initial step in the ultimate termination of Nagymaros¹¹⁹.

5.74 Following the meeting of 22 April 1991, Czechoslovakia sent a Note Verbale to Hungary dated 18 June proposing a second round of meetings¹²⁰. This Note made absolutely clear Prague's position that every action taken by Hungary since 13 May 1989 was in contravention of the 1977 Treaty and related agreements. It offered to "debate any definite suggestions submitted by [Hungary] which may lead to a resolution of the situation" at their

¹¹⁵ Ibid., Vol. 4, Annexes 48, 49 and 50; and Vol. 5 (Part I), Annex 10.

¹¹⁶ See, Slovak Memorial, paras. 4.14-4.34.

¹¹⁷ Ibid., Annex 87.

¹¹⁸ Hungarian Memorial, para. 3.127.

¹¹⁹ See, paras. 5.09, et seq., and para. 5.32, above.

¹²⁰ Hungarian Memorial, Vol. 4, Annex 51.

next meeting¹²¹. On 10 July 1991 the Plenipotentiaries again met¹²². Czechoslovakia informed Hungary that it was planning to fill the headwater canal by pumping water from the Danube in order to preserve the structures and in accordance with the procedures of the Joint Contractual Plan. This action, which began on 27 July, was not a part of any steps to implement Variant "C", as was made clear by Czechoslovakia. Its sole purpose was to prevent the deterioration of the headwater section of the bypass canal due to the delays caused by Hungary. Such a measure had been strongly recommended by the HQI report¹²³, and it would have been necessary in any event as part of the responsibility of the Treaty parties in the preservation of the works.

E. Czechoslovakia Proposes that the Alternative Solutions for Completing Gabčíkovo be Studied by a Trilateral Commission (15 July 1991)

5.75 The next intergovernmental meeting, held on 15 July 1991, shows once more that the only party willing - and able - to enter into constructive negotiations was Czechoslovakia¹²⁴. It proposed that a trilateral commission (composed of representatives of Czechoslovakia, Hungary and the EC) be appointed to study all variants of the Project submitted to the commission by 31 July 1991. The commission was to give special attention to any ecological problems and to submit its views to the heads of the governmental delegations, who would then decide on how to proceed further. The Communiqué of the meeting indicates that Hungary's proposal was purely negative - to "drop the works on Gabčíkovo project" and terminate the 1977 Treaty. Hungary proposed a bilateral commission to examine ecological risks but only if all works were suspended by Czechoslovakia. In other words, Hungary had not advanced or modified its negotiating position in any way.

5.76 The meeting of 15 July 1991 is crucial evidence because it shows this striking contrast: in spite of all the unilateral acts of Hungary and its dogged insistence on terminating the Treaty, and in spite of the fact that work on the Gabčíkovo section of the

¹²¹ Following that, Czechoslovakia replied in detail to the 22 April paper of the Hungarian Academy of Sciences (*ibid.* Vol. 5 (Part I), Annex 10). See *ibid.*, Vol. 4, Annex 52.

¹²² Slovak Memorial, Annex 89. This meeting is not mentioned in the Hungarian Memorial, which erroneously states that the last meeting of Plenipotentiaries was held on 15 February 1991. See Hungarian Memorial, para. 3.120.

¹²³ Slovak Memorial, Annex 28 (at p. 83).

¹²⁴ Hungarian Memorial, paras. 3.134-3.137. Hungary's account is based on a report of Hungarian Minister Mádl, which is annexed in translation but not produced in its original version, as required by the Rules of Court. *Ibid.*, Vol. 4, Annex 165. This report indicates that a recording was made of the meeting, but the Hungarian report does not purport to be a transcription of it. However, a Joint Communiqué was issued at the end of the meeting, and this document was annexed in translation and furnished in its original text by Slovakia. Slovak Memorial, Annex 90.

Project was 90% complete, Czechoslovakia nevertheless remained open to enter again into negotiations over the completion of the G/N Project, and any alternative variants to do so. At the meeting, Czechoslovakia formally offered to turn over to a trilateral commission four different alternatives:

- Proceeding with the Project according to the original plan;
- Postponing Nagymaros, and operating Gabčíkovo as originally planned (Variant "B");
- Postponing Nagymaros, and operating Gabčíkovo with a "so-called canal solution", which the Hungarian report indicates was not exactly the same as Variant "C" had been described in the past¹²⁵;
- Restoring the site to its original condition.

5.77 The Hungarian Memorial sidesteps the importance of this offer and misdescribes these alternatives, by implying that the "abandonment" of Nagymaros had been accepted, rather than its "postponement", in two of these variants¹²⁶. This is another example of the persistent attempt in the Hungarian Memorial to try to establish Czechoslovakia's acquiescence in the unilateral termination by Hungary of the Nagymaros section of the Project. It is of no avail. Both before and after the governmental changes in Czechoslovakia, the Czechoslovak Government refused to consider the termination of Nagymaros in the absence of further studies showing that heretofore unperceived risks existed that would warrant such action. Hungary never showed the slightest interest in pursuing such studies.

5.78 This formal offer of Czechoslovakia, and the discussions preceding it, bring out an essential point - the eventual approval and commencement of work on Variant "C" were provisional, unlike Hungary's preceding definitive acts. At the time of the meeting of 15 July 1991, Czechoslovakia had started no more than planning studies on Variant "C", so it is senseless for Hungary to accuse the Czechoslovak Government of having been "unwilling to suspend work" on Variant "C"¹²⁷.

5.79 The Hungarian Memorial nonetheless states that it was informed a few weeks after the meeting that construction work on Variant "C" had already commenced. But

¹²⁵ This is a further indication of Hungary's knowledge of the details of the Variants under study.

¹²⁶ Hungarian Memorial, para. 3.135.

¹²⁷ Ibid., para. 3.137.

no such work had commenced. The protest in Hungary's letter of 24 July 1991, relied on in support of this contention, could only have concerned the conservation measures taken in accordance with the Project, to fill partially the headwater canal, which began on 27 July and was not a part of Variant "C" at all, as Hungary well knew, having been specifically informed in advance of this operation¹²⁸. It was in no way what Hungary now calls a "further unilateral step"¹²⁹. In fact, as will be shown in detail below, the first construction work under Variant "C" did not begin until November 1991, following the third year in which Hungary had prevented the damming of the Danube¹³⁰.

5.80 On 30 July 1991, the Slovak Prime Minister informed the Prime Minister of Hungary that both the Slovak Government and the Czech and Slovak Federal Government had finally reached the decision "to continue work so as to put the Gabčíkovo system of locks into operation on the basis of a provisional solution on the territory of [Czechoslovakia]"¹³¹. However, what was approved was only initial financing and planning for Variant "C" - no construction work had been authorised¹³². Thus, Czechoslovakia had waited for over two years since Hungary's initial unilateral decision to prevent the damming of the Danube before taking this decision, and it was taken only after it became clear that its initiative at the 15 July meeting - to submit the alternative variants to a trilateral committee for

¹²⁸ See, para. 5.74, above.

¹²⁹ Hungarian Memorial, para. 3.140.

¹³⁰ In its Memorial, para. 3.141, Hungary says that in a letter dated 9 August 1991 Hungarian Minister Mádl had "expressed outrage" at Czechoslovakia's decision "to continue work on" Variant "C". Once again, Hungary is implying that the operation to fill partially the bypass canal was carried out under Variant "C". This is not so, as Minister Mádl and other Hungarian officials were well aware, having visited the site in the summer of 1991. See, para. 5.68, above. In the Special Agreement (Article 2(1)(b)), Hungary conceded that Czechoslovakia did not proceed with Variant "C" until November 1991.

¹³¹ Slovak Memorial, Annex 93. See, para. 5.67 and fn. 105, above, which refer to the Slovak and Czechoslovak Resolutions of 23 and 25 July 1991. Hungary's translation of this document of 30 July 1991 is faulty and tends once again to give the wrong impression that the decision involved the continuation of work on the provisional solution. Compare, Hungarian Memorial, Vol. 4, Annex 56 and Slovak Memorial, Annex 93: Hungarian translation: "the decision ... to continue work on the Gabčíkovo power plant, as a provisional solution"; Slovak translation: "the decision ... to continue work so as to put the Gabčíkovo system of locks into operation on the basis of a provisional solution".

¹³² See, para. 5.67, above. Resolution No. 484 dated 25 July 1991 of the Czechoslovak Government (i) approved going ahead with the "investment and supply preparation" for putting the Gabčíkovo section into operation under the provisional solution, (ii) called for the continuation of negotiations with Hungary, and (iii) instructed that Hungary be informed that Czechoslovakia "insists on the original technical solution in accordance with the [Joint Contractual Plan] in force for the [G/N Project]". The Resolution had been preceded by the approval of Variant "C" on 25 June 1991 by the Slovak Commission for the Environment, the relevant authority, following a detailed study. It imposed 19 conditions on the Slovak organisation charged with carrying out Variant "C". See, Hungarian Memorial, Vol. 4, Annex 168. On 3 October 1991, the Czechoslovak Parliament approved the Government position set out in Resolution No. 484 and established guidelines to be followed in the continuing negotiations with Hungary. Hungarian Memorial, Vol. 4, Annex 169.

examination and in this way to open up the question of provisional measures to negotiation with the participation of the EC - had been rejected by Hungary.

5.81 Both before and after this 30 July letter, there was a flurry of activity, including the following:

- A Joint Press Release of 15 July 1991 concerning the 15 July negotiations¹³³;
- A second letter of 30 July 1991 from the Slovak Prime Minister to Hungarian Minister Mádl informing him that Czechoslovakia proposed that the proposed trilateral committee should examine the original technical solution of the G/N Project as set out in the Joint Contractual Plan, giving special attention to ecological problems¹³⁴;
- A Hungarian Note Verbale of 30 July 1991 protesting the operation to fill partially the bypass canal and requesting that Czechoslovakia halt all work underway on the G/N System¹³⁵; and finally,
- A Czechoslovak Note Verbale of 27 August 1991 responding to Hungary's 30 July Note¹³⁶.

5.82 This last Note Verbale (of 27 August), which the Hungarian Memorial annexes but otherwise ignores, deserves particular attention for it shows that Czechoslovakia did not rush into starting to construct Variant "C". This Note makes the following points:

- At the 22 April and 15 July meetings no "constructive conclusions" were reached, in part because the Hungarian delegation had only a "limited mandate"¹³⁷;
- As a result, Czechoslovakia -

¹³³ Hungarian Memorial, Vol. 4, Annex 53. The release brings out the limited mandate of the Hungarian delegation and the condition Hungary imposed on the establishment of a committee (which it recommended be bilateral rather than trilateral): the establishment of such a committee was subject to the condition of suspension of all work on the Project by Czechoslovakia.

¹³⁴ Ibid., Annex 55.

¹³⁵ Ibid., Annex 57.

¹³⁶ Slovak Memorial, Annex 96.

¹³⁷ See, para. 5.66, above; see, also, fn. 133, above.

"...guided by the efforts to minimize damage caused by the unilateral course of the Hungarian side, approved investments and supplies within the preparation for putting into operation the Gabčikovo system of locks on the basis of a provisional solution on the territory of [Czechoslovakia]¹³⁸."

This brought out clearly the fact that the decision reached by Czechoslovakia concerned only financial and logistical planning and was entirely reversible.

- The note explained the reasons for the filling of the bypass canal: so as to protect the headwater canal, a step that had been scheduled for December 1989 but prevented by Hungary;
- The decision regarding the "provisional solution" was no obstacle to further negotiations; if Hungary should present "specific technical solutions on the basis of the valid Treaty of 1977 and its related treaty documents" concerning the Gabčikovo section, Czechoslovakia was prepared to proceed with any subsequently agreed method of resolution.

5.83 Two things stand out from this Note Verbale. First, the decision of Czechoslovakia concerning Variant "C" had so far only concerned preparatory measures - such as its financing and arrangements for transportation of materials on Czechoslovak territory - and no decision as to construction work had yet been taken. Second, in spite of Hungary's unilateral prevention of the construction of the Nagymaros section of the Project, Czechoslovakia remained fully prepared to negotiate with Hungary the details of how to put the Gabčikovo section into operation.

F. For the Third Year In a Row Hungary Prevents the Damming of the Danube (October 1991)

5.84 There was, of course, a more immediate objective for Hungary during the summer and autumn of 1991, other than merely putting a stop to any provisional solution. For once again, the short period in the late autumn when the Danube could be dammed was fast approaching. But, because no construction had begun on Variant "C", Hungary still had the upper hand: the only possible damming operation was near to Dunakiliti at a joint Czechoslovak-Hungarian part of the Danube, and the weir to be operated was to be entirely on

¹³⁸ See, Hungarian Memorial, Vol. 4, Annex 61, for a somewhat different translation into English, which reads in part as follows: "approved preparations for investment and transport in the territory of [Czechoslovakia] for the purposes of beginning temporary operations of the Gabčikovo hydroelectric plant..."

Hungarian territory. It was here that Hungary had abandoned work in mid-1989 and had cancelled all contracts in June 1990.

5.85 At the time of what Hungary has called the third intergovernmental meeting, which took place on 2 December 1991, Hungary had succeeded in putting off the damming of the Danube for the third year in a row. This brought to a halt the work on the Gabčíkovo section of the Project for which Czechoslovakia was responsible¹³⁹. In anticipation of the meeting, the Slovak Prime Minister had written to Hungarian Minister Mádl on 21 October 1991 stressing how important it was for the Hungarian delegation to have a broader mandate than it had been given in the earlier meetings of April and July¹⁴⁰. As he explained in the letter:

"... a precondition of successful negotiations is the widening of the mandate of the Hungarian delegation in such a way that the Hungarian delegation may negotiate regarding all the alternatives concerning the completion of the [G/N Project]."

He also queried whether it was contemplated that the expert committee would include EC participants; and he noted that Hungary had failed to follow up the 15 July meeting by submitting its Project variants to be considered by such a group in order to resolve the problems under the Project. The Hungarian response of 7 November 1991 to this letter failed to answer either question¹⁴¹.

5.86 The 2 December meeting did arrive at an agreement in principle to appoint a Joint Expert Committee and to accept Czechoslovakia's proposal that there be the participation of EC experts. But to this agreement Hungary interposed a condition that blocked even the appointment of the Committee, let alone its operation. Hungary gave Czechoslovakia a 10-day ultimatum: the appointment of the Committee could be made, and its work begun, only if within that period Czechoslovakia agreed to stop all work on putting the Gabčíkovo section of the Project into operation until June 1992¹⁴². As the Hungarian Prime Minister expressed this condition in his letter of 19 December 1991, Czechoslovakia must:

¹³⁹ The Environmental Committees of the Czechoslovak and the Hungarian Parliaments had issued a Joint Declaration on 11 October 1991 calling for the appointment of an expert committee to carry forward the negotiations, and this was the principal question to be addressed at the meeting of 2 December 1991. Hungarian Memorial, Vol. 4, Annex 64. There is no agreed record of this meeting of 2 December 1991, but, once again, the Hungarian Memorial gives an account of what transpired citing a document that has not been annexed or filed with the Court.

¹⁴⁰ Ibid., Annex 65.

¹⁴¹ Ibid., Annex 67.

¹⁴² See, Slovak Memorial, Annex 99, a letter dated 18 December 1991 in which the Slovak Prime Minister refers to the 2 December meeting.

"...refrain from work which is inconsistent with the [1977 Treaty] and which (in contravention of International Law) aims at a unilateral decision¹⁴³."

5.87 The Hungarian Memorial defends the position taken by Hungary on the basis that:

"... if Czechoslovakia continued its work towards the implementation of Variant "C", the Committee's work would be meaningless¹⁴⁴."

But this argument is without substance; such a commitment by Czechoslovakia would have had no effect on the Committee's work, one way or another. The Committee's work was to have been completed by the end of June 1992. And the Czechoslovak Prime Minister pledged in his 18 December letter not to "carry out any work in the river bed of the Danube up to July 1992"¹⁴⁵. The audacity of presenting such an ultimatum, as if the succession of Hungarian unilateral acts preventing, *inter alia*, the damming of the Danube for three years in a row had never taken place, is stunning.

5.88 Although Czechoslovakia had started the first construction work under Variant "C" in November 1991, preparatory to narrowing the size of the reservoir, it was carried out solely on Czechoslovak territory and involved only its funds. This work had no practical effect whatsoever on the flow of the river and, like all the other work to the end of June 1992, it in no way prejudiced any findings that the Committee might make by the end of June 1992 or any decisions of the Treaty parties based on such findings. At worst, it might ultimately have resulted in a waste of money and work by Czechoslovakia¹⁴⁶.

5.89 The Hungarian Memorial seems to imply that continuing work on Variant "C" in a limited way would have had a psychological effect on the Committee; and the Hungarian Prime Minister's letter of 19 December 1991 asserted that :

"...[the Parties] should be open to the conclusions of the experts, instead of putting improper pressure upon them by accelerating the work and implying the

¹⁴³ Hungarian Memorial, Vol. 4, Annex 70.

¹⁴⁴ *Ibid.*, Vol. 1, para. 3.144. In his 19 December letter, the Hungarian Prime Minister suggested that such a condition would "aid the equanimity of the joint research", seemingly a sort of psychological argument.

¹⁴⁵ Slovak Memorial, Annex 99 (at p. 274 - emphasis added).

¹⁴⁶ Even today this work performed in November 1991 to narrow the reservoir does not exclude a return to the original Project.

irreversibility of the construction¹⁴⁷."

But there was no such acceleration of work and no irreversible construction. Further, if the notion is to be accepted that the Committee would have been under "improper pressure" if work continued on Variant "C", it is no less true that it was under even greater and more improper pressure in the light of Hungary's unilateral actions to halt all work and its refusal to accept anything other than the end of the Project and the termination of the Treaty.

5.90 Czechoslovakia naturally refused Hungary's 10-day ultimatum. On 12 December 1991, the Czechoslovak Government decided "to put the Gabčskovo part [of the Project] into operation and to complete its construction on the territory of [Czechoslovakia]"¹⁴⁸. But this decision did not mean that Czechoslovakia was no longer "open to the conclusions of the experts" of a trilateral committee. This is clear from the Czechoslovak Prime Minister's letter of 18 December 1991¹⁴⁹.

5.91 As Hungary's Memorial points out, this letter expressed Czechoslovakia's intention to put Gabčskovo into operation - but only "to preserve the substance and goals of the interstate Treaty of 1977"¹⁵⁰. Moreover, it contained three other elements of importance. First, it contained the undertaking, just mentioned, to refrain from work on the Danube's riverbed until July 1992¹⁵¹. Second, it added the commitment "to participate in the formulating of a concept for ... solving possible ecological problems" on Czechoslovak or on Hungarian territory. Third, as the letter explains, the role of the trilateral commission would be to :

"...consider and evaluate alternate solutions and scientific and technical questions concerning the [G/N Project] which will be presented by the Heads of government delegations before December 31, 1991"¹⁵²."

¹⁴⁷ Hungarian Memorial, Vol. 4, Annex 70.

¹⁴⁸ See, letter of 23 January 1992 from the Czechoslovak Prime Minister to the Prime Minister of Hungary. Slovak Memorial, Annex 102.

¹⁴⁹ Ibid., Annex 99.

¹⁵⁰ Ibid.

¹⁵¹ Para. 3.147 of the Hungarian Memorial wrongly describes the offer as having been made only until June rather than July 1992.

¹⁵² Slovak Memorial, Annex 99. Emphasis added.

In the light of these considerations, it is difficult to see how Czechoslovakia could possibly be accused - as it was by Hungary - of having rendered "the establishment and aim of the joint specialist committee impossible"¹⁵³.

5.92 The Hungarian Memorial sidesteps this evidence of Czechoslovakia's flexibility. Instead, it emphasises the reference in the 18 December letter to Czechoslovakia's right to be compensated for damages "resulting from a failure, by the Hungarian side, to fulfil the obligations under the interstate Treaty". It is alleged that this was interpreted by Hungary to mean that the Czechoslovak Government "no longer considered the completion of the works at Nagymaros as a requirement"¹⁵⁴. It is not hard to see that this is just another illustration of the Hungarian Memorial's obsession with trying to establish a degree of acquiescence on Czechoslovakia's part. But this was anything but a waiver of Czechoslovakia's claims concerning Nagymaros. The letter states the existence of a breach in the clearest possible terms and simply points to a possible remedy. Further, if at the time Hungary interpreted this statement as an acquiescence, as its Memorial contends, such an important concession by Czechoslovakia would certainly have been prominently mentioned in Hungary's 1992 Declaration. But in the Declaration no hint can be found of any such interpretation, even though the 18 December letter itself is referred to there¹⁵⁵.

G. Hungary Prepares to Announce its Purported Termination of the 1977 Treaty (December 1991 - May 1992)

5.93 In a very short letter of 23 December 1991 to the Slovak Prime Minister, the head of the Hungarian delegation, Mr. Mádl, bluntly put an end to the possibility of appointing a trilateral committee of experts¹⁵⁶. In the negotiations during the course of 1991, Hungary had offered nothing to Czechoslovakia except an ultimatum that was certain to ensure the failure to appoint a trilateral committee. Hungary's professed willingness at the 2 December meeting to appoint such a committee, which seemed to suggest a broader negotiating mandate than just seeking the termination of the 1977 Treaty, turned out to be a sham.

¹⁵³ See, letter of 23 December 1991 from the Hungarian Minister, Mr. Mádl, to the Slovak Prime Minister. Hungarian Memorial, Vol. 4, Annex 71.

¹⁵⁴ *Ibid.*, Vol. 1, para. 3.148.

¹⁵⁵ See, in this regard, para. 5.50, *et seq.*, above.

¹⁵⁶ Hungarian Memorial, Vol. 4, Annex 71. The contrasting positions of the two Governments as 1991 came to an end are summarised in the Slovak Memorial, para. 4.75.

5.94 Nonetheless, Czechoslovakia continued to demonstrate its willingness to meet head on Hungary's expressed environmental concerns over the implementation of the Gabčíkovo section of the Project. The Czechoslovak Prime Minister's letter of 23 January 1992 again urged the appointment of the trilateral committee, and gave the following expanded undertaking:

"Provided these conclusions [of the Committee] and results of monitoring the test operation of the Gabčíkovo part confirm that negative ecological effects exceed its benefits¹⁵⁷ the Czechoslovak side is prepared to stop work on the provisional solution and continue the construction [only] upon mutual agreement¹⁵⁸."

Czechoslovakia's position could not have been clearer or more cooperative. The implementation of Gabčíkovo was to be made subject to an independent assessment of the ecological effects. It cannot be argued that Czechoslovakia was not fully "open to the conclusions of the experts".

5.95 But the offer was rejected by Hungary, and its Memorial now offers this interpretation of the letter of 23 January 1992:

"In other words, Czechoslovakia was unwilling to suspend construction of Variant C and would put into operation the Gabčíkovo Barrage by all means, independently of the work of the Joint Expert Committee¹⁵⁹."

This is a most perverse reading of the letter. Czechoslovakia had already promised not to touch the riverbed until after the Committee's work had been completed at the end of June 1992. The final damming operation could not have been undertaken for another four months after that date because of hydrological conditions¹⁶⁰. Czechoslovakia's undertaking should have been entirely satisfactory had Hungary been negotiating in good faith.

5.96 At this critical moment, the President of the Czechoslovak Federal Assembly, Mr. Dubček, added his weight and prestige to the seeking of a joint solution. In his letter of 27 January 1992 to the President of the Hungarian National Assembly, he urged further negotiations at both the Parliamentary and Governmental levels, saying:

¹⁵⁷ The Hungarian translation of the phrase "exceed its benefits" is slanted so as to read "are greater than its expected profit". Hungarian Memorial, Vol. 4, Annex 73.

¹⁵⁸ Slovak Memorial, Annex 102 (emphasis added).

¹⁵⁹ Hungarian Memorial, para. 3.151.

¹⁶⁰ See, para. 5.18 (second item) and fn. 35, above; see, also, Slovak Memorial, para. 4.02.

"It is my judgment ... that the immediate resumption of negotiations on joint solutions of problems related to the [G/N Project], without preconditions, and on the establishment of [the] Joint Commission which would involve independent experts, is the only way to arrive at solutions benefiting our countries as well as the environment¹⁶¹."

5.97 But, the remaining exchanges between the Treaty parties up to Hungary's final announcement of its purported termination of the 1977 Treaty on 19 May 1992 indicated that Hungary had closed the door to further negotiations to resolve the dispute under the Treaty and to the appointment of a trilateral committee¹⁶². The formal end of negotiations occurred with the Hungarian Parliament's Resolution No. 12/1992 of 24 March 1992 authorising the Hungarian Government to terminate the 1977 Treaty and all related agreements if Czechoslovakia did not cancel all work on the Project "being done in contravention [of the Treaty]" by 30 April 1992. It is preposterous to suggest, as the Hungarian Memorial does, that by this Resolution "a new deadline for negotiations" had been set based on "suspension of Variant C"¹⁶³.

5.98 Nonetheless, as is clear even from the Hungarian Memorial, Czechoslovakia remained willing to enter into negotiations¹⁶⁴ and, in particular, to establish a trilateral committee. In his letter of 23 April 1992¹⁶⁵, the Czechoslovak Prime Minister informed his Hungarian counterpart that "the Government of the CSFR ... is interested in the creation of this [trilateral] committee without preconditions"¹⁶⁶. Hungary's interpretation of this statement is incomprehensible:

"The words 'without preconditions' meant that Czechoslovakia would not comply either with the Hungarian or the EC conditions¹⁶⁷."

¹⁶¹ Slovak Memorial, Annex 103.

¹⁶² Slovakia rejects the self-serving account of these exchanges appearing in the Hungarian Memorial, starting at para. 3.152, which tries to justify the Hungarian Government's proposal that its Parliament adopt a Resolution calling for the termination of the 1977 Treaty. See, Hungarian Memorial, para. 3.155. Furthermore, contrary to the impression given by Hungary, approaches to the EC were made by both sides. See, Slovak Memorial, para. 4.92, et seq.

¹⁶³ Hungarian Memorial, para. 3.157.

¹⁶⁴ As the Czechoslovak Prime Minister pointed out in his letter of 23 April 1992, "there is still time ... until the damming of the Danube (... until October 31, 1992), for resolving disputed questions on the basis of the agreement of both sides". Slovak Memorial, Annex 108.

¹⁶⁵ Ibid.

¹⁶⁶ Quoted at Hungarian Memorial, para. 3.159.

¹⁶⁷ Ibid., para. 3.160.

This is clearly nonsense and Hungary makes no attempt to justify such an interpretation.

5.99 Three points must be made. First, Hungary misquotes the Czechoslovak Prime Minister, for his statement continued: "... without any preliminary preconditions and is ready to take into consideration [the trilateral committee's] conclusions and recommendations within further decision-making concerning the problem of the construction of the [G/N Project]"¹⁶⁸. Second, there was no link between the Hungarian and the EC conditions. Hungary's ultimatum related to Czechoslovakia ceasing work on Czechoslovak territory in relation to its implementation of the Gabčíkovo section. The EC conditions, contained in a letter of 13 April 1992, required 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"¹⁶⁹.

5.100 Third, it must be stressed that Czechoslovakia was both willing and able to meet this EC condition. Hungary's Memorial neglects to point out that attached to the Czechoslovak Prime Minister's letter of 23 April was a draft invitation to the EC requesting the formation of the trilateral committee. This invitation, which Czechoslovakia was ready to sign, contained the undertaking that each side would "not take any steps which could hinder the implementation of measures recommended by the [EC] Committee of experts and jointly agreed upon". This, in fact, went further than the EC's condition as it provided for the actual implementation of the EC recommendations. This reflected Czechoslovakia's earlier commitment, by letter of 23 January 1992, "to stop work on the provisional solution and continue the construction [only] upon agreement" if the results of the trilateral committee and test monitoring should so demand¹⁷⁰.

5.101 As to the commitment not to "prejudice possible actions to be undertaken on the basis of the report's findings", Czechoslovakia committed itself in the draft invitation not to dam the Danube before 31 October 1992, leaving ample time for the Committee to issue its findings¹⁷¹. And the undertaking not to commence work in the riverbed before July 1992 still held good. By contrast, Hungary had resolved to terminate the 1977 Treaty. This action clearly prejudiced actions to be taken under the report, which was entirely

¹⁶⁸ Slovak Memorial, Annex 108 (at p. 312 - emphasis added).

¹⁶⁹ Ibid., Annex 107.

¹⁷⁰ See, para. 5.94, above.

¹⁷¹ It will be remembered that the EC reports of 31 October 1992 and 23 November 1992 were prepared in a matter of days and weeks, respectively.

likely to find that the 1977 Treaty and the G/N Project, far from being environmentally disastrous, offered real ecological benefits.

H. Hungary's Announcement of its Purported Termination

5.102 The decision of the Hungarian Government to terminate the 1977 Treaty was made on 7 May 1992 by Resolution No. 3190/1992¹⁷², albeit that it was to take effect on 25 May 1992. It stated unconditionally in its first paragraph that the Hungarian Government "unilaterally terminates" the Treaty effective 25 May 1992.

5.103 The Resolution, which was not made public at the time but which immediately came to the attention of the Czechoslovak Government, did not offer "one last chance for reaching a compromise to avoid termination", as the Hungarian Memorial suggests¹⁷³. The Resolution purported to terminate the Treaty but, at the same time, it instructed Minister Mádl to hold negotiations without delay with his counterpart at the intergovernmental talks, the Slovak Prime Minister, with the participation of the EC representatives in Prague and Budapest. These negotiations were to be directed solely at:

"... [Czechoslovakia's] acceptance of a temporary solution for a six month suspension of work on the C variation for the purpose of beginning trilateral examinations during which the parties, on the basis of recommendations, may render a decision in joint agreement with regard to the Interstate dispute."

The Resolution stipulated expressly that if these negotiations were not "successful", then Mr. Mádl was to "disclose" by Note Verbale, not later than 20 May, Hungary's termination of the Treaty"¹⁷⁴.

5.104 It is clear from the Resolution what the real situation was. Hungary had purported to terminate the Treaty. But this would not be "disclosed" immediately because then there would be no hope at all of stopping work on Variant "C". Thus, formal notification to Czechoslovakia of the termination was to be withheld while these negotiations (whose time limit was set at 20 May, five days before the date the purported termination was to take effect) were underway, unless they failed before that time.

¹⁷² Hungarian Memorial, Vol. 4, Annex 157.

¹⁷³ Ibid., Vol. 1, para. 3.161. The quotation from the Resolution does not match at all the text of the document found at Vol. 4, Annex 157 (not Annex 15, as fn. 194 wrongly indicates).

¹⁷⁴ Emphasis added.

5.105 It was not exactly a forthright procedure for negotiations, but in any event they were to be directed only at getting Czechoslovakia to agree to suspend work on Variant "C" for six months - if that was agreed, the negotiations would be "successful". This is because a six month delay would effectively be a delay for a further full year; for a six month suspension by Czechoslovakia of Variant "C" would have lasted until at least 7 November 1992, making it too late to carry out the preparatory work to dam the Danube in 1992.

5.106 The Resolution left unstated when Czechoslovakia was to be informed officially of the termination of the Treaty, but it must be presumed it would have been on or about 25 May, when this part of the Resolution took effect. Since it was a unilateral act, official notification of Czechoslovakia was not a prerequisite to its effectiveness. It is clear that this was not in the least a last chance offer to avoid termination of the Treaty. Notification of termination was to be withheld while Hungary attempted to succeed in delaying, for the fourth year in a row, the damming of the Danube. Hungary obviously believed that if it notified Czechoslovakia of its 7 May Resolution, this would harden Czechoslovakia's determination to proceed with Variant "C". There is nothing to suggest that, had Czechoslovakia agreed to such a postponement, Hungary would have revoked its purported termination.

5.107 In the event, the Hungarian stratagem failed, for the Czechoslovak Government learned immediately of the Declaration and asked for, and received, a copy of its text. The Slovak Government responded in a Declaration of 11 May 1992¹⁷⁵. But, in forwarding this Declaration to Hungarian Minister Mádl, the Slovak Prime Minister indicated his continued desire to negotiate, and he took one further step towards compromise. He stated:

"I would like to stress my readiness to discuss with you a possible change in

¹⁷⁵ Resolution No. 329, Slovak Memorial, Annex 111. This Declaration shows that the interpretation set out above is exactly what the Czechoslovak Government understood Hungary's Declaration of 7 May to mean.

the date of damming the Danube riverbed by the Czecho-Slovak side¹⁷⁶ . "

5.108 Nevertheless, Hungary evidently felt it had what it needed to justify the announcement of its unilateral decision purportedly to terminate the 1977 Treaty, made by the Hungarian Prime Minister on 19 May 1992. With this last act in the series of unilateral acts of Hungary, the story of consultation and negotiation to attempt to resolve the dispute between the Treaty parties under the Treaty ends. What remains to be dealt with concerns the putting of the Gabčíkovo section of the Project into operation, to which the next Chapter now turns.

5.109 However, it is necessary to mention here one final event: the meeting proposed by the EC to be held in Vienna on 18 May, the day before Hungary's 19 May announcement¹⁷⁷ . This was to have been an important, last-minute, trilateral attempt to find a basis for resolving the dispute before it was too late. But Hungary failed to attend the meeting.

5.110 The Hungarian Memorial asserts that Hungary failed to appear because it never received an invitation¹⁷⁸ . This is demonstrably untrue: the EC invited both parties by telephone, and the forthcoming event was widely covered in the Hungarian mass-media at the time. On 16 May, a Saturday, the Hungarian Ambassador was informed at a meeting at the Czechoslovak Foreign Ministry of the broad mandate of Czechoslovakia's delegation to attend the Vienna meeting on 18 May¹⁷⁹ . This final episode again illustrates Hungary's unwillingness to negotiate a settlement of the dispute except on its own terms - the termination of the 1977 Treaty. Coming just one day before Hungary's planned announcement of its purported termination of the Treaty, already decided in its 7 May Resolution, the Vienna meeting must have been seen as an embarrassment for Hungary.

5.111 The account in the press of the 15 May meeting stated that the Czechoslovak Ministry of Foreign Affairs issued a statement that day saying that at the

¹⁷⁶ Ibid. letter of 11 May 1992, Hungary has introduced a unilateral statement of Mr. Mádl alleging that the Slovak Prime Minister in a telephone conversation on 11 May rejected further negotiations. Hungarian Memorial, para. 3.163 and Vol. 4, Annex 158. According to the record available, Slovakia understands that the Slovak Prime Minister, during a telephone conversation with Mr. Mádl, on 8 May, declined to accept the proposal that talks be scheduled for 13 May; due to the intervening holidays on 9 and 10 May, it was not possible for him to make the necessary preparations. However, in his 11 May letter just referred to, contrary to Hungary's contention, the Slovak Prime Minister specifically invited Mr. Mádl to meet again to discuss "all the topical questions" concerning the construction and operation of the G/N Project, but insisting that it was "inappropriate to limit the subject of the negotiations in advance by setting preliminary conditions". In this letter, he indicated that the Czechoslovak Plenipotentiary has been given instructions to prepare materials necessary for the proposed trilateral expert talks.

¹⁷⁷ See, Slovak Memorial, para. 4.93.

¹⁷⁸ Hungarian Memorial, para. 3.171.

¹⁷⁹ See, Magyar Hírlap, 18 May 1992, reporting on this 15 May meeting, Annex 13, hereto.

forthcoming Vienna meeting "the Czechoslovak side would be prepared to discuss all questions"; and it indicated that the following day (Sunday) a Hungarian Government Communiqué was issued stating Hungary's readiness to participate in the meeting¹⁸⁰. The same press account goes on to indicate that the Hungarian Government was unwilling to accept to be bound by the results of the trilateral commission.

5.112 The principal events covered by this Chapter are set out in Illus. No. CM-2, allowing a comparison to be made between Hungary's decisions and actions to abandon the Project and those of Czechoslovakia in regard to Variant "C". Such a comparison confirms the conclusions reached in this Chapter and reveals how unrelated Hungary's unilateral acts were to the decisions and actions of Czechoslovakia as to Variant "C" during this period up to Hungary's purported termination of the 1977 Treaty.

180

Ibid.

**CHRONOLOGY OF DECISIONS AND ACTIONS
(MAY 1989-MAY 1992)**

| | HUNGARY | CZECHOSLOVAKIA (Variant "C") | HUNGARY | CZECHOSLOVAKIA (Variant "C") |
|-------------|---|---|----------------|---|
| 1989 | <p>13 May. Work unilaterally suspended at Nagymaros</p> <p>20 July. Work unilaterally suspended at Dunakiliti</p> <p>Sept. Hardi report lays down strategy for termination of G/N Project</p> <p>27 Oct. Nagymaros unilaterally abandoned</p> <p>Oct.-Nov. Damming of Danube unilaterally prevented</p> | <p>21-22 and 31 Aug. Possibility of provisional solution first mentioned as a recourse; studies of alternative variants begun</p> | 1991 | <p>13-14 Feb. Details of Variants discussed at meeting of Hungarian and Czechoslovak Academies of Sciences</p> <p>25 July. Government Resolution approves start of financial and logistical planning for Variant "C"</p> <p>Nov. First construction begun to reduce reservoir size - does not affect flow of Danube</p> <p>12 Dec. Decision to proceed to put Variant "C" in its entirety into operation</p> <p>18 Dec. Offer not to affect flow of Danube before end of June 1992, when proposed trilateral commission's work was scheduled to end</p> |
| 1990 | <p>10 Jan. Negotiations unilaterally halted; Czechoslovakia informed that all construction work on Project to be stopped</p> <p>6 March. Unilateral decision to stop for an indefinite period all Project construction work and terminate all contracts</p> <p>End of June. All contracts terminated and Project effectively unilaterally abandoned</p> | | 1991 | <p>16 April. Parliament Resolution expressly limits negotiating authority of Government to the objective of terminating the Treaty</p> <p>15 July. Rejection of Czechoslovak proposal that alternative Variants be submitted to a trilateral commission</p> <p>27 Aug. Refusal of Czechoslovak invitation to submit Hungary's Variant proposals to a trilateral commission</p> <p>Oct.-Nov. Damming of Danube unilaterally prevented for third year</p> <p>2 Dec. 10-day ultimatum to Czechoslovakia to stop all work on Project as a pre-condition of appointment of a trilateral commission</p> <p>23 Dec. Prospects of appointing a trilateral commission abruptly ended</p> |
| | <p>Oct.-Nov. Damming of Danube unilaterally prevented for a second year</p> <p>20 Dec. Government Resolution to start negotiations to terminate 1977 Treaty</p> | <p>5 Sept. Hungarian Environmental Minister briefed on different Variants being considered by Czechoslovakia; Hungary begins to study these Variants.</p> | 1992 | <p>23 Jan. Calls again for appointment of trilateral commission; extends undertaking - will stop work on Variant "C" if study and test operation subsequently confirm alleged negative ecological effects</p> <p>7 May. Government Resolution to terminate 1977 Treaty</p> <p>18 May. Failure by Hungary to attend trilateral meeting with EC in Brussels</p> <p>19 May. Announcement of purported termination of 1977 Treaty</p> |

CHAPTER VI. THE PERFORMANCE OF THE TREATY: THE PUTTING INTO OPERATION OF THE GABCIKOVO SECTION OF THE G/N PROJECT THROUGH VARIANT "C"

SECTION I. Introduction; Variant "C" Only Began to Affect the Flow of the Danube Five Months After Hungary's Termination Notice

6.01 This Chapter turns to the events following Hungary's series of breaches of the 1977 Treaty, and its purported termination of the Treaty, up until the start of the damming of the Danube on 24 October 1992.

6.02 The 19 May 1992 letter of the Prime Minister of Hungary, one of the group of documents on that day announcing and attempting to justify Hungary's notice of termination of the Treaty, blamed this action principally on Czechoslovakia's supposed "fait accompli during the negotiations" by continuing work on Variant "C"¹. Similarly, the Hungarian Memorial contends that this was "the main reason for terminating the 1977 Treaty"². In so doing, Hungary paradoxically turns the sole means available to Czechoslovakia to implement the 1977 Treaty into an excuse for its purported termination of the Treaty.

6.03 But surely Variant "C" is not to blame for this attempt by Hungary to terminate the Treaty any more than it could have provided a reasonable justification for Hungary's series of unilateral acts culminating in the 19 May announcement. As has just been shown in Chapter V, and by the Chronological Table (at the end of that Chapter), long before a decision had been taken to proceed with Variant "C" - on 25 July 1991 - all of Hungary's unilateral acts in breach of the Treaty had already occurred. And the initial approval of Variant "C" on 25 July 1991 was directed to financing and logistics, as Hungary was informed on 30

¹ Hungarian Memorial, Vol. 4, Annex 82.

² Ibid., Vol. 1, para. 3.165.

The remaining events covered in Chapter 3 of the Hungarian Memorial up to early 1994, concern a number of subjects dealt with elsewhere in this Counter-Memorial. Although Slovakia has many exceptions, corrections and objections to make concerning this analysis by Hungary - and therefore enters a general denial here as to this material, making it clear that its failure to address a particular argument or contention or a particular fact or piece of alleged evidence does not connote Slovakia's acceptance - it will focus attention next on Variant "C", since this forms part of the story of Hungary's breaches of the 1977 Treaty, which forced Czechoslovakia into taking provisional measures.

Since Hungary's contentions regarding Variant "C" are spread widely through other Chapters - e.g., ibid., paras. 6.73, 6.79 and 6.81; large portions of Chapter 7; paras. 8.11 and 8.16; and large portions of Chapters 9 and 10 - they will be dealt with together here.

July and again on 27 August 1991³. The decision to implement Variant "C" had not yet been taken, and the limited actions that had been taken were obviously reversible.

6.04 Chapter V also demonstrates that preparatory construction work on the Gabčíkovo section had not been started before November 1991. As discussed there, this work in no way affected the flow of the Danube, nor indeed with the implementation of the Treaty Project⁴; and on 18 December 1991, Czechoslovakia offered not to proceed with any work on the riverbed of the Danube until July 1992, after the scheduled completion of the proposed trilateral committee's work - an undertaking that Czechoslovakia enlarged on 23 January 1992⁵.

6.05 Throughout the Hungarian Memorial these facts are incorrectly reported, giving the erroneous impression that construction work under Variant "C" began in April 1991 and that the decision to proceed with Variant "C" had been taken almost 10 years earlier⁶. As Czechoslovakia made clear during the exchanges and the meetings of 1991-1992 (and as was well known by all the Hungarian scientists and engineers), it was only when the actual damming of the Danube began that any real effect on the flow of the Danube would occur. This would have been so had the damming taken place at Dunakiliti as envisaged under the Treaty.

6.06 The damming work actually commenced on 24 October 1992, after three years' delay in this operation caused by Hungary's unilateral acts. This was more than five months after Hungary announced its purported termination of the 1977 Treaty, which it then blamed - and now continues to blame - on Variant "C". But in May 1992, the implementation of Variant "C" had not yet started to have any impact on Hungarian territory, and in any event remained provisional⁷. Had Hungary agreed at the time, in lieu of adopting its termination resolution, to resume its Treaty obligations, a provisional solution would have been unnecessary.

³ See, paras. 5.80-5.81, above.

⁴ See, para. 5.88, above.

⁵ See, paras. 5.90-5.91 and 5.94, above.

⁶ See, for example, Hungarian Memorial, paras. 7.64-7.65 and paras. 8.15 and 9.40. At para. 7.119, Hungary wrongly asserts that "the decision to divert had been envisaged and prepared even before 1989, at least as early as 1982". See, in this regard, paras. 4.15-4.16, above.

⁷ That Variant "C" was not the real reason for Hungary's decision to terminate is further evidenced by the fact that, up to the very end, Variant "C" was publicly referred to as a "paper tiger" by Hungarian officials. The Hungarian people were not told that Variant "C" was considered by the Hungarian Government to be so critical that its implementation would lead to termination of the Treaty - rather it was the G/N Project itself that continued to be held up to ridicule and attack. But, at the international level, Variant "C" was a convenient explanation for a termination decision already taken.

SECTION 2. The Availability to Hungary of Adequate Information Concerning Variant "C"

6.07 Both Memorials provide evidence that the Hungarian Government was well informed concerning the essential elements of Variant "C" long before Hungary's termination announcement of 19 May 1992, let alone before the start of the damming of the Danube on 24 October 1992⁸. Only when the dispute had entered its post-negotiation phase, following Hungary's actions of 19 May 1992, did Hungary make an issue over the alleged absence of information concerning Variant "C"⁹. The statement in the Hungarian Memorial that "Czechoslovakia ... persistently refused to communicate appropriate technical data" on Variant "C"¹⁰ is shown to be untrue by the evidence.

6.08 For the Hungarian Government had been kept informed of Variant "C" and was well aware of its essential details, and Czechoslovakia was ready to give full details concerning all variants under study to the trilateral committee proposed by Czechoslovakia during the 1991 negotiations, as the evidence discussed above in Chapter V shows¹¹. In this regard, it should be noted that after Hungary's unilateral notice of termination of the 1977 Treaty, the Hungarian Government also acted officially to abolish the post of Hungarian

⁸ See, e.g., para. 5.68, above, where it is shown that, as early as 5 September 1990, the Hungarian Environmental Minister had been given a full briefing and that even before then, in July 1990, the Hungarian Government had directed that the alternative variants being considered by Czechoslovakia be evaluated during the following six months.

⁹ Shortly after being notified of Czechoslovakia's decision of 12 December 1991 to proceed with putting Variant "C" into operation, the Hungarian Prime Minister did state that they had "yet to receive information with regard to the results and aims of this construction". See, letter of 19 December 1991; Hungarian Memorial, Vol. 4, Annex 70. But the information Hungary sought was intended by Czechoslovakia to be given to the trilateral committee whose appointment Hungary had just thwarted. Czechoslovakia's response to this letter was to urge that the preconditions preventing the appointment of the committee be dropped by Hungary so as to allow Variant "C" and other alternatives to be examined by the committee.

¹⁰ Hungarian Memorial, para. 7.12, citing paras. 3.122, 3.144 and 9.18-9.42 in support. But there is no evidence cited in any of these paragraphs to support this statement.

¹¹ See, para. 5.68 and fn. 109, above, referring to a press interview with Mr. Mádl, the responsible Hungarian Minister for the Project at the time. During this interview he mentioned Project site visits made during the summer of 1991 by himself and other Hungarian officials, and in the same interview he is quoted as saying:

"...when the Hungarian Government learned about the Variant, it understood immediately what was happening The Hungarian Government was conscious from the very beginning [as to] what was being prepared and it undertook all steps ... to prevent it." (Magyar Nemzet, 8 October 1992, Interview with Ferenc Mádl, Annex 13, hereto.)

Plenipotentiary¹² and had put a stop to all participation in the Joint Operating Group, the key mechanisms established to run the Project under the 1977 Treaty. So the normal channels of exchange of information at the technical level ceased to exist.

6.09 Following Hungary's announcement of 19 May 1992, there was no constructive purpose to be served by supplementing the adequate information either already provided to Hungary concerning Variant "C" or otherwise available to it. Hungary's requests were only intended to serve its interests in litigating rather than settling these issues, a move Hungary in fact commenced on 22 October 1992, with the filing of Hungary's Application to the Court.

6.10 The Hungarian Memorial repeats over and over again false accusations concerning the provision of information on Variant "C" - supplementing these false accusations with other misleading comments. Thus:

- "Czechoslovakia ... persistently refused to communicate appropriate technical data on Variant C"¹³;
- "When the Czechoslovak Government proceeded with Variant C it failed ... to transmit detailed information foreseen by the law, let alone to consult with the Hungarian Government and affected Hungarian residents"¹⁴;
- "When the Czechoslovak Government decided to order the execution of Variant C, the only notification it gave to the Hungarian Government was an announcement made by its representative during ... the meeting of the [Joint Boundary Waters Commission] in March 1991"¹⁵;
- "Czechoslovakia was ... unwilling to communicate the details of its unilateral plans. For example, at meetings of the Joint Operating Group,

¹² See, Annex 14, hereto, a Hungarian Note Verbale of 16 September 1992 informing Czechoslovakia of Hungary's abolition of the post. But it is evident that long before, that is after the appointment of the new Hungarian Plenipotentiary following the change in Government in Hungary in May 1990, the Hungarian Plenipotentiary no longer fulfilled the functions previously performed. See, Magyar Hirlap, 9 October 1991, Annex 12, hereto.

¹³ Hungarian Memorial, para. 7.12 (and fn. 12), referring in turn to other paragraphs that neither contain, nor refer to, evidence to support the contention. Nor does Hungary define what would have been considered "appropriate".

¹⁴ Ibid., para. 7.61.

¹⁵ Ibid., para. 7.64. But as already pointed out, Czechoslovakia had made no such decision at that time. See, para. 6.03, above.

even as late as June 1991, Czechoslovakia still opposed Hungary's wish for precise information on the technical characteristics of Variant C, which was already being built¹⁶ .

Finally, in Chapter 8 of the Hungarian Memorial, where the period from the start of damming of the Danube in 24 October to 31 December 1992 is dealt with, Czechoslovakia is similarly accused of refusing to provide Hungary - and even the EC - with "appropriate information about Variant "C"¹⁷, again citing no evidentiary proof. By that time the details of Variant "C" were known to the whole world - but not to Hungary, it is contended in Hungary's Memorial¹⁸ .

6.11 This is clearly not so. Hungary knew all the technical details that had been in the original plan of the G/N Project and were now, because of its own failure to perform, to be put into operation by means of Variant "C". It thus had complete technical information on:

- The Gabčikovo step (although no longer able to operate at peak flow);
- The bypass canal;
- The reservoir (although it knew that its proportions would be smaller as it had to be limited to Czechoslovak territory since the damming of the Danube was forced to move upstream from Dunakiliti); and
- The measures for restoring the side arms on both sides of the Danube.

6.12 The question therefore arises as to what information Hungary lacked. As to the reservoir, it could witness the construction - and the evidence shows that Minister

¹⁶ Hungarian Memorial, para. 7.108. But Variant "C" was far from "already being built": even the initial approval of financing and logistical planning had not yet been given. See, paras. 5.78-5.80, above. In attempting to support the above contention, the Hungarian Memorial makes a cross-reference to a footnote that contains the following statement: "Hungary repeatedly requested the detailed description of the structure of Variant C at various negotiations"; it goes on to say that at a meeting of the Joint Operating Group in June 1991 the Czechoslovak delegate "stated that he was not empowered to provide these descriptions"; but no documentary or other evidentiary proof is supplied by Hungary, only a renvoi to the paragraph containing the original contention. It hardly needs to be pointed out that the original contention has no validity. The only other example given in the same footnote concerns requests by Hungary in December 1993 to aid it in preparing its Memorial.

¹⁷ Hungarian Memorial, para. 8.20.

¹⁸ See, ibid., Vol. 5 (Part I), Annex 12, a report issued in September 1992 by Equipe Cousteau indicating that, certainly well before the date the report was issued, this environmental group had been given the details of Variant "C" bearing on questions concerning the environment.

Mádl and other Hungarian officials did visit the site¹⁹. Thus Hungary was hardly unaware as to the exact reduced dimensions of the reservoir. With regard to the Čunovo weir, Hungary also knew that this would have all the functions of Dunakiliti and that it would be located on Czechoslovak territory close to the Hungarian border. This had been made clear earlier when Hungary had been informed of the several variants under consideration by Hungary²⁰. Hence, it was only the exact technical details of the Čunovo weir and the precise location of the damming that were not apparent from a walk along the Hungarian border or from the original G/N Project design. However, the latter information had been disclosed to the Danube Commission on 5 August 1992, prior to the start of the damming operation²¹. In addition, the evidence shows that in July 1990, the Hungarian Government ordered a study to be conducted of the different variants being considered by Czechoslovakia²², indicating that they must have known the details of these variants. And before the damming operation commenced, the brochures appearing at Annex 37 to the Slovak Memorial were in wide circulation. They contained detailed information about Variant "C", including a technical drawing of the Čunovo weir; and these brochures also described in detail the differences between this provisional solution and the original Project.

6.13 Hungary had been offered the chance to discuss all variants²³, including what was eventually to be known as Variant "C" - but Hungary repeatedly refused to proceed with the appointment of the tripartite commission proposed by Czechoslovakia. The work of this commission was to have been focused on Variant "C", and it was intended that the Czechoslovak representatives at that meeting would further address the technical aspects. But Hungary prevented this meeting from taking place, thus ensuring that it did not receive any information about Variant "C" that it felt it did not have. Later, the three EC expert groups, assigned to study Czechoslovakia's actions in damming the Danube, on which each Party had a representative, were provided with very detailed information concerning Variant "C"

¹⁹ See, para. 5.68, above.

²⁰ Ibid.

²¹ See, Slovak Memorial, para. 4.84.

²² See, para. 5.68, above.

²³ See, para. 5.75, et seq., above.

and its effects²⁴. And the EC never complained of a lack of information concerning Variant "C".

6.14 Quite simply, Hungary has invented a point of dispute. It was informed about the technical details of Variant "C". By frustrating the appointment of the proposed trilateral commission, Hungary deliberately deprived itself of the opportunity to participate in technical discussions of all aspects of Variant "C", inter alia which this commission was to have conducted.

SECTION 3. The Final Stages of Damming the Danube (Starting on 24 October 1992)

6.15 The events following the total collapse of bilateral negotiations to settle the dispute - when Hungary announced its purported termination of the 1977 Treaty on 19 May 1992 - were focused to a large degree on the imminent prospect of the damming of the Danube at the end of October. An urgent change in approach in its hitherto uncompromising negotiating tactics was required by Hungary to prevent this happening. Thus, for the first time, in its Prime Minister's letter of 28 September 1992, the Hungarian Government agreed, in response to a proposal by the Czechoslovak Prime Minister of 23 September, to the establishment of a tripartite expert commission (the third party being the EC) with no pre-conditions imposed²⁵. Although Hungary's Memorial quotes from this letter, it ignores this key commitment by Hungary's Prime Minister:

"I accept therefore your recommendation that the specialists of our governments prepare, as soon as possible, a joint request to be sent to the European Communities Commission and reach an understanding concerning the mandate of the planned trilateral committee²⁶."

This apparent step forward led to a meeting between the two parties on 13 October²⁷.

²⁴ See, Slovak Memorial, Annex 12 and 20, the reports, respectively, of the EC Working Group issued on 23 November 1992, and of the EC Fact Finding Mission issued on 31 October 1992. See, also, Slovak Memorial, para. 4.98.

²⁵ Slovak Memorial, para. 4.94, and Annexes 121 and 123. In the 23 September letter, Czechoslovakia urged pursuing trilateral negotiations rather than stopping these efforts and attempting to negotiate a special agreement to refer the dispute to the Court. In this regard, the sole question Hungary proposed submitting to the Court concerned Variant "C". See, Slovak Memorial, paras. 4.85-4.89.

²⁶ Ibid., Annex 123. It was, however, implicit in this letter that the tripartite commission's mandate would be restricted to Variant "C" and would not involve an explanation of the entire G/N Project.

²⁷ Ibid., para. 4.94. Compare, Hungarian Memorial, para. 3.181. Neither Party has submitted any record of this meeting, and Slovakia knows of none.

6.16 But this seeming flexibility in Hungary's position soon proved to be illusory. At the 13 October meeting, as both Parties accept, Hungary reimposed its preconditions to the appointment of the tripartite commission that Czechoslovakia must suspend at once all work on the Gabčůkovo section of the Project. Czechoslovakia once again rejected this condition. It also became evident that what Hungary was attempting to do was to narrow the dispute to the question of Variant "C".

6.17 Just as the Hungarian Memorial fails to mention the seemingly positive step towards a resolution of the dispute taken in the Hungarian Prime Minister's letter of 28 September 1992, so it fails to comment on this reversal in position. However, it alleges that the Czechoslovak Deputy Foreign Minister stated at the meeting that the conditions established for EC participation²⁸ could no longer be applied since "the work on Variant C had been completed"²⁹. There is no evidence offered to support this contention, and it is difficult to believe that such an incorrect statement was made by Czechoslovakia. Work on Variant "C" could by no means have been complete, given that the final operation to dam the Danube had not by then been started. Furthermore, it was Czechoslovakia's view that proceeding with Variant "C" did not conflict with the conditions of EC participation and, in particular, Czechoslovakia insisted that the EC report's findings would not be prejudiced by so proceeding³⁰. Czechoslovakia had given a concrete commitment to this effect as early as January 1992:

"Provided these [the trilateral commission's] conclusions and results of monitoring the test operation of the Gabčůkovo 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 agreement³¹."

Furthermore, Variant "C" had always been regarded by Czechoslovakia to be a reversible measure³², preventing neither the implementation of the EC findings nor the completion of the Treaty Project. So Slovakia rejects Hungary's unsupported account of the meeting.

²⁸ See, para. 5.99, above.

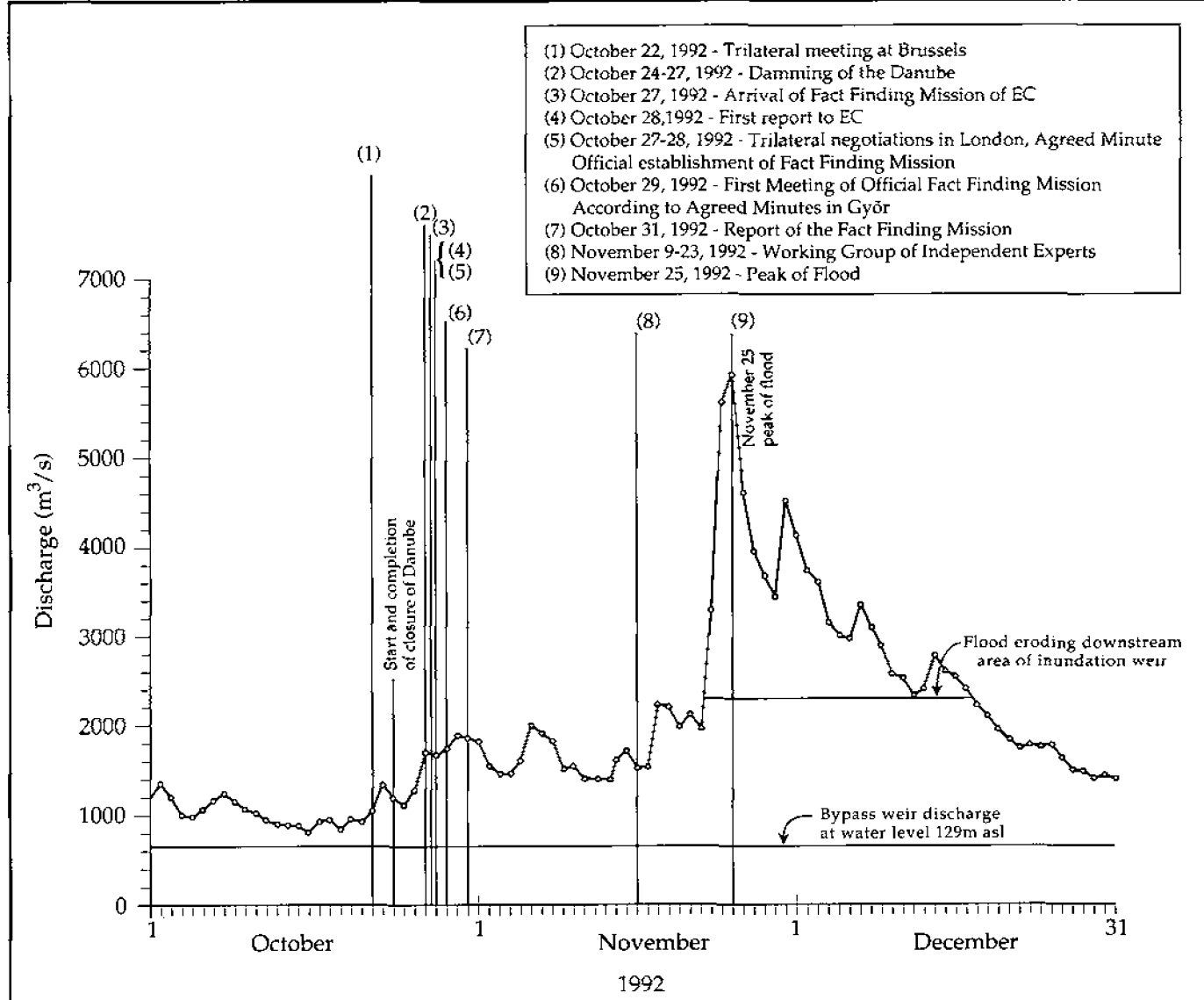
²⁹ Hungarian Memorial, para. 3.181.

³⁰ See, paras. 5.99-5.101, above. Czechoslovakia rejected Hungary's interpretation that such a condition was a prerequisite of EC participation, as set out in Mr. Andriessen's letter of 13 April 1992, and so informed Hungary on 23 April 1992. A copy of the 23 April letter was sent to Mr. Andriessen, and no disagreement with Czechoslovakia's interpretation was ever received from the EC. See, Slovak Memorial, para. 4.80.

³¹ Slovak Memorial, Annex 102.

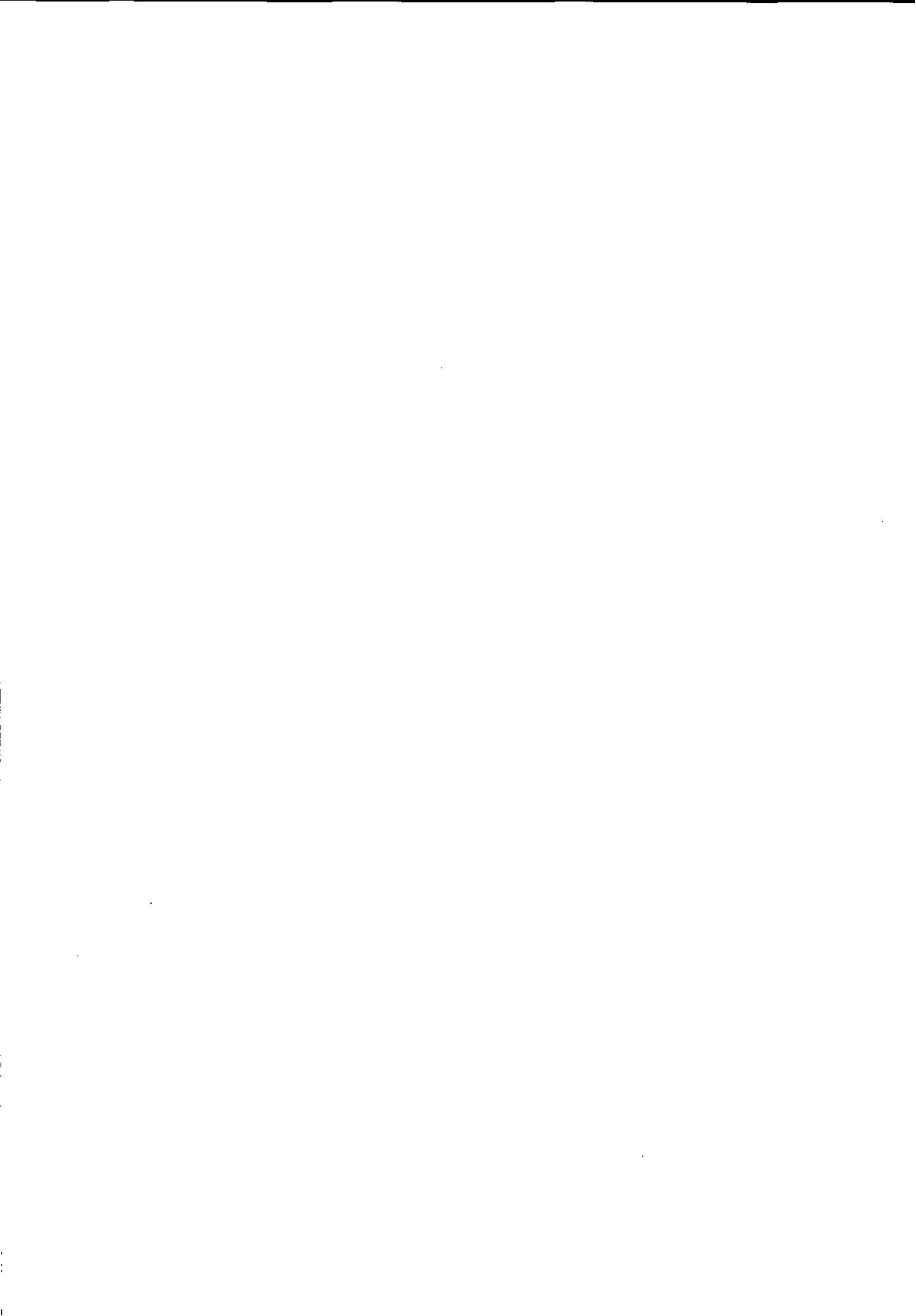
³² A fact confirmed by the EC Fact Finding Mission's report of 31 October 1992. Slovak Memorial, Annex 20.

- (1) October 22, 1992 - Trilateral meeting at Brussels
- (2) October 24-27, 1992 - Damming of the Danube
- (3) October 27, 1992 - Arrival of Fact Finding Mission of EC
- (4) October 28, 1992 - First report to EC
- (5) October 27-28, 1992 - Trilateral negotiations in London, Agreed Minute
Official establishment of Fact Finding Mission
- (6) October 29, 1992 - First Meeting of Official Fact Finding Mission
According to Agreed Minutes in Győr
- (7) October 31, 1992 - Report of the Fact Finding Mission
- (8) November 9-23, 1992 - Working Group of Independent Experts
- (9) November 25, 1992 - Peak of Flood



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-3



6.18 According to the Hungarian Memorial, work on Variant "C" was accelerated thereafter, and it describes the activities involved in the damming of the Danube in such a way as to suggest sudden, frantic activity, mentioning rumours of 60 armoured vehicles being moved by the Czechoslovak military to the vicinity of the work³³. If there were such rumours of military activity, they were untrue. This dramatic account by Hungary leaves out the essential fact that in order to dam the Danube only a few days in the year were available. Thus, starting on 24 October 1992, a very intensive effort was required to complete the work in time without subsequent risk to the facilities due to hydrological warnings that had been received of approaching flood conditions. Illus. No. CM-3 shows graphically the events occurring during the months of October through December in relation to the flood that had started and was to peak on 25 November 1992. Czechoslovakia completed the work in four days; but the work activity that took place was for the large part what would have been required had the damming of the Danube taken place at Dunakiliti as originally agreed by the Treaty parties, although made more urgent by the approaching flood conditions.

6.19 The critical period for the damming operation in 1992 was during the end of October. The work of the tripartite commission intended to be appointed at the 13 October meeting could have been completed by the end of October. Had Hungary not prevented the appointment of the tripartite commission, to which it had initially - and unconditionally - agreed on 28 September, the work of the commission would have been completed before the start of the damming operation was technically necessary; and Czechoslovakia made the firm commitment in the Aide-Mémoire tabled at the subsequent meeting in Brussels on 22 October, this time with EC participation - when a final attempt was made to reach agreement on the appointment of the commission - that:

"...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 riverbed³⁴."

6.20 The Hungarian Memorial fails to mention or annex the Aide-Mémoire,

³³ Hungarian Memorial, para. 3.182.

³⁴ Slovak Memorial, Annex 126.

and it then confuses it with another document, Czechoslovakia's Note Verbale of 21 October³⁵. Thus, Hungary's account of what happened at the 22 October meeting omits the three key points: first, Czechoslovakia's attempt to reach a compromise by its commitment not to divert the flow of the Danube until the commission's work had been completed was rejected by Hungary; second, Hungary refused to proceed with the appointment of the commission unless the same precondition it had insisted on since 1990 - to stop all work on the Gabčíkovo section of the Project - was met by Czechoslovakia; and third, Hungary continued to attempt to shift negotiations from considering all works under the Project to merely the question of proceeding with Variant "C".

6.21 Slovakia rejects the inaccurate account of these events in the Hungarian Memorial, which obscures Hungary's refusal to consider any compromise solution such as Czechoslovakia had advanced, thus once again frustrating the appointment of a tripartite commission. It was in these circumstances that Czechoslovakia proceeded to take the first step under Variant "C" to alter the flow of the Danube by damming the Danube.

SECTION 4. Conclusions

6.22 The facts recounted in this Chapter, and in Chapter V, lead to the following conclusions concerning Variant "C":

- Czechoslovakia was prepared to negotiate the choice of Variant for the Gabčíkovo section of the Project, in spite of Hungary's unilateral refusal to proceed with the Project, and had proposed that the negotiations be undertaken by a tripartite commission;
- Hungary had ample information regarding Variant "C";
- By blocking the appointment of the proposed tripartite commission, Hungary rejected the opportunity offered by Czechoslovakia to negotiate issues relating to Variant "C" or to offer some alternative solution;
- Until the very end, until hydrological warnings made any further delay impossible without losing another year, Czechoslovakia continued to

³⁵ Hungarian Memorial, paras. 3.184-3.185, and Vol. 4, Annex 101. The offer of Czechoslovakia in the 21 October Note Verbale to hold up the closure of the Danube until 2 November could not be carried out because of the hydrological warnings that required the damming operation, a matter of extreme urgency. See, para. 6.18, above.

postpone the final damming of the Danube in order to reach a compromise solution, but Hungary adamantly insisted on its precondition that all work be stopped on the Gabčíkovo section before any tripartite negotiations could take place;

- Variant "C" did not start to have any impact on Hungary's interests until the damming operation started on 24 October 1992 - an event that took place six months after Hungary's termination announcement of 19 May 1992 and over three years after Hungary began its unilateral actions to stop work on the G/N Project.

PART III

DEFECTS IN HUNGARY'S ANALYSIS OF ENVIRONMENTAL RISKS AND DAMAGE

CHAPTER VII. HUNGARY'S ALLEGATIONS AS TO WATER QUALITY, ENVIRONMENTAL AND OTHER RISKS RELATING TO THE G/N PROJECT

7.01 Before examining Hungary's various allegations relating to risks arising from the implementation of the G/N Project¹, it is important to focus on one key point: Hungary's decision to suspend its performance at Nagymaros, just as its later abandonment of works and purported termination of the 1977 Treaty, was not initiated by the discovery of new research data. Nor was either this decision, or those that followed, inspired by an expert and scientific re-examination of pre-existing data. As Hungary has admitted in its own Memorial, its alleged concern about water quality, environmental or other risks was not accompanied by Hungarian research into the possible impacts. Thus, in a review of Hungarian studies relating to the G/N Project, it is asserted:

"Between 1989 and the summer of 1992 there were no investigations of appropriate detail into the problems related to the hydropower scheme and neither were joint projects carried out²."

7.02 This admission is in direct contradiction to the Hungarian 1992 Declaration, which purported to show that Hungary's decision to terminate was based on new scientific research and analysis³. In the light of this contradiction, Slovakia examines closely in Section 1 below the basis on which Hungary's evocations of environmental risk are alleged to have been founded, taking into account the newly admitted lack of detailed study. It will be shown that, whereas Hungary's breaches of the 1977 Treaty caused Czechoslovakia specific and immediate harm, the only justifications advanced for such breaches were unsubstantiated opinions of the possibility of future harm that even Hungary did not seriously believe in.

¹ These allegations are contained in Chapter 5 of Hungary's Memorial, in the three appendices thereto and in the two volumes of "Scientific Reports" that constitute Volume 5 of Hungary's annexes. It is obviously necessary to deal with these allegations at some length.

² See, App. 3 to the Hungarian Memorial, Vol. 1, p. 408. Apps. 1-3 to the Hungarian Memorial appear to be studies specially commissioned during the preparation of this case, which have been given a special status by being appended to the main text of Hungary's Memorial.

³ Ibid., Vol. 4, Annex 82 (at p. 168). After alleging "the lack of investigations that would have been fundamental during the planning and early constructions", it is claimed: "In the recent past, admittedly with a long time lost, the Hungarian Party started the assessment of environmental conditions..." As to the first claim, see, Chapter IV, above. The second is patently untrue as shown in para. 7.01, above.

Further, it is shown that although Hungary did, in the summer of 1989, commission an independent review of the Project and of the mass of scientific data collated by that date, it has wholly ignored the findings of that review - the Bechtel report - both at the time of its completion and in its current Memorial. The only logical explanation for this is that the Bechtel report did not support Hungary's claims that the Project is environmentally unsustainable⁴.

7.03 In Section 2, Slovakia will examine the all-important issue of water quality - from the point of view of surface and ground water, the alleged threat of risks to drinking water supplies, and, finally the issue of water pollution. Hungary's allegations of risk to the environment, agriculture and forestry will be considered in Section 3. The analysis of the evidence carried out in this Section shows that there is no support for Hungary's claims that first Nagymaros, and then Dunakiliti, could not be made operable because of the threat posed to the environment. Sections 4 and 5 will examine, respectively, the issues of seismic stability and navigation.

7.04 In Section 6, Slovakia turns to Hungary's approach to the benefits of the Project in terms of flood protection. It is noted that not only does Hungary wholly ignore such benefits in its Memorial, but also it takes no account of the Project region's susceptibility to flooding and the fact that one of the key aims of the Project, as reflected in Article 13 of the 1977 Treaty, was to ensure safe and effective flood control for the first time. Finally, in Section 7, the basis and relevance of Hungary's claim that the Project was not economically viable will be examined.

SECTION 1. The Absence of Proper Scientific Evidence Supplied By Hungary

A. Hungary's So-Called Evidence is an Amalgam of Scientifically Superficial and Politically Oriented Assertion

7.05 It has already been seen in Chapter IV above that the mass of scientific data collected and the studies carried out by Hungary prior to 1989 supported the overall validity of the Project in terms of its environmental impact. Nonetheless, it is now alleged by Hungary in its Memorial that "a re-consideration of the Project" was inspired by the "well-documented concerns over the likely environmental impact of the Barrage System" contained in the Ecologia report of March 1989⁵. In its justification of its decision to suspend

⁴ Neither the fact of the commissioning of this report, nor the report itself, were known to Czechoslovakia at the time.

⁵ Hungarian Memorial, Vol. 1, para. 3.74. This report is referred to as the "Massachusetts study" in the Slovak Memorial. See, also, para. 5.05, *et seq.*, above.

performance, Hungary also relies on the subsequent Ecologia report of May 1989 and the Hardi report of September 1989⁶.

7.06 These three reports share a common fundamental flaw: regardless of Hungary's claims, they were not scientific reports prepared by experts - at least insofar as expertise in the consideration of environmental aspects is concerned. This is clear, first, from the contents of each report. Not one is supported by scientific data. The first Ecologia report has only one reference and no annexes - in other words, it is a non-scientific paper comprised largely of a series of assertions. It is simply incorrect to state that this report contains "well-documented concerns". The same is true of the second Ecologia report and the Hardi report.

7.07 Second, as pointed out in Chapter V above, Ecologia is seemingly an unknown organisation and the personnel identified as having drawn up its reports have not been shown to have a real expertise in the field of environmental impact assessment. The authors of the first Ecologia report described its compilation as a "tremendous learning experience"⁷. This is tantamount to an acknowledgement by the authors of their deficiency in the field of environmental study. In fact, the eleven authors identified in the report comprised a lawyer, experts in the fields of economic development, landscape architecture and urban and regional planning and only two persons with credentials relating specifically to the environment⁸. Yet, the Hungarian Memorial claims that Hungary's re-consideration of the Project relied heavily on the findings of this non-expert group (so far as scientific questions of environmental impact were concerned).

7.08 The second Ecologia report does not even appear to have aimed at all at establishing a reliable assessment of environmental impact: the only section on the environment is an excerpt from the March report. The new material is largely in the form of an engineering evaluation (that in fact praises the excellence of construction work on the Project) and sections on economic issues and visual impact, together with a proposal for a Danube Bend national heritage park⁹. The report concludes with a section entitled "Needed Legal Documents and Economic Data", which shows the apparent focus of the report:

⁶ Hungarian Memorial, para. 3.95. See also, para. 5.29, et seq., above. In terms of the alleged environmental impact of Variant "C", Hungary relies particularly on various reports prepared by environmental groups: Equipe Cousteau and the World Wildlife Fund (in particular its Statement of December 1993). These reports are considered in Chapter VIII, below.

⁷ See, Slovak Memorial, para. 2.23, fn. 12.

⁸ Hungarian Memorial, Vol. 5 (Part D), Annex 5 (at p. 34).

⁹ See, para. 5.05, et seq., above.

"In order to complete a quantitative economic evaluation of program options, we need access to the data on project costs and benefits previously requested on several occasions. Furthermore, no meaningful legal analysis can be performed in the absence of complete official copies of all relevant treaties, international agreements, and contracts¹⁰."

The compilers of the report appeared to have had no interest in evaluating scientific data; their avowed aims were "to complete a quantitative economic evaluation" - to carry out a "legal analysis", not to conduct an impartial review of environmental issues.

7.09 And, it must be noted, Hungary did not at the time attempt to justify its actions by these reports, i.e., at no stage were they made available to Czechoslovakia (and only to Slovakia, with Hungary's Memorial). This is significant: if the studies had contained compelling scientific justifications for suspending the works, it is inconceivable that their findings would not have been communicated to Czechoslovakia in support of Hungary's actions. This did not happen, for it was immediately apparent that the reports lacked real substance. As early as March 1989, a series of comments prepared by Hungary's own National Hydraulic Company (OVIBER) showed that the first report contained "misunderstandings or misinterpretations" and that its central recommendations had already been taken into account¹¹.

7.10 The Hardi report is more overtly a document prepared for entirely internal purposes, although it purports to be "an expert review concerning the ecological, environmental, technological, economic, international and legal issues" of the G/N Project¹². The stress here appears to be on ecological and environmental issues; yet this is scarcely reflected in the make up of the 10 man committee that produced the report. The head of the team, Mr. Hardi, was a professor in political sciences. The committee members included the then managing director of the Hungarian National Bank, together with representatives from the World Economic Research Institute, the Hungarian University of Economics and the

¹⁰ Hungarian Memorial, Vol. 5 (Part I), Annex 6 (at p. 133).

¹¹ Hungary has chosen to ignore this fact: that in the same month as its preparation, the first Ecologia report was shown by Hungarian scientists at OVIBER to be seriously flawed - a fact that, it may also be presumed, was conveniently ignored by the Government of the time. See, Slovak Memorial, para. 2.24, *et seq.* An extract from this document prepared by OVIBER formed Annex 25 to the Slovak Memorial. Because the Hungarian Memorial has wholly ignored this important document, it is now annexed in full as Annex 15.

¹² Hungarian Memorial, Vol. 5 (Part I), Annex 8. The cover page of the English translation of the report annexed contains this description.

international law department of Budapest University¹³. Clearly this was not a group of "independent Hungarian scientists" as claimed in the Hungarian Memorial¹⁴. Rather, it was a senior policy group formed for the purpose of guiding the Hungarian Government in reaching political decisions regarding the G/N Project.

7.11 Appendix 3 to the Hungarian Memorial states that the report "did not prove, in terms of detailed research results, the magnitude or probability of the mentioned potential hazards and damages"¹⁵. A reading of the report, as annexed in translation by Hungary, reveals that it could not have been further from a scientific study. Although the wholly unsubstantiated and dramatic assertions contained in the report are offered by Hungary as a reliable reference in Chapter V of its Memorial, the report's principal area of concern is the economic viability of the Project - from the point of view, solely, of Hungary¹⁶. And, like the two Ecologia reports (and the OVIBER criticism of the first Ecologia report), this report was never furnished to Czechoslovakia in support of Hungary's contentions.

7.12 Hungary's treatment of the economic viability of the Project is considered briefly in Section 7 below. At this point, Slovakia only notes that economics would not occupy a central place in a scientific environmental study and that Hungary consistently mischaracterises the Hardi report. The report concludes that "the complete cancellation of the Nagymaros Project would become economically more favourable in the long run". This was the real basis for Hungary's decision to abandon Nagymaros, communicated to Czechoslovakia just one month after the report's completion¹⁷.

B. The Truly Scientific Environmental Studies of the G/N Project Commissioned By Hungary After May 1989

7.13 In spite of the above, in its 1992 Declaration, Hungary asserted that it had supplied copious expert evidence of environmental risk:

¹³ The remainder comprised two engineers, a geophysicist and two biologists. Of these two biologists, one was a member of the Danube Circle, a group that in 1989 was overtly counter to the Project's completion. The second, Mr. Vida, was noted as being Head of the Department of Genetics at Budapest University.

¹⁴ Hungarian Memorial, para. 6.44. See, also, para. 5.29, *et seq.*, above.

¹⁵ Hungarian Memorial, App. 3, p. 406.

¹⁶ *Ibid.*, Vol. 5 (Part I), Annex 8 (at pp. 157-158).

¹⁷ *Ibid.* (at p. 162).

"The Hungarian Party presented numerous expert opinions on the serious environmental risks and irreversible damages arising from the operation of the Gabčíkovo Nagymaros Barrage System¹⁸."

This is simply untrue¹⁹. Given that Hungary has now admitted in its Memorial that between 1989 and the summer of 1992 it failed to carry out "investigations of appropriate detail into the problems related to the hydropower scheme"²⁰, the question arises as to what studies were completed by Hungary (apart from those briefly considered above).

7.14 The Hungarian Memorial, in its Appendix 3, centres on and quotes from two assessments of the then existing studies prepared in early 1992. The first was prepared by an ad hoc committee of the Hungarian Academy of Sciences and the second by the same Academy's Committee of Water Management Sciences. What is striking is that the two separate committees allegedly came to radically different conclusions - according to the ad hoc committee the Project would result in the pollution of the Žitný Ostrov/Szigetköz aquifer, while the view of the more obviously specialised Committee of Water Management Sciences was wholly to the contrary.

7.15 Neither of these assessments forms part of the "numerous expert opinions" said to have been furnished to Czechoslovakia; nor is either now annexed to Hungary's Memorial. Once again, allegedly scientific reports have been kept secret and, in this case, it appears that Hungary has taken some care to hide the existence of serious disagreements between its different expert bodies. This is very important in terms of an evaluation of Hungary's multiple allegations of environmental risk.

7.16 The same must be said of the independent report that Hungary commissioned Bechtel Environmental Incorporated to prepare in July 1989²¹. The Bechtel report appears to have been the sole scientific, objective report commissioned by Hungary after its suspension of works at Nagymaros and was presumably commissioned so that Hungary could benefit from an impartial and expert assessment of environmental risks. Yet neither in its

¹⁸ Ibid., Vol. 4, Annex 82 (at p. 167).

¹⁹ Even on the following page of the Declaration, it is admitted that these "numerous expert opinions" amount to no more than three "summaries" of environmental risk. Ibid. (at p. 168).

²⁰ See, para. 7.01, above.

²¹ Hungarian Memorial, App. 3, pp. 409-413.

1992 Declaration nor in its Memorial does Hungary discuss this report²², and it was never officially communicated to Czechoslovakia. It seems fair to conclude that Hungary has ignored the Bechtel report because its findings did not at all support the allegations of a threat of serious environmental risk on which Hungary publicly based its unilateral decisions to stop work on the Project.

7.17 The findings of Bechtel have already been examined in the Slovak Memorial²³. The purpose here is simply to underline the fact that at the date of the Bechtel report's issuance in February 1990, that is just before the Hungarian Prime Minister's notification of the unilateral decision to postpone indefinitely all works on the Project (6 March 1990), the best evidence available did not support any such postponement - at least on environmental grounds.

7.18 If the Bechtel report is compared, in terms of evidentiary value, with the Ecologia study of March 1989, the following must be noted: while the Ecologia study was not compiled by a team expert in the field of environmental assessment, Bechtel, at the time of its report, had produced approximately sixty environmental impact reports and assessments, a detailed list being annexed to its report²⁴; the Bechtel report is far more detailed than the Ecologia study; and while the Ecologia study makes reference to only one scientific report, Bechtel annexes a three-page list of its references²⁵.

7.19 Moreover, the brief of the compilers of the Bechtel report was most specific. Unlike the Ecologia studies, the Bechtel report was not concerned with economic, legal and political issues. As stated in its introduction, Bechtel's terms of reference were limited to environmental impact assessment:

"Bechtel has independently reviewed the Gabčikovo (Bös) - Nagymaros (GNB) Project in terms of potential environmental impacts, operational

²² The Bechtel report is given only a brief reference in the Hungarian Memorial at fn. 60 to para. 5.57 and at App. 3, p. 407.

²³ Slovak Memorial, para. 2.84, et seq.

²⁴ Annex 16, hereto.

²⁵ Ibid. Further details of Bechtel's environmental experience with specific reference to 10 hydroelectric projects are also contained in this Annex.

considerations, and currently planned mitigation measures²⁶."

To this end, not only did Bechtel review the previous studies of VIZITERV (the Hungarian Consultancy Company for Water Engineering), but it examined new data and analyses first hand - for example, in relation to Project impact on biological resources: "Therefore, a more detailed impact analysis was made for biology than that provided by VIZITERV²⁷."

7.20 Put simply, the Bechtel report was a detailed, professional study prepared by independent scientists who were experts in the relevant fields. It is a fact of major significance in this case that, both at the time of its completion in 1990 and in the current Hungarian Memorial, this report has been ignored by Hungary, who commissioned it - just as the critical comments of OVIBER on the first Ecologia report were ignored²⁸.

7.21 In the Sections that follow, Slovakia examines in greater detail the allegations of environmental and other risks made by Hungary alongside the evidence that is offered in support. In doing so, it is hampered by the fact that, even five years after the original suspension of works at Nagymaros, Hungary is not sufficiently sure of its position in relation to the alleged damage and risks associated with the Project to provide anything other than "an interim report" in its Memorial²⁹. As it will not be until the Hungarian Counter-Memorial that Slovakia receives the "more detailed report on the scientific issues", the analysis below will necessarily have to be updated at a later stage.

SECTION 2. Water Quality

7.22 The first of Hungary's claims to be addressed is the allegation of an immediate deterioration of water quality as a result of Project operation, for it is on this allegation that Hungary has placed the greatest emphasis, whether in the 1992 Declaration or

²⁶ Slovak Memorial, Annex 27 (at p. 199). It continues: "Our approach to the environmental review was a multidisciplinary effort, which focused on:

- Defining significant impacts associated with the project that warrant evaluation and mitigation
- Determining additional baseline data needed for impact definition
- Reviewing planned mitigations to reduce impacts to insignificant levels or to enhance project benefits
- Identifying additional investigation measures that could reduce impacts further
- Assessing effectiveness of the monitoring program by defining preoperational environmental conditions and operational conditions."

²⁷ Ibid. (at p. 202).

²⁸ See, para. 7.09, above.

²⁹ Hungarian Memorial, para. 5.09.

in its Memorial³⁰. In its consideration of Slovakia's comments below, it will be recalled that the status of this sector of the Danube (and its related ecosystems) prior to the damming in October 1992 had greatly changed from that of the original meandering river with its associated branch system and floodplain - due, principally, to the canalisation of the river, *i.e.*, the reinforcement of its banks and its isolation from the branch system and floodplain³¹. As pointed out in Slovakia's Memorial, the correct implementation of the G/N Project was to lead (and through the limited implementation of Variant "C" is leading) to a positive improvement in this situation, particularly in respect to water quality³².

A. Hungary's "General" Allegations as to Water Quality

7.23 Hungary introduces the allegations in its Memorial relating to water quality deterioration with a series of general remarks, which are both confusing and misleading³³. In the first of these remarks, great emphasis is placed on the Project region's water reserves. Such emphasis is not misplaced - the water reserves are of great importance.

7.24 But it is important to locate the reserves precisely, not simply to refer to "the largest bank filtered water resource in Europe", which confuses the Žitný Ostrov/Szigetköz aquifer and the Budapest supply wells downstream of Nagymaros. The two are in no way connected, as is abundantly clear from Illus. No. CM-4 appearing at paragraph 7.65 below. It is only the second of these that is truly a bank-filtered resource, with wells located only a few metres away from the Danube, and truly of importance to Hungary in terms of drinking water supply.

7.25 The upstream wells are wholly different in nature because they tap water in the aquifer, not water direct from the river. They are therefore located at a greater distance from the Danube and its tributaries and tap water from a greater depth as also shown by Illus. No. CM-4. Moreover, the upstream aquifer is chiefly exploited by Slovakia, not Hungary, and its waters are supplied to the inhabitants of Bratislava, not Budapest. Insofar as the Project could have an impact on the two separate supplies, such impacts are wholly different and are therefore considered separately below.

³⁰ See, ibid., paras. 5.11 and 5.31, et seq.

³¹ See, Slovak Memorial, para. 1.25, et seq.

³² The 1985 Opinion of the Hungarian Academy of Sciences also came to a similar conclusion. See, para. 4.30, above.

³³ Hungarian Memorial, paras. 5.31 - 5.38.

7.26 Hungary's second contention is that there are no barrage systems similar to the G/N System, which is portrayed as a unique experiment. This is confusing, for just two paragraphs later Hungary makes a reference to "similar schemes"³⁴. In fact, the G/N Project is only unique insofar as all hydroelectric projects have an individual character, responding to the width, flowrate and geological conditions of the river in question. But the construction of a bypass canal is quite usual. The 10 French and Franco-German schemes on the Rhine are all canal schemes, four of these being on the Grand Canal d'Alsace which is 52 km long, i.e., twice the length of the G/N Project canal³⁵.

7.27 In relation to this contention - and also in relation to Hungary's third contention that the design of the G/N System is antiquated - it is gradually being accepted that the G/N Project has evolved to provide appropriate, contemporary solutions to the ecological problems arising from water impoundment. Unlike other older projects on the Rhine and the Danube, the floodplain and branch system of the river is preserved and restored. In upstream projects on the Danube, the river has been canalised, inevitably leading to the gradual drying up of the old floodplain and some local deterioration in ground water quality³⁶. But, with the G/N Project, the bypass canal has been built outside of the floodplain (Illus. No. CM-8 appearing at paragraph 7.86 below)³⁷. It has therefore destroyed less of the original environment and has played a key role in the current revitalisation of the side arm area³⁸.

7.28 As part of the G/N Project design (on both sides of the Danube) and equally as part of Variant "C" (so far on the Slovak side only due to Hungary's failure to participate), the floodplain is supplied with fresh water continuously and can also be inundated from time to time. The process of drying up, therefore, has been reversed. As discussed in

³⁴ Compare, ibid., paras. 5.34 and 5.36.

³⁵ See, Annex 17, hereto.

³⁶ See, also, Hungary's example relating to the impoundment of the Moselle, Hungarian Memorial, para. 5.36.

³⁷ Illus. No. CM-8 is based on Map No. 1 to the Hungarian Memorial and shows how the floodplain is limited by inundation dykes, built during the last century, outside of which the bypass canal was built. Agricultural land, not floodplain, was taken to build the bypass canal. It is accepted that the creation of the reservoir meant the removal of an area of cultivated forest. But such deforestation was completed on both Hungarian and Slovak territory before Hungary suspended works on the Project. Moreover, the forest in question would, in any event, have had to be removed as a necessary step towards preventing flood waters backing up to Bratislava.

³⁸ A further difference resulting from the diversion of the Danube's waters between the old channel and the bypass canal is that more water is devoted to protecting the river ecosystems and less to hydroelectricity production. Currently, only 72.5% of the discharge at Bratislava is used for electricity production, which is less than for other projects on the Danube or the Rhine.

Chapter VIII below, this central fact has been noted by critics of the original Project. For example, in a recent article in New Scientist, Fred Pearce, author of "The Dammed" (a book critical of large dams), reviewed the latest developments in Hungary's claim, "with support from the WWF and others" that " Gabčikovo would dry out a large forested wetland beside this stretch of the Danube and either empty or pollute important underground water sources fed by the river"³⁹. Mr. Pearce notes, however:

"The project seems to be having the opposite effect to that claimed by the WWF as recently as last month [June 1994]. It is reviving an almost desiccated wetland and recharging underground water supplies."

In a follow up article, Mr. Pearce summarised Hungary's catastrophe theories and concluded:

"Yet, the ecological disaster hasn't happened. The forest is still flooded, the trees healthier than for years, and the wells mostly clean and full"⁴⁰."

Further, the original braided nature of the river can now be recreated by interconnection between the side arms and the old Danube channel. This was proposed as part of the G/N Project and is currently projected as part of the implementation of Variant "C", as is the addition of riverbed material. Once these are achieved, the Project will have come close to reproducing the original floodplain balance, *i.e.*, as it was in the 1950s, not as it was in 1992. As the EC Working Group report of 23 November 1992 explained, the transfer of navigation into the bypass canal creates "a unique situation ... [i]nitiating by technical measures the river and the floodplain can develop more naturally"⁴¹."

7.29 Hungary's fourth contention is that the disadvantages of impounding water, such as potential eutrophication and adverse impacts on ground water, outweigh to a large extent the advantages. In other words, it suggests, dams are generally not to be favoured. But the Court will be aware that hundreds of new dams are commissioned each year, and that its role in this case cannot be to weigh the general advantages and disadvantages of water impoundment. In addressing the particular circumstances of this case, the simple fact is that there is no evidence that the Project will have adverse impacts on ground water quality, either immediately or in the future.

³⁹ New Scientist, 16 July 1994, Annex 18. The Dammed is published by Bodley Head, London, 1992.

⁴⁰ New Scientist, 17 September 1994, Annex 19. See, Illus. No. CM-18 appearing after para. 11.79, below.

⁴¹ See, Slovak Memorial, para. 1.19.

7.30 Hungary's final general remark relates to the pollution in the Danube which, it is argued, will inevitably lead to a polluted reservoir. This is now considered below.

**B. Surface and Ground Water Quality:
Risks of Eutrophication and Colmatation**

7.31 According to Hungary's Memorial : "The organic content of the Danube water and its nutrient state render it unfit for retention in a reservoir⁴²." This will no doubt come as a shock to Germany and Austria, which have, respectively, 26 and 10 hydroelectric power plants on the Danube, each with its own reservoir⁴³.

7.32 Hungary's approach to risk assessment reveals a lack of balance and scientific appreciation. Moreover, in giving the impression that the water quality in the Danube is unequivocally "very bad", Hungary contradicts the data given by its own representative to the EC Working Group of Independent Experts. The report of 2 November 1993 notes:

"The Danube water quality can according to Hungarian classification be categorized as 1st class regarding the majority of the components, as 2nd class regarding Ph, orthophosphate, nitrate, BOD and 3rd class with regard to bacteria and some heavily degradable substances such as e.g. hydrocarbons⁴⁴."

Although in terms of its bacterial content the quality of water in the Danube has improved considerably since the 1970s - due, in particular, to the construction of treatment plants at Vienna and Bratislava - the content of nutrients remains high. This does not mean that the water quality is bad overall and, in fact, the EC Working Group report of 2 November 1993 noted that the Danube water here is "well-suited for river bank infiltration" due to its high oxygen content⁴⁵.

Eutrophication

7.33 However, because the water is rich in nutrients, there is always a

⁴² Hungarian Memorial, para. 5.41.

⁴³ Slovak Memorial, para. 1.13.

⁴⁴ EC Working Group report of 2 November 1993, Slovak Memorial, Annex 19 (emphasis added).

⁴⁵ Ibid.

potential for "eutrophication"⁴⁶, a phenomenon which Hungary treats in its Memorial as if it was unknown to the Project's designers and as if its very mention spelt the doom of the Dunakiliti-Hrušov reservoir. Only in certain conditions does eutrophication become problematic - this is where an excess of nutrients develops, leading to a lack of dissolved oxygen in the water and to unfavourable conditions for underwater life. But the existence of nutrients in the water and the growth of algae in shallow sections of a reservoir are not in themselves necessarily harmful⁴⁷.

7.34 Where nutrient rich water is retained in a reservoir, the risk of harmful eutrophication is potentially increased by reduced water velocity. But this fact is well known, as are the means of limiting any increased risk: after all, the risk of harmful eutrophication exists at any given moment for the G/N Project as it does for any other dam project on the Danube, the Rhine, or on any other river for that matter. Thus, eutrophication, like colmatation (discussed below), is a phenomenon that has been extensively studied throughout the world and in relation to this particular Project. It is an affront to the scientists of both Treaty parties that the Hungarian Memorial should now write about these textbook subjects as if they had previously been ignored by the experts of both countries.

7.35 For example, Hungary's 1985 Environmental Impact Assessment specifically considered eutrophication issues. It found that - due to the large surface area of the Dunakiliti-Hrušov reservoir, the wave movement of the water, and the aeration effect of passing through the turbines - the impact of the reduced velocity in the reservoir and the resultant potential for eutrophication would be counteracted:

"The retention time in the Dunakiliti-Hrušov reservoir and in the power channel will grow (it will pass this section in a longer period), so the sedimentation can speed up at certain places. Both effects reduce the oxygen demand. The larger surface area, the waviness, the production of the biomass of the water body increase the oxygen uptake, the slower velocity reduce it at the same time. The

⁴⁶ "Eutrophication is the gradual increase in the concentration of phosphorus, nitrogen, and other plant nutrients in an aging aquatic ecosystem such as a lake. The productivity or fertility of such an ecosystem increases as the amount of organic material that can be broken down into nutrients increases. This material enters the ecosystem primarily by runoff from land that carries debris and products of the reproduction and death of terrestrial organisms. Blooms, or great concentrations of algae and microscopic organisms, often develop on the surface, preventing the light penetration and oxygen absorption necessary for underwater life. Cultural eutrophication occurs when man speeds up the aging process by allowing excessive amounts of nutrients in such forms as sewage, detergents, and fertilizers to enter the ecosystem." Encyclopedia Britannica, Vol. 4, p. 611, 15th ed., Chicago, 1987.

⁴⁷ The impacts of eutrophication are not solely negative. Weed infestation in the correct places and at the correct level can lead to water purification and an increase in primary production. Water in a reservoir should not be sterile; by means of monitoring and careful management of eutrophication the equilibrium between aquatic producers and consumers can be optimised.

decomposition processes of the organic materials increase the oxygen consumption. Letting the water through the turbines contributes to the oxygen uptake and aeration. Thus the effects in the reservoir compensate each other⁴⁸."

7.36 In support of its current portrayal of an unambiguous deterioration of water quality due to eutrophication, Hungary cites the EC Working Group report of 23 November 1992⁴⁹. It is alleged that this report predicted eutrophication in the downstream part of the reservoir, threatening the water supply for Bratislava located at Šamorín, the threat becoming serious with the following growth season (of 1993). But the report's words have been taken out of context. The report predicts that the problem of eutrophication might arise if 95% of the Danube's water (as demanded by Hungary) were channeled back into the old riverbed. This might result from the fact that the velocity in the downstream part of the reservoir would be radically reduced because virtually all the flow would be passing over the Čunovo weir - inevitably leading to a large body of nearly calm water, in which harmful eutrophication could indeed occur⁵⁰.

7.37 But it was not reasonable to envisage such a situation as arising under the G/N Project. It was planned that the main part of the flow would be through the bypass canal and thus a sufficient velocity would be maintained so that harmful eutrophication would not occur. This has been shown by the actual practice. The summer of 1993 was relatively dry and hot - hence, it was well-suited to the commencement of eutrophication. But conditions did not evolve so as to adversely affect the quality of the water in the reservoir. Indeed, the EC Working Group report of 2 November 1993 specifically confirmed that there had been no significant changes in surface water quality⁵¹. This is particularly significant because, as the report notes, surface water quality is carefully monitored by the Parties and, since 1993, the reservoir has been continually monitored for the development of eutrophication conditions:

"The amount of surface water quality data in the area is comprehensive...The routine programme has been carried out in Slovakia for 10 - 30 years (depending on parameter) and in Hungary for 10 - 30 years (depending on parameter).

⁴⁸ Hungarian Memorial, Vol. 5 (Part I), Annex 4. See, also, the Bechtel report, para. 7.16, et seq., above.

⁴⁹ Hungarian Memorial, para. 5.44.

⁵⁰ Hungary uses the eutrophication risk argument only when it is convenient to do so. It has been more than happy to forget eutrophication risks and to argue that at least 1200 m³/s should be channeled into the old Danube in the TWMR negotiations, which would inevitably lead to harmful eutrophication conditions in the downstream section of the reservoir.

⁵¹ See, Slovak Memorial, para. 5.53.

In addition to the above network a program of surface water quality monitoring in the reservoir has been initiated in 1993. This monitoring comprises the key parameters for assessment of eutrophication conditions⁵²."

7.38 It must also be stressed that the issue of water quality in the reservoir was studied with care by the Treaty parties prior to the commencement of this dispute, and that the results of such studies were in turn reviewed technically in the Bechtel and HQI reports. 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 low⁵³.

7.39 Hungary also assumes that, due to Project implementation, eutrophication conditions would arise in the side arm system, which would no longer be "frequently flushed" as under "natural conditions"⁵⁴. This makes no sense. The "natural conditions" consisted of a nearly constant drought in the side arms. Thus, eutrophication was a serious problem in the side arm system before Project implementation as noted, inter alia, by the Hungarian Environmental Impact Assessment of 1985:

"In the present state the system of the tributaries in Szigetköz receives continuous freshwater supply only in case of water discharges exceeding 2500m³/s (55-70 days annually). In case the discharge is less than this - annually nearly 300 day - there are permanently stagnant water bodies, where eutrophication, sedimentation occurs⁵⁵."

In stagnant areas, the poor quality water infiltrated into parts of the underlying aquifer, leading to a deterioration in the water quality of this important resource. The planned impact of the Project was to solve this problem. As will be seen below, the limited implementation of the Project to date has shown how this problem can be successfully reversed.

⁵² Ibid., Annex 19 (at p. 347). It should be noted that one of the goals of the PHARE project, in which Hungary declined to participate, is to create a computer model to forecast and control eutrophication conditions in the reservoir. See, paras. 5.57-5.58, above.

⁵³ Slovak Memorial, para. 2.95, et seq.

⁵⁴ Hungarian Memorial, para. 5.52.

⁵⁵ Ibid., Vol. 5 (Part I), Annex 4. See, also, the EC Working Group report of 23 November 1992, recording the situation in the side arms prior to the implementation of Variant "C", ibid., (Part II), Annex 14. "The water quality of the side branches differs from that of the main Danube channel due to the much lower velocities and periods and places with stagnant water. In drier years a negative trend has been observed with high pH, high organic matter and low oxygen contents."

Colmatation

7.40 The quality of the water downstream of the Dunakiliti weir would naturally be related to the quality in the reservoir. Hungary argues however that there would be additional water quality problems in the old Danube caused by sedimentation problems and the clogging of the river bottom (colmatation) - both due in turn to the lower velocity of flow, which, it is alleged, would be aggravated by the planned construction of underwater weirs.

7.41 Colmatation is indeed an important phenomenon because it could theoretically create an impermeable barrier between the river water and the underlying aquifer, which relies on water infiltrating through the Danube riverbed and its side arms for recharging (and, as planned, water infiltrating from parts of the reservoir)⁵⁶. If the riverbed were to become clogged with fine sediment and clay particles, this recharge would be impeded. But, again, this phenomenon had been given careful study by the Treaty parties and by independent experts. In terms of recent studies, the EC Working Group report of 1 December 1993 predicted for the old Danube that "during some events sedimentation of fine material will take place", but also that "fine material may be washed away during flood events"⁵⁷. The impact would be an equilibrium, and, hence: "No major net erosion and sedimentation in the Old Danube." This conclusion was, of course, made in relation to Variant "C". It is nonetheless valid for the G/N Project, for the potential problem is the same.

7.42 A brief review of the actual situation in the Slovak side arms explains the basis for the Working Group's statement. Due to the construction of a water intake at Dobrohošť⁵⁸, flow into the Slovak side arm system has been greatly increased, and the result of this increased flow is, as the EC Working Group report of 2 November 1993 noted, that "the running water has removed the fine material, previously clogging the bed of these river arms"⁵⁹. This is particularly important because, as Hungary points out in its Memorial, "[a]lluvial floodplains, and especially alluvial forests, create a most efficient system of water purification and recycling of organic matter"⁶⁰. Prior to the implementation of the recharge, this natural purification system was not functioning and the side arms, characterised by areas of

⁵⁶ Slovakia uses the aquifer as the main supply for Bratislava's water. The water pumped out is replaced naturally by means of water infiltrating from the reservoir, side arms and, as planned, from the Danube.

⁵⁷ Hungarian Memorial, Vol. 5 (Part II), Annex 19 (at pp. 782-783).

⁵⁸ See, Illus. No.CM-7, appearing at para. 7.84, below.

⁵⁹ Hungarian Memorial, Vol. 5 (Part II), Annex 18.

⁶⁰ Ibid., Vol. 1, para. 5.19.

stagnant water, were actually damaging ground water quality. This situation has been reversed in the Slovak side arms due to the implementation of the artificial recharge system⁶¹.

7.43 The EC Working Group report of 1 December 1993 predicted that good infiltration conditions would continue on the Slovak side due to the recharge. But, at the same time, it predicted that if the recharge of Hungarian side arms was not assured, poor conditions would continue due to the lack of water flow:

"The river bed in the main branches on the Slovakian side will continue to be free from mud, so that good infiltration conditions exist. The river bed in the main branches on the Hungarian side will continue to be clogged with fine material/mud and prevent significant infiltration to the ground water system⁶²."

Thus, where adequate water flow is assured - in this case, in the range of 30-70 m³/s - no colmatation problems will arise.

7.44 There is no evidence to support Hungary's claim that underwater weirs would lead to colmatation problems. The underwater weirs for the old Danube riverbed were designed under the Project to raise the water level so that water could flow into an upstream river branch and at the same time raise ground water levels in the immediate terrain⁶³. They would also slow down erosion of the riverbed. But velocity would not be so reduced as to lead to colmatation problems, especially as the G/N Project envisaged that flow in the old Danube would be increased periodically to 1,300 m³/s, with the specific aim of ensuring that the riverbed was kept clean of fine sediment that might impede infiltration. It will be noted that Hungary points to the beneficial impact of "the controlled addition of riverbed material"⁶⁴. But, the underwater weir is very similar both in substance and in effect to a natural ford or sandbank that would be created by the addition of riverbed material. The weirs

⁶¹ Ibid., Vol. 5 (Part II), Annex 18 (at p. 707): "By comparison of Fig. 6.5 and 6.6, which represent conditions before and after putting water to the side channels on the Slovakian floodplain, it is evident that a good hydraulic connection between the side channels and the ground water system has been established. Thus, a substantial ground water recharge takes place from the side channels resulting in up to 1.5 m increased ground water levels."

⁶² Ibid., Annex 19 (at pp. 782-783).

⁶³ See, Illus. No. CM-12, appearing at para. 8.11, below.

⁶⁴ Hungarian Memorial, para. 5.35.

are built up from stone and river gravel - the only difference is that they are not subject to erosion⁶⁵.

C. Drinking Water: the Non-Existent "Threat" to the Žitný Ostrov/Szigetköz Aquifer

7.45 According to the Hungarian Memorial, the eventual contamination of the vast aquifer underlying Žitný Ostrov and Szigetköz constitutes "one of the most serious risks of the impoundment"⁶⁶. It is later asserted that the deterioration of the aquifer is one of the "unavoidable results" of the Project⁶⁷. It was always a major concern of Czechoslovakia - and now Slovakia - to ensure that one of its essential water supplies is not damaged. The water of the aquifer is of enormous importance to Slovakia - far less so to Hungary. It is necessary that the Parties' respective interests in the drinking water supplies contained in the aquifer be placed in the proper perspective before reviewing the exhaustive research into the possibility of any threat to such supplies.

The Importance of the Aquifer

7.46 In order to boost its claim that an ecological state of necessity existed in 1992, Hungary has, in public, exaggerated the importance to it of the Žitný Ostrov/Szigetköz aquifer. To take one example, in its 1992 Declaration, Hungary describes the importance of its share of the aquifer with its "capacity of 1 million m³/day permanent drinking water supply - the average need of the Hungarian capital"⁶⁸. In fact, the capacity is 0.3 million m³/day, none of which is used to supply Budapest⁶⁹. And, in an internal paper produced in April 1992, that is just one month before the Declaration was issued, the Committee for Water Management Sciences of the Hungarian Academy of Sciences dismissed the importance of the aquifer, particularly in terms of it being a possible supply to Budapest. It noted:

⁶⁵ Further, as the EC Working Group has noted, the division of the Slovak side arms into eight separate regions separated by cascades has not led to colmatation problems. In fact, velocities have been sufficient to clean the river bottom and ensure good infiltration as noted at para. 7.42, above. There is no reason why underwater weirs, which similarly hold up water flow, should have a different effect.

⁶⁶ Hungarian Memorial, para. 5.43.

⁶⁷ Ibid., para. 10.22.

⁶⁸ Ibid., Vol. 4, Annex 82 (at p. 171).

⁶⁹ I. Nagy, Professor Emeritus of Budapest University, "Effect of the System of the Hydropower Projects Gabčikovo-Nagymaros on Subsurface Water Supplies of the Kisalföld Area and the Influence of Respective Cascades", Inžinierske Stavby, Vol. 42, 1994, No. 1, Annex 20.

"In this area less than 1% of the population of the country receives water supply from these resources [the aquifer]. The National Water Management Master Plan did not make any proposal for the long term utilization of this water resource, since exhausting of the Nation's drinking water resources is not expectable. The geographical location of the area renders, as a matter of course, the conveyance of water via water mains over long distances uneconomical⁷⁰."

Hungary's concern that this resource should not be contaminated is legitimate. But to link this concern to an imminent threat to Budapest's drinking water supplies is scientifically untenable and deliberately misleading of public opinion⁷¹.

7.47 By contrast, the aquifer is the major source of Bratislava's water supply; waterworks are located at Sihof, Šamorín, Kalinkovo, Rusovce and Gabčíkovo that tap around 7 m³/s of good quality water from the aquifer. It is scarcely likely that Slovakia would ignore any possible threat to the purity of this water resource.

7.48 Hungary nonetheless accuses the planners of the G/N System of having failed to consider the threat to this resource posed by the Project and alleges that Slovakia has more recently ignored warnings as to the existence of this threat⁷². The evidence does not support such allegations. From the very inception of the Project the ground waters of this region were carefully monitored with the aim of examining the inter-relationship between surface and ground water on the one hand and the underlying aquifer on the other. Various of the studies carried out by Hungary are even listed in Appendix 3 of its Memorial. By way of rebuttal of Hungary's accusations, it must be noted that as early as the 1950s the Project's planners were examining the hydrology of Szigetköz, as noted in the Geological Map Series of the Hungarian Geological Institute:

"This region can be referred to as the most accurately studied area in Hungary from the angle of hydrogeology. In the early 1950s eight series of ground-water observation wells were completed along the Danube between Rajka and Győr for preliminary studies concerning the Gabčíkovo-Nagymaros Water Dam Project and observed permanently up to the present day by VITUKI (Water Management and Research Institute) and by the Regional Water Management Offices⁷³."

⁷⁰ Hungarian Memorial, App. 3, p. 411 (emphasis added).

⁷¹ See, para. 7.65, et seq., below, and Illus. No. CM-4.

⁷² Hungarian Memorial, paras. 10.37-10.38.

⁷³ Annex 21, hereto (emphasis added).

The comment continues (further undermining Hungarian claims that environmental issues were effectively ignored in the political climate prevalent prior to 1989):

"Resumption of the construction of the dam in the 1980s prompted again to launch wide-ranging studies in Szigetköz⁷⁴."

7.49 The impact of the Project on water resources was no less extensively researched in Czechoslovakia and, in 1990, HQI was commissioned with a specific mandate to review the existing data and to examine public fears as to the impact of the Project on the aquifer⁷⁵. In a synthesis of its report (issued in December 1990, like the main report), HQI divided these fears into three subject areas: contamination by heavy metals; an excessive accumulation of organic matter (hydrocarbons) at the bottom of the reservoir; change in the chemical balance of the water in the aquifer. But this synthesis concluded that the risk was exaggerated:

"En fonction des considerations suivantes: qualité de l'eau du Danube, qualité de l'eau potable qui alimente la ville de Bratislava, qualité de l'eau actuelle de la plaine Žitný Ostrov et mesures de corrections proposées pour éviter le colmatage complet du réservoir, les craintes formulées nous semblent peu fondées et les risques du projet paraissent limités⁷⁶."

Translation:

"Due to the following considerations: the water quality of the Danube, the quality of the drinking water supplying Bratislava, the current quality of the water of the Žitný Ostrov plain and the corrective measures proposed to avoid the total colmatation of the reservoir, the fears formulated seem to us without real foundation and the risks of the Project seem limited."

⁷⁴ Ibid. As part of such studies, 213 10m deep boreholes were drilled in the region, together with 45 40m deep survey boreholes. It cannot be denied that the Project engendered a very careful study of ground water conditions and potential Project impact.

⁷⁵ The HQI report notes that: "des craintes spécifiques ont été formulées face au projet." Translation: "Specific fears had been formulated in face of the Project." It continues: "C'est afin de répondre à ces craintes que plusieurs études ont été entreprises dans le cadre du projet et c'est aussi dans ce contexte que certains objectifs de la mission d'HQI visent à donner une opinion extérieure et impartiale sur les résultats des études et sur les effets appréhendés du projet." Translation: "It is in order to respond to such fears that several studies have been carried out within the Project framework and it is also within this context that certain objectives of HQI's mission have been aimed at giving an external and impartial opinion on the results of studies and on the anticipated effects on the Project." Hungarian Memorial, Vol. 5 (Part I), Annex 9 (at p. 209).

⁷⁶ HQI, Rapport Synthèse, December 1990, Annex 22, hereto, at pp. 8-9. See, also, the main report, Hungarian Memorial, Vol. 5 (Part I), Annex 9 (at p. 242).

7.50 The evidentiary value of the external and impartial opinion given by HQI has been recognised in the Hungarian Memorial, to which the HQI report was annexed in full. But HQI's assessment does not support Hungary's claim that the aquifer would be contaminated. Nor indeed does the assessment in Hungary's own commissioned report, the Bechtel report. This predicted an improvement in the quality of the water impounded in the reservoir and that "there should be no significant impact to ... downstream potable water works due to the GNB project"⁷⁷.

The Alleged Risks

7.51 The strident tone adopted in the legal sections of Hungary's Memorial, where the "serious threat" to the aquifer is invoked, together with the "high probability of risking the quality of the drinking water", conflicts with the actual description of the alleged risks in its factual Chapter⁷⁸. There it is accepted that, far from being imminent, any risk would take "some decades" to manifest itself; far from an assertion of a high, scientific probability of risk, it is cautiously argued that the result "could be" that the aquifer "might become" unusable⁷⁹. It would be hard to depict something further removed from the grave and imminent peril that would be required for a state of necessity or for the invocation of the "precautionary principle" (according to Hungary's later interpretation of the relevant law).

7.52 Hungary's allegation of risk is based on the assumption that recharge of the aquifer would no longer be from the Danube but would solely be from the reservoir and the side arm system which, it is assumed in turn, would become contaminated. It is true, and has always been known, that the pressure of water in the reservoir, together with its increased surface area, would increase infiltration into the aquifer from this source. It is undeniable that, following the implementation of Variant "C", a more pronounced recharge now occurs from the Čunovo reservoir. But it is equally undeniable that this reservoir has had no impact on surface water quality and will continue to be a good source of aquifer recharge⁸⁰.

7.53 This is significant because, although the Čunovo reservoir is smaller than the Project reservoir, the nature of the risk to the aquifer alleged by Hungary remains the same. And, with regard to the Čunovo reservoir, there is absolutely no evidence (and no

⁷⁷ See, Slovak Memorial, Annex 27 (at pp. 209 and 213).

⁷⁸ Hungarian Memorial, para. 10.21. Compare, Chapter 5.

⁷⁹ Ibid., para. 5.43.

⁸⁰ See, para. 8.21, et seq., below.

evidence offered) to support Hungary's claim that "direct impacts of contamination from [reservoir] recharge water have been noted"⁸¹. Indeed, this extraordinary assertion is contradicted even in Appendix 3 to Hungary's Memorial: "No qualitative changes have yet been detected upon the effect of the water exfiltrating from the reservoir and infiltrating from the water recharge system, or due to the altered groundwater flow directions"⁸².

7.54 Hungary alleges that such contamination would arise due to the accumulation of "toxic materials and heavy metals" in the sediment at the bottom of the reservoir. This is voiced by Hungary both as a certainty and a certain cause of risk to the aquifer. But as noted at paragraph 8.21 below, the latest data collected shows that the alluvial gravel and sandy sediment brought down by the Danube is not polluted or, at least, not in comparison to Europe's other major rivers⁸³.

7.55 Naturally, the possible impact of heavy metal accumulation was carefully studied prior to this dispute and the results of such studies were, in turn, reviewed in the Bechtel and HQI reports. The Bechtel report did not anticipate any ground water contamination by heavy metals⁸⁴. The HQI report considered that the only serious threat of contamination was posed by iron and manganese since only these were susceptible to chemical conversion into a soluble state. But it concluded that the risk was insignificant⁸⁵.

7.56 The recharge into the aquifer would not in any event be solely from the reservoir. Recharge through the old Danube riverbed would continue once water levels were

⁸¹ Hungarian Memorial, para. 5.45.

⁸² *Ibid.*, p. 422.

⁸³ In any event, heavy metals are insoluble and thus cannot enter the aquifer - unless there is a lack of dissolved oxygen, *i.e.*, reduction conditions in the water. In normal conditions, heavy metals do not become soluble. And, as noted at para. 7.36 above, the threat of eutrophication in the reservoir would only accompany specifically non-Project, non-normal operating conditions.

⁸⁴ Slovak Memorial, Annex 27. The importance of careful monitoring and remedial dredging of undesirable metal concentrations at 3-5 year intervals is nonetheless noted.

⁸⁵ Hungarian Memorial, Vol. 5 (Part I), Annex 9. The HQI report found that: "Le seul phénomène susceptible de détériorer la qualité serait la mobilisation du fer et manganèse et cette éventualité peut n'être que lointaine en raison de l'apport rapide d'eau au fond des fouilles d'infiltration. Dans la pire des éventualités, le fer et le manganèse sont faciles à retirer de l'eau et ne posent pas de risque pour la santé."

Translation:

"The only phenomenon susceptible to lead to a deterioration in the water quality would be the mobilisation of iron and manganese and this possibility can only be distant due to the rapid flow of water at the bottom of the infiltration channels. In the worst possible case, iron and manganese are easy to recover from water and do not pose a risk to the health".

The presence of manganese and iron in ground water is common in many countries, *e.g.*, Denmark and the Netherlands and is simple to treat.

raised in the manner intended by the G/N Project, that is by the construction of underwater weirs. As noted at paragraph 7.43 above, there is no reason to conclude that the river bottom would in the meantime become clogged by sediment (colmatation). Certainly, the Committee for Water Management Sciences of the Hungarian Academy of Sciences did not see colmatation as a problem in its April 1992 paper⁸⁶.

7.57 Under the G/N Project, further recharge would have taken place through the side arm system, on both the Hungarian and the Slovak side arms. The Hungarian Memorial notes that the "frequently flushed side branches" are a major source of infiltration under "natural conditions"⁸⁷. This is correct; but the conditions in the side arm system prior to the damming were very far from natural, being most of the year without direct inflow.

7.58 Hungary addresses the impact of the creation of the reservoir as if this unnatural situation were intended to continue after the damming:

"Eutrophication occurring in the side branches and the increased organic load in the water leaving the reservoir will further affect the quality of the water entering the subsurface system"⁸⁸.

But insofar as eutrophication conditions continue today in the Hungarian branch system, this is due to Hungary's continued refusal to implement the recharge of its side arms⁸⁹. This refusal may lead to poor quality water entering the aquifer which would, in turn, constitute a breach of Hungary's obligations to protect the environment under Article 19 of the 1977 Treaty. In contrast, the conditions in the Slovak side arms have been radically improved and demonstrate the overall, beneficial impact that the Project could have on the aquifer⁹⁰. Where before the Slovak side branch riverbeds were clogged up and no recharge of the aquifer was taking place, now good infiltration occurs through the newly cleaned river branch bottoms.

⁸⁶ Ibid., Vol. 1, App. 3, p. 411.

⁸⁷ Ibid., para. 5.52.

⁸⁸ Hungarian Memorial, para. 5.53.

⁸⁹ See, para. 8.11, et seq., below.

⁹⁰ See, Slovak Memorial, Illus. Nos. 36A-D.

This has been confirmed by the EC Working Group report of 2 November 1993⁹¹.

7.59 As to the possibility of the water entering the side arm system being contaminated due to the conditions in the reservoir, this was examined in the HQI report⁹². The specific fear addressed related to the accumulation of hydrocarbons in sediment that would be washed into the side arms during flood conditions. But it was calculated that the risk was minimal. Put simply, toxic hydrocarbons are not found in the Danube's sediments save for near the Slovnaft refinery (close to Bratislava), which is isolated from the Danube by pumping stations which direct the ground water flow towards the refinery (this is known as a "hydraulic blanket").

7.60 Once again, these comments can be tested against the actual implementation of Variant "C". There is nothing to suggest that there has been a deterioration in the quality of the surface water entering the side arm system, nor indeed of the water that infiltrates into the aquifer, whether from the side arms, the old Danube, or the reservoir. The EC Working Group report of 2 November 1993 noted the long term high quality of the ground water infiltrating from the Danube into the aquifer prior to the damming. It also noted the "excellent" quality of this water once extracted from the aquifer, that is after undergoing the natural filtration process in the flow through its layers of gravel and sand.⁹³

7.61 It is stressed that this appraisal reflects the long term, pre-dam status. Before considering the EC's findings on the impact of damming, it is important to note that the EC's assessment is based on a vast amount of data. As the same report notes, the "amount of ground water quality data in the area is comprehensive". It continues:

"In Slovakia a systematic monitoring has been carried out since 1983 on a bimonthly basis. After the damming of the Danube an extended monitoring programme with fortnightly sampling has been made in a number of wells located close to the Danube... Under the extended monitoring analyses are made for more than 100 parameters including heavy metals and organic micropollutants. The Slovakian Data Report (ref /2/) shows plots of all data

⁹¹ The report states: "However, after discharging water into the side channels in the Slovakian flood plain from May 1993 onwards the ground water levels have increased above those corresponding to pre-dam conditions. This demonstrates that a considerable recharge now takes place from the side channels. This has become possible 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 (Part II), Annex 18.

⁹² Ibid., (Part I), Annex 9 (at pp. 236-237).

⁹³ The report states: "The ground water quality in the area dominated by the infiltration from the Danube is generally in a good state. Thus, the quality of the ground water abstracted from the water works located close to the Danube is generally excellent." Ibid., (Part II), Annex 18 (at p. 711).

from the ordinary monitoring programme plus a summary of data from a single well under the extended monitoring programme.

In Hungary a large amount of data is being collected on a fortnightly basis. 23 parameters are measured."

In other words, a comprehensive monitoring system was in place prior to the damming of the Danube and this was upgraded after the damming.

7.62 The question, therefore, is what this diligent monitoring has, as a matter of fact, revealed since the damming of the Danube. The response is that the good quality of the ground water has not been impaired. The same EC Working Group report concludes that "no ground water quality changes can be identified after the damming of the Danube" and that "no significant changes in surface water quality parameters as compared to pre-dam conditions can be detected after damming the Danube"⁹⁴. Further:

"According to the Hungarian Data Report (ref /3/) no significant changes have been detected in the ground water quality"⁹⁵.

There is simply no evidence to support Hungary's reference to the "toxic quality" of the water entering the aquifer⁹⁶. There is no evidence of pollution problems in the reservoir and no evidence of pollution of sediments. And, since there has been no change in the quality of the water entering the aquifer, there can be no change in the quality of the water being extracted. And, of course, such a change would become known immediately, for the extracted water is extremely carefully monitored, being used to supply the inhabitants of Bratislava.

7.63 A further positive benefit of the Project - to Hungary - was to be guaranteed in the supply of additional water to the Mosoni Danube. Whereas prior to the implementation of the Project this main branch was without input flow from the Danube for 300 days a year (as shown in Illus. No. CM-6A) appearing at paragraph 7.82 below), the G/N Project would ensure a constant flow of 20 m³/s. This would clearly have a beneficial impact on the water entering the water table from what was once a frequently stagnant tributary. As the Hungarian Environmental Impact Assessment of 1985 noted:

⁹⁴ Ibid. (at pp. 696 and 713).

⁹⁵ Ibid. (at p. 713 - emphasis added).

⁹⁶ Ibid., Vol. I, para. 5.53.

"In the future as a result of the construction of the designed infiltration system for the regulation of the subsurface water resources the majority of the stagnant water surfaces will be eliminated⁹⁷."

7.64 In 1992, there was no reliable scientific evidence to suggest that the aquifer would become contaminated as a result of the G/N Project. The actual operation of Variant "C" has provided further evidence that the Project's impact would not be harmful. Variant "C", as discussed in greater detail in Chapter VIII below, has not led to surface or ground water quality deterioration. Moreover, no eutrophication problem has developed in the Čunovo reservoir and there is no evidence to suggest that any contamination of the aquifer is to be anticipated. The impacts of the impoundment have been very carefully studied and monitored - throughout the development and construction phase of the G/N Project and Variant "C". Hence, Hungary's allegations as to the risk of contamination of drinking water in this region are demonstrably unfounded.

D. Drinking Water: the Non-Existent "Threat" to the Budapest Bank-Filtered Wells

7.65 As shown in Illus. No. CM-4, the bank-filtered water wells that supply drinking water to Budapest are located downstream of Nagymaros. Insofar as these wells have been under threat, this is not due to the quality of the water leaving the Gabčfkovo section but due to unrelated pollution from background sources in Hungary, from direct pollution of the Danube due to untreated sewage from Budapest, and the extensive commercial dredging of the Danube for its gravel resources; no "threat" is now or has ever been posed by the G/N Project⁹⁸.

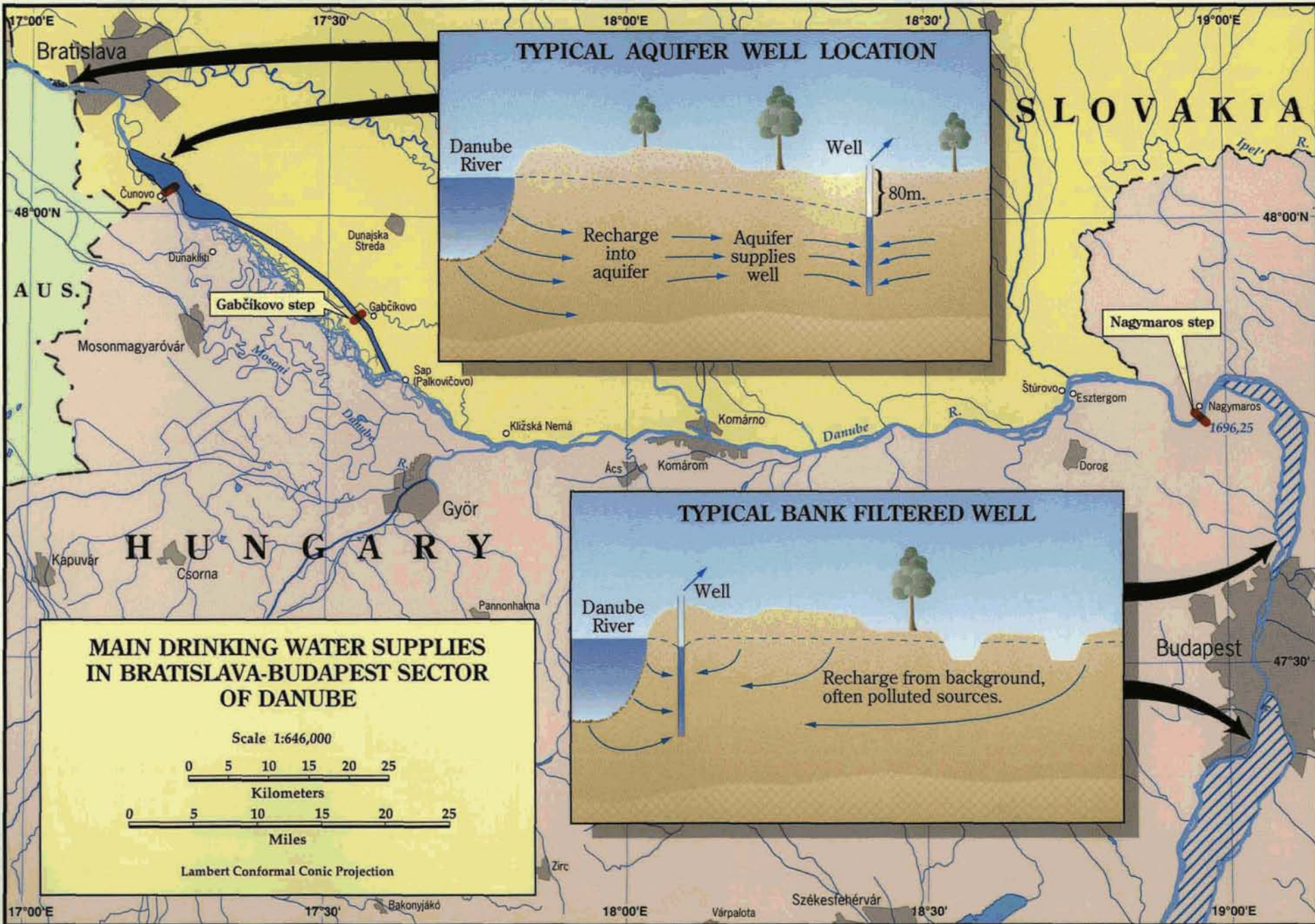
7.66 The existence of the "threat" to these supplies allegedly caused by the Project is, as admitted by Hungary, based on no more than simple speculation, resting on mere possibilities that might have led to a deterioration in the water from the bank-filtered wells. In Appendix 3 to its Memorial, Hungary reviews three risks of damage to the Budapest supply wells, each of which is described as no more than a vague possibility: it is stated that water quality upstream of Nagymaros "could have" deteriorated (thus leading to a possible deterioration in the quality of water filtering into the wells); that the release of sediment through the Nagymaros weir "could have created rather uncertain conditions"; that there

⁹⁷ Ibid., Vol. 5 (Part I), Annex 4. This improvement is particularly important as there is a conspicuous rise in sulphate content in the Mosoni Lowland region, leading to a deterioration in ground water quality, especially around Rabca and Hansag.

⁹⁸ "Background" pollution is contamination from sources on the land side of the wells, i.e., pollution that is not related to the river water. It might comprise industrial effluent from refineries or processing plants, sewage seepage or agricultural fertiliser.

Specifically prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-4



"could have" been erosion problems downstream of the weir⁹⁹. This uncertainty is in striking contrast to Hungary's contention in its 1992 Declaration of the certainty "that irreversible damage afflicts the ... drinking water reserves of millions of people"¹⁰⁰.

7.67 As the Hungarian Appendix 3 makes clear, there is no scientific basis for this last assertion:

"With respect to the above mentioned risks no detailed investigations that could have quantified these effects had been made. Nevertheless neither were results of investigations available to prove the insignificance of the above hazards"¹⁰¹.

In other words, certain assertions without scientific basis have been made and, as a result of insufficient research, these assertions have neither been proved nor disproved. This cannot be regarded as compelling evidence of anything, except possibly indifference. Nonetheless, in the main body of its Memorial, Hungary reverts to the positive, certain tone of the 1992 Declaration. Once again, adverse impact on the Budapest wells becomes "expected" and "a significant and non-replaceable loss in water production" is predicted¹⁰². But no explanation is given for the discrepancy between such positive assertions and the lack of evidence supplied in support.

7.68 If the threat had any real basis, it seems extraordinary that no sufficiently detailed investigations were carried out. And it must be stressed that, insofar as research was insufficient, this represents a breach by Hungary of its Treaty-related obligations. (Obviously, Czechoslovakia had no research obligations relating to Budapest's water supplies.) Hungary was obliged, in particular by the 1976 Joint Contractual Plan Agreement, to further "the hydrological and hydraulic examination ... of the new condition between Budapest and Nagymaros". A further task was:

"The complementation and evaluation of the examinations relating to the effect

⁹⁹ Hungarian Memorial, App. 3, p. 432.

¹⁰⁰ See, its 1992 Declaration, *ibid.*, Vol. 4, Annex 82 (at p. 154).

¹⁰¹ *Ibid.*, Vol. 1, App. 3, p. 432 (emphasis added). By contrast, there is concrete evidence of the deterioration of the Budapest water supplies due to other hazards such as background pollution.

¹⁰² *Ibid.*, para. 5.59.

of the dredging in the downstream water at Nagymaros taking into consideration the wells of the waterworks in Budapest¹⁰³."

And, of course, Article 15 of the 1977 Treaty required Hungary to ensure the protection of water quality.

7.69 Thus, Hungary has asserted the existence of a risk - which it had a Treaty-based obligation to verify and which it is practically impossible for Czechoslovakia either to verify or disprove - but on the basis of which Hungary has purported to terminate the 1977 Treaty. Slovakia can do no more than to rely on Hungary's Memorial to judge whether Hungary's assessment of its own non-compliance with such important obligations is valid.

7.70 According to Appendix 3 of Hungary's Memorial, a five year research and development program was carried out, starting in 1980, by Budapest Waterworks specifically directed at "the protection and development of bank filtered drinking water resources"¹⁰⁴. The results of this program have not been annexed by Hungary to its Memorial. However, short extracts are provided, from which the following two points are of crucial importance:

- First, the Danube riverbed in the Nagymaros-Budapest sector has been lowered by up to 1.5 m "due to the effects of commercial gravel dredging (20 million m³)". Such dredging, carried out by Hungary and exceeding by 3 times the excavations envisaged under the Project, has decreased the depth of the gravel aquifer below the riverbed from 4-7 m to 1-4 m, apparently leading to a loss in capacity of 200,000 - 300,000 m³ per day of water supply.
- Second, the results of five years of research and development by the principal body responsible for the exploitation of this water supply in

¹⁰³ Ibid., Vol. 3, Annex 18 (at p. 226). There was a focus on the impact of dredging because it was important that the natural filtration process, which takes place through a thin layer of gravel and sediment, not be disturbed.

¹⁰⁴ Ibid., Vol. 1, App. 3, p. 428.

no way suggested that the planned construction of Nagymaros should be modified, let alone aborted so as to protect the wells¹⁰⁵.

7.71 With regard to Hungary's dredging of this sector of the Danube, Appendix 3 to the Hungarian Memorial now states that further "river training or regulation works along the Danube reach of concern" must be avoided¹⁰⁶. This may or may not be correct, although this new-found concern for the riverbed filter layer is in contrast to the large-scale dredging works carried out in the 1960s and 1970s. And it must be stressed that the dredging to date has far exceeded that which was anticipated for the construction of the G/N System. It is true that the Project originally envisaged that there should be dredging below Nagymaros to the extent of 6.5 million m³ of gravel from the Danube riverbed. But the dredging that has already been carried out by Hungary - for reasons largely unconnected with the Project - is according to the Hungarian Memorial, 20 million m³¹⁰⁷. It is for this reason that the Bechtel report noted in 1990 that the dredging work "has been terminated, so that is no longer a factor"¹⁰⁸.

7.72 No evidence is given to support Hungary's contention that the water quality in the impounded section upstream of Nagymaros might deteriorate, in turn leading to a deterioration in the quality of the water filtering into the Budapest supply wells. The Bechtel report predicted, to the contrary, that for the Danube in the Nagymaros region "the project operation might result in an improved water quality except for a few months during the summer"¹⁰⁹. As to the water supply wells located upstream of Nagymaros, a general improvement was predicted by Bechtel, not least because more water would be filtering through from the Danube and less "from adjacent areas, which are the present sources of poor quality water"¹¹⁰. As to the downstream sector, it saw no likelihood of deterioration:

¹⁰⁵ It was noted that the "channel regulation downstream of Nagymaros must be planned with due concern for the above [protection of the riverbed filter zone]". This is self-evident and it in no way suggests that the construction of Nagymaros was incompatible with continued exploitation of the water supplies, let alone that it created a grave and imminent peril.

¹⁰⁶ Ibid., p. 432.

¹⁰⁷ The Hungarian Memorial claims that "large scale dredging in the 1960s and 1970s [was] done partly to prepare for the Nagymaros Barrage and partly for other commercial reasons". Ibid., para. 5.59. This is untrue according to its Appendix 3, which states that the only dredging operations carried out in connection with the construction of Nagymaros were in 1985.

¹⁰⁸ Slovak Memorial, Annex 27 (at p. 216).

¹⁰⁹ Ibid.

¹¹⁰ See, also, ibid., para. 2.105, et seq.

"The planned operation of the project will not significantly alter the flow characteristics or hydrology of the river downstream of Nagymaros."

No problems of erosion or sedimentation were predicted. Put simply, the possible risks to the Budapest supply wells were thoroughly researched, were found to be minimal and have now been grossly exaggerated by Hungary.

E. The Non-Existence of "Threats" to Drinking Water Was Confirmed by the Findings of the 1985 Environmental Impact Assessment

7.73 Prior to Hungary's abandonment of works at Nagymaros in May 1989, one of the most important assessments of the Project's impact on water quantity and quality was Hungary's 1985 Environmental Impact Assessment¹¹¹. It may be noted that this was concluded at the same time as the 1980-1985 research program carried out by the Budapest Waterworks.

7.74 Before reviewing the Assessment's conclusions, two points must be made. First, the Resolution requiring its preparation also laid down a series of environmental prerequisites, the first of which was that the Project should not "impose danger on the water supply of Budapest"¹¹². The compilers of the Assessment therefore accorded primary importance to the issues of drinking water resources¹¹³. Second, the findings of the Assessment in relation to drinking water were not challenged until it was politically convenient to do so, that is, not until 1989. The 1985 Opinion of the Hungarian Academy of Sciences may have criticised certain aspects of the Assessment¹¹⁴, but it fully accepted the findings in relation to drinking water supplies.

7.75 With regard to both the water in the aquifer and that taken from the bank-filtered wells, the Assessment found that the Project would have no negative effect and that the real threat to such resources was from wholly unrelated sources of background pollution. For the Szigetköz aquifer, a positive improvement in the quality of the resource was in fact predicted:

¹¹¹ See, para. 4.24, et seq., above.

¹¹² Hungarian Memorial, Vol. 5 (Part 1), Annexes 3 and 4 (at p. 17).

¹¹³ Ibid. Thus, the introductory paragraph to the first section of the Assessment states: "The impact of the Barrage System upon the water supply of the region was examined mainly from the aspect of the drinking water resources of the used Danube section." (At p. 18.)

¹¹⁴ See, para. 4.28, et seq., above.

"The water treasure in the gravel layer of the Szigetköz will receive freshwater supply from the infiltration system being filtered, more clear water, which brings it into better state from the water quality point [of view]."

Nor was sedimentation in the Dunakiliti-Hrušov reservoir seen as a problem. However the threat to the aquifer from "communal and agricultural" pollution was highlighted. And it was noted that a similar pollution threat existed for the wells of Szentendre Island (downstream of Nagymaros) that supply Budapest:

"The Szigetköz water treasure is not hampered by the local sedimentation of the Dunakiliti Reservoir... . However it is very important to reduce, stop or as an immediate task to reduce the growing tendency of the pollution through the diffuse pollution from the communal and agricultural sources... Similarly important from the point of view of the Szentendre Island bank filtered water resources [is] the background pollution on the surface of the island."

7.76 No Project-related deterioration was predicted for the bank-filtered wells upstream of Nagymaros. Again, the threat to these wells was seen to be from background pollution, a threat that would be decreased as a direct result of Project operation¹¹⁵:

"The research dealing with the circumstances of the bank filtered water resources showed that the deterioration of its water quality is mainly due to the growing pollution coming from the background areas. It is expected as a clearly favourable effect of the Barrage System that the height of raised water level - due to the growing portion of the discharge into the wells from the Danube side - will reduce the background pollution process."

Finally, the all-important Budapest supply wells were considered:

"The Barrage System has no effect upon the filter layer of the Budapest Waterworks' water resources at the Szentendre Island. The changes in the filter layer are influenced by factors independent from the [G/N Project]."

7.77 Thus, the Assessment's overall conclusion was that "the [G/N Project] will not deteriorate the water treasure's present social-economic usefulness". There is no evidence that even suggests that this particular conclusion was ever challenged. To challenge

¹¹⁵

Exactly the same conclusion was reached in relation to the karstic waters (ground waters caught in underground hollows, faults, etc., usually in limestone formations) that Hungary now claims to have been under threat (Hungarian Memorial, para. 5.58): "The quality of the karstic water is also far more influenced by the pollution washed in (especially in case of concentrated pollution sources and open karstic regions) from the Middle-Transdanubian region than the water reaching these layers with low probability and filtered by the alluvial layers from the Danube water. On the basis of this the pressure pattern altered by the [G/N Project] will not hamper the quality of the Middle-Transdanubian Mountains' water treasure."

it now - on the basis of no new studies or information - is entirely unwarranted. It is clear from the Assessment that, insofar as water resources were threatened, this was due to unrelated pollution problems. This analysis has been recently confirmed by I. Nagy, Professor Emeritus at Budapest University. He reviewed the claims that the G/N Project posed a threat to drinking water supplies in Hungary and found them to be "incomprehensible and scientifically unauthorised"¹¹⁶. According to his scientifically substantiated paper, the claims are "a consequence of the misunderstanding of facts and realities, which ... represent a danger of directing attention from actual and topical problems of water supply for the population, of wastewater treatment and vital problems of the environment".

SECTION 3. The Project's Impact on Soils, Agriculture, Forestry, Flora and Fauna

A. Introductory Comments

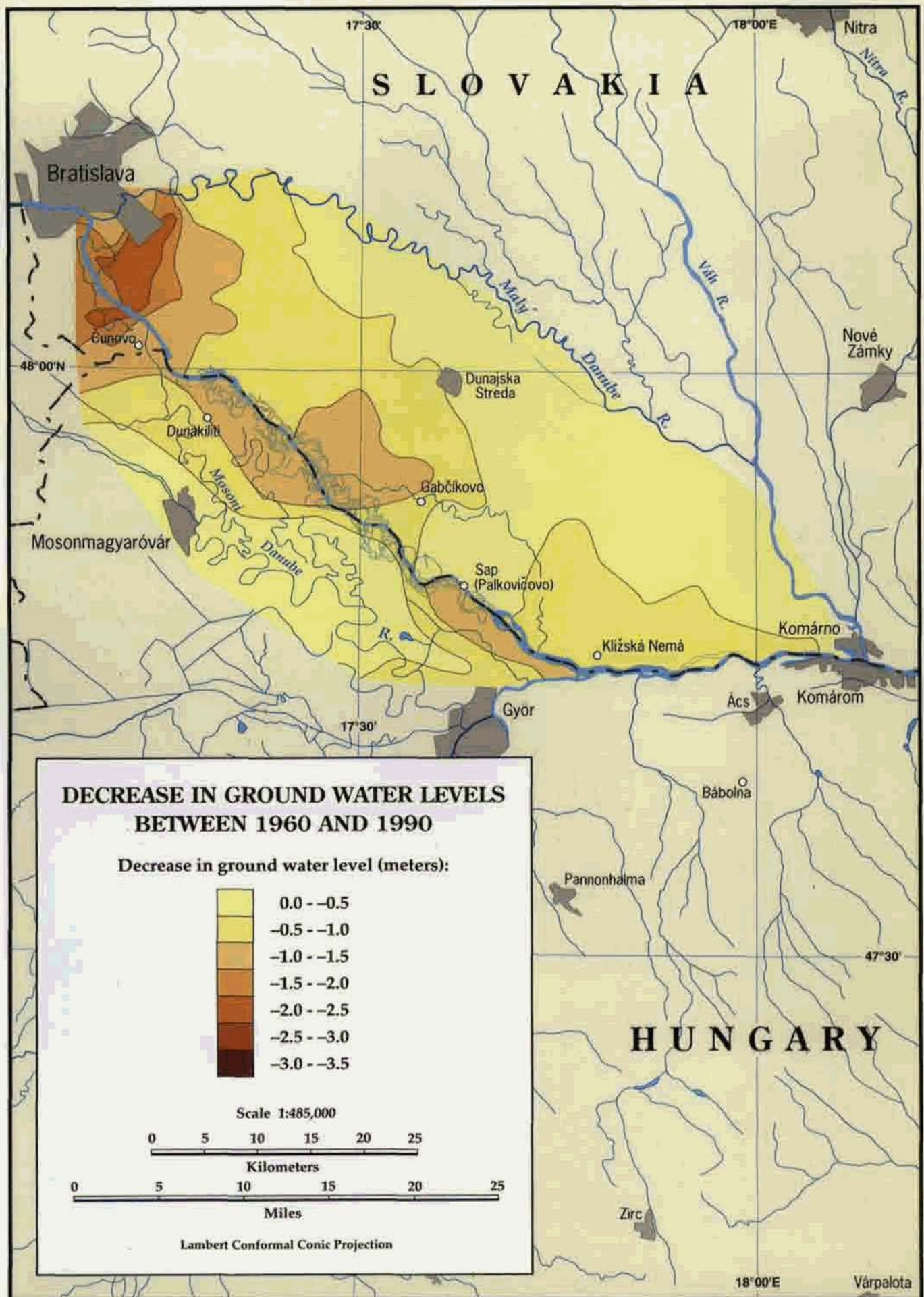
7.78 Although Hungary divides the Project impact area into three regions - Szigetköz, the Danube Valley, and the Nagymaros bend - it is only the potential environmental impact on the first of these that is considered by Hungary in any detail. Slovakia deduces from this that even Hungary does not take its allegations as to environmental impact in the downstream area seriously. Accordingly, the following analysis focuses largely on the Project's alleged environmental impact on the Gabčíkovo section, that is on Szigetköz and Žitný Ostrov.

7.79 Hungary alleges that the G/N Project "would have wiped out the floodplain, which, together with its branch systems, constitute the productive basis of the region"¹¹⁷. This extreme contention is founded on a description of the Danube and its floodplain that presumes that the Project designers were approaching a virgin landscape and on a description of the G/N System that ignores all those elements of the Project design that the Treaty parties incorporated so as to mitigate environmental impact. Furthermore, the impression is given that the environmental impact was to be felt by Hungary alone. A more misleading starting point for an examination of the expected impacts of the G/N Project on the environment is hard to imagine.

7.80 Hungary's central premise is that the Project's impact would have been felt most intensely in Szigetköz, whose environment "would have significantly deteriorated

¹¹⁶ "Effect of the System of the Hydropower Projects Gabčíkovo-Nagymaros on Subsurface Water Supplies of the Kisalföld Area and the Influence of Respective Cascades", Inžinierske Stavby, Vol. 42, 1994, No. 1, Annex 20.

¹¹⁷ Hungarian Memorial, para. 5.90.



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-5

HUNGARIAN SIDE



A section of the Mosoni Danube (with standing water) near Rajka, below the old lock, before 1990. At that time, the Mosoni Danube received no flow from the Danube for approximately 300 days in each year; see, Slovak Memorial, para. 2.87.



Source: Hungarian "White Book"

Completely dried-up section of the Mosoni Danube, before 1990. The character of living vegetation demonstrates the prolonged absence of water.

HUNGARIAN SIDE



The dried-up branch system Ásányi, before 1990.



Source: Hungarian "White Book"

Completely dried-up Lake Öntési, a protected region for the settlement of herons, before 1990.

SLOVAK SIDE



An example of a dried-up section of the side arms on the Slovak side, before the damming of the Danube. A flow from the Danube was received in the side arms only when the Danube's discharge exceeded 4,000 m³/s.



Source: Hungarian "White Book"

The same area after installation of the side arms water supply system under Variant "C".

because of the diversion of the Danube into a by-pass canal for 31 km¹¹⁸. This clearly contradicts the findings of the EC Working Group and, in particular, its report of 23 November 1992, which noted that due to the transfer of navigation into the bypass canal: "a unique situation has arisen. Initiated by technical measures the river and the floodplain can develop more naturally¹¹⁹."

7.81 It is important to focus on the reason for the contrast in these assessments. The EC Working Group appraised the environment of this sector of the Danube in its actual condition in 1992, not as it was a century or more ago. The Danube has been radically altered over the past hundred years. First, with the aim of improving navigation, a main channel was created from the formerly braided river. This involved the isolation of the current riverbed from the side arms and the fortifying of its banks with concrete. As the same EC report points out, the effect of this "embankment and endikement" was that the original vegetation "was largely diked out of the system". Second, the impact of this canalisation has been aggravated by the accompanying erosion of the Danube riverbed by up to 2 metres over the past 30 years, leading to a corresponding drop in local ground water levels as depicted in Illus. No. CM-5.

7.82 As a result of these factors, the Danube was in recent decades fully connected to the side arm system and the Mosoni Danube only at times of high flood, that is around 20 days each year¹²⁰. The impact of this is shown most clearly in Illus. Nos. CM-6A and B, which show the state of the Mosoni Danube and the Hungarian side arms prior to the damming of the Danube and call into question the relevance of the photographs of dried up side arms contained in Volume 2 to the Hungarian Memorial. Extraordinarily, Hungary wholly ignores the fact that the side arm system was, prior to the damming, throughout much

¹¹⁸ Ibid., para. 5.75.

¹¹⁹ Ibid., Vol. 5 (Part II), Annex 14 (at p. 418).

¹²⁰ See, the EC Working Group report of 1 December 1993, ibid., Annex 19.

of the year either stagnant or completely without water¹²¹. The Project offered the opportunity to reverse this harmful situation. It enabled the original inter-relationship between the Danube and its floodplain to be re-established, not "wiped out".

7.83 The corollary to Hungary's "head in the sand" description of the Danube is its deliberate failure to take into account the Project's steps to improve the floodplain ecology through the direct input of large amounts of water into the Danube side arms. To take an example, the Hungarian Memorial states: "If the side arms of the floodplain were to disappear completely with construction of the Barrage System, it has been predicted the total ichthyomass would decrease by 57%"¹²². This is based on a wholly false premise because there was no prospect of the disappearance of the side arms as a result of the Project. Quite the opposite: a central feature of the Project was the reversal of the progressive disappearance of the floodplain¹²³.

7.84 The G/N Project envisaged that the branch system of both Czechoslovakia and Hungary would be revitalised. The measures planned for the Slovak side arms, along with the success of such measures, have already been detailed in Slovakia's Memorial¹²⁴. But equivalent measures were planned and, in part, realised for the Hungarian side arms. Thus, an offtake with a capacity of 200 m³/s was built into the Dunakiliti weir complex to supply water to the Hungarian side arms. The location of this offtake is shown in Illus. No. CM-7. It would have served to ensure sufficient flow into the Hungarian side arms to prevent the then usual stagnant or dried up conditions shown in Illus. Nos. CM-6A and B. See, in this regard, Illus. No. CM-6C.

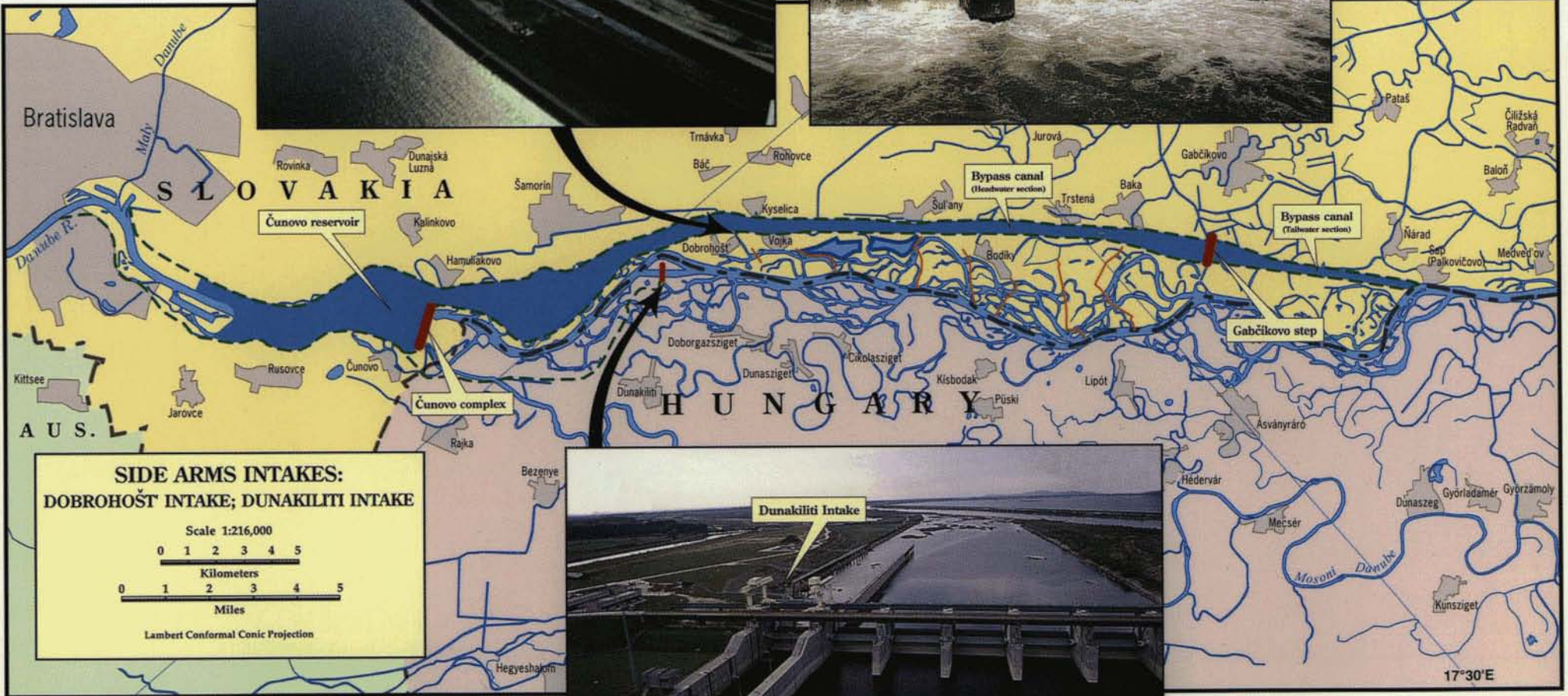
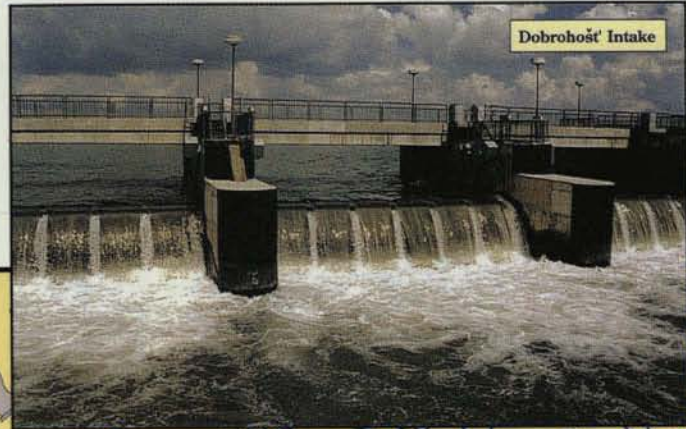
7.85 No less misleading is the impression given that the environmental impact of the G/N Project was only to be felt on the right bank of the Danube, i.e., in

¹²¹ Ibid., Vol. 1, para. 5.78. For example, Hungary blithely states that the "maintenance of connections between the various bodies of water is necessary because if they are too isolated and infrequently flooded, their biomass productivity becomes low". Such is regarded by Hungary as the inevitable result of the Project. But, as the EC Working Group pointed out, the problems of the isolation of the Danube from its floodplain and the resultant disappearance of the natural ecosystems long pre-dated the inception of the Project.

¹²² Ibid., para. 5.83.

¹²³ See, the EC Working Group report of 2 November 1993, ibid., Vol. 5 (part II), Annex 18.

¹²⁴ Slovak Memorial, para. 2.87, et seq., and para. 5.38, et seq.



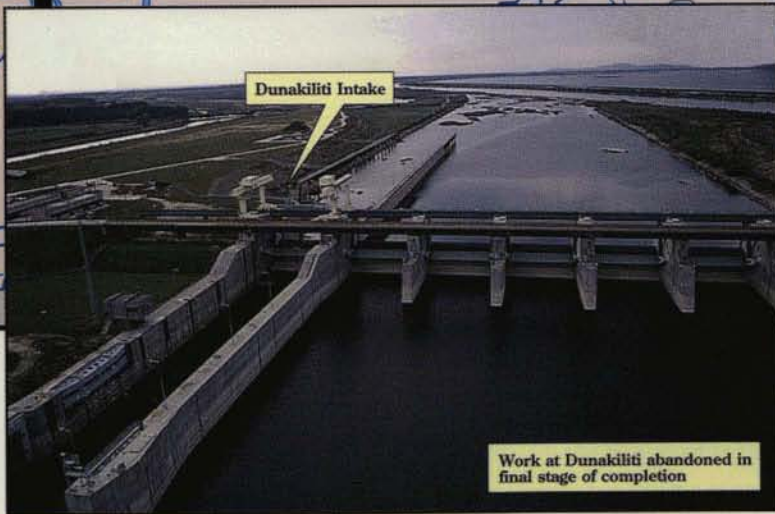
**SIDE ARMS INTAKES:
DOBROHOŠŤ INTAKE; DUNAKILITI INTAKE**

Scale 1:216,000

0 1 2 3 4 5
Kilometers

0 1 2 3 4 5
Miles

Lambert Conformal Conic Projection



17°30'E



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-8

Hungary¹²⁵. The prime area in which environmental impact was to be felt was in the upper part of the Danube Lowland on both banks of the river, that is Žitný Ostrov on the left bank and Szigetköz on the right bank. There are two central points to be made in relation to the Project's anticipated and agreed impact on these two regions.

7.86 First, both regions are primarily agricultural in nature. This is quite clear from Map No. 1 to Hungary's Memorial and is the deliberate result of steps taken over the centuries to confine the Danube floodplain, to construct drainage and irrigation canals and, thus, to cultivate the land. Hungary nonetheless claims: "The active alluvial floodplain in the Gabčíkovo sector covers approximately 6,000 hectares on the Hungarian side and 23,000 hectares on the Slovak side¹²⁶." This is nonsense. The active alluvial floodplain is maintained within dykes built around a century ago at a distance of a few hundred metres to one or two kilometres from the main channel and covers a far smaller area. This is also quite clear from Map No. 1 to Hungary's Memorial and has been emphasised in the map based thereon which forms Illus. No. CM-8¹²⁷.

7.87 Thus, the Project's potential impact on the active alluvial floodplain was limited to a narrow stretch down each side of the Danube, as Illus. No. CM-8 shows, and its intended impact was to safeguard that stretch. For, unlike most barrage projects, the bypass canal was constructed outside the floodplain area, enabling the floodplain's survival and eventual revitalisation¹²⁸.

7.88 Insofar as there is any interest in the statement from the Hungarian Memorial quoted above, it is that according to Hungary, the immediate environmental impact of the Project was to be felt in Slovakia over an area four times the size of the respective area of Hungarian territory. If the expected impact was such as Hungary now describes, and if the

¹²⁵ Hungary almost wholly ignores Project impact on Czechoslovakia in the region of Žitný Ostrov. It even goes so far as to use the term "Little Hungarian Plain" to describe the entire Danubian Lowland (the plain occupied by the Danube on both sides of the river from downstream of Bratislava to Nagymaros).

¹²⁶ Hungarian Memorial, para. 5.20.

¹²⁷ The active alluvial flood plain lies between the Inundation Dyke (Slovak side) and the Inundation Dyke (Hungarian side) shown on Illus. No. CM-8 by the two red lines drawn on either side of the Danube. See, also, the EC Working Group report of 23 November 1992 which noted that the original vegetation and forestry has largely been "dyked out of the system". *Ibid.*, Vol. 5 (Part II), Annex 14 (at p. 435).

¹²⁸ The construction of the reservoir did however require the deforestation of the area to be inundated - although this was anyway required in part, as a flood protection measure, by means of stopping floodwaters backing up to Bratislava.

Project had been as bereft of benefits as Hungary now claims, it would have been Czechoslovakia that would have pressed to have the G/N Project reevaluated.

7.89 Second, the 1977 Treaty provided that by far the larger part of the G/N System constructions works would be carried out on Czechoslovak territory - due to the fact that the greater part of the reservoir, the bypass canal and the Gabčikovo step were all located on Slovak soil. Furthermore, in relation to the Nagymaros section, substantial protection measures (dykes and pumping stations) were required on Slovak territory but less so on Hungarian territory where local mountains provided a natural means of retaining impounded water.

7.90 The ramification of this difference in commitment of land resources is that quite simply, in 1989, when Hungary abandoned works, it had far less to lose. By 1989 Czechoslovakia had fulfilled around 90% of its construction obligations. The indelible impact that this had on the Slovak countryside as of 1989 is shown in Illus. No. CM-1 appearing above at the end of Chapter IV. Hungary, which fulfilled only around 40% of its construction activities before abandoning works, has not suffered this environmental impact to the same degree.

7.91 This is not to say that if a real environmental emergency had existed, Czechoslovakia would not have been prepared to consider the abandonment of the construction. But it was very much simpler in 1989 for Hungary to manufacture environmental arguments against the Project and move to abandonment because its commitment of resources - both in terms of land and money - was far less. And it is futile for Hungary to argue now as if the constructions had not been built or as if the Danubian lowland was today what it was 100 years ago.

B. Soils, Agriculture and Forestry

7.92 One of the many factors that contributes to a particular soil regime is the local level of groundwater. This factor must be weighed alongside the guiding effect on soils of mineral content, relief and geomorphological processes, climate, as well as plant, animal and human activity¹²⁹. It is accepted that declining groundwater levels may have an impact on the soil regime. Once again, however, in terms of the Danubian Lowland this particular impact was experienced prior to the damming of the Danube: the G/N Project was aimed at addressing

¹²⁹

This is explained in a study on the Project's impact on soils and agriculture, recently prepared by S. Reháč, et al. of the Slovak Research Institute of Irrigation Management, Department of Hydropedology, Annex 23. This study also shows the impressive level of recent Slovak research into the Project's impact in these areas.

this impact by increasing water levels in the reservoir region and the side arm system, that is in the areas where the greatest drops in ground water levels had historically been felt. Such increase would not in any event be random: water levels close to the reservoir were to be regulated by the seepage canals; and water levels in the side arm regions were to be regulated by the intakes into the branch system at Dobrohošť (Czechoslovakia) and the Dunakiliti weir (Hungary)¹³⁰.

7.93 Hungary argues that if the water table falls below the soil layer the ground water is effectively lost and it implies that the G/N Project would inevitably have led to this problem¹³¹. It is correct that if the water table remains in the underlying gravel layers, it is not brought up to the surface by capillary action. But this was the case prior to the damming of the Danube in large parts of Žitný Ostrov and Szigetköz. And Hungary's claim as to a loss of capillary action in "more than 50% of the area previously receiving subsurface water", as a result of the Project, is not supported by any evidence. Nor is it supported by what transpired after the implementation of Variant "C", which shows exactly the reverse effect happening on the Slovak side of the Danube¹³².

7.94 Similarly, the operation of Variant "C" has shown that carbonate accumulation in soils (due to increased evaporation of subsurface water where a water level rise was experienced) has not occurred, in spite of Hungary's expressed fears to the contrary¹³³. Hungary ignores the fact that where the Project was to raise subsurface water levels - that is upstream of Dunakiliti and in the side arm system - this was to be in accordance with the natural, i.e., 1950s levels. The impact of the sinking riverbed over the previous decades had been to decrease ground water levels; the Project was the best means of reversing this process¹³⁴.

7.95 As to the possibility of carbonate accumulation in the topsoil layer due to peak power operation and the resultant water fluctuation in the Danube downstream of Sap

¹³⁰ See, para. 4.34, above.

¹³¹ Hungarian Memorial, para. 5.62.

¹³² See, para. 8.29, below and Annex 23, hereto.

¹³³ Carbonate accumulation has a negative impact on soil quality because it leads to an excessive soil density and a lack of oxygen.

¹³⁴ See, the EC Working Group report of 1 December 1993, op. cit., describing the impact of the Čunovo reservoir: "The ground water levels in areas close to the reservoir have increased by up to 2½ m. This has occurred in the areas which were most negatively affected by the long term trend of decreasing ground water levels of up to 2 m during the past 40 years." See, also, Annex 23.

(Palkovičovo)¹³⁵, two points must be made. First, the fluctuation in the ground water related to peak production would only be felt within a few hundred metres of the main channel. Second, the problem of carbonate accumulation presupposes the evaporation of ground water causing additional calcite to be deposited and an absence of precipitation which might dilute the depositions. Simply, the appropriate conditions are not to be found in the stretch affected by peak production flows.

7.96 The G/N Project has evolved so as to ensure an optimisation of the soil regime in the surrounding areas.

7.97 And there is an obvious link between soil quality and crop growth. With the necessary measures such as flow into the side arms and the construction of underwater weirs, the impact of the Project on agriculture and forestry would clearly be beneficial overall. Indeed, Hungary's own commissioned report, the Bechtel report, concluded that the "Project will provide several benefits to agricultural and forestry production in the Szigetköz with installation of the artificial recharge system"¹³⁶. Nevertheless, Hungary now claims without a shred of scientific evidence that 107,000 hectares, *i.e.*, more than 1,000 square kilometres of agricultural land, would suffer a reduction in yield due to the Project's implementation. This is simply absurd.

7.98 In considering the impact of the Project on the region's forests, it is essential to remember that the original alluvial floodplain forest had largely been destroyed long before the conclusion of the 1977 Treaty and that the cultivated forest that took its place had been adversely affected for several decades by the sinking riverbed. Conditions for both cultivated and original species should improve as a result of Project implementation. This is demonstrated by the actual results of the implementation of Variant "C", as discussed in Chapter VIII below¹³⁷.

¹³⁵ Hungarian Memorial, para. 5.64, *et seq.*

¹³⁶ See, Slovak Memorial, para. 2.117.

¹³⁷ Hungary claims that "peak power fluctuations ... would inundate the surrounding floodplains, killing off the forests", Hungarian Memorial, para. 5.74. This is clearly impossible. The water level fluctuation in the impounded section upstream of Nagymaros was to be maintained within the existing inundation dykes. It could not possibly inundate and kill off the forests in the plain behind these dykes.

C. Flora and Fauna

7.99 As noted at paragraph 7.81 above, the factors that Hungary posits as responsible for the Project's negative effects on flora and fauna - "the decrease in water flow, followed by a drop of water levels, and the absence of regular water level fluctuations"¹³⁸ - existed long before the planned damming of the Danube in 1989. By 1989, the river branch system of Szigetköz and the Mosoni Danube was receiving its full water capacity from the Danube for only 20 days per year, and regular water fluctuations simply did not occur due to the region's isolation from the main river.

7.100 To allege that due to the Project "no longer would the water level supporting the ecosystems in the Szigetköz have fluctuated naturally with each season" is simply to overlook this historical fact as well as to ignore the planned artificial recharge program, providing for flows up to 200 m³/s into the Szigetköz from the Dunakiliti offtake¹³⁹ and similar flows into the Slovak side arms from Dobrohošť. Due to this program a significant water level fluctuation would be achieved in the side arm system on both sides of the Danube¹⁴⁰. It makes no sense for Hungary to quote a 1981 study as evidence that, after Project implementation, the stretch of the Danube affected could have "minimal biological importance"¹⁴¹, for it was in direct response to such assessments that mitigation measures were incorporated into the design.

7.101 Thus, insofar as the Hungarian Memorial's discussion of the Project's impacts on flora and fauna is based on an assumption of "disappearance of water" in the Szigetköz¹⁴², it is meaningless, because this would not be the result of the Project's implementation. The Project was modified to provide for water recharge into the side arms, and the actual success of this modification can now be judged from the Slovak side arm system which has benefited from the artificial recharge system since May 1993. There, to Slovakia's knowledge, not a single species from the presently known plant communities of the floodplain

¹³⁸ Hungarian Memorial, para. 5.75.

¹³⁹ See, para. 7.84, above, and Illus. No. CM-7. The maximum 200 m³/s flow would be implemented only when it was desired to inundate the side arm area. The usual range of flow would be much less i.e., 40-70 m³/s. Care would in any event be taken to fluctuate the flow.

¹⁴⁰ As the EC Working Group has noted: "A variation of the water level within 2m will be enough to ensure the dynamic character including the floodings according to the pattern in pre-dam conditions." EC Working Group report of 1 December 1993, op. cit.

¹⁴¹ Hungarian Memorial, para. 5.90.

¹⁴² Ibid., para. 5.79.

ecosystems has been threatened or, much less, has disappeared due to the implementation of Variant "C". The impact of the G/N Project on Szigetköz would have followed this example if the specific mitigation measures had not been abandoned by Hungary.

7.102 As to the effect of the Project on the region's fish communities, it is pointless to make a comparison between the G/N Project's impact and the impact of other dam projects on the Danube, the Rhine, or the Rhone. In the German and Austrian Danube and elsewhere, projects have resulted in the canalisation of the river and its isolation from the associated inundation area, where old branches have been reduced to polders (isolated lakes) with stagnant water. The G/N Project is quite different for it aims to turn the old Danube from a partially canalised river into an approximation of the original braided river: the attempt is to recreate a more natural side arm system, not to decrease habitat diversity as Hungary seems to imply¹⁴³.

7.103 Once again, Hungary has ignored the status of the Danube at the time of the 1977 Treaty's conclusion and the problems that the parties were trying to address. The water quality of the Danube in the 1970s was adversely affected by pollution, a situation that has improved in part due to waste water treatment associated with the Project. This has had a beneficial impact on some fish species. Nonetheless, overall fish numbers continued to dwindle due to the loss of habitat in the side arms and the erosion of the Danube riverbed, problems that could only be solved by Project implementation.

7.104 A brief exposition of the Project's expected impact on the region's fish is set out in Annex 25 to this pleading. Its main findings are as follows:

First, the gradual canalisation of the Danube from the 1950s and the progressive fortification of its riverbanks has led to a loss of habitat. This, alongside the changes in the sediment content of the river water due to upstream dam projects, has led to a progressive reduction in fish numbers that pre-dates the Project. Thus the total fish catch in the Slovak-Hungarian sector of the Danube shows a steady decline since the 1960s.

Second, the main Danube channel, as opposed to the side arms, was characterised by a low ichthyomass (fish density) due to high flow velocity, high turbidity, and fortified, strengthened river banks.

¹⁴³ Hungarian Memorial, para. 5.82. See, also Annex 24 (at p. 98), which explains some of the key differences between this Project and those on the Rhine (for example).

Third, the implementation of the Project would not be expected to lead to a reduction in the number of fish species in the bypassed section of the Danube. River banks would develop more naturally, fortifications would gradually be destroyed and lateral erosion would start once more.

Fourth, no great changes would be expected in the fish types in the reservoir as opposed to the main river flow. Some relocation of species and some better spawning grounds would be created.

Fifth, the seepage canals and the tailwater canal would provide good living conditions for fish.

Sixth, the changes in water regime and river topography prior to 1989 had not only led to a decrease in fish numbers in the side arms but also to a prevalence of fish of a low economic value. This situation was to be reversed by means of the Project's artificial recharge program.

SECTION 4. The Myth of Seismic Instability Invented by Hungary

7.105 It is interesting to note that the section in the Hungarian Memorial entitled "Geological and Geophysical Risks" is simply a copy of the section contained in Hungary's 1992 Declaration and written exactly two years earlier¹⁴⁴. Bearing this in mind, paragraph 5.99 of Hungary's Memorial (also paragraph 1 of Part II of Hungary's 1992 Declaration) is now quoted in full:

"From the point of view of geology, the greatest risk is the lack of detailed knowledge of the area. Without such knowledge, technical planning and environmental risk assessment cannot arrive at sound results. A reliable prognosis can only be made based on systematic studies revealing geological conditions."

If there had been any merit to the allegation of lack of detailed knowledge, if Hungary had been serious in its desire to arrive at sound results through systematic studies, it is inconceivable that Hungary would have failed to rectify the alleged ignorance of the region's seismic conditions in the two years between the May 1992 Declaration and submission of its Memorial. It would not have contented itself with simply repeating a series of unsubstantiated and easily contradicted allegations.

¹⁴⁴ Compare, Hungarian Memorial, paras. 5.99-5.105 and the 1992 Declaration at *ibid.*, Vol. 4, Annex 82 (at pp. 169-170). It is noted that the 1992 Declaration is specifically cited as the source of one of the many untenable statements contained in the Hungarian Memorial, at para. 5.100.

7.106 In any event, Hungary's contentions are totally wrong. The quantity of research work and exploratory drilling in relation to the G/N Project region's geology, seismic and tectonic status is colossal. Further, this fact is well known to Hungary. Before the commencement of construction, the results of the then existing geological research and exploratory works were summarised in a joint document entitled: "Summary Results of the Geological Exploration from the whole system of Water Works Gabčíkovo-Nagymaros, in Slovak and Hungarian languages, 1977-1978"¹⁴⁵. This shows that extensive exploration works were carried out in 1963-1966, 1968 and shortly before the conclusion of the 1977 Treaty, that is in 1975-1976.

7.107 Subsequently, an impressive quantity of supplementary studies were carried out in step with the construction phase. The results of these studies, and a comparison between the conclusions drawn therefrom and the state of knowledge at the time of the conclusion of the G/N Project, are contained in a comprehensive study dated October 1994. This has been prepared by a team of 12 geologists headed by Professor M. Mahei of the Slovak Academy of Sciences and is entitled "Comparison of Older and Present Views on the Geological-Tectonic Setting of the Danube basin in relation to the Seismological Situation of the Water Work Gabčíkovo"¹⁴⁶. The basic finding of this study is that the risks, as identified today, are in fact smaller than those considered by the Project designers and allowed for in the construction.

7.108 Thus, the Project planning did indeed comprise a detailed geological survey and deep drilling. The choice of the location of the main structures was based on the results, inter alia, of boreholes drilled to 400-600 m below the surface. Far from being "built near a geologically young fault", the Gabčíkovo step was deliberately relocated away from the nearest fault which, although young from a geological point of view, has been inactive since the lower Pleistocene, i.e., two million years ago.

7.109 Hungary's allegation that the parties' research results have never been integrated is clearly shown to be false by the joint geological summary collated in 1977-1978. Within the context of the Joint Contractual Plan, joint methods for exploration were elaborated and regular consultations held. Cooperation also flourished at the level of basic research

¹⁴⁵ A copy of the original document has been deposited with the Court.

¹⁴⁶ A summary of this study appears in Annex 26. A copy of the entire original document has been deposited with the Court. See, also, F. Horváth (University of Budapest), "Towards a Mechanical Model for the Formation of the Pannonian Basin", *Tectonophysics*, Elsevier, Amsterdam, March 1993. This technical article reveals the substantial amount of Hungarian research into the geology of the Danubian Lowland region.

leading, for example, to the publication of a tectonic map of the Carpathian/Balkan region in 1974 with assistance from UNESCO. More recently, Slovak and Hungary have cooperated within the framework of the DANREG program (Danube Region Environmental Geology). This was established in 1989 with the collaboration of four bodies: the Geological Institutes of Bratislava and Budapest, the Slovak Ministry of Environment and the Hungarian Geological Office. In September 1990, the Austrian Geological Institute was brought into the program¹⁴⁷.

7.110 The real "lack of detailed knowledge" in this case is that shown by the compilers of Hungary's Memorial (and the 1992 Declaration). To take an example, it is alleged that the fault line near Gabčíkovo has never been traced into Hungary, thus demonstrating the parties' failure to coordinate research. But there was no such failure to coordinate research and, in any event, the fault line in question does not continue into Hungary but ends around 2 km southeast of Gabčíkovo. As to the Rába line, this is not only at a safe distance from Gabčíkovo, but is also situated on a different geological underlayer.

7.111 Hungary also claims that the seismic values allowed for in the Project design were insufficient. It alleges that "the expected intensity estimated for the Dunakiliti area based upon historical data is 8.7-9.0 MSK"¹⁴⁸. No evidence is offered in support of this, nor could it be. The Dunakiliti weir is not situated directly in an active zone. The nearest active zone is the Komárno region, which registered an earthquake in 1763, the intensity of which is now estimated at 8.5° MSK, that is less than the value which Hungary now says should be applied outside the affected region¹⁴⁹.

7.112 In fact, the G/N Project structures are located in an area without any registered earthquake epicentres throughout the whole historic period. Based on a detailed analysis of the Komárno recorded intensities, the Project designers originally allowed for seismic values of 6-7° MCS but, due to the application of the relevant construction codes, the

¹⁴⁷ The aim of the DANREG program is to establish a unified series of geological, tectonic and other maps, together with written documentation.

¹⁴⁸ Hungarian Memorial, para. 5.104. As to the MSK scale (and the MCS scale), see, Slovak Memorial, para. 2.60.

¹⁴⁹ No earthquakes have been recorded in the Komárno region with an intensity of greater than 5° MSK since 1861. An earthquake with an intensity of 2.5° MSK was registered there on 27 September 1994. This represented absolutely no threat to Project structures.

structures are safe in the case of an earthquake of 7.5-8.0 MSK intensity¹⁵⁰. Furthermore, Gabčíkovo is situated on a layer of gravel up to 500m thick which is wholly without tectonic disturbance and would absorb the shock of even an earthquake far exceeding any recorded in the historical period.

7.113 It should also be noted that the G/N Project zone is monitored by a whole series of seismic stations, none of which has registered an earthquake of any value in the immediate vicinity of any of the major construction sites. There is strong evidence that the Project designers over-estimated the likelihood of an earthquake in the Project region¹⁵¹. And, once again, there is no evidence offered in support of Hungary's claims that the values allowed for in designs are not relevant because "the compulsory building codes have not been applied"¹⁵². In no independent report have the Project's structures ever been subjected to adverse criticism: not in the Bechtel report, nor in the HQI report, nor in any of the EC reports. Even the Ecologia reports praise the quality of the construction work and the HQI report, which was specifically mandated to examine the works, records that these "correspondent en général aux standards appliqués ..." ¹⁵³.

7.114 In conclusion, Hungary's allegations in relation to seismic risks are ill-researched, unsubstantiated and, in any event, without foundation. The risk of earthquake is dramatically evoked as if a real disaster was awaited. But the risk has been thoroughly studied, by both parties, and has been fully taken into account.

SECTION 5. The Project's Impact on Navigation

7.115 Perhaps the most extraordinary of the claims in Hungary's Memorial is that the G/N Project would entail certain risks to navigation. One of the primary aims of the Project was to improve navigation; its impact would be to render the Danube navigable day and night for 330 days per year instead of just 120 days per year; and the safety of navigation would be greatly improved due to the increase in navigable depth. Hungary's claims that the "large waves" accompanying peak production would have impaired navigation is simply

¹⁵⁰ See, Slovak Memorial, para. 2.60, et seq.

¹⁵¹ See, Annex 26.

¹⁵² Hungarian Memorial, para. 5.104.

¹⁵³ HQI Report, Slovak Memorial, Annex 28 (at p. 78). See, also, the HQI Rapport Synthèse, Annex 22, hereto, which notes that the seismic values originally allowed for were adequate.

incorrect. Peak operation would lead to fluctuations in water levels, but not waves that could impede a ship's progress upstream or downstream.

7.116 In fact, the navigable route provided by the Project has been specifically approved by the Danube Commission, which considered the Project to be the sole means of obtaining the required navigation possibilities in this sector:

"Sur le secteur tchécoslovaque-hongrois, le secteur entre Rajka et Gőnyű y compris, l'unique et rationnel moyen d'obtenir les gabarits de chenal recommandés pour ce secteur est la construction de centrales hydrauliques¹⁵⁴."

Translation:

"In the Czechoslovak-Hungarian sector, including the sector between Rajka and Gőnyű, the sole and logical means of obtaining the recommended channel dimensions for this sector is through the construction of the hydraulic works."

This has been confirmed by the technical experts of the Danube Commission, which met on 7-15 December 1992 and found that:

"...la satisfaction des exigences des Recommandations en vigueur relatives à l'établissement des gabarits du chenal, des ouvrages hydrotechniques et autres sur le Danube, constitue la garantie pour que les conditions nécessaires à la navigation soient assurées¹⁵⁵."

Translation:

"...the satisfaction of the requirements in the recommendations in force for the establishment of navigation channel dimensions, hydrotechnical and other works on the Danube constitutes the guarantee that the necessary navigation conditions may be assured."

7.117 The gravity of the problem may be seen from the fact that the Danube Commission's recommended depth of 2.5 m was available in the Project sector for just 46% of 1990 and 40% of 1992. It is for this reason that, as noted in Slovakia's Memorial, Hungary's interruption of the works has given rise to numerous protests. Thus, the Union Ouest-Européenne des Chambres de Commerce et d'Industrie des régions rhénane, rhodanienne et danubienne, by its resolution of 16 February 1990, demanded "... la reprise des travaux de construction du projet commun tchécoslovaque-hongrois Gabčíkovo-Nagymaros"¹⁵⁶.

¹⁵⁴ Slovak Memorial, Annex 137 (at p. 245).

¹⁵⁵ Ibid., Annex 15.

¹⁵⁶ Ibid., Annex 31. Translation: The West European Union of Chambers of Commerce and Industry for the Rhine, Rhone and Danube Regions demanded "... the recommencement of construction works on the joint Czechoslovak-Hungarian Gabčíkovo/Nagymaros Project". See, also, ibid., paras. 6.147, et

SECTION 6. Hungary's Argument Neglects the Solutions Provided By the Project to the Risks of Flooding

7.118 In its interpretation of the 1977 Treaty, Hungary ignores the importance accorded to flood protection by the Treaty parties. But the first of the stated aims of the Treaty in the preamble is the development of water resources, not energy production. The stress is on navigation and, importantly, flood control. This last is provided for in Article 13, which precedes the articles relating to water protection, navigation and protection of the natural environment and is the first article in Chapter V - "Water-Resource Management Functions". Hungary's current emphasis away from the importance of Article 13 must be contrasted with the emphasis placed in the Hungarian Academy of Sciences' Opinion of 1985. There a general approval to the damming of the Danube is given in order, first, to develop navigation, second, to achieve flood control and, third, to generate energy¹⁵⁷.

7.119 In fact, a main impetus for the conclusion of the Treaty was the experience of disastrous flooding, in particular in the years 1954 and 1965¹⁵⁸. This may be seen clearly from Government resolutions passed in the aftermath of the 1965 flood. Thus, for example, on 28 May 1966, the Presidency of the Slovak National Council considered a detailed report on the 1965 flood and adopted the position that "the most important task [is] to ensure the flood protection of the territory in connection with the [G/N Project]"¹⁵⁹

7.120 Nonetheless at no stage in its Memorial does Hungary even mention the enormous benefit provided by the Project in terms of finding a long term solution to the Danube's tendency to severe flooding¹⁶⁰.

seq. See, also, E. Fleischhacker, *Analysis of the Effect of the Gabčikovo-Nagymaros System on International Navigation*, 1993, Annex 27.

¹⁵⁷ Hungarian Memorial, Vol. 5 (Part I), Annex 3.

¹⁵⁸ The impacts of the past flooding of Žitný Ostrov and Szigetköz and, in particular, the floods of 1954 and 1965 have already been discussed in Slovakia's Memorial, at para. 1.30, et seq.

¹⁵⁹ Resolution of the Presidency of the Slovak National Council, 28 May 1966, Annex 28. See, also Resolution of the Czechoslovak Government, 10 April 1967, Annex 29, and proposal of the Slovak Government, March 1972, which found that the G/N Project would achieve the necessary flood protection and "that the construction of the Project can substantially lower the costs for flood protection". Annex 30.

¹⁶⁰ It must be stressed that there is a vast difference between the inundation of the side arm system and its floodplain as a result of the usual summer and winter floods of the Danube and the disastrous floods that result when a river, which has been controlled by a series of flood dykes, breaks those dykes. It is the second risk to which the Danube area was exposed at the time of the inception of the G/N Project; for it was a fast flowing, single channel river whose regular high waters were contained, except when flood dykes burst with disastrous effect.

7.121 In terms of flood protection, the Project in its upstream sector would allow for the dispersal of flood waters between the old Danube, the side arms and the surrounding floodplain, and would also enable up to 5,200 m³/s to be channeled into the bypass canal. The 10,000 year flood, that is a flood the likelihood of which is 1 in 10,000, could thus be safely handled by dividing the flood waters. In the downstream sector, floodwaters could be controlled within specially strengthened inundation dykes reflecting the latest technology. As HQI has noted: "il y a lieu de ne jamais perdre de vue le gain de sécurité ainsi acquis ...¹⁶¹." But Hungary ignores these benefits.

SECTION 7. Hungary's Allegations Relating To the Financial Risks of the Project

7.122 The economics of the Project, if they are to be analysed, must be analysed from the point of view of both parties and as at the date of the particular breach by Hungary which it is trying to justify: questions as to whether the Project was economic as of 1977, *i.e.*, prior to the commencement of works that were actually constructed, are entirely irrelevant. It cannot be for the Court to evaluate or second guess the economic analyses of the Treaty parties in 1977.

7.123 The purpose of this Section is not to provide an after the event assessment of the Project's economic viability. Slovakia does however wish to point out that a balanced analysis of the situation in 1989-1992 would necessarily show that the abandonment of largely complete structures such as the bypass canal, the Dunakiliti weir, and the Gabčškovo power plant represented the commitment of a vast capital outlay for no return; that the Project offered economic benefits in addition to energy production, *i.e.*, in terms of reliable flood control, better conditions for agriculture, the end to riverbed erosion, vastly improved navigability, and a revitalised side arms system, each of which had a real and high value; that, therefore, by any standards, the cancellation of the Project would make no sense from the standpoint of economics.

7.124 The purpose of this Section is rather to examine Hungary's treatment of the Project's economics¹⁶². For, the repetitive theme, running through the Hungarian Memorial and its annexes, is that the construction of the G/N System was not economically

¹⁶¹ HQI Rapport Synthèse, Annex 22. Translation: "The gain in security thus acquired must never be lost sight of."

¹⁶² In this respect, the Court is also invited to the consideration of Hungary's economic analyses in the so-called "White Book", compiled by various Hungarian scientists. *See*, para. 5.47, above. There, Hungary's analyses are strongly refuted. *See*, Annex 1 (at pp. 15-22).

viable - for Hungary. Hungary is cautious in using this as a specific reason for its suspension, abandonment of works and subsequent termination of the 1977 Treaty. It is no doubt aware that the fact that the Project involved a considerable investment, which Hungary decided in 1989-1992 that it did not want to make, offers no legal justification for its actions.

7.125 Nonetheless, Hungary accepts also that, immediately prior to the suspension of Nagymaros, the Hungarian Prime Minister participated in a review of a cost-benefit analysis of the Project, which "concluded that the abandonment of the Nagymaros barrage would be the most reasonable choice ... from the economic point of view"¹⁶³. Thus, Hungary admits that its 1989 decision to suspend the Nagymaros section of the Project was, at least in part, financially motivated¹⁶⁴. It is useful to trace how this economic concern developed.

7.126 Hungary's plans to develop the Danube were always certain to involve it in a significant commitment of resources. This was true in the early 1950s when, alone, Hungary considered plans to construct one or two barrages at Nagymaros. It was no less true when, later, Hungary initiated negotiations in relation to a joint development with Czechoslovakia, or in 1958 when a preliminary decision to develop was reached, or in 1977 when the Treaty was signed¹⁶⁵.

7.127 Hungary argues that, in 1980, it commenced a review of its financial undertakings as a result of "the changing world economy and the deteriorating economic position of the Socialist bloc countries" and as a result sought a postponement of the Project¹⁶⁶. But this is undermined by its assertion that, as from the perspective of 1977, "there was never the slightest possibility" that the Project would be completed in accordance with the 1977 Treaty timetable¹⁶⁷. Thus, there was no fundamental change after the 1977 Treaty - the circumstances in question existed prior to the creation of the treaty obligations.

¹⁶³ Hungarian Memorial, para. 3.74.

¹⁶⁴ In Chapter V above, it has been demonstrated that economic considerations were Hungary's only motive other than political considerations.

¹⁶⁵ With regard to the joint development, far from being pushed into a bad bargain, Hungary negotiated a 50% share of all electricity produced, whereas in terms of hydroelectric potential of the Danube's water utilised, its share should only have been 45%.

¹⁶⁶ Hungarian Memorial, para. 3.42.

¹⁶⁷ Ibid., para. 4.15. The legal ramifications of Hungary's arguments are considered in Chapter X.

7.128 In its 1983 position paper, the Hungarian Academy of Sciences estimated the cost of Hungary's share of the Project construction at 30 billion Forints. It noted that such did not reflect the "unavoidable installation costs (such as the regulation of the Old Danube, purification of the waste water of the region, etc.) which have the same order of magnitude"¹⁶⁸. Its direct conclusion was as follows:

"It is doubted that such an amount.... can be spent on a barrage system which will optimally provide electricity only in 1993."

7.129 In the Hungarian Academy of Sciences Opinion of 1985, this position developed into a recommendation that construction of Nagymaros be put to one side to avoid "a significant burden to the national economy"¹⁶⁹. Its particular concern was to delay the heavy investment required to build the sewage construction facilities necessary at Győr and other towns that pumped raw sewage into the Danube¹⁷⁰. This was clearly for national, economic motives, not for environmental reasons. The necessary investments would, of course, have had to be made at some stage, but if construction work could be carried out gradually, the burden on the economy would be less.

7.130 A more detailed analysis of the economic pros and cons of continuing with Nagymaros was carried out in the Hardi report. It found that, taking into account the necessary sewage treatment and other environment related works, cancellation was the most satisfactory outcome for Hungary in the short term although, long term, there was little to choose between cancellation and continuation of construction. However, it was noted that if peak operation were dropped, continuation immediately became economically unviable because the value of the electricity share to be taken by Hungary would fall substantially¹⁷¹. The economic considerations therefore began to take on a life of their own, that led inevitably to cancellation. Hungary was aware (in the 1983 position paper) that the construction necessitated additional environment-related expenditures. To avoid such expenditures, the best means was to defer peak production (the recommendation of the 1985 Hungarian Academy of Sciences Opinion). Once peak production was no longer envisaged, from Hungary's point of view, the Project lost its economic attractiveness altogether (the conclusion of the Hardi report)¹⁷².

¹⁶⁸ Ibid., Vol. 5 (Part I), Annex 2.

¹⁶⁹ Ibid., Annex 3.

¹⁷⁰ See, para. 4.29, above.

¹⁷¹ Hungarian Memorial, Vol. 5 (Part I), Annex 8 (at p. 161).

¹⁷² This is admitted by Hungary. See, Hungarian Memorial, para. 10.75.

7.131 As to Hungary's argument that no account was taken of the additional costs of ensuring the requisite water quality in the Danube at the time of the allocation of joint investment funds in the 1977 Treaty, it must be noted that the parties' individual responsibility for the construction of water treatment plants was established prior to the signature of that Treaty, that is by Article 11(1) of the 1976 Boundary Waters Management Agreement. This provision was reflected in Article 2 of the 1977 Treaty, which related to the carrying out of national investments. And such specifically national investments had always been envisaged. Thus, for example, in the Protocol of the negotiations of 18-20 April 1963 it was agreed that "investments which ... serve for amelioration of present state, will be guaranteed by each side on its own territory with [its] own means"¹⁷³. This principle was maintained in the 1977 Treaty although modified to the extent that the joint investment would cover the following: the restoration of vegetation in Czechoslovak and Hungarian territory - Articles 5(5)(a)(5) and (b)(13); and, in addition, the improvement of the old riverbed on both Czechoslovak and Hungarian territory, such work being the sole responsibility of Hungary - Article 5(5)(b)(6).

7.132 As noted in the Slovak Memorial, Czechoslovakia did take the necessary steps within its national investment program and was ahead of schedule in its planned construction of sewage treatment plants by 1989¹⁷⁴. But Czechoslovakia's expenditures, whether in terms of its national investments or its fulfilment of construction obligations, have never had any relevance to Hungary's economic analyses, which have been carried out solely from the Hungarian point of view. Neither has any account been taken of the fact that by May 1989 Czechoslovakia's share of the construction work had been completed to around 90% (as opposed to around 40% for Hungary). The abandonment of the Project for Czechoslovakia would clearly therefore have been economically disastrous.

7.133 It is literally the case that Hungary's economic analyses ignore the existence of the 1977 Treaty and of Czechoslovakia as a party thereto. Thus, in the Hardi report, it is baldly stated:

"Each and every item includes the values calculated on the basis of the technological requirements and excludes estimates for damages as we will request amendments to the agreements signed between governments"¹⁷⁵.

¹⁷³ Annex 31, hereto. This meeting is referred to at para. 3.23 of Hungary's Memorial.

¹⁷⁴ Slovak Memorial, para. 3.21. See, also, para. 4.42, et seq., above, and Annex 9, hereto.

¹⁷⁵ Hungarian Memorial, Vol. 5 (Part I), Annex 8 (at p. 161 - emphasis added).

In the calculation, the losses that Czechoslovakia will inevitably suffer are simply put to one side. Also ignored is a valid economic evaluation of the Project's benefits (in terms of flood control, for example). In essence, the analysis is wholly one-sided and tilted towards the inevitable conclusion of the Project's abandonment. The same approach is followed in Hungary's Memorial which fails to provide a balanced analysis, rendering valueless Hungary's discussion of economic issues relating to the Project.

SECTION 8. Conclusions

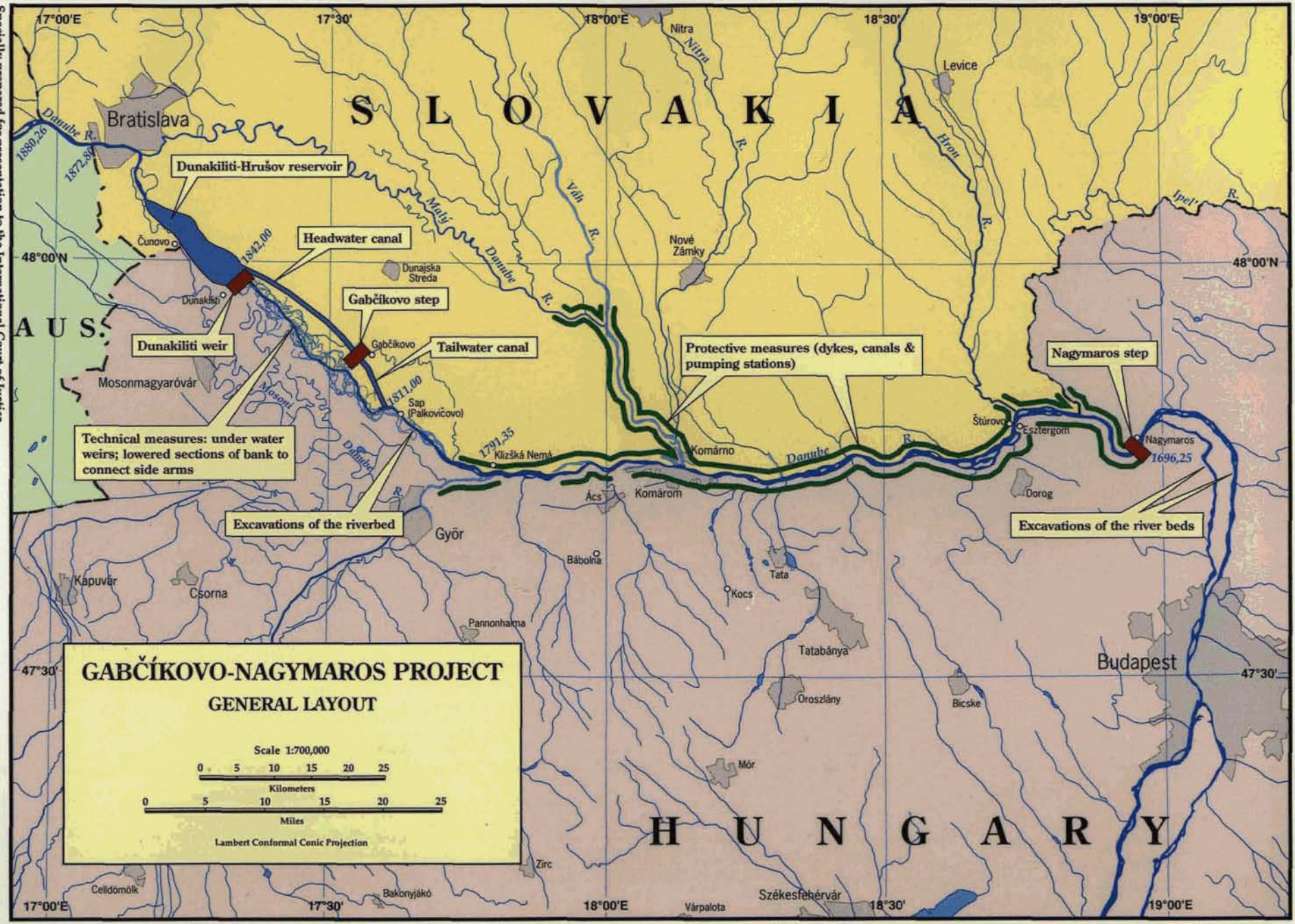
7.134 Hungary's allegations as to environmental risk and damage threatened by the original Project were not supported by impartial and scientific evidence - not at the time of Hungary's suspension of works, nor at the time of its subsequent abandonment of construction work on the Nagymaros and Gabčíkovo sections, nor at the date of its purported termination of the 1977 Treaty. And Hungary has now failed to supply such evidence in its Memorial.

7.135 The best evidence available, including the actual implementation of the Project in partial and approximate form by means of Variant "C", shows the Project to be environmentally sustainable. It shows that Hungary has greatly exaggerated, if not invented, risks to water supplies and has, in order to strengthen its arguments, deliberately ignored all those measures taken during the Project's evolution to optimise its impact on flora and fauna, forestry and agriculture.

7.136 Furthermore, Hungary has totally ignored the real and very necessary benefits that the Project was to offer in terms of improved navigation and flood protection. And in its treatment of seismic issues, it has not even attempted to update its assessment as contained in the 1992 Declaration, an assessment of risk that was in any event wild in its assertions and that Slovakia has easily and definitively rebutted. Finally, Hungary's analysis of the Project's economics has been shown to be one-sided and wholly uncertain in terms of its legal relevance. The simple fact is that, as Slovakia has demonstrated through putting the Gabčíkovo section of the Project into operation through Variant "C", the Project was and is sustainable both in environmental and economic terms.

Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-9



GABČÍKOVO-NAGYMAROS PROJECT
GENERAL LAYOUT

Scale 1:700,000

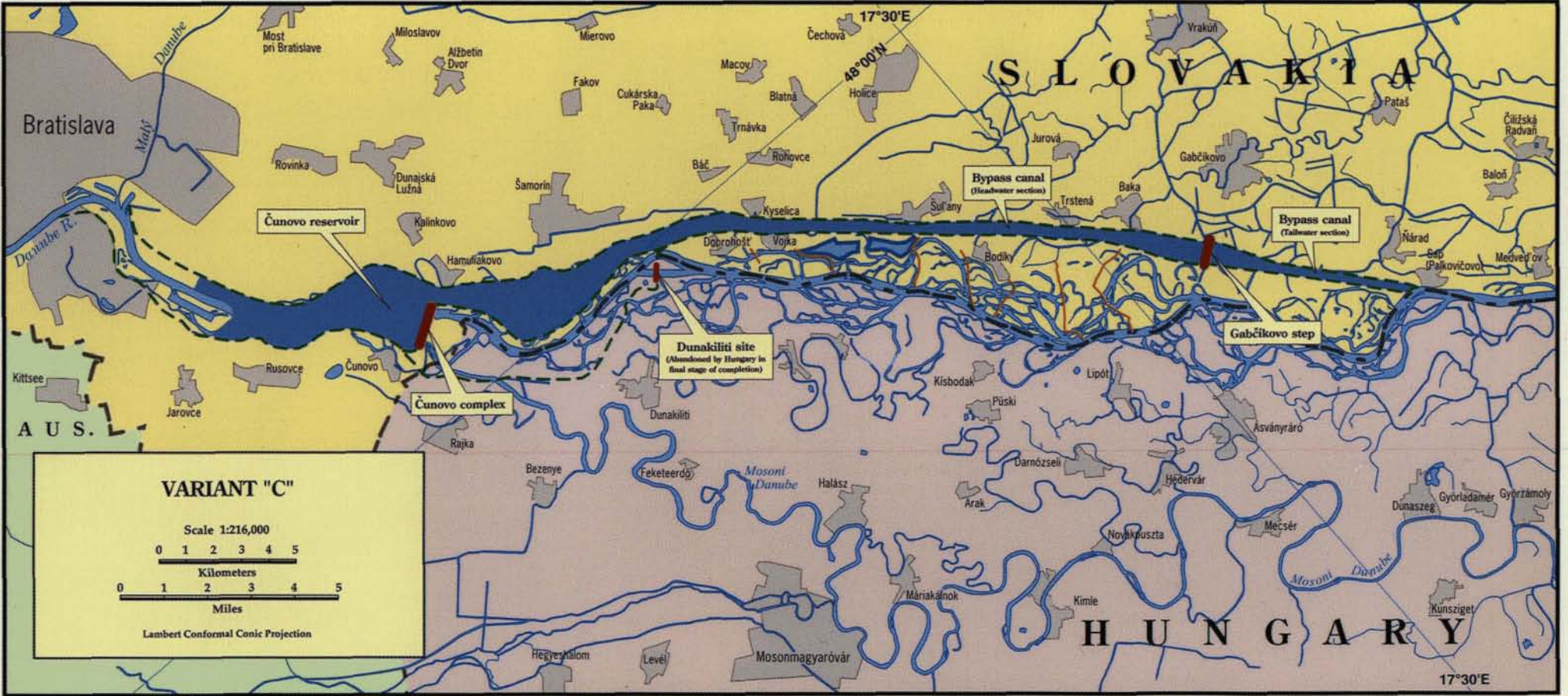
0 5 10 15 20 25
 Kilometers

0 5 10 15 20 25
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Lambert Conformal Conic Projection

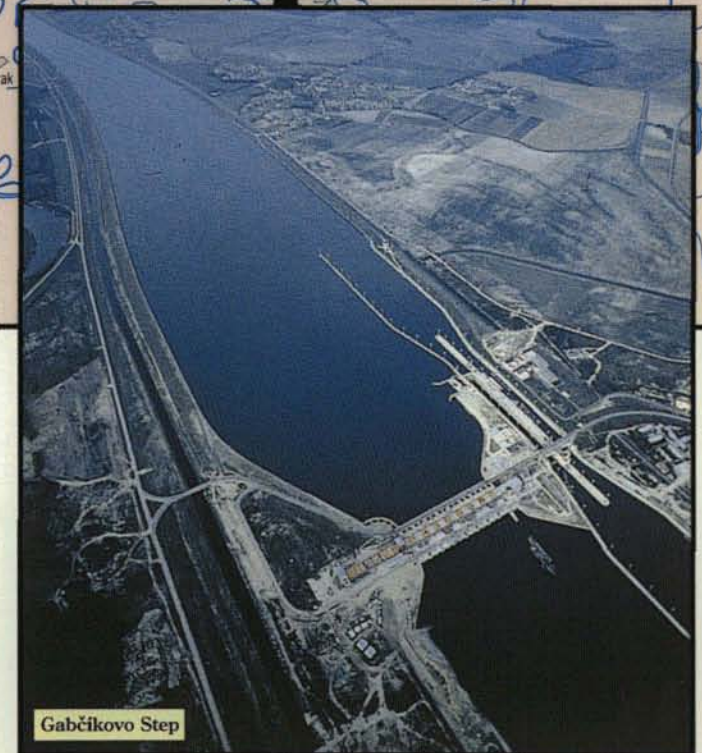
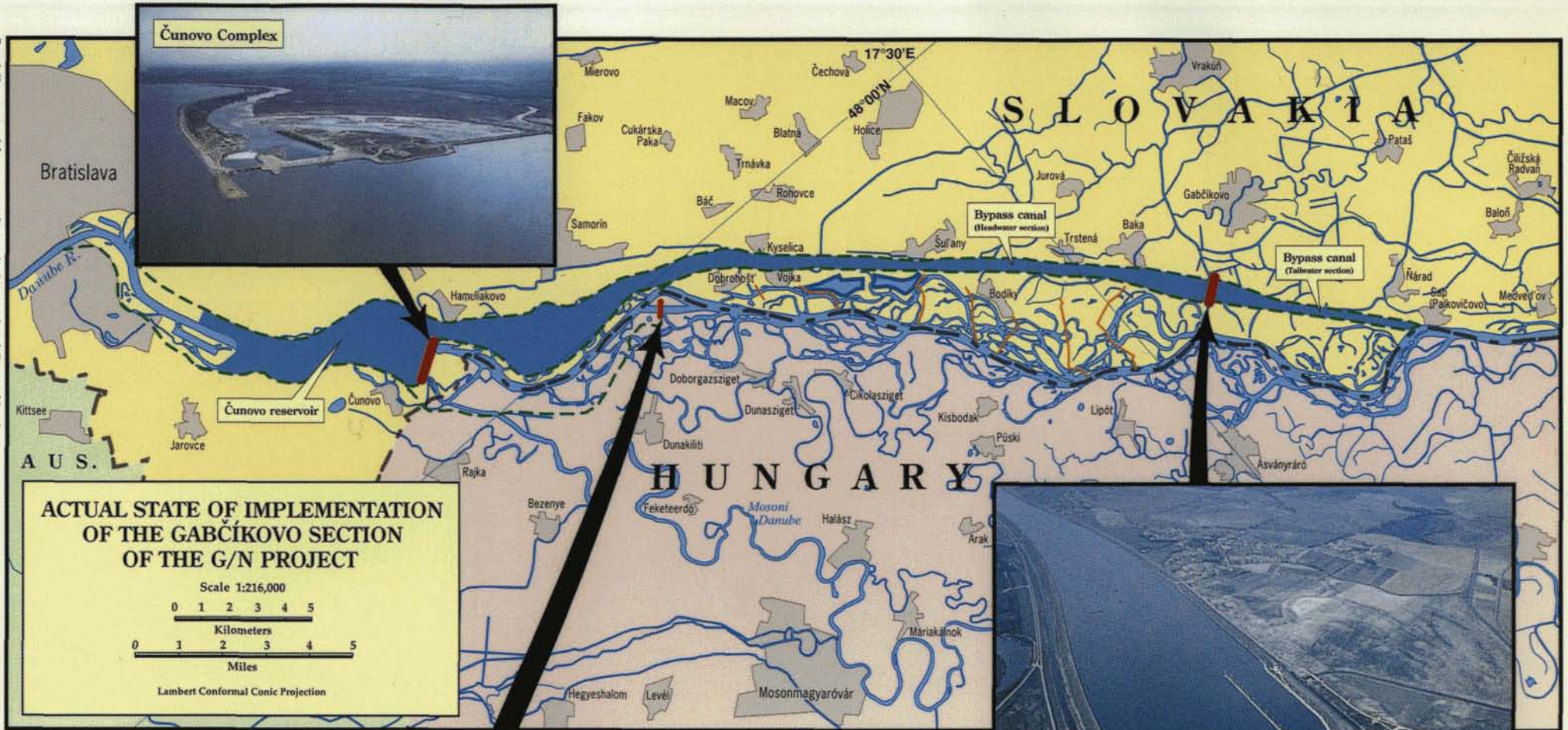
Specialty prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-10



Specialty prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-11



CHAPTER VIII. HUNGARY'S INCORRECT CONTENTIONS AS TO WATER QUALITY, ENVIRONMENTAL AND OTHER RISKS RELATING TO VARIANT "C"

SECTION 1. Introductory Comments

8.01 The Hungarian Memorial's exposition of the actual or potential environmental damage arising from Variant "C" - as opposed to the original Project - is noticeably uncertain in tone. It is first stated that the impacts of Variant "C" "may be less than the 1977 Barrage System would have been". However, it is claimed a few lines later that this impact is, in fact, "likely to be more severe"¹. In order to avoid such confusion, it is essential to focus on the key differences between Variant "C" and the G/N Project².

A. Variant "C": Overview

8.02 First, Variant "C" is an approximate implementation of only one part of the G/N Project, the Gabčŕkovo section. This means that Variant "C" can have none of the adverse impacts that Hungary alleges would have resulted from the construction of Nagymaros, i.e., no adverse impact on either water levels, water quality or the environment generally downstream of Sap (Palkovičovo) and, of course, no adverse impact on the Budapest drinking water supply wells³.

8.03 Second, the implementation of Variant "C" means that the bypassed stretch of the Danube can now develop more naturally⁴. This has been confirmed not only by the EC working groups but also in a recent paper by an expert on river restoration, Dr. Martin Jaeggi of the Swiss Federal Institute of Technology. Dr. Jaeggi supports the idea that restoration of the old Danube is made possible by

¹ Hungarian Memorial, paras. 5.108 and 5.109. See, also, the favourable opinion contained in App. 3 to the Hungarian Memorial (at p. 422). See, para. 8.04, below.

² Illus. Nos. CM-9 and -10 portray the main elements of each; and Illus. No. CM-11 shows the present state of completion of the Gabčŕkovo section of the Project, including the Dunakiliti weir, which was virtually completed when Hungary abandoned the Project.

³ However, Variant "C" may have a positive impact on water quality downstream due to the aeration effect of water passing through the Gabčŕkovo hydroelectric power plant.

⁴ EC Working Group report of 23 November 1992, Hungarian Memorial, Vol. 5 (Part II), Annex 14.

Variant "C" (as it would have been by the original G/N Project)⁵. He proposes that some of the "training works" - riprap and groynes - that had been installed to confine the river within the main channel for navigation purposes, but that are now of little use, be removed. According to Dr. Jaeggi, this could "induce lateral erosion and widening of the existing channel of the Old Danube". Thus:

"A wider channel can then be expected to bifurcate and braid. With time, a channel system comparable to the one existing before the main regulation may develop... .

On the whole, the new river will become sort of a model of the original river and thus not be identical to it. But the expected natural development of a channel system comparable to the original will favour the reforming of natural morphological elements where pioneer plants can settle and the cycle of formation of an alluvial forest may start again In general terms, a higher habitat variety compared to the present situation can be expected."

Slovakia is in full agreement with the views expressed in Dr. Jaeggi's paper, which shows what would be possible with Hungary's cooperation.

8.04 Third, the damming of the Danube 10 km upstream of Dunakiliti, at the Slovak village of Čunovo, means that the actual reservoir is considerably smaller than that originally envisaged. The Hungarian Memorial takes the view that this reduction in size "decreases the risk of eutrophication"⁶. Appendix 3 also notes: "From the view point of subsurface waters the "Variant C" strategy, that is the impoundment at [Čunovo], is more favourable, to some extent, than the impoundment at Dunakiliti⁷."

B. Impact on Hungary: Overview

8.05 Hungary, nonetheless, offers three main reasons why Variant

⁵ Martin N.R. Jaeggi, Swiss Federal Institute of Technology, Zurich, Possibilities of River Restoration on the Danube in relation to the Gabčíkovo Scheme, October 1993, Annex 32.

⁶ Hungarian Memorial, para. 5.108. The ensuing claim that, according to the EC Working Group of Experts, a risk of harmful eutrophication remains is misleading. The risk would only arise if Variant "C" were operated in a manner directly contrary to Slovakia's intentions and wishes. See, para. 7.36, above.

⁷ Hungarian Memorial, App. 3, p. 422.

"C"'s impact should be seen as being more severe⁸. Each of these reasons is without substance. It is alleged that "Hungary did not plan short term technical fixes to compensate for the water loss", that Hungary "receives absolutely no benefit" from Variant "C" and that it "has no control over the supply of water". Slovakia contests each of these allegations. Further, it considers that insofar as severe environmental damage to Szigetköz has been suffered by Hungary, this is entirely due to Hungary's wilful intransigence, and is not the inevitable result of the damming of the Danube.

8.06 With regard to the first allegation, it is crucial to remember that Hungary had planned for and built the necessary facilities to ensure the water recharge and revitalisation of the Szigetköz side arms within the G/N Project. These facilities remained available at the time of the implementation of Variant "C". These were not short term fixes, for none were necessary; they were concrete steps to ensure a revitalised side arm system from the instant of the damming of the Danube. Thus, Hungary provided for:

- Construction of a water supply structure in the Dunakiliti weir for discharge up to 200 m³/s into the Szigetköz side arms, which was ready at the time of completion of the Dunakiliti weir, *i.e.*, long before the purported termination of the 1977 Treaty (the location of the Dunakiliti intake is shown in Illus. No. CM-7⁹);

- The necessary connections in the Szigetköz side arm system to enable waterflow to be distributed to all river branches;

- Projection of measures to ensure higher water levels in the Danube, *i.e.*, underwater weirs.

Further, although Hungary has subsequently been unwilling to make use of the intake at Dunakiliti, it did plan for and partly carried out the works to ensure the water recharge of its side arms just upstream of Dunakiliti. Thus, it provided for:

⁸ Ibid., para. 5.109. But see, also, ibid., para. 10.29: "Variant C was liable to create similar damage to ... the original Project." Hungary is extremely inconsistent on this point. At ibid., para. 5.109, Hungary in fact enumerates five reasons, the last two of which, however, have no real relevance. The fourth reason relates solely to economic changes in Hungary since 1988 - 1989. Hence, it is in no way a reason particular to the impacts of Variant "C" as opposed to the original Project. As to the fifth reason, this relates to the change in size of the reservoir. As this is seen as a beneficial impact in the preceding paragraph of Hungary's Memorial, and as no further explanation is given, it is difficult to see precisely what Hungary's point is.

⁹ Appearing at para. 7.84, above.

- A project to construct an underwater weir upstream Dunakiliti (at rkm 1843)¹⁰;
- Opening of the fortified banks of the Danube main channel at three points upstream of Dunakiliti and dredging of connecting canals from the channel to the side arms.

8.07 In terms of benefit from Variant "C", Hungary now receives a regular and assured supply into the Mosoni Danube of 20 m³/s and a flow of approximately 3 m³/s from the reservoir's right side seepage canal¹¹. But, of even greater importance, for the first time Szigetköz is now safeguarded from the threat of devastating floods such as that of 1954 which caused Hungary loss and damage in excess of a billion dollars¹². This threat of a "big flood catastrophe", vividly described by the Hungarian hydrologist Dr. Vagas in 1991, has disappeared (in the upper part of the Project area) because flood waters can now be channelled into the bypass canal¹³.

8.08 Thus, Hungary's contention that it has no control over flood waters, which may inundate Szigetköz "in a matter of hours", is wholly without sense¹⁴. Prior to the implementation of Variant "C", Hungary did not have control over the meteorological changes that create floods. This has not changed. The only difference is that, due to the implementation of Variant "C", such flood waters can be diverted into the bypass canal, so that even if it is not possible just as before to prevent

¹⁰ This was prohibited by the Hungarian Parliament. See, para. 8.11, below. The underwater weir works by raising the water level in the river upstream of the weir and allowing flow through lowered sections in the Danube river banks into the side arms. See, Illus. No. CM-12, appearing at para. 8.11, below.

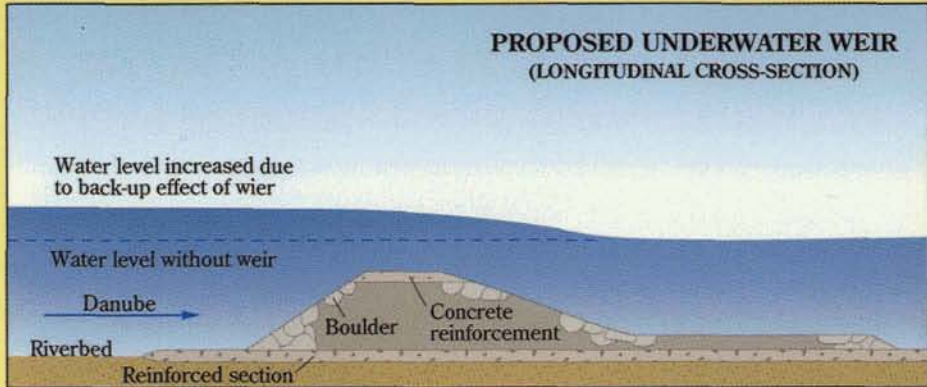
¹¹ An increase of the flow diverted into the Mosoni Danube to 30-40 m²/s is currently being engineered.

¹² Slovak Memorial, paras. 1.31 and 5.06.

¹³ Ibid., Annex 34. Dr. Vagas stated: "Those who observed the flood of August 1991, were struck by the fact that ... the water level at Dunaremete [on the Hungarian side of the Danube, opposite Gabčikovo] was of 30 cm higher than the maximum levels measured in the 1954 flood. The time bomb is [ticking]! ... In the following ten years, a lower backwater of the Danube can cause a big flood catastrophe. A headwater canal was completed ... which will protect Szigetköz against floods. Czechoslovakia will never dismantle this headwater canal for this reason. If Hungary does not allow that a part of the Danube water is drained to this canal in the event of a flood, thus, it can cause the break of the protection dyke because if gathered suspended load will reach its peak I can say only God save Szigetköz ... I would say that this is the opinion of experts - hydrologists. But this is also the opinion of the Commission of water management of the Hungarian Academy of Sciences." (Emphasis added.) It must be noted that Slovak territory downstream of the bypass canal remains exposed to a real flood danger due to Hungary's abandonment of the Nagymaros section of the Project.

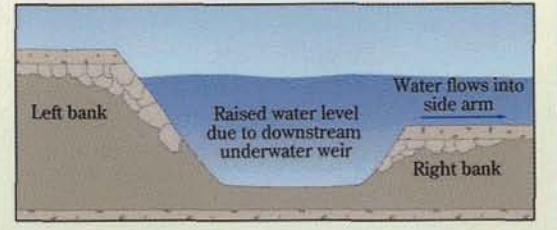
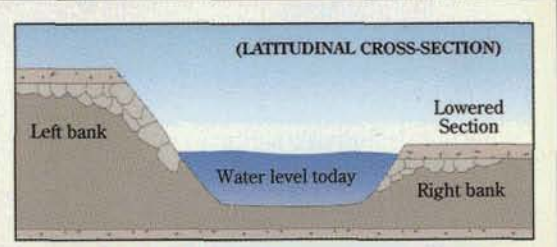
¹⁴ Hungarian Memorial, para. 5.117.

PROPOSED UNDERWATER WEIR TO RESTORE HUNGARIAN SIDE ARMS



The map depicts the Danube River system between Slovakia and Hungary. Key features include:

- Čunovo Reservoir** and **Mosoni-Danube intake** in Slovakia.
- Čunovo Weir Complex** and **Variant "C" right side reservoir dyke**.
- Right side seepage canal** and **G/N Project right side reservoir dyke** in Hungary.
- Dunakiliti Weir** and **Lowered section in Danube River bank carried out by Hungary in 1993**.
- Left side reservoir dyke** and **1842** / **1843** markers.
- Bypass Canal**, **Dobrohošť**, **Szigeti side arm**, and **Dunakiliti**.



H U N G A R Y

SLOVAKIA

SLOVAKIA

sudden increases in surface water level, at least the level of these increases can be reduced and controlled.

8.09 Hungary is by no means powerless in terms of its control of water supplies. It has the ability to ensure the revitalisation of its side arms; but it has made the decision not to take the necessary steps in order to preserve evidence of ecological harm and thus further its legal claims against Slovakia.

8.10 In this respect, Hungary has placed before the Court a false picture of the impacts of Variant "C" on its territory - a falsification that manifests itself on the actual terrain of Szigetköz. It is true that some Hungarian river branches have dried up, that fish have died, that flora has been adversely affected. But none of these impacts is the inevitable result of the implementation of Variant "C". Rather, these impacts are the direct result of a deliberate and calculated refusal to implement the water recharge which is necessary to the region, which would be simple to implement and which would in any case have been necessary had Hungary complied with its Treaty obligations.

8.11 First, Hungary has refused to put the Dunakiliti offtake into operation, i.e., to allow for the revitalisation of the side arms as originally planned by the Project¹⁵. Second, regardless of this refusal, the EC Working Group found that adequate flow into the Hungarian side arms could still be secured if an underwater weir were built upstream of Dunakiliti. As noted in the final recommendations of the EC in the Temporary Water Management Regime report of 1 December 1993: "This underwater weir is sufficient without other measures to ensure the water supply to the Hungarian floodplain¹⁶." Approval was given for such a project by the Hungarian Government, and the Danube's river banks were lowered at three points to allow interconnection with the side arms on Hungarian territory. The functioning of the underwater weir is shown in Illus. No. CM-12. But the weir remains unbuilt due to the intervention of the Hungarian Parliament, for reasons that concern only Hungary's victory in the current dispute not the presentation of its environment. Thus, as recorded in the Hungarian newspaper Magyar Hírlap:

¹⁵ This refusal is inexplicable because the water recharge into the Slovak side arms has been extremely successful and this report predicted the same beneficial impacts for Hungarian territory if water recharge is implemented on a similar scale as is currently the case on Slovak territory. Ibid., Vol. 5 (Part II), Annex 19 (at p. 790).

¹⁶ Ibid., (at p. 816, emphasis added).

"At the extraordinary session of parliamentary council for the environment on Monday ... it was said that the construction of a temporary weir could unfavourably influence the decision of the ICJ in The Hague ... Lajos Zsebök, the deputy of the Hungarian Democratic Forum drew attention to the danger of a solution consisting in underwater weirs¹⁷."

But this "danger" does not relate to environmental damage. Mr. Zsebök's concern was quite different:

"We could confirm with this solution that it is possible to eliminate unfavourable effects of the Danube diversion through technical measure and thus we would give up the idea of the return of the river and a decision of the Hague favourable for us."

It is the parliamentary intervention that has allowed the present adverse environmental impact. And, as a follow up article in Magyar Hírlap makes clear, this intervention went against local and Government support for the underwater weir and the acceptance of its efficacy:

"We are in an emergency situation, we must act immediately. We must finish with hesitations. It will no more be possible to repair all what we don't do today in two years - Mr. Boross expressed his view when visiting Szigetköz. 'Naturally, if Parliament rejects the project of the inhabitants of Szigetköz supported by the government, the underwater weir will not be constructed. Then, it will be necessary to face the public and tell why the environment is dying out' - the Prime Minister highlighted the water appropriation question as a national matter¹⁸."

The reason for the Parliament's stance is then explained:

"According to the experts of the Department for the Environment, some members of the Danube Circle and the Parliamentary Council for Environmental Protection, the realisation of the governmental proposal would negatively influence the long-term interests of Hungary. We would admit, with this solution that it is possible to prevent negative sides of the Danube diversion, we would give up the return of the river and a favourable decision of the Court¹⁹."

¹⁷ Magyar Hírlap, 1 March 1994, Annex 33 (emphasis added).

¹⁸ Magyar Hírlap, 7 March 1994, Annex 34.

¹⁹ Ibid. (emphasis added).

8.12 The only measure Hungary has taken is the recent action of pumping water from the old Danube into the side arms at various points. This project makes no sense. It is elaborately expensive, particularly in comparison with the cost of constructing an underwater weir²⁰. Also, as pointed out in the Hungarian newspaper, Kisalföld, the "result of hundred millions investment is the water level increase of some centimetres in the mid of Szigetköz and the negative impacts failed to be stopped"²¹. The relevant paragraph of the article concludes:

"But the gravitational water supply would have diminished the Szigetköz damages much more effectively and with lower costs."

8.13 This is entirely correct. The construction of an underwater weir (referred to in the article as "gravitational water supply") would raise water levels in the Danube riverbed and enable the Szigetköz side arms to be supplied by water flow through the gaps opened in the Danube's banks by a simple gravity flow. This operation, which is shown in Illus. No. CM-12, would cost just 30 million Forints and have practically no running costs. It would also be far more efficient. Not only would the flow into the side arms be far higher, but also the quality of the water in the side arms would rapidly improve. The current measures, by contrast, will almost certainly lead to eutrophication conditions in the Hungarian side arms as a result of the small amount of water being pumped and a negative impact on ground water quality.

C. The Evidence Relied on by Hungary: Overview

8.14 It would be impossible to glean the important facts just discussed above either from the Hungarian Memorial or from the non-governmental organisation reports on which Hungary relies so heavily, that is the various studies of Equipe Cousteau and the World Wildlife Fund ("WWF"). Before examining the actual, recorded impacts of Variant "C" that have been detailed, *inter alia*, in the various EC Working Group reports, Slovakia wishes briefly to comment on the evidential value of the reports of these two non-governmental organisations. While there can be no doubt that the Equipe Cousteau and WWF organisations play a vital role both in raising public awareness of environmental issues and in taking concrete steps to address such issues, nonetheless Slovakia considers that the contribution of

²⁰

The cost of purchasing the pumping equipment was apparently 120 million Forints and the cost of their operation nearly 2 million Forints per day. Thus, it is not surprising that on 10 September 1994 the budget for this was exhausted. Hungarian newspaper, Kisalföld, 10 September 1994. Annex 35.

²¹

Ibid.

both to this particular case has not been based on a valid or impartial scientific evaluation.

8.15 To take one example, the Hungarian Memorial quotes from the report prepared by the Austrian arm of WWF in January 1994 as authority for the contention that Variant "C" "inevitably will result in detrimental alterations" and that "even though many impacts are not yet visible to the public, they can already be monitored by experts"²². But the experts best placed to monitor and analyse Variant "C"'s impacts are those truly familiar with the Project, *i.e.*, the members of the EC Working Group of Independent Experts, the scientists working on the PHARE program and those Hungarian and Slovak scientists who have studied the Project in depth. All these experts have come to a different conclusion as to the impacts of Variant "C" from that put forward by the WWF. The EC Working Group has found no significant changes in surface or ground water quality - findings accepted by the Hungarian representative on the Working Group²³. The WWF's portrayal of invisible dangers known only to unidentified experts is therefore extremely misleading.

8.16 Unfortunately, the WWF publications in relation to the G/N Project are characterised by a lack of in depth scientific study and a prejudice against the Project. WWF Austria published in January 1994 a critique of the work of the various EC Working Groups, a copy of which was annexed to Hungary's Memorial²⁴. A careful and detailed rebuttal of this critique has been prepared by Professor Igor Mucha, the Slovak representative to the various EC Working Groups. This rebuttal forms Annex 24 to this pleading.

8.17 Professor Mucha's rebuttal was also sent for review to WWF International (distinct from WWF Austria). The reply of Dr. Magnus Sylven, Director of WWF's Europe and Middle East Regional Programme, is important to an analysis of the merits of the respective analyses. This letter, which appears to express a personal view, constitutes an embarrassed rejection of WWF's involvement to date:

"Thank you very much for your kind reception at the time of WWF's visit to Gabčíkovo on June 3.

I apologise for not having written earlier ... this delay has enabled me to have the opportunity to carefully read your study entitled "Gabčíkovo -

²² Hungarian Memorial, para. 5.107.

²³ See, para. 8.21, below.

²⁴ Hungarian Memorial, Vol. 5 (Part II), Annex 20.

WWF". I would like to tell you how impressed I am by your work and knowledge on this subject, and how embarrassed I personally feel about WWF's past involvement.

...

I have today had an opportunity to assess the case with the Director General of WWF - International, Dr. Claude Martin. We have both agreed to immediately stop all further involvement from WWF - Austria. Dr. Martin will be sending a personal letter to Ing. Dominik Kocinger assuring him that there will be no future involvement from WWF unless a formal request is received from the Slovak side which, of course, we do not expect²⁵ ."

Although WWF has since decided to stand by its report of January 1994²⁶, Slovakia believes that it is fully justified in considering the publications of WWF in relation to the G/N Project to be of little evidentiary value. What at least is clear is that there has been great internal division within that organisation²⁷.

8.18 The publications of Equipe Cousteau are also considered to have been prepared without demonstrating the necessary research into the complexities of this particular case. The 1993 publication, "The Danube ... For Whom and For What?" extensively cited in the Hungarian Memorial, is very broad in its coverage and extreme in its conclusion. One of its key recommendations, for example, is that the production of nuclear energy for all the Danubian States be ended²⁸. This shows a focus of concern far removed from this Project.

8.19 Hungary also cites as an authoritative source the March 1993 publication of a group called the Slovak Union of Nature and Landscape Protectors

²⁵ Letter dated 14 June 1994, Annex 36 (emphasis added). This annex also comprises a letter from Dr. Claude Martin to the Slovak Plenipotentiary for the G/N Project confirming the suspension of "any further involvement of WWF in the Gabčikovo issue".

²⁶ Letter dated 3 October 1994, Annex 37.

²⁷ In this respect, the opinion of T. Pačes, one of the scientists behind the WWF report of January 1994, is important. By letter of 6 September 1994 he reviewed Professor Mucha's response (Annex 24), insisting that Professor Pačes' submissions to WWF had not been based on "field or laboratory" studies and that his "opinions have been based on the documents offered ... by WWF". Furthermore, Professor Pačes praises the quality of research by Slovak scientists continuing: "Neither have I found any reasons why to doubt Mucha's statement that the ground water quality has not significantly changed after one year of the Gabčikovo operation." He concludes his letter: "I have a feeling that ground water and surface water quality will be a minor problem within the Gabčikovo issue." Annex 38.

²⁸ Hungarian Memorial, Vol. 5 (Part II), Annex 16 (at p. 571).

("SUNLP")²⁹. This also is no real authority, although it is cited as such in Hungary's Memorial³⁰. It comprises no more than a series of wholly unsubstantiated allegations, based on the findings of unspecified "independent experts". It is replete with misleading statements, material errors and inconsistencies and is far from impartial³¹.

8.20 In conclusion, Slovakia considers that Hungary has relied heavily on publications that are far from impartial. Environmental groups approach a pre-existing development from a pre-determined point of view. Hence, impartiality is difficult to achieve, especially when a party like Hungary is avowedly abandoning construction work on claimed environmental grounds.

SECTION 2. The Actual, Recorded Impacts of Variant "C"

A. Surface and Ground Waters

8.21 The commentary contained in Chapter 5 of the Hungarian Memorial on Variant "C"'s impact on surface and ground waters is limited to the issues of changing water levels³². In other words, no claim is made as to a change in water quality. This is significant, for it reflects the confirmation of the Hungarian representative to the EC Working Group of Experts that there had been no detectable change in water quality as a result of the damming of the Danube³³. In fact, the latest EC Working Group report noted as to Variant "C":

"The impacts on the surface water quality are expected to be insignificant."

²⁹ Ibid., Annex 17.

³⁰ See, for example, ibid., Vol. 1, para. 5.134.

³¹ For example, while it is claimed by the SUNLP that the 1977 Treaty "was hastily ratified in 1977", a few lines later it is noted that the Treaty was signed "after preparation work lasting almost 20 years". It is also alleged that the 1973 oil crisis led to a radical change in the Project design, including the extension of Gabčikovo and the creation of the bypass canal and the Dunakiliti-Hrušov reservoir. This is completely wrong, as is clear, not least from Chapter 3 of the Hungarian Memorial, paras. 3.02-3.40.

³² Ibid., para. 5.110, et seq.

³³ See, para. 7.62, above. See, also, the admission contained in App. 3 to Hungary's Memorial (at p. 422): "No qualitative changes have yet been detected upon the effect of the water exfiltrating from the reservoir and infiltrating from the water recharge system or due to the altered flow directions."

"The impacts on the ground water quality are in general expected to be insignificant³⁴."

Thus neither short term nor long term deterioration is expected. Nor has there been any change in quality or contamination of the Danube's alluvial gravel and sediment - as demonstrated by samples taken (under supervision from the Netherlands' independent scientists) and analysed (in the Netherlands) within the PHARE program³⁵. Fears of heavy metal accumulation in the sediment settled in the reservoir or the presence there of toxic hydrocarbons have been proved to be greatly exaggerated.

8.22 As to water levels, Slovakia contests both Hungary's presentation of the impact of the damming and the statistics put forward in support. It is misleading in the extreme to state that an "immediate consequence" of the diversion was that "side branches were cut off from the main channel"³⁶, when it is well established that prior to the diversion a full connection between the side arms and the main channel was achieved only at times of flooding, that is for no more than around 20 days per year³⁷.

8.23 Similarly, the figures given to show the decrease in the ground water levels in Szigetköz are exaggerated. It is claimed that these were "up to 3m in the floodplain and up to 1.5m on the protected side"³⁸. However, Appendix 3 to Hungary's Memorial shows a decrease of 2-3m in the territory alongside the Danube but a decrease of just 0.5m in the middle region of Szigetköz³⁹. And in some areas an increase has been recorded: "the ground water levels [in Hungary] have also increased close to the [Čunovo] reservoir", as the EC Working Group report of 2 November 1993 recorded⁴⁰.

³⁴ EC Working Group Report of 1 December 1993, Hungarian Memorial, Vol. 5 (Part II), Annex 19 (at pp. 783-784).

³⁵ "Preparation of Input Parameters for Model of Ground Water Flow, Danubian Lowland - Model SHE", PHARE Project EC/WAT/1, December 1993, Annex 39.

³⁶ Hungarian Memorial, para. 5.112.

³⁷ See, for example, the EC Working Group report of 23 November 1992, *ibid.*, Vol. 5 (Part II), Annex 14 (at pp. 435-436).

³⁸ *Ibid.*, Vol. 1, para. 5.112.

³⁹ *Ibid.*, p. 422.

⁴⁰ *Ibid.*, Vol. 5 (Part II), Annex 18.

8.24 Furthermore the decrease that has been recorded is not an inevitable result of Variant "C"⁴¹.

8.25 Starting in August 1993, Hungary began to divert 10 m³/s of the flow it receives in the Mosoni Danube into the side arm system. The impact of even this small amount of water (small compared to the flow that could easily be diverted by means of the underwater weir recommended by the EC but denied by the Hungarian Parliament) is impressive. The decrease in ground water level in comparison with the pre-diversion levels has been reduced to zero in a very substantial area of Szigetköz and the area in which a decrease of more than 0.5m was experienced was more than halved. This is depicted in Illus. No.CM-13. Essentially the impact of the 10 m³/s (plus water infiltrating on the Slovak side of the Danube and underground seepage from the reservoir) has been to restrict ground water level changes to a relatively narrow corridor alongside the Danube in Upper Szigetköz.

8.26 Hungary's depiction of the "longer term consequences of the diversion" - "the drop in water level, the disappearance of seasonal fluctuation and the lack of water entering the side branches" - is once again very misleading⁴². Each one of these effects will disappear with the implementation of the recharge program planned for the Hungarian side arms⁴³. This has been verified by the EC Working Group of Experts. In its report of 1 December 1993, the scenario was considered by which the current recharge of 10 m³/s was increased "to the same level as the one presently existing on the Slovakian side"⁴⁴. The predicted impact of this was as follows:

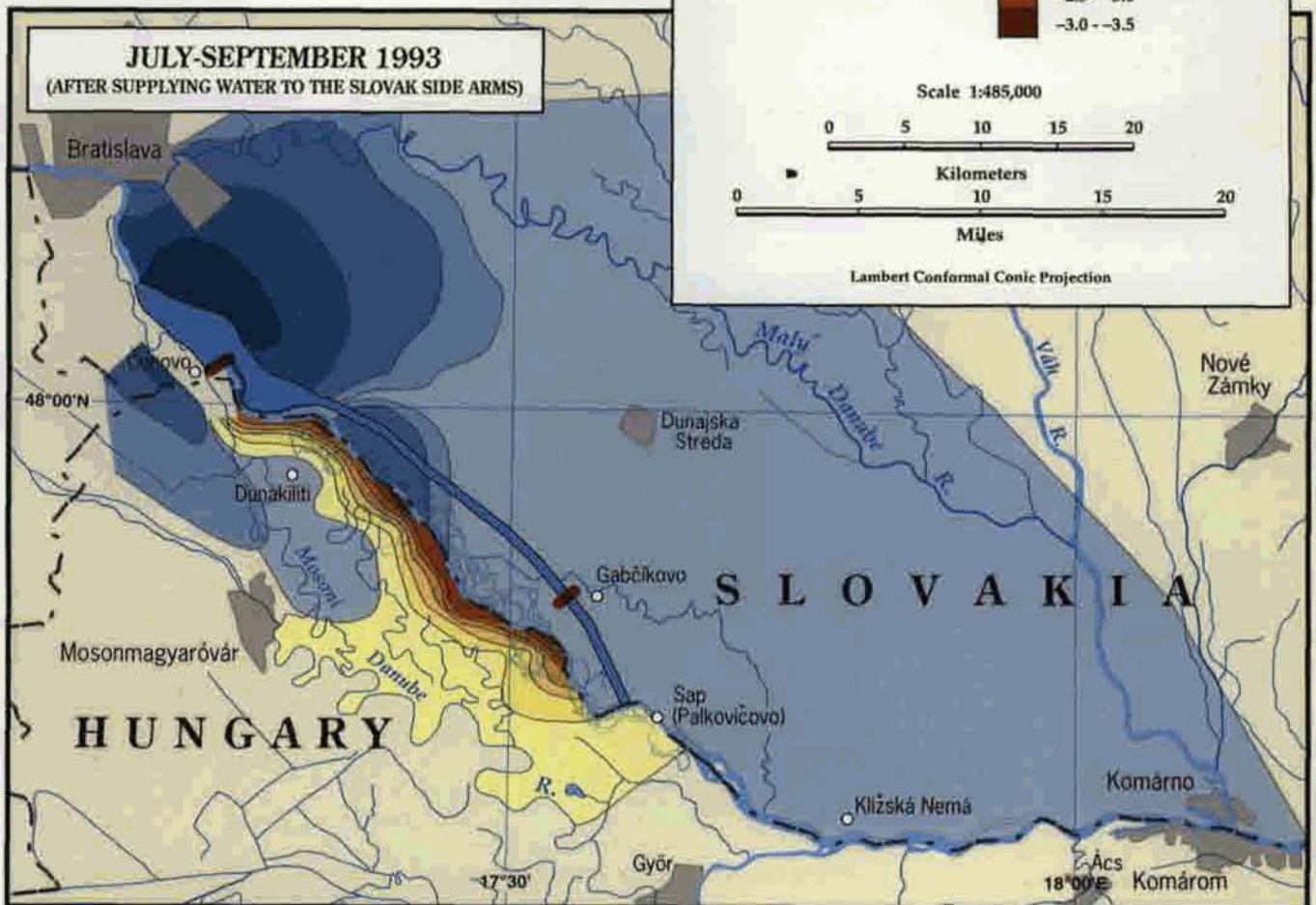
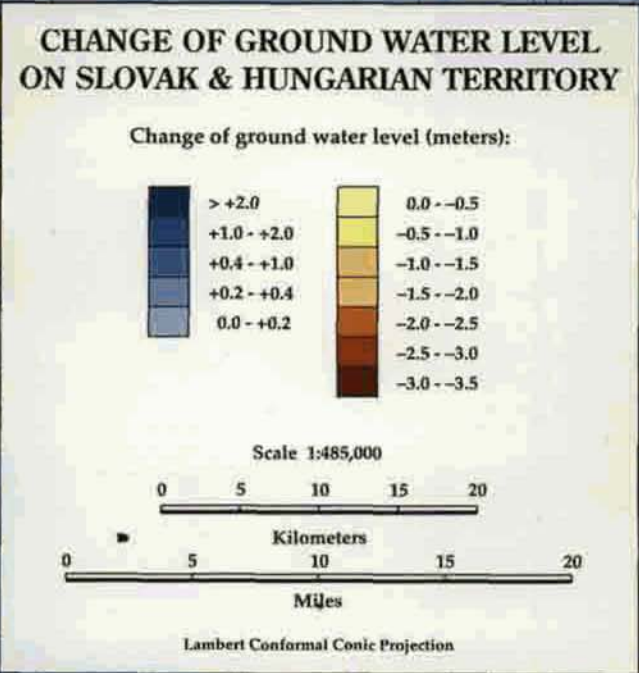
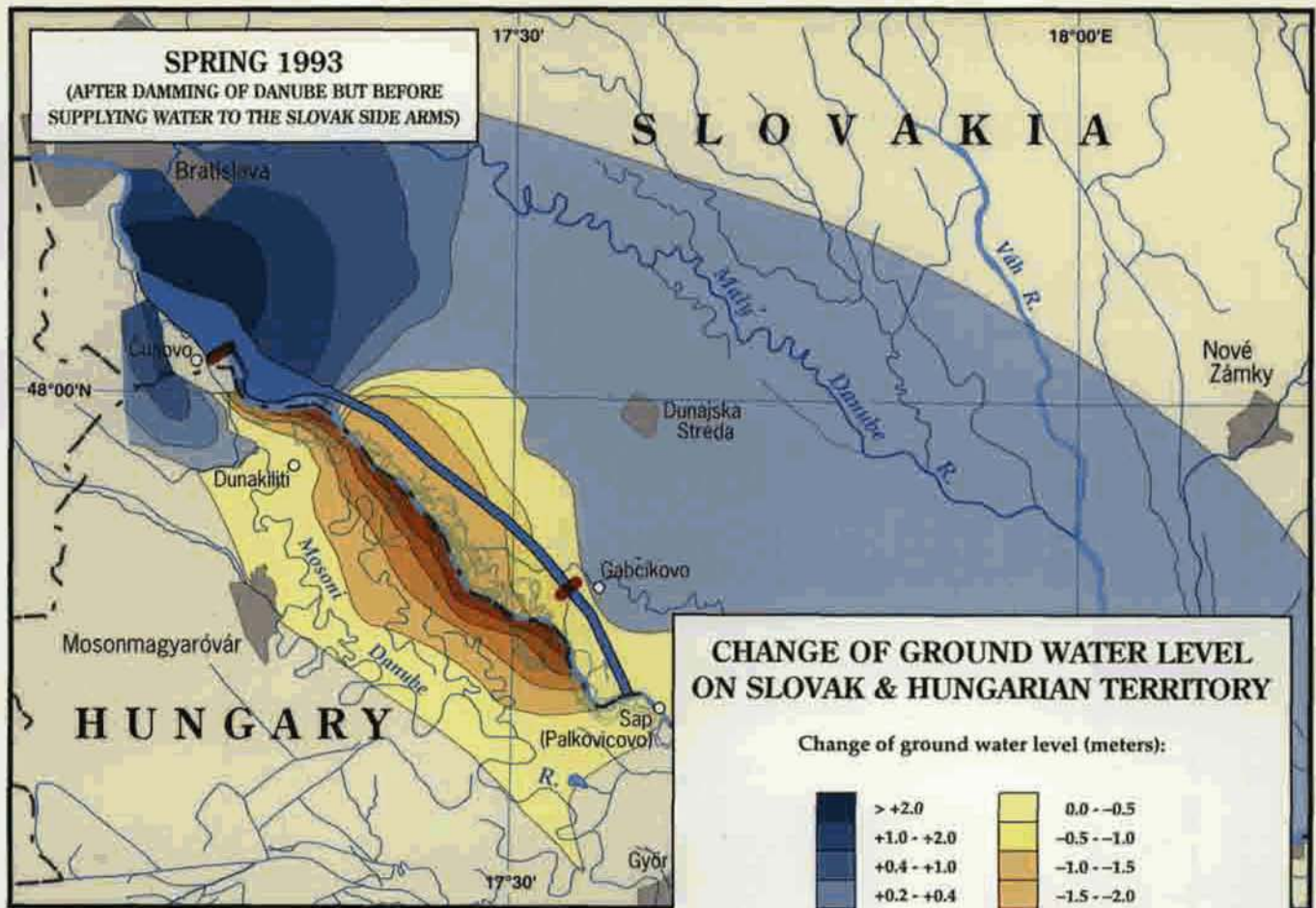
"Ground water levels on the Hungarian territory are expected to be not lower than in the pre-dam conditions.

⁴¹ See, para. 8.10, et seq., above.

⁴² Hungarian Memorial, para. 5.113.

⁴³ In terms of the success of the recharge program in the Slovak side arms, see, Slovak Memorial, para. 5.38, et seq.

⁴⁴ See, Hungarian Memorial, Vol. 5 (Part II), Annex 19 (at p. 787). It will be noted that, according to the same report (at p. 771), the Hungarian side arm area is similar to the Slovak area.



Reestablishing the dynamics of ground water level fluctuations will to large extent be possible downstream the reservoir⁴⁵."

Moreover, once accumulated mud has been cleared off, this flow would be sufficient to maintain the Hungarian side arms free from excess mud and sediment and to reestablish a good connection with the underlying aquifer:

"The river bed in the main branches on the Hungarian side will become sufficiently free from mud, so that good infiltration conditions will exist⁴⁶."

B. Soil and Agriculture

8.27 The Hungarian Memorial predicts a "primarily long term impact" on the Szigetköz soil regime due to Variant "C". It supports this assertion by a series of statistics relating to reduced water level and reduced soil moisture levels, measurements taken in March 1993. But, as is clear from Illus. No. CM-13, these measurements were no longer valid after August 1993 (after which date a limited discharge into the Hungarian side arms was achieved). Thus, Hungary has predicted a long term effect on the basis of a short period of measurements that are no longer valid. And, if the recharge into the Szigetköz side arms is increased to the realistic level of 40-50 m³/s by means of increasing the water level in the old Danube by the construction of underwater weirs⁴⁷ in combination with the increased flow into the

⁴⁵ Ibid. (at p. 790). This is also true for the side arms between Čunovo and Dunakiliti that were planned to be flooded under the G/N Project.

⁴⁶ Ibid., at p. 789.

⁴⁷ See, Annex 24 (at pp. 98-100). This gives technical details of the proposed underwater weirs, explains their functioning and purpose, and also explain their dissimilarity with the transverse barrages used on the Rhine river. See, also, Illus. No. CM-12, appearing at para. 8.11. It will be noted that the concept of the underwater weir has been specifically approved by the EC Working Group of Experts. See, e.g., its report of 23 November 1992. Hungarian Memorial, Vol. 5 (Part II), Annex 14 (at p. 418).

Mosoni Danube, the measurements will change once more to approximate or even improve on the pre-dam position⁴⁸.

8.28 As to the alleged short term changes, even these are uncertain because, prior to the putting into operation of Variant "C", the water table in large parts of Szigetköz did not reach above the gravel layer and thus any decrease in water level could not have any impact on capillary elevation (which did not exist anyway) or on crop yield. It is noted that no statistics are given to support Hungary's claim of a drop in crop yield⁴⁹.

⁴⁸ This assessment is also supported by Annex 23 hereto, as well as by the following studies (a copy of each of which or their synopses has been submitted to the Court):

1. J. Hraško, E. Fulajtar, B. Surina, The prognosis of soil development on Žitný Ostrov influenced by water work system Gabčkovo-Nagymaros. Research report. VUVPR, Bratislava, 1980.
2. M. Mikloš, Z. Bedrna, Changes of ground water level due to influence of water work system Gabčkovo-Nagymaros and their ecological interpretation. Level Gabčkovo. UEBE CBEV SAV, Bratislava, 1989.
3. M. Lehotský, J. Otahel, A. Grešková, Landscape types of supplying of agricultural crops with ground water in area of water work Gabčkovo. Geogr. cas., c. 2, Bratislava, 1990.
4. P. Jambor, et al., The statement of water work system Gabčkovo-Nagymaros in rural landscape. Research report, VUPU Bratislava, 1990.
5. M. Ružička, et al, Ecological optimization of use of area of water work Gabčkovo. Study. UKE SAV, Bratislava, 1990.
6. J. Alena, S. Reháč, Determination of optimized depths of ground water level on future agricultural activities and the proposal of hydro-amelioration provisions in influenced area. Research report. VUZH Bratislava, 1993.
7. S. Reháč, et al., The impact of performance of Danubian water work on change of water regime of soils and the proposal for its optimization from the point of view of agricultural production. Research report. VUZH Bratislava, 1993.
8. K. Nováková, J. Takáč, E. Blaskova, The evaluation of retention, transport and selected chemical properties of soils impacted on water regime of soils and on ground water contamination. Research report. VUZH Bratislava, 1993.
9. I. Sobocký, S. Reháč, J. Takáč, The evaluation of soil-ecological conditions of the area potentially influenced by performance of water work on Danube. Research report. VUZH Bratislava, 1993.

⁴⁹ Where ground water does reach the soil layer there may indeed be an influence on crop yield where the water table level subsequently drops. But such an influence is by no means straightforward nor in direct relation to the drop in ground water. Crop yield is obviously also dependent on climatic effects, as the Hungarian Memorial admits. Hungarian Memorial, para. 5.121. See, also, Annex 23 hereto.

8.29 Certainly, the correct response to the current situation would not be to grow "deeper rooting crops" as Hungary asserts⁵⁰. The most effective response would be to construct the underwater weirs in the old Danube that would enable ample water to flow directly into the Hungarian side arms. This would restore water levels and capillary elevation as originally envisaged by the G/N Project. The success of similar measures on Slovak territory cannot be doubted:

"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 place⁵¹."

With an equivalent water recharge (40-50 m³/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 expected⁵²."

8.30 Finally, as the Hungarian Memorial emphasises, the documentation and monitoring of Variant "C"'s impact on soil and groundwater pollution is one of the 19 environmental conditions issued by Slovakia in June 1991⁵³. The necessary functions are fulfilled by the Slovak Hydrometeorological Institute, which has input from three expert bodies specialising in soil monitoring (the Research Institute of Soil Fertility, Bratislava), water in the aeration zone (the Hydrological Institute of the Slovak Academy of Sciences), and water quality (Slovak Hydrometeorological Institute). Systematic monitoring has been carried out on a continuous basis since 1989 and all results are evaluated annually. These results show that, in Slovakia, there has been no decrease in the quality of soil or groundwater to date.

⁵⁰ Hungarian Memorial, para. 5.120.

⁵¹ EC Working Group report of 1 December 1993, *ibid.*, Vol. 5 (Part II), Annex 19 (at p. 785).

⁵² *Ibid.* (at p. 791).

⁵³ *Ibid.*, Vol. 1, para. 5.135. And, *see*, para. 8.45, *et seq.*, below.

C. Forestry

8.31 Slovakia recognises the current unfavourable situation in the Hungarian side arms for the floodplain forests. Hungary quotes the EC Working Group report of 1 December 1993 as authority to substantiate its claims of deteriorating conditions⁵⁴; but this report notes on the very next page to that quoted by Hungary that conditions for forestry have improved in Slovakia - due solely to the impact of Slovakia's recharge program⁵⁵. According to the EC Working Group, if just 40-50 m³/s is channelled into the Hungarian side arms, Hungary will enjoy a similar improvement⁵⁶.

8.32 This flow will bring to the side arms not only water but nutrients. Prior to the damming, the nutrient input into the floodplain had been dramatically reduced due to the isolation of the Danube main channel from the side arms, which led to a lack of flow and a lack of inundation in the floodplain. Direct input into the side arms by the recharge program corrects the lack of flow and enables inundation, thus allowing for an increased nutrient input⁵⁷.

8.33 Hungary claims that a significant percentage of its alluvial forest has died⁵⁸. But the dying back of trees on Hungarian territory pre-dates the damming of the Danube by at least ten years and has been caused by the sinking water level of the Danube. This unfavourable situation has now improved on the Slovak side due to the implementation of the artificial recharge program, and such an improvement has been available to Hungary. In the absence of this recharge program, Hungary's record of decreased timber growth is entirely as expected. But, in the areas where water

⁵⁴ Hungarian Memorial, para. 5.122.

⁵⁵ Ibid., Vol. 5 (Part II), Annex 19 (at p. 785): "As a result of the changes in ground water level the forestry is mainly positively effected in Slovakia and mainly negatively in Hungary." This report predicted for Hungary the same beneficial impact as that now experienced by Slovakia if the recharge into Szigetköz side arms is increased to a rate equivalent to the recharge into the Slovak side arms. Ibid. (at p. 790).

⁵⁶ See, para. 8.29, above.

⁵⁷ Under non-flood conditions nutrient input into the side arms is also reduced by 20-40% due to settlement in the Čunovo reservoir. However, because the amount of water to be channelled into the side arms is greatly in excess of pre-dam conditions, the total nutrient input into the side arms will also be superior. In flood conditions the nutrient concentration is not reduced by settlement in the reservoir and thus the nutrient input into the floodplain will be equivalent to that of the 1950s.

⁵⁸ Hungarian Memorial, para. 5.123.

recharge is implemented (i.e., in Slovakia), an increase in annual timber growth has been recorded⁵⁹.

8.34 It is therefore incorrect to claim that "deterioration of the alluvial forests ... is a direct negative effect of Variant C's operation"⁶⁰. Variant "C" leads to an improvement in forestry conditions where the planned recharge into the side arms is implemented - but to a continuing deterioration if such plans are shelved.

D. Flora and Fauna

8.35 In its Memorial, Hungary focuses on the adverse impact on the Danube's fish of implementing Variant "C". It points to the disappearance of a large amount of spawning grounds and of both adult and immature fish. Hungary also implies that the silting of the old riverbed has rendered it an unsuitable habitat for certain fish species.

8.36 The EC Working Group report of 1 December 1993 does not predict such silting. Its comment on the current position is as follows:

"No major net erosion and sedimentation in the Old Danube. During some events sedimentation of fine material will take place. This fine material may be washed away during flood events⁶¹."

The report specifies that excess sediment can be cleaned away by a twice yearly discharge of 3,500 m³/s into the old Danube. In other words, sedimentation is no more than a temporary phenomenon⁶². The same habitat for fish species as existed prior to the damming in the old Danube may therefore be maintained and even improved. For, as pointed out above⁶³, the conditions for fish in this sector of the

⁵⁹ This increase has been: 0.3mm for *Populus Alba* (white poplar) and *Salix Alba* (white willow), and 0.2mm for *Fraxinus Augustifolia* (ash).

⁶⁰ Hungarian Memorial, para. 5.125.

⁶¹ Ibid., Vol. 5 (Part II), Annex 19 (at p. 782).

⁶² It may be noted here that the same EC Working Group report has recorded 1993 flow velocity in the Danube at 1.08 m/s at Rajka and 0.87 m/s at Dunaramete (with a water flowrate of 400 m³/s). Ibid. (at p. 765). It also notes that a velocity of 0.1 - 0.3 m/s is sufficient to prevent colmatation. Ibid. (at p. 779). Thus, once the riverbed has been cleaned by the flow of 3,500 m³/s, it will remain free of siltation with the current average flow of 400 m³/s.

⁶³ See para. 7.104, et seq., above.

main Danube channel prior to the damming were not good due to the high velocity of flow and high turbidity.

8.37 A distinction must also be made between fish conditions in the old Danube and in the side arm system. The conditions in the side arms prior to the damming were very different, characterised by low flows and even stagnant waters. The position was worsened by the lack of a full interconnection between the Danube and its side arms save for approximately 20 days each year. Such interconnection is important because the inundation cycle - under natural, i.e., pre 1950s conditions - coincides with the spawning period of most fish species, thus allowing for a vast spawning area. As the inundation declines, the young fish float into the side arms, passing progressively from temporary inundation waters to main branches and to the main channel.

8.38 It is now possible to re-establish this interconnection or, in the terminology the EC Working Group report of 23 November 1992, for the floodplain to develop more naturally. This is precisely what Slovakia desires. The EC Working Group report of 1 December 1993 stated:

"To ensure ecological conditions which are as good as pre-dam conditions migration of wetland species between the main river and the side branches should be possible all over the year in both directions.

Migration can be made possible either through fish passes or through direct flows between the main river and the side branches during some periods⁶⁴."

Full reconnection will require the raising of water level in the old Danube by the construction of underwater weirs. In other words, it will require Hungary's cooperation. But Slovakia is taking what steps it can and is currently constructing the necessary fishpasses mentioned in the above quotation to enable migration. It also proposes removing or lowering the fortified banks of the main channel of the Danube at certain points to enable an interconnection at high flows. But the reconnection is only now a possible option as a result of the diversion of navigation into the bypass canal. Prior to this, there was simply no scope for re-establishing the connection between the Danube and the side arm system for this would have made it impossible to have a suitable depth in the navigation channel.

⁶⁴ Hungarian Memorial, Vol. 5 (Part II), Annex 19 (at p. 780).

8.39 Thus, Slovakia considers that Variant "C" can, when coupled with the revitalisation of the side arms and the necessary measures in the old riverbed, benefit various species of fish. The areas of spawning grounds on Slovak territory decreased from the 1960s, but have now increased with the availability of more good spawning areas in the side arms. It is no doubt true for Szigetköz that "if the surface water and groundwater level stabilises at its present level and there is no change in the discharge regime, the mosaicity of the landscape and the presence of a highly diverse and wide range of habitats is likely to be lost"⁶⁵. But both the original Project and Variant "C" envisaged the supply of a far greater water recharge to this area than Hungary is now allowing for. Slovakia urgently wishes to bring about a change in this discharge regime. A constant flow of 40-50 m³/s together with several inundations per year is sufficient to obtain similar, if not superior, conditions for flora and fauna in Szigetköz to those prior to the damming.

E. Navigation

8.40 It was always planned by the 1977 Treaty parties that international navigation would be diverted to the bypass canal. This has been the case with Variant "C". There is therefore no sense to Hungary's complaint that "the transit of international shipping in the Danube between rkm 1852-1811 [is] impossible"⁶⁶. Moreover, this has engendered no complaints from the Danube Commission nor from other international organisations. To the contrary, organisations and users of the Danube have expressed their contentment with the bypass canal for it has had an obviously beneficial impact on the navigation in this sector⁶⁷. Further, with the completion of the shiplocks at the Čunovo weir, navigation of small and, if necessary, larger craft will be possible along the old Danube⁶⁸.

8.41 Certainly the mere 14 days of inoperability of the Gabčskovo shiplocks in their first year of operation (November 1992-November 1993) compared

⁶⁵ Ibid., Vol. 1, para 5.130.

⁶⁶ Ibid., para. 5.132.

⁶⁷ See, para. 7.115, et seq., above.

⁶⁸ Hungary's complaint of the "lack of an emergency navigation route" will thus disappear. It may anyway be noted that no emergency routes exist for the dam projects upstream in Germany and Austria. Where shiplocks are inoperable, navigation is suspended - an undesirable though unavoidable situation.

favourably with the 60% (i.e., 220 days) non-availability of the requisite navigation conditions in the Bratislava sector in 1991⁶⁹. This is confirmed by the praise accorded to the bypass canal by its users. The German representative of the Federal Union of River Transport Contractors welcomed the implementation of the canal and noted that "transport is much more regular and many problematic river points from the past were eliminated"⁷⁰. Similarly, the Romanian State navigation company has ascertained that "navigation conditions improved significantly due to the fact that, with navigation through the canal, one of the most difficult sections of the Danube (km 1811-1856) is avoided"⁷¹.

8.42 Illus. No. CM-14A portrays the Gabčokovo navigation locks. Illus. No. CM-14B is a photograph of the Danube at Bratislava (1985-1986) showing the poor navigation conditions that could not be prevented there prior to the putting into operation of Variant "C". In fact, the result of implementation of Variant "C" is that seven ford sections (shallows) have been bypassed as well as the dangerously narrow Bagomer section. Also the water velocity in the bypass canal is lower than in the old Danube, increasing safety and decreasing fuel costs. Lower velocities and increased water depths in the Bratislava region are of great benefit both to safety and to the general functioning and economic well-being of the Bratislava port⁷². Moreover, the beneficial impact of Gabčokovo is not merely felt on the bypass canal section. For Gabčokovo can also be used to build up and then release larger flows of water so as to enable ships to navigate difficult and shallow sections further downstream. This is of a clear economic benefit because it enables a more reliable navigation on the Danube. It is also beneficial for the region for it enables shipyards such as at Komárno to construct larger ships, which they would otherwise have been unable to deliver⁷³.

⁶⁹ EC Working Group report of 23 November 1992, Hungarian Memorial, Vol. 5 (Part II), Annex 14.

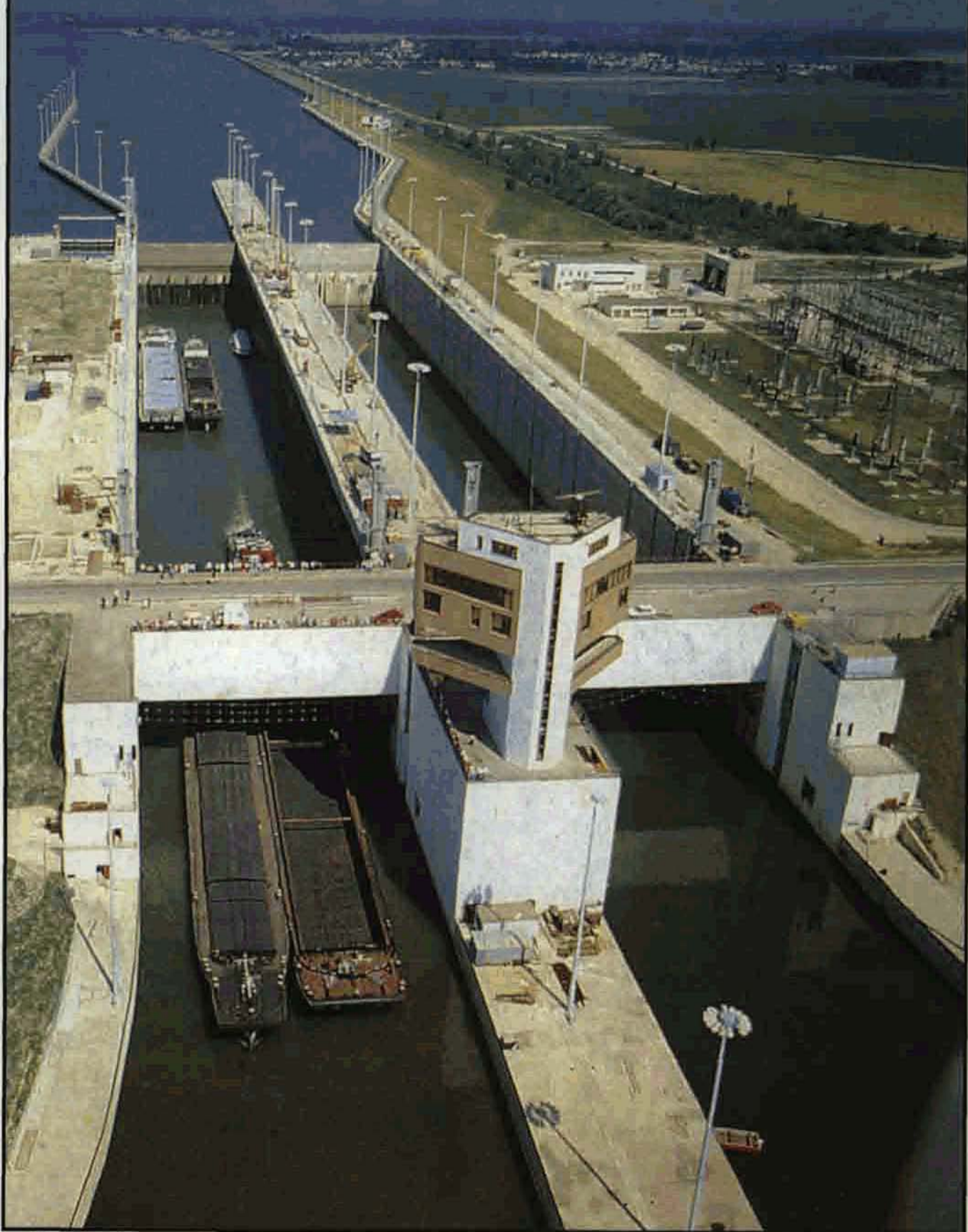
⁷⁰ Interview with the Regional Representative of the Federal Union of River Transport Contractors and head of the navigation company Bayerischer Lloyd AG (VEBA AG), Mr. Ott, Annex 40. And, see, para. 7.118, et seq., above.

⁷¹ Letter from Compania de Navigatie Fluviala Romana to the Slovak Embassy in Bucharest, 17 October 1994. Annex 41.

⁷² See, E. Fleischhacker, Analysis of the Effects of the Gabčokovo-Nagymaros System on International Navigation, Annex 27.

⁷³ Annex 42.

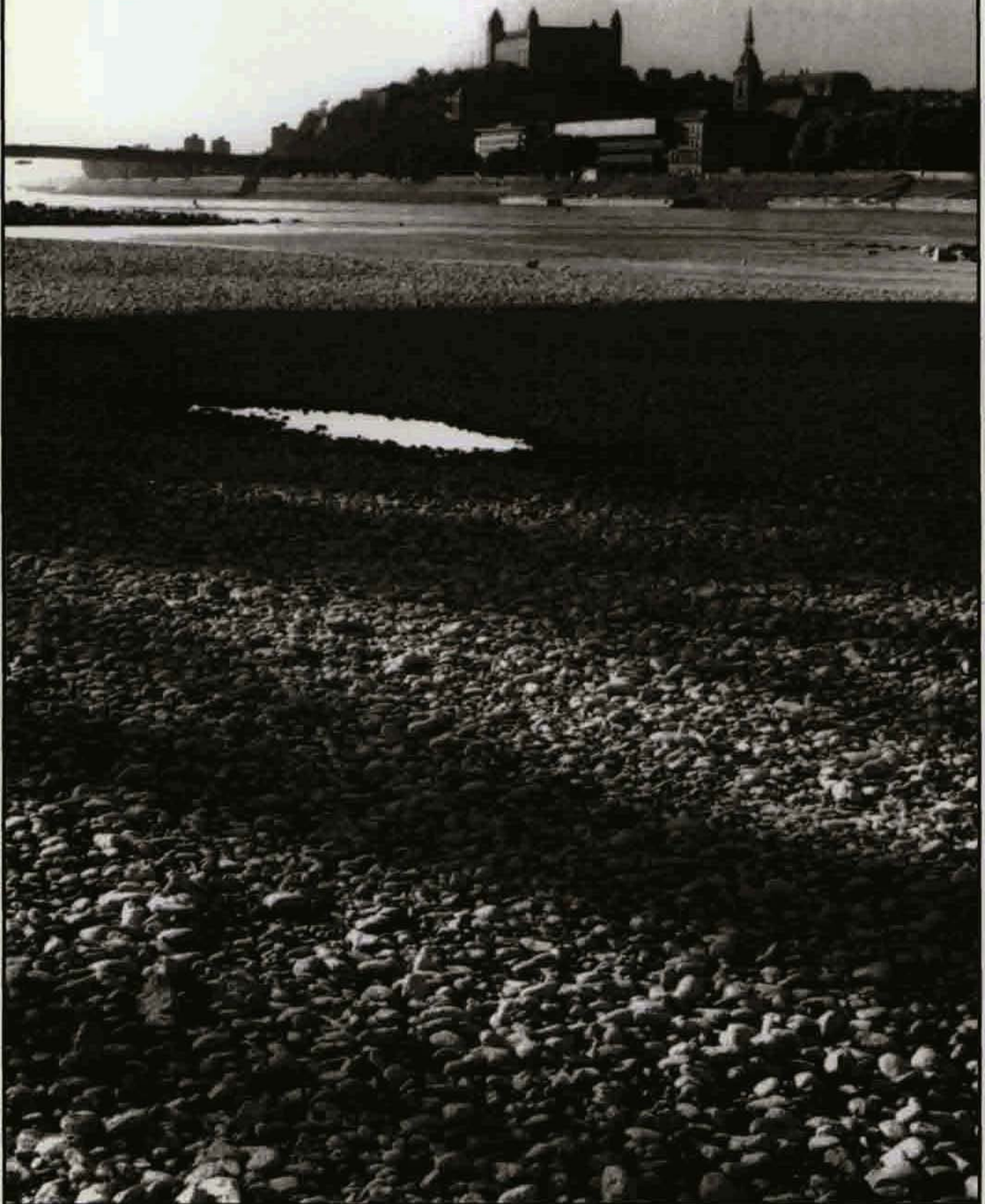
GABČÍKOVO STEP: NAVIGATION LOCKS



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-14A

DRYING-UP OF THE DANUBE
(1985-1986)



Specially prepared for presentation to the International Court of Justice.

ILLUSTRATION NO. CM-14B

8.43 However, the Court is reminded that Hungary's failure to construct Nagymaros is the cause of the remaining shallow sections in this sector. For example, in June 1993, the Danube water level around Nagymaros dropped to 68 cm, making commercial navigation quite impossible⁷⁴. In the light of this, Hungary's contention that Variant "C" has had an adverse effect on navigation is nonsense. It is Hungary's unilateral non-implementation of the G/N Project that has created the continuing navigational problems on the Bratislava to Budapest stretch of the Danube.

F. Seismic and Geological Considerations

8.44 Variant "C" was, like the original Project, supported by a comprehensive evaluation of the region's geological and seismic risks. Not only did Variant "C" benefit from the impressive research data, studies and explanatory data previously carried out in relation to the G/N Project but, from 1991, a new series of exploratory and research works was carried out with a particular emphasis on the Čunovo weir region. The eventual location of the weir was thus based on the latest geological research⁷⁵.

G. Environmental Protection

8.45 The Hungarian Memorial concludes its section on the impacts of Variant "C" with a review of the 19 environmental conditions which the Slovak Commission for the Environment developed prior to the implementation of Variant "C"⁷⁶. Hungary makes no comment as to the sufficiency of these conditions. It is therefore supposed that they are accepted to be adequate prerequisites for the implementation of Variant "C".

8.46 Hungary does not cite the conditions; it merely summarises them in its Memorial. Reference in support is made to the WWF Austrian Report of January 1994, which does not cite the conditions, either, but contents itself by noting that two of the conditions had not been fulfilled. Slovakia has therefore provided a copy of the conditions⁷⁷.

⁷⁴ Ibid.

⁷⁵ See, para. 7.105, et seq., above.

⁷⁶ Hungarian Memorial, para. 5.135, et seq.

⁷⁷ Annex 43, hereto.

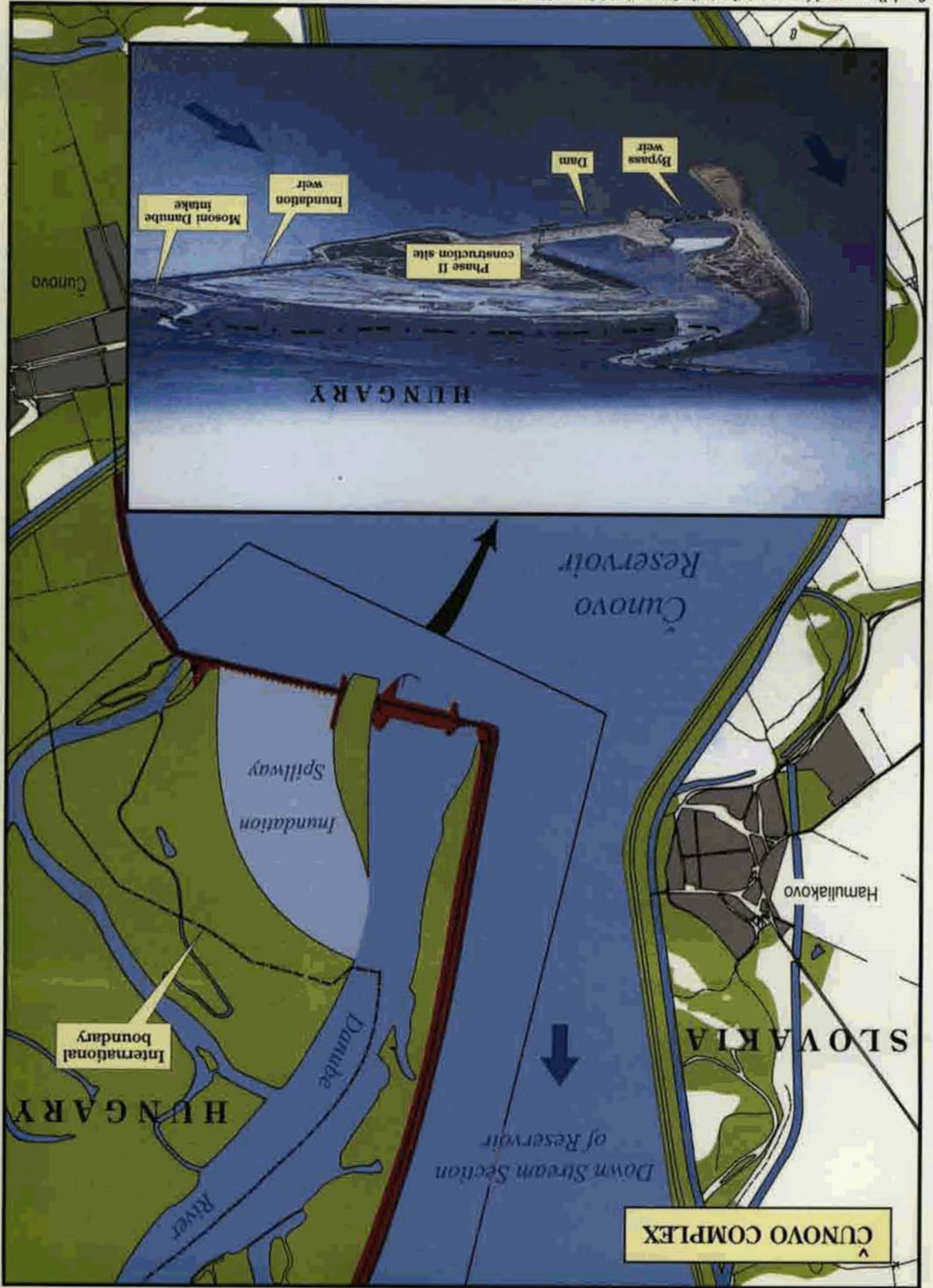
8.47 In spite of the evidence in the WWF Austria report to the contrary, Hungary asserts, on the basis of an information release of the Slovak Environmental Commission of March 1993, that as of that date just 7 of the 19 conditions had been fulfilled (conditions 9, 10, 12, 14, 15, 16 and 19)⁷⁸. In fact, this document, which is actually annexed to Hungary's Memorial, shows that, in addition to the seven conditions that Hungary accepts as fulfilled: condition 2 "may be considered satisfied", conditions 6 and 7 "were satisfied", condition 8 "was resolved", condition 13 "has been satisfied" and condition 17 "is being satisfied on a continual basis". Thus, at least 13 and not 7, of the 19 conditions had been fulfilled according to this document.

8.48 Furthermore, the same document predicts the fulfilment of conditions 1, 3, 4 and 5 before the end of 1993. Thus, only 2 conditions were deemed problematic - conditions 11 and 18. The first of these (condition 11) requires the linking of the branch system with the Danube. This is the final step necessary to recreate the original braided river. Slovakia continues to seek this interconnection. Improvement of communication between the branch system and the Danube in both ways is now projected using underwater weirs with a depth of approximately 2 m and artificial fords which will create a rise in the water level in such a way that inter-communication is possible. But for the expected beneficial impact to be realised, Hungary's cooperation (in terms of the necessary measures on the Danube right bank and the construction of underwater weirs in the old riverbed) is essential. Thus, the Hungarian Memorial blames Slovakia for a condition whose fulfilment Hungary is blocking.

8.49 Condition No. 18 is aimed at securing the flow level in the bypassed section of the Danube necessary to enable ground water to reach the soil level and to prevent the drainage effect of the river. In terms of the Danube's water level, this would have to correspond to the level of a discharge of 1300-1500 m³/s. But the requested ground water level was reached and, in fact, exceeded by alternative means: the river branch system was supplied directly with an average 30-50 m³/s with discharge into the old Danube being approximately 400 m³/s.

⁷⁸

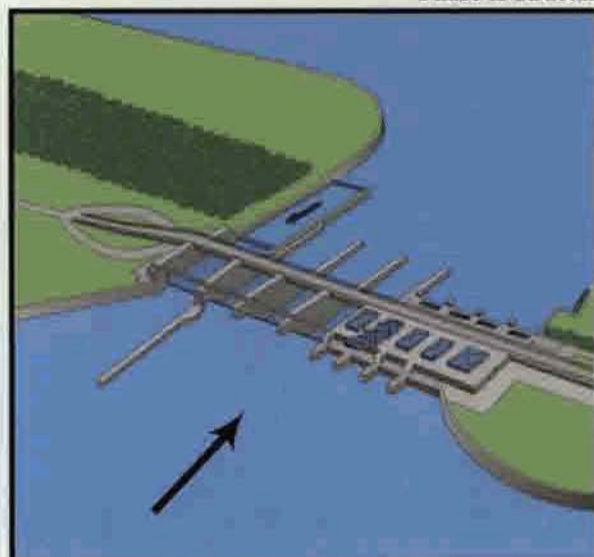
The relevant document is annexed at *ibid.*, Vol. 4, Annex 172. Emphasis added in text. In fact, condition 9 requires the proposal of a solution for dealing with navigation problems downstream of the bypass canal. It must be stressed that it is Hungary's breaches of the 1977 Treaty that have created the need for this particular condition.



**CUNOVO COMPLEX:
CLOSE UP**

Phase II Structures

Bypass weir and dam



Inundation weir



Mosoni Danube intake

8.50 Thus, Slovakia has, except where hindered by Hungary's refusal to cooperate, fulfilled the 19 environmental conditions. Its positive attitude must be compared to Hungary's recent decisions in relation to the environment (of Szigetköz), which display, not a concern to protect and improve the region's ecology, but a preoccupation with political considerations and the avoidance of any actions that might adversely affect Hungary's case before the Court.

SECTION 3. Hungary's Allegations as to the Poor Construction Quality of Variant "C"

8.51 Although Hungary confidently claims that Variant "C" was "hastily and incompetently executed"⁷⁹, it is unable to provide more than a few instances in support of this statement. Before considering the examples provided by Hungary, it is worthwhile to remind the Court of the main features of the Variant "C" structures. First and foremost, Variant "C" has been designed for implementation in two phases. The various components of the two phases are depicted in Illus. Nos. CM-15A and B.

8.52 The first phase facilities were put into operation from October 1992. These consist of the new right side reservoir dyke leading from the bypass canal to the dam across the original bed of the Danube. To the left of the dam, a bypass weir diverts flow back into the old riverbed and, to the right, an inundation weir diverts flood waters. The final element is the intake into the Mosoni Danube. The second phase facilities will come into service in 1996. These are currently being constructed in the space between the dam and the inundation weir. They consist of a shiplock, a third "spillway" weir which will take over the function of directing water into the old Danube on a daily basis, and a hydroelectric power plant.

8.53 Hungary's principal allegation is that the bypass weir does not function properly and that its design capacity has been reduced to 600 m³/s. In fact the weir itself operates correctly, as Hungary is aware. It is simply its "day in, day out" capacity that is limited to 600 m³/s by the boulder section downstream of the weir, which would suffer undue erosion if the weir throughput continually exceeded 600 m³/s. This has no safety ramifications whatsoever. At times of flood, the bypass weir capacity can be increased to 1,200 m³/s, without creating any erosion problem, since

⁷⁹

Ibid., Vol. 1, para. 1.04.

the downstream water level is then higher. Furthermore, in flood conditions Slovakia simply operates the inundation weir⁸⁰.

8.54 The overall discharge capacity of the Phase 1 structures is 12,715 m³/s⁸¹. Hungary's allegation that the structures provide inadequate flood control, and that a flood of 10,000 m³/s can only be handled if every part of the system is operating perfectly⁸², is simply wrong.

8.55 Furthermore, this capacity will be increased as part of Phase 2. A new spillway weir with a capacity of 5,300 m³/s will take over the discharge of the daily flow into the old Danube and will also enable the emptying of the reservoir and the flushing of sediment. Thus, Hungary's complaint that "the reservoir cannot be flushed" will be met⁸³.

8.56 The maximum discharge capacities after the completion of Phase 2 will be as follows:

| | |
|--|-------|
| Bypass power canal (at level 131.1 m asl this discharge is through turbines and, if necessary, through ship locks) | 5,200 |
| Discharge into the Mosoni Danube (20-44 m ³ /s) | 44 |
| Discharge into the Malý Danube (50 m ³ /s, maximum 150 m ³ /s) | 150 |
| Phase 2 - spillway weir | 5,300 |
| Discharge via bypass weir (600 m ³ /s, in flood conditions - 1,200 m ³ /s) | 1,200 |
| Discharge through inundation weir by water level 130.0 m asl | 2400 |

⁸⁰ This has a potential capacity of 4,800 m³/s under normal operating conditions, i.e., when the reservoir is at a depth of 131.1m asl (above sea level), and a capacity of some 6,000 m³/s when the reservoir height is at 131.5 m asl, during the summer flood.

⁸¹ See, Slovak Memorial, para. 5.48.

⁸² Hungarian Memorial, para. 5.116.

⁸³ *Ibid.*, para. 1.16. Sedimentation is in any event only of long term concern. There was absolutely no need to be able to flush sediment as part of the Phase 1 constructions as it takes several years for sediment to build up.

| | | |
|---|----------------------------------|--------------------------|
| 131.1 | 4800 | |
| 131.5 | 6000 (e.g., during summer flood) | 6,000 |
| Discharge via Dobrohošť offtake structure | | 243 |
| <hr/> | | |
| Total | | 18,137 m ³ /s |

8.57 The flood handling capacity of the Variant "C" structures will therefore comfortably exceed the capacity of the Dunakiliti weir complex⁸⁴. Hungary's allegations are without merit. Its complaint that the Čunovo weir has no shiplock will also be resolved by the implementation of Phase 2. Hungary nevertheless implies that the future existence of this shiplock is only theoretical. But this shiplock is under construction, as is clear to Hungary and as can be verified from a site inspection⁸⁵.

8.58 Finally it is entirely inaccurate to state that the Variant "C" structures "did not prove safe"⁸⁶. The inundation weir has passed flood waters on many occasions and at no time have either the stability of its structures or the safety of downstream habitations been endangered. It is totally false to state that "metal sections of the floodplain weirs broke off and were washed away"⁸⁷. Weir gates awaiting assembly when the flood of November 1992 arrived did float downstream⁸⁸. There was no time to further secure these gates as the flood arrived with little warning - a fact evidenced by similar occurrences at Freudenu, in Austria, which was also under construction at the time.

8.59 If Variant "C" had been in some way unsafe or implemented hastily, some criticism would have been raised in one of the EC Working Group

⁸⁴ See, Slovak Memorial, Annex 29 (at p. 253).

⁸⁵ Hungary's comments in relation to "ice floes" will also be rendered irrelevant by the operation of Phase 2.

⁸⁶ Hungarian Memorial, para. 3.198. Slovakia accepts that a flood in November 1992 led to substantial erosion of gravel/sand below the inundation weir. This, however, had no impact on the safety of the Variant "C" structures. Nor, in fact, was this a necessarily negative effect. At various points in its Memorial, Hungary advocates the addition of gravel to the Danube riverbed and this, in fact, was exactly what happened - the transfer of a large quantity of gravel from the inundation area into the old riverbed, thus raising the riverbed level. See, the EC Working Group report of 1 December 1993. *Ibid.*, Vol. 5 (Part II), Annex 19 (at p. 761).

⁸⁷ *Ibid.*, Vol. 1, para. 3.198.

⁸⁸ See, para. 6.18, above, and *Illus. No.CM-3*.

reports. Such is not the case. The EC Working Group report of 1 December 1993 provides a brief description of the river dam: "All works including protection works, a vertical clay-cement protection wall (for preventing seepage) and a system for technical monitoring (of seepage) are now completed⁸⁹." There is no reference to any defects. Hungary's reference to "flaws and cracks in the dam wall and canal" cannot be substantiated⁹⁰.

SECTION 4. An Independent Hungarian Perspective

8.60 By way of conclusion to this Chapter, Slovakia turns to an independent assessment of the current status of the Project from the perspective of Hungarian scientists. A recent edition of the specialist journal of the Hungarian Hydrological Society, "Hidrológiai Közölny" (Hydrological Bulletin) was dedicated in its entirety to questions of the water regulation of the Upper Danube, the restoration of Szigetköz and the completion of the G/N Project. Slovakia presents below the synopses of the various papers that form the special edition⁹¹. These provide the clearest evidence that the various allegations in the Hungarian Memorial are counter to a balanced scientific assessment.

Environmental Considerations in Engineering for the Danube River Dam Project

"The engineers of the Bös-Nagymaros River Dam Project have displayed from the very beginning interest, open-mindedness and readiness to reasonable modifications when confronted with the new requirements of environmental protection and ecological interests. Unfortunately, adverse political objectives, like change of the political regime, hostility to technology, have invaded public life in Hungary under the green flag of environmentalism. Professionally highly qualified biologists, ecologists, limnologists, foresters and landscape architects are, however, fully aware of the possibility of reaching a balance between man and his biological surroundings in new ways tailored to his needs and requirements. The Bös-Nagymaros river dams

⁸⁹ Ibid., Vol. 5 (Part II), Annex 19 (at p. 757).

⁹⁰ Ibid., Vol. 1, para. 5.134.

⁹¹ Hidrológiai Közölny (Hydrological Bulletin) 1994 74.EVF. No. 5. SZAM, Annex 44. Certain of the synopses are quoted in the text above in abridged form. "Bös" is the name persistently used by Hungary for Gabčikovo; see, Slovak Memorial, para. 20.

are also designed to serve human needs without any detriment to the environment⁹²."

The Hungarian Upper Danube - A Historical Review

"The [Bratislava]-Komárom river section, referred to also as the Hungarian [sic] Upper Danube, had been an unstable irregularly meandering, extensively braided river section, on which navigation, was extremely difficult and often impossible. ... River regulation ... and providing flood control by levees remained but partly successful. A complete solution was expected from the Bős-Nagymaros river dam project but the abandonment thereof has had grave consequences to the Szigetköz area. The country must rely on the professional skill of the hydraulic engineers for averting disaster⁹³."

The Present State of the Bős-Nagymaros Project and the Economic Consequences

"River dams, as facilities producing renewable, nonpolluting, environmentally sound energy have been built all over the world. ... The political attitude in Hungary vis-à-vis the Bős-Nagymaros Project, the most recent decrees, decisions were absurd, unfounded and detrimental in the economical and environmental sense alike. The mistakes made so far must be corrected urgently by involving clear-headed, properly qualified professionals observing high ethical standards in the process of decision making⁹⁴."

Unconfined and Confined Goundwaters in the Kisalföld Region

"... The drop in the groundwater table was less than anticipated, which is believed to be due to the fact that the role of the Danube in controlling the groundwater is a smaller one, while that of percolating precipitation a greater one that presented earlier⁹⁵."

The Forests in Kisalföld Region

"... Soil fertility in the Szigetköz area is determined by the variations in elevation and the depth to the gravel layer. Prior to commissioning the "C" Alternative the proportion of the sites at medium-high and medium-low elevations was higher. The floodplain forests comprise 65% poplar stands. These are the poplar stands of highest yield and value in Hungary. The forests on the protected part of the floodplain show a wider diversity of species with a higher proportion of deciduous hardwoods. The forest observations since 1986 have revealed that the main factor controlling tree growth is not the climate, but the Danube and the changes of the groundwater table induced by the River. ...

⁹² F. Papp, "Environmental Considerations in Engineering for the Danube River Dam Project". Annex 44.

⁹³ L. Fejér, et al., "The Hungarian Upper Danube - A Historical Review", *ibid.*

⁹⁴ T. Dóra, "The Present State of the Bős-Nagymaros Project and the Economic Consequences", *ibid.*

⁹⁵ I. Völgyesi, "Unconfined and Confined Goundwaters in the Kisalföld Region", *ibid.*

The reverse hydrological changes must be compensated by completing and operating in a controlled manner the network of recharging canals, learning also the lessons gained on the Slovak side⁹⁶ . "

The Hygienic Quality of Danube Water

"Regular monitoring of the quality of Danube water was started at the National Public Health Institute in 1951 and continued since. ... The organics content expressed in terms of the COD has changed but little over the past 15 years. Increases have been registered in the nitrate content and in the concentration of chlorophylls, regarded a measure of eutrophication. Bacterial pollution (in terms of faecal indicators) has increased perceptibly in the early parts of the period. The data of the recent years show some improvement, but the effects of the large volumes of untreated sewage (Győr, Budapest) are pronounced. Diversion of the Danube in October, 1992 has not resulted in any deterioration of microbiological quality, which according to the results for 1993 was appreciably better than in the previous year⁹⁷ . "

Canalization of the River in Europe Development of the Network of Waterways

"Canalization was introduced for regulating the rivers in Europe and then in the United States, using the method to these days. More than one hundred river dams were built in Europe. Construction work is in progress on five and engineering work on several others is under way. The experiences gained over the past close to 70 years demonstrate that this method offers solution to the major problems encountered in regulating the low- mean- and highwater beds. By complementary river training measures nature compatible and environmentally sound designs are possible. The environmental protection measures associated with river canalization provide aesthetically pleasing high-diversity landscapes even in the most demanding river valleys. Untreated discharges represent the gravest hazard to the streams and the life in them and must be discontinued regardless whether the river is canalized or not. Canalization of rivers in close to natural condition tends to improve, rather than deteriorate their quality. Experiences gained over centuries of attempts have demonstrated regulation of the Danube as an international waterway to be impossible without canalization along the Upper Danube and downstream of Paks if compliance with internationally accepted standards is desired⁹⁸ . "

⁹⁶ L. Halupa, et al., "The Forests in Kisalföld Region", ibid. (emphasis added).

⁹⁷ M. Csanády, et al., "The Hygienic Quality of Danube Water", ibid. (emphasis added).

⁹⁸ J. Juhász, "Canalization of the River in Europe Development of the Network of Waterways", ibid.

PART IV

**DEFECTS IN HUNGARY'S ANALYSIS OF THE LAWFULNESS OF THE
CONDUCT OF THE PARTIES TO THE 1977 TREATY**

**CHAPTER IX. THE APPLICABLE LAW IS THE 1977 TREATY;
HUNGARY'S MISGUIDED EMPHASIS ON THE
GENERAL INTERNATIONAL LAW OF THE
ENVIRONMENT**

9.01 In its Memorial, Hungary relies heavily upon the general international law of the environment to excuse its own breaches of the 1977 Treaty and to support its claims concerning the conduct of Czechoslovakia and Slovakia in relation to the G/N Project. There are two fundamental problems with Hungary's use of international environmental law: first, it ignores the agreement Hungary entered into with Czechoslovakia concerning the G/N Project itself, the 1977 Treaty. It is that agreement that contains the applicable standards concerning environmental protection. Second, it misunderstands and misapplies contemporary international environmental law.

9.02 In this Chapter, Slovakia will first underscore that the obligations of the Treaty parties concerning the environment are those set forth in the 1977 Treaty, not those under general international law. Slovakia will then demonstrate that the Treaty is consistent with principles of international environmental law, properly stated, and constitutes an expression of the mutual rights and obligations of the two States with regard to the protection, use and development of the Danube. The Chapter next turns to Hungary's resort to procedural obligations having their source outside the 1977 Treaty, in the general international law relating to the environment, and shows that this is simply another attempt by Hungary to evade its obligations under the 1977 Treaty. Finally, Slovakia will demonstrate how Hungary misconceives the substantive norms of international environmental law, and that the conduct of Czechoslovakia and Slovakia has been in conformity with those norms.

SECTION 1. The Applicable Standard is the 1977 Treaty

A. The 1977 Treaty Contains the Applicable Standards and Obligations Relating to the Protection of the Environment; These Are Not Modified by Other Rules of International Law

9.03 The first problem with Hungary's emphasis upon environmental norms is that Hungary invokes general principles of international environmental law as if the 1977 Treaty did not exist, or as if those principles were somehow contrary to, or superseded, the Treaty¹. At the same time, Hungary often lays stress upon the environment related provisions of the Treaty and concedes that the Treaty is sound from an environmental point of view². As shown in Slovakia's Memorial and in Chapter I of the present Counter-Memorial, the applicable standard to measure the rights and obligations of the Parties in this case is the 1977 Treaty itself, together with the instruments related to it. This is as true of the Treaty parties' obligations relating to the environment as it is of their other obligations. Hungary has never suggested that the environmental norms it cites in defense of its breaches are norms of jus cogens that would invalidate the 1977 Treaty³. The Treaty is a lex specialis that is binding upon the Parties, which has not been terminated⁴, and whose provisions relating to the environment have not been modified by rules of general international law⁵.

¹ See, for example, Hungarian Memorial, para. 6.09, et seq., discussing Articles 15, 19 and 20 of the 1977 Treaty.

² See, Hungarian Memorial, para. 4.21. The grounds for the purported termination of the 1977 Treaty discussed in Chapter 10 of Hungary's Memorial do not include any allegation that the 1977 Treaty is environmentally unsound.

³ See, Slovak Memorial, para. 8.107. Hungary does, however, claim that general international law obligations relating to the environment are obligations erga omnes and seems to suggest that they thereby automatically supersede prior treaty obligations. Hungarian Memorial, para. 10.95. Slovakia can only say that it finds this argument puzzling; it seems to confuse obligations erga omnes with norms of jus cogens.

⁴ See, Slovak Memorial, Chapter VIII, and Chapter X of this Counter-Memorial.

⁵ The present Chapter will deal chiefly with the effect of norms of general international law that antedate the 1977 Treaty. The effect of the possible emergence, subsequent to the conclusion of the Treaty, of norms of general international environmental law is discussed in para. 9.47, et seq., below, and in Chapter X.

B. The 1977 Treaty is Consistent with Principles of International Environmental Law and Applies Those Principles to the Utilisation of the Shared Water Resources of the Danube

9.04 In its Declaration and elsewhere, Hungary has argued that the 1977 Treaty is incompatible with general principles of international environmental law, was produced by a process that is inimical to those principles, and does not allow any environmental problems that may arise to be addressed in a cooperative manner within its provisions and mechanisms. Nothing could be further from the truth. In fact, Hungary in its Memorial belatedly recognises that the Treaty "was consistent with the maintenance of water quality and with environmental protection generally"⁶. The Treaty constitutes a patiently negotiated and thoroughly considered agreement in which the parties applied a number of general principles of what we now call international environmental law to the specific case of the construction and operation of a multipurpose project on one of the world's major international watercourses. These principles not only were enshrined in the Treaty itself, but also were applied in the period leading up to its conclusion.

9.05 Thus the Treaty contains provisions on the Protection of Water Quality (Article 15) and the Protection of the Natural Environment (Article 19), and - as currently recommended for all international watercourses⁷ - establishes a joint cooperative mechanism: the Government Plenipotentiaries (Article 3). In the period prior to the Treaty's conclusion, the parties in effect applied general principles of environmental impact assessment - which, even if they may have some normative force today, had not acquired that character in the 1970s - by conducting the numerous studies that led to the decision to approve the Project in 1974 and to its final design⁸. And during the Project's construction phase, environmental impact assessments carried

⁶ Hungarian Memorial, para. 4.21.

⁷ See, for example, Article 24, "Management", and related commentary, of the Law of the Non-Navigational Uses of International Watercourses, adopted on second reading by the International Law Commission in 1994. 1994 Reports of the International Law Commission, A/49/10, p. 300.

⁸ A list of the basic studies undertaken prior to governmental approval of the Project in 1974 is contained in Annex 23 to the Slovak Memorial. Studies relating specifically to the environment, and surface and ground water are discussed in paras. 2.14 and 2.15 of the Slovak Memorial. The "Bioproject", whose purpose was to study the effect of the G/N System on the ecosystems of the surrounding area, was commissioned in 1975 and completed in 1976 by URBION, Bratislava, with the participation of the Slovak Academy of Sciences. See, para. 4.06, above, and Slovak Memorial, para. 2.17, et seq. The "Bioproject" was updated in 1986: see, Slovak Memorial, para. 2.22.

out by Hungary itself in 1981, 1982 and especially in 1985, when a particularly thorough study was completed that "generally affirmed the Project"⁹.

9.06 Further, environmental problems that may arise during the operation of the Project can be met within the Treaty's provisions and mechanisms. In particular, the Treaty's provisions on monitoring (Article 15, para. 2) are directed precisely at ensuring that any environmental problems that may arise are detected at an early stage so they may be dealt with effectively. And the actual operation of the monitoring system developed pursuant to these provisions - a system that covers a wide array of environmental parameters - has been evaluated favourably both in the Bechtel Report and in the EC working Group report of 2 November 1993¹⁰.

9.07 The Treaty likewise establishes joint cooperative mechanisms and provides for the creation of sub-agencies to ensure ongoing coordination and communication between the parties with regard to the Project, including its environmental aspects. As noted in Slovakia's Memorial, the 1977 Treaty and its associated agreements lay down a mechanism for continuing cooperation between the parties in relation to the realisation of the joint investment¹¹. The Joint Contractual Plan states explicitly that "the whole realization of [the G/N Project] would require a close interstate cooperation ..."¹². The 1979 Joint Statute Agreement defines the powers and functions of the Government Plenipotentiaries established under Article 3 of the 1977 Treaty, providing for ongoing cooperation between the parties through the Plenipotentiaries, during both the construction and the operation of the Project. It sets forth in detail the ways in which the activities of the two parties to the 1977 Treaty are to be coordinated by the Plenipotentiaries and, in general, states that the "[P]lenipotentiaries shall be in permanent contact and discuss quarterly fulfilment of tasks stated in the Treaty"¹³. This Agreement also calls for the Plenipotentiaries to establish "permanent and temporary joint agencies," provides that the function of the permanent joint agencies is the "coordination and control of the construction and operation of the System of Locks", and specifies that the "Joint Group" shall be created as a permanent joint agency "consisting of the representatives of the ministries

⁹ Hungarian Memorial, para. 3.52. These studies are discussed in paras. 4.14-4.27, above.

¹⁰ Slovak Memorial, Annex 27 (at pp. 1-8) and Annex 19 (at pp. 20 and 23 - surface water levels and quality; and at pp. 34 and 40 - ground water levels and quality).

¹¹ *Ibid.*, para. 6.153.

¹² *Ibid.*, Annex 3, para. 10, "Realization" (at p. 40).

¹³ *Ibid.*, Annex 6, Article 5 (1).

concerned and central agencies, or other agencies"¹⁴. Furthermore, it should not be forgotten that the Plenipotentiaries were entrusted with the important function of the settlement of disputes under Article 27 (1) of the 1977 Treaty, which can itself be regarded as a form of cooperation. As with the other forms of cooperation under the 1977 Treaty regime, this function was rejected by Hungary¹⁵.

9.08 All of these provisions point to a system of close cooperation established by Hungary and Czechoslovakia under the 1977 Treaty and its related agreements. It is ironic that Hungary complains of a lack of cooperation by Czechoslovakia, when it was Hungary that refused to enter into dialogue, rejected the procedures for consultation under the 1977 Treaty and refused to follow the procedure for dispute settlement under that agreement, despite Czechoslovakia's repeated requests that it do so, as demonstrated above in Chapters V and VI.

9.09 In sum, the 1977 Treaty constitutes an expression of the concrete forms of cooperation agreed to by the Treaty parties with regard to the Project, including mechanisms for communicating information, as well as for consultation and negotiation. In many ways, the Treaty represents what may today be regarded as a translation of general principles of international environmental law and the law of international watercourses into a blueprint for the sustainable development of their shared freshwater resources. The Treaty also represents the fulfillment of the parties' efforts to consult concerning a Project on a shared watercourse, as well as to assess the environmental impact of that Project and avoid or minimise adverse environmental effects.

9.10 Furthermore, implementation of the Treaty would actually improve a number of environmental conditions¹⁶. The Treaty establishes mechanisms for monitoring environmental impacts during the Project's operation and for making adjustments in the Project to avoid or minimise any unforeseen adverse impacts it may have on the environment, including not only impacts on both flora and fauna, but also impacts on the quantity and quality of groundwater. It thus represents an example of the kind of environmentally sound integrated river basin development project that has been recommended by experts in the field and endorsed by the international

¹⁴ Ibid., Article 6, paras. 1, 2 and 3.

¹⁵ See para. 6.08, above.

¹⁶ This point has already been taken up in Chapter VII, above.

community¹⁷. The Project made good sense in 1977 because it was in the common interest of Hungary and Czechoslovakia as friendly neighbouring States who share a valuable natural resource -the Danube - to protect and develop that resource in a sustainable way for their mutual benefit. It makes good sense today for the same reasons.

9.11 Thus, the environmental rights and obligations of the parties in relation to the G/N Project are those laid down in the 1977 Treaty. That agreement conforms to the standards of international environmental law and applies them to the use and protection by the parties of the important international watercourse they share. However, if and to the extent that norms of general international law relating to the environment are considered as applicable in this case, the conduct of Czechoslovakia and Slovakia has been in conformity with those norms.

SECTION 2. Hungary's Contention that Czechoslovakia Breached the Obligation under General International Law to Cooperate on Environmental Matters Is an Attempt to Evade the 1977 Treaty

9.12 At various places in its Memorial, in particular in Chapters 6 and 7¹⁸, Hungary claims that Czechoslovakia refused to enter into consultations and negotiations and generally failed to cooperate with Hungary. These allegations are factually incorrect, as has been demonstrated in Chapters IV, V and VI above. First, they totally ignore the long history of consultations and negotiations leading up to the conclusion of the 1977 Treaty. Second, the 1977 Treaty and related agreements established a framework for ongoing cooperation, which both parties utilised until Hungary's withdrawal, and which Czechoslovakia, then Slovakia, demonstrated a continuing preparedness to utilise thereafter. And third, Czechoslovakia, and now Slovakia, have demonstrated a willingness to consult and negotiate, and did in fact enter into consultations and negotiations with Hungary. As has been shown in Chapters V and VI, it was in fact Hungary that spurned the mechanisms of the Treaty

¹⁷ See, e.g., United Nations, *Integrated River Basin Development, Report of a Panel of Experts*, U.N. Doc. E/3066/Rev.1 (New York, 1970); United Nations, *Experiences in the Development and Management of International River and Lake Basins, Natural Resources/Water Series No. 10*, U.N. Doc. ST/ESA/120 (New York, 1983); *River and Lake Basin Development, Natural Resources/Water Series No. 20*, U.N. Doc. ST/TCD/13 (New York, 1990); and, generally, Agenda 21, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June, 1992, Chapter 18, "Protection of the quality and supply of freshwater resources: application of integrated approaches to the development, management and use of water resources", U.N. Doc. A/CONF.151/26 (Vol. II), p. 167.

¹⁸ See, in particular, Hungarian Memorial, para. 6.70, et seq., and para. 7.06, et seq.

regime and that rejected invitations to enter into tripartite discussions outside that regime. And it was Hungary that acted contrary to the duty to negotiate in good faith by conditioning its willingness not only to engage in further negotiations, but also to conduct further research and to appoint a tripartite commission, on Czechoslovakia's halting all work on the Project.

9.13 Hungary claims that despite the substantial performance, in good faith, by Czechoslovakia of its obligations under the 1977 Treaty, it was in effect under an obligation to negotiate fundamental changes in, and ultimately the termination of, that agreement, including the dismantling or abandonment of the extensive and costly works constructed pursuant to its terms¹⁹. Hungary bases this asserted obligation largely upon sources outside the 1977 Treaty itself, sources that generally require States to cooperate in their relations with regard to shared watercourses and the environment²⁰.

9.14 However, it is not always clear from Hungary's Memorial how in its view these obligations under general international law relate to the 1977 Treaty. To the extent that Hungary views them as prior rules of international law, that somehow continue to be binding despite the subsequent conclusion of the 1977 Treaty, Slovakia would make the following observations: prior rules of general international law would continue to be binding on the Treaty parties only as to matters not covered by the Treaty. Procedural rules of international environmental law, to the extent they existed at all prior to 1977²¹, were of a highly general nature; their relationship to the

¹⁹ Ibid., paras. 6.71-6.73 and 6.79-6.80.

²⁰ Hungary's claim that it was entitled to terminate the 1977 Treaty because of subsequent obligations under the general international law of the environment is dealt with below in Section 4, starting at para. 9.47 and in Chapter X.

²¹ It is doubtful that many international environmental obligations of a procedural nature had developed significantly prior to 1977. For example, the Preparatory Committee for the 1972 United Nations (Stockholm) Conference on the Human Environment proposed inclusion in the Stockholm Declaration on the Human Environment of a principle requiring States to provide information on activities within their jurisdiction or control if they believed that such information would be needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction. This principle was hotly disputed; consequently, it was not included in the Stockholm Declaration. See, L. Sohn, "The Stockholm Declaration on the Human Environment," 14 Harvard International Law Journal 423, (1973), at pp. 496-502. Commentators have observed that the articulation of principles of cooperation concerning shared natural resources began with the adoption in 1978 by the Governing Council of the United Nations Environment Program of the "Principles of Conduct in the field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States", U.N. Doc. UNEP/IG.12/2 (1978); 17 International Legal Materials (1978), p. 1097. A. Kiss & D. Shelton, International Environmental Law, Transnational Publishers, New York/London, 1991, p. 131. Even these principles were highly controversial in the General Assembly,

Treaty would therefore be controlled by the maxim, lex posterior derogat legi priori, lex specialis derogat legi generali. Thus, to the extent that such rules existed prior to 1977, they were superseded by the relevant provisions of the 1977 Treaty.

9.15 Hungary defines the obligation to cooperate broadly to cover not only cooperation but also good faith performance of the 1977 Treaty and the obligation to consult and negotiate. Hungary's invocation of each of these purported obligations will be addressed separately in this section. To say, as Hungary does, that the Treaty parties continued to be under these general procedural obligations, in addition to or even in place of those contained in the 1977 Treaty, is to ignore and render nugatory the long history of negotiations that led to the conclusion of the Treaty and to ignore and render meaningless the terms of the Treaty itself. For the 1977 Treaty laid down, in the clearest of terms, an unequivocal obligation upon the parties to cooperate and consult, and provided for the mechanisms within which that cooperation and consultation was to take place²². The joint committees and groups established to accomplish the Project included environmental problems among the kinds of problems they were intended to resolve on the basis of consultation and joint agreement²³. It was Hungary, not Czechoslovakia, that spurned these mechanisms by abolishing the position of Plenipotentiary under the Treaty and otherwise attempting to withdraw from the Treaty and its mechanisms²⁴.

"indicat[ing] that the rules contained in the 1978 Principles cannot necessarily be regarded as settled law, nor as enjoying the support of all states" P. Birnie & A. Boyle, International Law and the Environment, Clarendon Press, Oxford, 1992, pp. 115-116.

²² See, especially, Article 3 of the 1977 Treaty, which, to cite only a few examples, provides for: the direction and supervision of "tasks relating to the operation of the [Project]" by the "government delegates", or Plenipotentiaries; for the establishment by the Plenipotentiaries of "appropriate permanent and temporary joint agencies for the performance of their functions"; for the Plenipotentiaries to "ensure that construction of the System of Locks is properly coordinated"; for approval by the Plenipotentiaries of "proposals for the modification of the technical procedures adopted in the joint contractual plan"; for the Plenipotentiaries to "provide for and approve the records and settlement of differences relating to the apportionment of labour and supplies"; for the supervision by the Plenipotentiaries of "compliance with the water balance approved in the joint contractual plan"; and for the Plenipotentiaries to "supervise and coordinate the activities of national operating agencies in times of flood or ice disposal", a function also provided for in Article 13.

²³ See, paras. 4.43-4.46, above.

²⁴ See, para. 6.08, above.

The Obligation to Cooperate

9.16 Hungary's argument misunderstands the purpose of the general obligation to cooperate in relation to shared freshwater resources. The purpose of that obligation is to encourage the States concerned to work together in relation to the international watercourses in question and, ultimately, to establish a specific framework within which to interact on an ongoing basis in relation to the protection, use and development of their shared water resources. The 1977 Treaty was such a framework. A specific framework is necessary precisely because of the general nature of the obligation to cooperate. As one commentator observes:

"The content of the obligation to cooperate is difficult to describe in abstract terms. It depends very much on the great variety of concrete situations; what is required of a State in any particular situation can be determined only by examining the relevant facts and circumstances of that situation²⁵."

The "relevant facts and circumstances" in the present situation consist of the 1977 Treaty and the works constructed thereunder, including those that were necessitated by Hungary's unlawful abandonment of the Project.

9.17 The purpose of the general obligation to cooperate is not, and cannot be, to terminate the very arrangements which the obligation encourages establishing. Such an interpretation of the obligation would destabilise treaty relations in general, and fluvial relations in particular, rather than strengthening cooperation in relation to shared water resources. A State would never be able to rely upon an agreement entered into in good faith, after long negotiations, and could never feel secure about undertaking substantial projects and expending significant financial resources in fulfilling obligations in reliance on a treaty, if Hungary's theory were correct.

9.18 As shown below, Hungary and Czechoslovakia complied with the general obligation to cooperate by the very negotiation and conclusion of the 1977 Treaty, which sets forth in detail the specific forms that the cooperation between the two countries is to take in relation to the Danube. Hungary agrees on this point²⁶.

²⁵ P.M. Dupuy, "Overview of the Existing Customary Legal Regime," in D. Magraw, ed., International Law and Pollution, University of Pennsylvania Press, Philadelphia, 1991, p. 61, at p. 72.

²⁶ Hungarian Memorial, para. 6.72.

The conclusion of the Treaty was thus the fulfillment of the general obligation to cooperate in relation to shared freshwater resources. To say, as Hungary does, that the obligation of cooperation under general international law requires parties to a treaty to negotiate not only its revision or termination but also the reversal of performance under it makes a mockery of the principle of pacta sunt servanda. These claims of Hungary are in reality simply another attempt to undermine the 1977 Treaty and to compensate for the fact that its claims based upon treaty law lack merit. It was in fact Hungary that breached the duties of cooperation arising from the 1977 Treaty by demanding that Czechoslovakia agree to terminate the Treaty and that it should demolish the works it had constructed in good faith as the Treaty required.

9.19 The real purpose of Hungary's attempt to define a special rule of cooperation relating to environmental concerns, which would supersede the specific provisions of the 1977 Treaty, is twofold: to distance itself from the need to negotiate in good faith the Treaty dispute that had arisen, and to impose on Czechoslovakia the special obligation of negotiating the termination of the Treaty itself and hence the G/N Project. A close examination reveals that the general obligations defined by Hungary, which are additional to those imposed by the Treaty and have their source outside the Treaty, are not defined in terms of a duty of joint consultation and good faith negotiation. Rather, they are defined in terms of a right of one State to impose its view on another State if the former alleges its environment is threatened.

9.20 This may be seen, inter alia, in Hungary's Memorial where, after referring to the Joint Contractual Plan, and to Article 15 (concerning the protection of water quality) and Article 19 (concerning the protection of nature) of the Treaty, Hungary states:

"These instruments represent an implementation of the general international duty to cooperate. But when doubts concerning the ecological consequences of the construction of the [G/N Project] could be expressed following the political changes, Czechoslovakia refused to amend the 1977 Treaty, or to engage in meaningful negotiations aimed at alleviating the legitimate concerns of the Republic of Hungary²⁷."

The factual inaccuracies contained in this statement have been dealt with in Chapters V and VI, above. What is of interest here concerns Hungary's legal arguments: first, that the relevant provisions of the 1977 Treaty were, in effect, an implementation of the international duty to cooperate, but that this general duty continued to exist, separately

²⁷ Ibid.

from the 1977 Treaty; and, second, that this duty transcended the obligation of joint cooperation and consultation set out in the Treaty and had the effect of requiring Czechoslovakia to accept at face value the unsubstantiated environmental concerns expressed by Hungary and, therefore, to agree to amend the 1977 Treaty so as to alleviate these concerns. This would follow, according to Hungary, even though Czechoslovakia might, as it did, disagree totally with Hungary's expressed concerns - concerns which, it might be added, were also refuted by Hungary's own environmental impact assessments, the most recent and thorough of which had been completed in 1985.

9.21 Thus, according to Hungary's argument, it makes no difference whether a treaty contains a provision on revision or not: in either case, Hungary contends, there is a duty to negotiate the revision of the treaty. Such a view of the law would render treaties ephemeral, if not entirely pointless. It would discourage States from entering into agreements, especially those calling for the expenditure of large sums in reliance on the good faith performance of the other party, as in the present case. It would not merely destabilise, it would destroy, the foundation of treaty relations.

9.22 Slovakia would make the following points in this connection. First, the 1977 Treaty contains no revision clause. This the parties agreed upon. Second, Article 27 of the Treaty covers, by its terms, disputes relating to "the realization and operation of the System of Locks" - that is, the subject matter of the Treaty, not its revision. And third, because Article 27 does not cover amendment or revision, when one party seeks consultations and negotiations on the amendment of the Treaty, or goes even further and seeks its termination, that party must make at least a prima facie case to show the existence of grounds that would justify unilateral termination in law. If that party fails or refuses to show such grounds, as Hungary has, that ends the matter. Czechoslovakia was therefore under no duty to consult or negotiate concerning the amendment or termination of the 1977 Treaty.

9.23 Hungary's invocation of its own version of the substantive norms of international environmental law will be examined in Section 4 of this Chapter. The point to be made here, in the context of discussing the duty of cooperation under the 1977 Treaty, is that Hungary attempts to escape from the specific provisions of the 1977 Treaty requiring joint action and cooperation, which were unlimited as to the matters in dispute that they covered, and from the general dispute-settlement provisions of Article 27 (after distorting the plain meaning of that Article), by invoking

its own version of general principles of international environmental law. Hungary is arguing that, because of environmental effects that it alone perceived, the duty to consult and negotiate in good faith to which the parties were subject under the Treaty was modified, imposing a special duty on Czechoslovakia. Thus, Hungary contends the negotiations had to involve either the furnishing of definitive proof by Czechoslovakia that Hungary's concerns were misplaced or the acceptance by Czechoslovakia of the arrangements for the halting of the G/N Project. This is illustrated by Hungary's discussion of the importance of a concept that will be addressed later in this Chapter, the "precautionary principle":

"One of the implications of the 'precautionary principle' is that the causal link²⁸ may be assumed in certain situations even in the absence of scientific certainty. Combined with the general obligation not to cause damage to another country's environment, this means that the State whose activities are likely to damage the environment of another State must show that the proposed action will not have such effects. If this cannot be done, the proposed activity must be modified or even abandoned²⁹."

9.24 This view of the "precautionary principle", according to which it would apply to all situations in which there is a likelihood of transboundary environmental harm, is, to say the least, a novel one³⁰. But the point to be made here is that Hungary uses this non-Treaty principle in support of its complaints about Czechoslovakia's efforts to implement the Treaty, and in attempting to justify the series of unilateral acts Hungary took leading up to its declaration of purported termination of the 1977 Treaty. At the same time, Hungary attempts to characterise

²⁸ The expression "causal link" is taken from Article 2, para. 5(a) of the U.N. ECE's Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 March 1992, which is referred to in para. 6.66 of the Hungarian Memorial. The Helsinki Convention is not yet in force and cannot be regarded generally as a codification of general international law. Paragraph 5 of Article 2 of the Convention states that the parties shall be "guided by" certain enumerated principles, including the "precautionary principle", in taking measures specified in paragraphs 1 and 2 of the article. As formulated in subparagraph (a) paragraph 5, the "precautionary principle" is quite restricted, applying only to "action to avoid the potential transboundary impact of the release of hazardous substances." It states that action to avoid such impact "shall not be postponed on the ground that scientific research has not fully proved a causal link between those [*i.e.*, hazardous] substances, on the one hand, and the potential transboundary impact, on the other hand" (Emphasis added.) Thus the Convention does not refer to a "causal link" between conduct or installations more globally and a transboundary impact. Hungary is attempting to take the Helsinki Convention's formulation of the "precautionary principle" out of its context and give it a much broader coverage than the language of the Convention permits.

²⁹ Hungarian Memorial, para. 6.68.

³⁰ For a more detailed discussion, see, para. 9.80, et seq., below.

Czechoslovakia's conduct as a refusal to consult and to negotiate in good faith concerning the amendment and termination of the Treaty.

9.25 Hungary's charges concerning the alleged failure of Czechoslovakia to consult and negotiate are in fact no more than a remarkably bold attempt to achieve its goals through invocation of the general international law of cooperation when there is no ground under the general international law of treaties for termination of the 1977 Treaty. Hungary's need to resort to such a double standard arises from its inability to justify either its conduct under the provisions of the 1977 Treaty, or its declaration of termination under treaty law. Thus it has cast about for some other international standard under which it would try to rationalise its conduct. But this is no more than a transparent attempt to undermine the 1977 Treaty and avoid the application of the principle of pacta sunt servanda.

9.26 Hungary is correct that the duty to cooperate had been specifically fulfilled by the parties through their negotiation and conclusion of the 1977 Treaty³¹. The Treaty was the culmination of long and intensive efforts to reach a cooperative solution to serious problems of flooding, navigation, energy needs, agricultural development and environmental protection. Indeed, the conclusion of an agreement concerning an international watercourse is a manifestation of cooperation between the States sharing that watercourse. It is in fact often regarded as the ultimate form of cooperation with regard to shared water resources³². This is particularly true when, as in the present case, the agreement establishes a framework for ongoing cooperation between the States concerned.

³¹ Hungarian Memorial, para. 6.72.

³² See, e.g., the award in the Lake Lanoux Arbitration, discussed below, stating that "the only way to arrive at such compromises of [conflicting] interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements..." Lake Lanoux Arbitration (France v. Spain), 24 International Law Reports (1957), p. 101, at pp. 129-130. The policy of encouraging cooperation between riparian States through the negotiation of agreements governing international watercourses is recognised in Article 3, "Watercourse agreements," especially paragraph 3, and the commentary thereto, of the International Law Commission's articles on the Law of the Non-Navigational Uses of International Watercourses, adopted on second reading in 1994 and in Article 8, "General obligation to cooperate," and accompanying commentary, 1994 Report of the International Law Commission, pp. 244-249. See, also, Article VII (1) of the Resolution on the Pollution of Rivers and Lakes and International Law adopted by the Institute of International Law at its Athens Session, 12 September 1979: "In carrying out their duty to cooperate, States bordering the same hydrographic basin shall, as far as practicable, especially through agreements, resort to the following ways of cooperation" Annuaire de l'Institut de droit international, 58-I, Athens Session, September 1979 (Basle/Munich, 1980), p. 197, et seq. (in translation).

Good Faith Performance of the 1977 Treaty

9.27 Hungary contends that in refusing to submit to its precondition for substantive negotiations - *i.e.*, cessation of all work on the Project - Slovakia breached obligations of cooperation and good faith performance of treaties:

"The refusal [of Czechoslovakia] to cooperate by accepting meaningful negotiations involved lack of good faith in the performance of a bilateral treaty Thus Czechoslovakia violated the generally recognised principle of good faith ... in the context of its performance of the 1977 Treaty³³."

9.28 Hungary's claim is that the general duty to perform a treaty in good faith requires, in this case, that the 1977 Treaty not be performed, but that it be continuously open to re-negotiation and amendment. The Hungarian position seems to be that Czechoslovakia acted in bad faith by continuing to perform its obligations under the 1977 Treaty and by expecting Hungary to continue performing its obligations. This amounts to an argument that the good faith obligation of Article 26 of the Vienna Convention on the Law of Treaties entails an obligation to negotiate the amendment, and ultimately the termination, of the very treaty that the same article of the Convention requires be "performed by [the parties] in good faith." This is nothing more than yet another repackaging of the "revision" argument, dealt with above³⁴.

9.29 Such an argument turns the good faith obligation on its head. Hungary cites no authority for this view based on the text of the Vienna Convention and confirmed by its travaux, or elsewhere. Indeed, a straightforward application of the duty to perform treaties in good faith (pacta sunt servanda) would indicate that it was Hungary, not Czechoslovakia, that breached the obligation of Article 26 of the Vienna Convention by suspending, then terminating, the performance of its obligations under the 1977 Treaty. Unilateral cessation of performance of treaty obligations can hardly qualify as good faith performance of those obligations. Such conduct cannot but be held to be a violation of the basic principle of pacta sunt servanda, which the International Law Commission described as "the fundamental principle of the law of

³³ Hungarian Memorial, paras. 6.48-6.49.

³⁴ See, paras. 9.21-9.22, above. See, also, para. 2.22 et seq., above, for a further discussion of this point.

treaties"³⁵ and is widely regarded as "perhaps the most important principle of international law"³⁶.

9.30 This is clear from the International Law Commission's commentary to what became Article 26, stressing that the obligation to "abstain from acts calculated to frustrate the object and purpose of the treaty ... [is] clearly implicit in the obligation to perform the treaty in good faith ..."³⁷. In fact, Hungary's unilateral suspension, and subsequent abandonment of work under the 1977 Treaty breached its good faith obligation not to engage in "acts calculated to frustrate the object and purpose of the treaty" and led to Czechoslovakia's efforts to ensure that the object and purpose was realised as nearly as possible.

9.31 Hungary's conduct contrasts sharply with that of Czechoslovakia and Slovakia. The facts leave no doubt that Czechoslovakia and Slovakia acted in good faith vis-à-vis Hungary under the 1977 Treaty. As detailed in Chapters V and VI, above, and further discussed below in Chapter X and XI, Czechoslovakia went out of its way to accommodate Hungary's repeated demands for changes in the Project timetable³⁸; postponed the damming of the Danube for three years while trying to get Hungary to enter into discussions concerning whether the Project could be modified to meet Hungary's concerns; offered, throughout the dispute, the possibility of revising technical elements to meet objectively verifiable environmental needs; proposed meetings of experts from both countries with impartial experts; decided to participate in a PHARE project to study groundwater along the Danube; stressed Czechoslovakia's readiness to negotiate with Hungary concerning "all aspects connected with the implementation of the 1977 Treaty"³⁹; and even thoroughly

³⁵ Yearbook of the International Law Commission, 1966, Vol. II, A/CN. 4/SER. A, p. 211.

³⁶ Restatement Third of the Foreign Relations Law of the United States, Sec. 321, comment a (1987). The International Law Commission, in its commentary to Article 23 ("Pacta sunt servanda") of its draft articles on the law of treaties, noted that the importance of the principle "is underlined by the fact that it is enshrined in the Preamble to the Charter of the United Nations". Yearbook of the International Law Commission, 1966, Vol. II, A/CN. 4/SER. A, p. 211. The Charter refers to the determination of the Parties "to establish conditions under which ... the obligations arising from treaties ... can be maintained ...". Charter of the United Nations, third preambular paragraph.

³⁷ Yearbook of the International Law Commission, 1966, Vol. II, A/CN. 4/SER. A, p. 211.

³⁸ The delays in the Project due to Hungary's economic difficulties that led to the 1983 Protocol, and the acceleration of the Project from 1985-1989 at Hungary's request, are described in Chapters III and IV of Slovakia's Memorial, and in Chapter IV, above.

³⁹ Letter of the Czechoslovak Prime Minister of 23 April 1992, Slovak Memorial, Annex 108.

examined the option put forward by Hungary that the Project be abandoned and the area be completely restored to the status quo ante⁴⁰. These cannot be interpreted other than as sincere efforts by Czechoslovakia to work with Hungary to implement the 1977 Treaty in good faith - precisely what is required by the good faith component of the principle of pacta sunt servanda.

9.32 Hungary, in contrast, unreasonably and repeatedly demanded - as a non-negotiable precondition to its willingness to negotiate, to conduct further research, or to establish a tripartite commission - Czechoslovakia's halting of all work on the Project, and, later on, Variant "C".

The Obligation to Consult and Negotiate

9.33 Turning to Hungary's argument concerning the duty to negotiate, once again it seems to boil down to a theory that the obligation to cooperate under general international law required Czechoslovakia, first, to agree to stop all work on the Project as a non-negotiable precondition to entering into negotiations, and second, to agree to the demolition and abandonment of the works already constructed by Czechoslovakia in good faith, in fulfillment of its obligations under the 1977 Treaty. Like Hungary's other efforts to use obligations under general international law to circumvent the 1977 Treaty regime, this is misconceived and ill-founded.

9.34 The argument is misconceived because, like the good faith and cooperation claims discussed above, it would if followed mean that a valid treaty in force would be constantly subject to being re-opened and re-negotiated, or terminated, at the option of one of the parties, even if it had been substantially performed by the other party. This would negate the principle of pacta sunt servanda.

9.35 Hungary argues that "[o]ne of the most evident tools of cooperation is the duty to negotiate when difficulty appears in the management of a shared resource or in the implementation of a common project"⁴¹. Hungary states that it "repeatedly proposed to begin negotiations in order to reach an ecological guarantee agreement, without success"⁴², and that "Czechoslovakia refused to negotiate except on the basis that the Gabčíkovo barrage would be put into operation irrespective of the

⁴⁰ See, Slovak Memorial, paras. 5.14-5.25.

⁴¹ Hungarian Memorial, para. 6.76.

⁴² Ibid.

results of independent scientific studies"⁴³. These allegations have been shown to be untrue in Chapters V and VI above, and will be dealt with again in Chapter X, below⁴⁴.

9.36 Hungary cites, as support for its argument that Czechoslovakia was obliged to re-negotiate the 1977 Treaty, precedents that do not apply to the present case. Hungary relies principally upon the award in the Lake Lanoux arbitration⁴⁵ and the decision in the Fisheries Jurisdiction case⁴⁶. Those cases are not apposite to the facts of the present case and, even if they were apposite, they support the 1977 Treaty regime rather than Hungary's efforts to minimize the importance of that system of agreements.

9.37 It will be recalled that the Lake Lanoux arbitration, decided in 1957, involved a dispute between Spain and France over a French plan to utilise the waters of Lake Lanoux, which eventually flowed into Spain, to produce electricity. There, as here, there existed a set of treaties between the parties. In that case it was the Treaty of Bayonne of 26 May 1866 and the Additional Act of the same date. The question put to the tribunal by the parties was whether France was correct in claiming "that, in carrying out, without a preliminary agreement between the two Governments, works for the use of the waters of Lake Lanoux on the terms laid down in the project ... , it would not commit a violation of the provisions of the Treaty of Bayonne of 26 May 1866 and of the Additional Act of the same date"⁴⁷?

9.38 In Lake Lanoux, the French project was not specifically foreseen by the applicable agreements, which had been concluded nearly a century

⁴³ Ibid., para. 6.79.

⁴⁴ See, para. 10.11, et seq., below. The authority cited by Hungary for the latter proposition is the letter from the Slovak Prime Minister of 19 September 1991. In that letter, Czechoslovakia actually proposes that a committee of experts from Czechoslovakia, Hungary and the EC resolve the problems pertaining to the construction and operation of the [G/N Project] and "would examine all variations of possible solutions in a comprehensive manner". The letter does state, understandably at that advanced stage, that "Czechoslovakia will only find acceptable a variant which would make the operation of the Gabčskovo Barrage possible," but says nothing about refusing to take into account "the results of independent scientific studies". In fact, the entire tenor of the letter is to the contrary: it proposes the participation in the committee of experts of a truly independent third party, the EC, and indicates a willingness to "examine all variations of possible solutions in a comprehensive manner".

⁴⁵ Hungarian Memorial, para. 6.77.

⁴⁶ Ibid., para. 6.78 (referring to the case as the "Fisheries" case). Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3.

⁴⁷ Revue générale de droit international public, Vol. LXII, p. 80; English translation in Yearbook of the International Law Commission, 1974, Vol. II, Part. 2, p. 194, at p. 195.

earlier. This contrasts sharply with the present case, where the entire object and purpose of the 1977 Treaty was the construction by the two parties of the G/N Project. Thus, when the Lake Lanoux tribunal speaks of "an obligation for States to agree in good faith to all negotiations and contacts which should ... place them in the best circumstances to conclude agreements"⁴⁸, it is referring to negotiations concerning a possible agreement on France's hydroelectric project, which had not theretofore been the subject of an agreement between France and Spain. In the present case, Hungary and Czechoslovakia had already negotiated, over a period of many years, an agreement concerning the project in question the 1977 Treaty. Thus, negotiations of the kind referred to by the Lake Lanoux tribunal had long since been held by Hungary and Czechoslovakia; nothing in that award suggests that if an agreement resulted from negotiations, that agreement would itself have to be re-negotiated.

9.39 In fact, the Lake Lanoux tribunal, applying general principles of international law, held that there was no obligation to reach an agreement prior to utilising the hydroelectric power potential of an international watercourse. Thus, even if the Tribunal's statements concerning negotiations could be taken to apply to Hungary's demands for an "ecological guarantee agreement" or for the amendment or termination of the 1977 Treaty, there would have been no obligation to actually reach such an agreement.

9.40 The Lake Lanoux tribunal, therefore, went only so far as to emphasise the importance of negotiations concerning projects on international watercourses planned by one State that might affect another State. In the case of the G/N Project, such negotiations were held between Hungary and Czechoslovakia, concerning a project planned by both States, and resulted in the 1977 Treaty. In addition, Czechoslovakia and Slovakia have consistently been willing to negotiate with Hungary, and have in fact consulted and negotiated with Hungary, as shown later in this Chapter. Hungary, in contrast, made impossible any meaningful negotiations by insisting that Czechoslovakia suspend work on the Project as a pre-condition to any meaningful negotiations to settle the dispute.

9.41 Hungary also cites the Fisheries Jurisdiction case in support of its argument concerning the duty to negotiate⁴⁹. While that case also involved an agreement - the 1961 Exchange of Notes - and while the Court did order the parties to

⁴⁸ Ibid. at p. 197; quoted in the Hungarian Memorial at para. 6.77.

⁴⁹ Hungarian Memorial, para. 6.78.

negotiate, the Court did not question the validity of the agreement and ordered negotiations on matters that lay wholly outside the purview of the agreement. Thus, the case supports Slovakia's position and damages Hungary's.

9.42 The Fisheries Jurisdiction case involved a dispute between Iceland and the United Kingdom over whether Iceland could unilaterally extend its fisheries jurisdiction (and with it its exclusive fishing rights) to 50 nautical miles from its baselines. The Court ruled that it could not. It further held, inter alia, that Iceland and the UK were under mutual obligations to undertake negotiations in good faith to reach an equitable solution of their differences concerning their respective fishing rights in the area between a 12-mile fishery zone recognised in the 1961 agreement by an agreement between them and the 50-mile limit proclaimed by Iceland.

9.43 One of the ironies in Hungary's use of this case lies in the fact that, like Hungary in the present case, Iceland had in 1971 repudiated an agreement with the UK governing the subject matter of the dispute and containing a compromissory clause: this was the Exchange of Notes between the two countries of 11 March 1961. Iceland, which did not participate in the case, informed the Court by letter that it regarded the Exchange of Notes as having been terminated. The UK, for its part, had stressed that "the Exchange of Notes was not open to unilateral denunciation or termination"⁵⁰. As already indicated, the Court held that Iceland was bound by the 1961 agreement, which also provided the basis for the Court's jurisdiction⁵¹.

9.44 The case is also of little help to Hungary with regard to the Court's statements concerning negotiations. The Court ordered no negotiations with regard to areas covered by the agreement⁵². Thus Hungary's reliance on the case as a source of an obligation to negotiate with regard to matters covered by an agreement between the parties is misplaced. The Court did order the parties to enter into negotiations, but only with regard to the area between the 12-mile Icelandic fishery zone covered by the 1961 agreement, and the 50-mile limit proclaimed in the Icelandic Government's Regulations. That is, the Court ordered the parties to negotiate only with regard to matters not covered by the 1961 agreement. Similarly, it would seem

⁵⁰ Fisheries Jurisdiction, (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3, at p. 14.

⁵¹ Ibid., at p. 34.

⁵² In the 1961 Exchange of Notes, the UK had agreed that it "would no longer object to a 12-mile fishery zone around Iceland ...". Ibid., at p. 13.

inappropriate in the present case for Czechoslovakia (and now Slovakia) and Hungary to be required to negotiate matters that had already been resolved in the 1977 Treaty and related agreements, or whose resolution was entrusted by the Treaty to mechanisms it established. The negotiations in Fisheries Jurisdiction were believed necessary for two reasons: Iceland's preferential fishing rights as a coastal State in a situation of special dependence on coastal fisheries; and the UK's special interest in fishing in those waters, by virtue of its long history of fishing there and the importance of the fishery to its economy. There was no agreement between the parties concerning that area. The "negotiations" sought by Hungary would in reality constitute re-negotiation of an existing agreement - the 1977 Treaty. Thus the Court's statements in the Fisheries Jurisdiction case concerning negotiations were made in a context that bears no similarity whatsoever to the present case.

9.45 That having been said, however, it bears repeating that Czechoslovakia, then Slovakia, was always prepared to discuss and agree with Hungary ways in which to improve the environmental soundness of the G/N Project. This point has been developed at length in Chapters IV-VI above.

9.46 This section has shown that Hungary's invocation of purported obligations having their source outside the 1977 Treaty constitutes nothing more than another attempt to evade its obligations under the Treaty. Whether the obligations in question are styled as general duties of cooperation, or as more specific ones of good faith performance, consultation and negotiation, it is clear, first, that the applicable obligations are those under the 1977 Treaty, and second, that even when tested against these obligations under general international law, it is Hungary's conduct, not that of Czechoslovakia or Slovakia, that is not in compliance. The following section will turn from these largely procedural duties to Hungary's misuse of the substantive norms of international environmental law.

SECTION 3. Hungary Mischaracterises and Misapplies the Substantive Norms of International Environmental Law

9.47 The second fundamental problem with Hungary's argument is that even if and to the extent that the general international law of the environment is applicable in the present case independently of the Treaty, that law is misunderstood and misapplied by Hungary.

A. Hungary's Characterisation of International Environmental Law Would Thwart the Legitimate Efforts of States to Develop

9.48 Hungary properly stresses the importance of preventing environmental harm⁵³ but interprets the principle of prevention in such an absolute fashion as to virtually foreclose any development of international water resources. Hungary goes so far as to suggest that "changes in international environmental law, and equally importantly in international environmental awareness" qualify as fundamental changes of circumstances that constitute a ground for terminating the 1977 Treaty⁵⁴. Hungary goes on to imply that these "changes" left it with "no choice but to reconsider the Project, especially in its scientific, environmental and energy-related aspects"⁵⁵. In reconsidering the Project, Hungary was, according to its Memorial, only "seeking to comply with international standards ..."⁵⁶.

9.49 But what are the applicable international standards? Has international environmental law changed substantially since 1977 (or, more accurately, since February 1989, when Hungary affirmed the 1977 Treaty in all its substantive elements), and if so, has the change been as fundamental as Hungary implies? It is certainly not the policy of the international community to discourage States from developing their water resources especially when every reasonable effort is made to protect the environment. This Section will attempt to throw some light upon these questions, and will conclude that the G/N Project is in fact in full conformity with the current standards, policies and attitudes of the international community in respect of the environment.

9.50 The general principles of contemporary international environmental law do not operate in isolation from other norms of international law including the principle of pacta sunt servanda, or from other values of the international community. In particular, those principles, properly understood, inform but do not thwart the efforts of countries to develop for the benefit of present and future

⁵³ Hungarian Memorial, para. 6.63.

⁵⁴ Hungarian Memorial, para. 10.76. Hungary's use of rebus sic stantibus in this regard is dealt with in Chapter VIII of the Slovak Memorial (para. 8.80) and in Chapter X of this Counter-Memorial, para. 10.61, et seq.

⁵⁵ Hungarian Memorial, para. 10.76. Hungary's specific claims concerning alleged "scientific, environmental and energy-related" problems with the Project have been dealt with in the present Counter-Memorial in Chapter VII.

⁵⁶ Hungarian Memorial, para. 10.76.

generations. Yet if Hungary's view of the general international law of the environment were followed to its logical conclusion it would mean that no dams or other development projects could be constructed on international watercourses because they would alter the natural environment. Even if it were conceivable that such a result could attract support in some quarters of industrialised countries that had already extensively developed their freshwater resource potential, it is highly unlikely that it would be endorsed by any government. In any event, such a theory should not operate to prevent a struggling new democracy from developing its freshwater resources, particularly when they constitute the country's principal potential source of clean energy. Nor should such a view be allowed to negate a State's efforts to protect its citizenry from the ravages of natural disasters such as floods. The international community never intended the principles of international environmental law to operate in such a way.

B. The Current Approach of the International Community to Environment and Development: Sustainable Development

9.51 Before addressing the current approach of the international community to environmental protection, it must be emphasised that contrary to the impression Hungary seeks to create, international environmental law did not develop overnight. In its Memorial, Hungary itself cites a number of instruments that pre-date the 1977 Treaty⁵⁷, including: the 1975 Helsinki Final Act⁵⁸; the 1973 EC Programme of Action on the Environment⁵⁹; and the 1972 Stockholm Declaration on the Human Environment⁶⁰. Hungary also cites the 1935 award in the case that many regard as the fountainhead of international environmental law, the Trail Smelter Arbitration⁶¹. Indeed, Hungary states that "[s]ince the end of the 1960s environmental law has developed with an unprecedented intensity and speed"⁶². Whether the "intensity and

⁵⁷ Curiously, Hungary also cites a number of authorities that post-date not only the Treaty but Hungary's ultimate repudiation of it in 1992. These include the instruments adopted at the United Nations Conference on Environment and Development (June, 1992), such as the Convention on Climate Change and the Rio Declaration. Hungarian Memorial, para. 6.64.

⁵⁸ Ibid., para. 6.58. According to Hungary, "[t]here is no doubt that the Contracting Parties to the 1977 Treaty were aware of and influenced by" the Final Act and related developments, which, in Hungary's words "gave legitimacy to environmental concerns in [Eastern Europe]". Ibid., para. 6.60.

⁵⁹ Ibid., para. 6.61.

⁶⁰ Ibid., para. 6.70.

⁶¹ Ibid., para. 6.70.

⁶² Ibid., para. 6.57.

speed" of its development have been "unprecedented" may be debatable; the important point here is that Hungary acknowledges that the development began well before the late 1970s. It can therefore hardly claim to have been surprised that international environmental law was in the process of developing when it concluded the 1977 Treaty with Czechoslovakia or thereafter; nor can it claim that a qualitatively new and different "international environmental awareness" has suddenly sprung forth so as to work a fundamental changes of circumstances. The awareness was present in the international community at least from the 1972 Stockholm Conference⁶³.

9.52 It is thus clear from the historical record, much of which is cited by Hungary itself, that while there have been developments in international environmental law and awareness over the past two decades, they began well before the conclusion of the 1977 Treaty. Moreover, they have not been cataclysmic, but have progressed gradually in response to increased knowledge of the problem and the needs of States, as in other fields of international law. Current law in the field may thus be seen as a natural and logical outgrowth of a process that began many years ago.

9.53 The key to understanding the current approach of the international community to the integration of environmental protection and economic development is the concept of "sustainable development". According to this idea, which was advanced in the 1987 Report of the World Commission on Environment and Development (the Brundtland Commission)⁶⁴, humanity should "ensure that it meets the needs of the present without compromising the ability of future generations

⁶³ See, generally, L. Sohn, "The Stockholm Declaration on the Human Environment," 14 Harvard International Law Journal (1973), p. 423. The following observation by Professor Sohn is illuminating in this regard: "One might also consider - as did the delegate of Kenya in the General Assembly - that the 26 principles of the Stockholm Declaration were 'common convictions' which 'reinforced the Principles and Purposes of the Charter of the United Nations', and that, together with the Universal Declaration of Human Rights and the International Strategy for the Second Development Decade, they 'collectively create a new atmosphere for international co-operation.' ... Having accepted the responsibility for the preservation and improvement of the human environment, the international community will find in the Stockholm Declaration a source of strength for later, more specific action." Ibid., at p. 515. Thus, there was already considerable "awareness" of the problem on the part of the international community in 1972.

⁶⁴ "Our common future", distributed at the forty-second session of the General Assembly as document A/42/427, 4 August 1987, published as Our Common Future, Oxford University Press, 1987. The General Assembly, in Resolution 38/161 of 19 December 1983, had welcomed the establishment of a special commission that would "report on environment and global problématique to the year 2000 and beyond, including proposed strategies for sustainable development. The Commission later adopted the name "World Commission on Environment and Development". Document A/42/427, p. 1.

to meet their own needs"⁶⁵. While the concept implies some limits on human activities, the Commission explained that "sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life"⁶⁶. Thus, inherent in the concept of sustainable development is the principle that developmental needs are to be taken into account in interpreting and applying environmental obligations⁶⁷. This principle was well known and widely accepted as the keystone of efforts to integrate environmental protection and economic development well in advance of Hungary's unilateral suspension of work on the Project in 1989.

9.54 The most recent pronouncement of the international community on the subject of integrating environmental considerations and developmental needs is the Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development (UNCED or "Earth Summit") in Rio de Janeiro in June 1992⁶⁸. Of particular interest in the present context are Principles 1, 3 and 4 of the Rio Declaration, which provide as follows:

"Principle 1

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

⁶⁵ Ibid., p. 24 (para. 27).

⁶⁶ Ibid.

⁶⁷ See, e.g., P. Sands, "The 'Greening' of International Law: Emerging Principles and Rules", 1 Ind. Journal of Global Legal Studies, (1994) 293, at p. 302.

⁶⁸ Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1, June 13, 1992, reprinted in 31 International Legal Materials (1992), at p. 874 (adopted by consensus). As stated in the Hungarian Memorial, para. 6.57: "172 States (out of the 178 which then existed) were represented by approximately 10,000 delegates, including 116 heads of State or of government. All the relevant international organisations were present." So it is not an exaggeration to speak of the Rio Declaration as reflecting the approach of the international community.

Principle 4

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

9.55 These principles leave no doubt that the fundamental policy of the international community is not the single-minded pursuit of environmental protection or the non-alteration of the status quo. Rather, as indicated in Principle 1, the over 170 States participating in the Earth Summit took a human-centered approach to the integration of environmental concerns and developmental needs. They emphasised that fulfillment of the "right to development"⁶⁹ must meet both the "developmental and environmental needs" of present and future generations of humans. And, importantly for the present case, they stressed that environmental protection "constitute[s] an integral part of the development process and cannot be considered in isolation from it". There could not be a clearer confirmation of the idea that environmental protection cannot be pursued in isolation, without regard to other needs and values, but rather must be approached in the context of the development process.

9.56 It is clear from both the letter and the spirit of these principles that the overarching policy of the international community is that environmental concerns are not directed to frustrate efforts to achieve social and economic development, but that development should proceed in a way that is environmentally sustainable. Slovakia submits that these have been, and are today, the very policies on which the G/N Project is based. The consistency of the Project with the prevailing approach of States to environment and development is confirmed and further clarified by the approach taken by international fora and institutions to the development and protection of internationally shared freshwater resources.

9.57 As noted in Slovakia's Memorial⁷⁰, Hungary refers to several instruments that at most represent "soft law" in its effort to justify suspension of work at Nagymaros, then at Dunakiliti, in 1989. Yet if Hungary wished to rely upon non-

⁶⁹ Even the United States, which does not accept the idea of a "right" to development, joined the consensus on the Rio Declaration. The US explained that this did not represent a change in its long-standing opposition to such a "right". Instead, it understood Principle 3 to mean that "economic development goals and objectives must be pursued in such a way that development and environmental needs of present and future generations are taken into account". Report of the United Nations Conference on Environment and Development, U.N. GAOR, 47th Session, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. II), at p. 17 (1992). This is consistent with the position of Slovakia, which is not dependent on the existence of a "right to development".

⁷⁰ Slovak Memorial, para. 8.111.

binding instruments, the most pertinent one is Agenda 21. Also adopted at the Rio conference⁷¹, Agenda 21 elaborates in great detail upon the implementation of the principles contained in the Rio Declaration. Agenda 21 is, in essence, a plan of action for the 21st Century in the field of environment and development. Chapter 18 of Agenda 21 concerns freshwater resources. It is entitled, "Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources"⁷². The introduction to Chapter 18 states:

"The multisectoral nature of water resources development in the context of socio-economic development must be recognized, as well as the multi-interest utilization of water resources for water supply and sanitation, agriculture, industry, urban development, hydropower generation, inland fisheries, transportation, recreation, low and flat lands management and other activities. Rational water utilization schemes for the development of surface and underground water-supply sources and other potential sources have to be supported by concurrent water conservation and wastage minimization measures. Priority, however, must be accorded to flood prevention and control measures, as well as sedimentation control, where required."

9.58 Chapter 18 contains seven "Programme Areas." Programme Area A is entitled, "Integrated water resources development and management." In establishing the "basis for action" under this program area, the following observation is made: "The extent to which water resources development contributes to economic productivity and social well-being is not usually appreciated, although all social and economic activities rely heavily on the supply and quality of freshwater"⁷³. Under the subsection of Programme Area A entitled "Objectives", the following statements are made:

"18.7. The overall objective is to satisfy the freshwater needs of all countries for their sustainable development."

"18.8. Integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization. To this end, water resources have to be protected, taking into account the functioning of aquatic"

⁷¹ Agenda 21, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June, 1992, U.N. Doc. A/CONF.151/26.

⁷² Agenda 21, *ibid.*, Chapter 18, "Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources", U.N. Doc. A/CONF.151/26 (Vol. II), p. 167.

⁷³ *Ibid.*, p. 168.

ecosystems and the perennality of the resource, in order to satisfy and reconcile needs for water in human activities.

...

18.9. ... Four principal objectives should be pursued, as follows:

...

(b) To plan for the sustainable and rational utilization, protection, conservation and management of water resources based on community needs and priorities within the framework of national economic development policy ...⁷⁴."

9.59 Thus, Agenda 21, like the Brundtland Commission Report and the Rio Declaration, does not counsel blind pursuit of environmental values in isolation from human needs, including the need to develop economically. Indeed, it emphasises the importance of "satisfy[ing] the freshwater needs of all countries for their sustainable development". Applying the criteria contained in Agenda 21 to the G/N Project reveals that the Project, both as originally designed and as provisionally implemented through Variant "C", in effect anticipated and followed the guidelines in Chapter 18.

9.60 Specifically, the G/N Project constitutes an "integrated approach to the development, management and use of water resources" as called for by Agenda 21. The Project represents an "integrated approach ..." because it was carefully designed to serve a number of purposes at the same time: improvement of navigation; production of hydroelectric power; protection against floods; restoration of previous groundwater levels; prevention of further erosion of the riverbed; rehabilitation of the river branches; and other purposes discussed in the Memorial of Slovakia⁷⁵. Approval of the Project was preceded by numerous scientific studies of the Project's potential impact upon terrestrial and aquatic ecosystems; further studies have been conducted since the inception of work on the Project and since the implementation of the provisional solution⁷⁶. Flood control and problems of sedimentation are addressed, as called for by Agenda 21. Agenda 21 recognises that "water resources development contributes to economic productivity and social well-being", two of the Project's broad objectives. The Project in its original form, and as provisionally implemented, treats

⁷⁴ Ibid., pp. 168-169 (emphasis added).

⁷⁵ See Chapter II, Section 3, of the Slovak Memorial.

⁷⁶ See Chapter IV, above.

"water as an integral part of the [Danubian] ecosystem, a natural resource and a social and economic good ...". It recognises that "water resources have to be protected ... in order to satisfy and reconcile needs for water in human activities". Some of those activities - navigation, agriculture, and forestry - were threatened by the erosion of the bed of the Danube and consequent lowering of the level of groundwater. The Project was designed, *inter alia*, to stop erosion of the riverbed, which occurred in the upper part of its reach, and to ameliorate navigation conditions and restore groundwater to levels that would reduce the necessity for irrigation and assure sufficient water supplies. This would also enable the revitalising of the river branches and the enhancing of recreational opportunities in those areas. In sum, the G/N Project reflects careful planning "for the sustainable and rational utilization, protection, conservation and management of water resources based on community needs and priorities within the framework of national economic development policy" of the Treaty parties, as called for by Agenda 21.

9.61 Further evidence that Hungary's anti-dam approach is out of line with current expert thinking is supplied by "The Dublin Statement", adopted at the International Conference on Water and the Environment: Development Issues for the 21st Century⁷⁷. The Conference was held in Dublin in January, 1992, in preparation for the Earth Summit. Conference participants commended The Dublin Statement to world leaders that would assemble in Rio de Janeiro⁷⁸. The first of four "Guiding Principles" set forth in the Statement is as follows:

"Principle No. 1 - Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment.

Since water sustains life, effective management of water resources demands a holistic approach, linking social and economic development with protection of natural ecosystems. Effective management links land and water uses across the whole of a catchment area or groundwater aquifer⁷⁹."

9.62 The Dublin Statement also contains an "Action Agenda" which, under its second item, stresses the importance of protection against natural disasters such as floods: "Economic losses from natural disasters, including floods and

⁷⁷ International Conference on Water and the Environment: Development Issues for the 21st Century, 26-31 January 1992, Dublin, Ireland, "The Dublin Statement," reproduced in U.N. Doc. A/CONF.151/PC/112, Annex I, p. 7.

⁷⁸ *Ibid.*, p. 8.

⁷⁹ *Ibid.*, Principle No. 1, at p. 9.

droughts, increased three-fold between the 1960s and the 1980s." It further emphasises that climate change could further exacerbate flood problems: "Projected climate change and rising sea levels will intensify the risk for some ...⁸⁰."

9.63 The coincidence of the Dublin Statement's Principles and Action Agenda, on the one hand, and the G/N Project, on the other, demonstrate again that even when measured by the standard of the most recent thinking, the design of the G/N Project is environmentally sound. It is not, as Hungary would have the Court believe, out of line with current international environmental law or "awareness". For example, as recommended by Principle 1 of the Dublin Statement's Guiding Principles, the G/N Project takes what amounts to "a holistic approach, linking social and economic development with protection of natural ecosystems". Indeed, the Project is designed at once to promote social and economic development and to protect and restore natural ecosystems. Experience with the Project's provisional implementation through Variant "C" indicates it is achieving these objectives. In particular, the Project promotes social and economic development by providing substantial navigation benefits to all countries and individuals using the Danube-Rhine waterway; by improving agricultural conditions by raising the water table; and by providing clean, sustainable and inexpensive hydroelectric power for the economic and social well-being of the citizens of Hungary and Slovakia. The Project protects and restores natural ecosystems by, as already indicated, reversing erosion of the bed of the Danube, halting concomitant lowering of groundwater levels; restoring water to the branch system; and revitalising the riparian environment. In addition, as recommended in the Action Agenda, the Project provides much needed protection against the most serious kind of natural disaster in the region, floods - phenomena that could become increasingly intense with projected climate change.

9.64 In the light of the position of the international community revealed in the foregoing survey, it is surprising that Hungary would take the absolute position that environmental considerations foreclose development of the freshwater resources it shares with Slovakia. Hungary's position is particularly surprising in light of the environmental benefits the Project brings to the area⁸¹. By purporting to play the environmental card, Hungary is actually depriving its citizens of environmental benefits. These benefits would be enhanced if Hungary were to observe its obligations under the 1977 Treaty and show a greater willingness to cooperate with Slovakia - for

⁸⁰ Ibid., at p. 10.

⁸¹ See, Slovak Memorial, paras. 2.09-2.17. See, also, para. 4.30 and Chapter VIII, above.

example, by placing underwater weirs in the bed of the Danube so that water will flow into river branches on the Hungarian side. Instead, Hungary stopped work on the Project at a moment when the major alterations to the environment - *i.e.*, clearing of land and construction of works on agricultural and forestry land - had already been irrevocably accomplished, but before the expected environmental benefits - the increase in ground water levels and the watering of the branch system - could be realised.

9.65 The environmental benefits of the Project result largely from corrections it envisages of the adverse environmental consequences in Slovakia and Hungary of upstream works on the Danube in other countries - consequences that will not correct themselves but will only become worse if no action is taken⁸². Nor, for that matter, will the other problems the G/N Project was designed to address, such as flooding and obstructed navigation, disappear without human intervention. But rather than recognising that these conditions will inevitably worsen unless remedial action is taken, Hungary ignores them, in effect taking the position that nothing should be done. Hungary's unwillingness to address the deterioration of the riparian environment in the Danubian lowlands demonstrates that it is not prepared to observe one of the principles it invokes with such force: that the environment should be "passed on to future generations in no worse condition than it was received"⁸³. Further, Hungary's refusal to allow completion of the entire Project, including measures aimed at the mitigation of certain adverse effects of the operation, and elimination of a number of national investments, solely because these were linked with the Project, has resulted directly in the continuing degradation of the environment on Hungarian territory⁸⁴. In addition, it is clear that Hungary recognised that its suspension of work would cause environmental damage, since it referred to this result when it sought a shortening of the construction schedule before 1989⁸⁵. Thus, Hungary's position is not only anti-development; it is also, in fact, anti-environment.

9.66 Slovakia has shown that Hungary misunderstands the contemporary international law of the environment and has indicated the fundamental approach of the international community to the integration of environmental protection and economic development. Against the background of this general discussion,

⁸² The problems requiring remedial action in the Slovak-Hungarian section of the Danube are described in Chapter I, Section 2, of the Slovak Memorial.

⁸³ See, *e.g.*, Hungarian Memorial, para. 10.38.

⁸⁴ See, paras. 4.19, 4.29 and 4.41, *et seq.*, above. See, also, para. 8.11, *et seq.*, above.

⁸⁵ Slovak Memorial, Annex 49: Protocol of 21st Session of ESTC Committee (at p. 420).

Slovakia now turns to specific claims of Hungary implicating the international law of the environment. As indicated at the outset of this Chapter, Hungary's claims misapply that law. In addition, as will appear below, they are unsupported by the facts.

C. Hungary Distorts the Principle of Prevention and the "Precautionary Principle"

The Principle of Prevention

9.67 Hungary's arguments relating to international environmental law rest on the proposition that "[t]he main principle of international environmental law is that environmental degradation must be prevented"⁸⁶. Hungary even goes so far as to declare that the "principle of prevention ... must be considered an erga omnes obligation"⁸⁷. While the latter proposition has no bearing upon the present case, it is noted because it betrays the extreme view of international environmental law adopted by Hungary⁸⁸: if the principle of prevention were in fact an erga omnes obligation, moderate transfrontier air pollution moving from State A to State B could theoretically be challenged by State C, even if State C were totally unaffected and located in another hemisphere - a patently absurd consequence.

9.68 The principle of preventing environmental harm must be properly understood and applied⁸⁹. Hungary, however, implies that the obligation to prevent such harm is absolute⁹⁰. As the foregoing discussion of the concept of sustainable development has shown, this is not the case. If it were, development would come to a standstill.

⁸⁶ Hungarian Memorial, para. 6.63.

⁸⁷ Ibid.

⁸⁸ It may also betray confusion. See, fn. 3, above.

⁸⁹ Professor Christopher Stone, a noted authority in the fields of national and international environmental law, has argued that prevention may not always be the best approach: "an ounce of prevention may be worth a pound of cure; but by the same quaint token, to pay a pound in prevention to get only an ounce of cure is a distinctly bad buy. . . . [T]he question whether to lean toward prevention or cure is not one that can be answered generally." C. Stone, The Gnat Is Older Than Man: Global Environment and Human Agenda, Princeton University Press, Princeton, 1993, pp. xv-xvi.

⁹⁰ See, e.g., para. 6.63 of the Hungarian Memorial: "The main principle of international environmental law is that environmental degradation must be prevented." Emphasis added.

9.69 What many regard as the seminal authority in the field of international environmental law, the Trail Smelter case, placed significant conditions on the obligation to prevent transfrontier air pollution in its famous statement of the law:

"Under principles of international law, . . . no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"⁹¹ ."

Hungary has provided no scientific evidence of any adverse environmental consequences of the G/N Project, other than the ones that had been disclosed by the preparatory studies planned to be mitigated by appropriate measures envisaged by the Treaty and to which Hungary agreed⁹² . Thus, neither condition laid down by the Trail Smelter tribunal is satisfied.

9.70 Similarly indicative of a realistic, non-absolutist approach to the prevention of harm are the draft articles on the Law of the Non-Navigational Uses of International Watercourses adopted by the International Law Commission on second reading at its 1994 session. Of particular interest for present purposes are draft articles 7 and 21. Article 7, entitled "Obligation not to cause significant harm," provides in relevant part as follows:

"1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States"⁹³ ."

9.71 The Commission explains in its commentary to paragraph 1 of Article 7 that a State can be deemed to have breached its obligation to exercise due diligence to avoid causing 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 that event or has abstained from abating it"⁹⁴ . Leaving aside the fact that Hungary consented to the

⁹¹ 3 United Nations Reports of International Arbitral Awards, 1935, p. 1911, at p. 1965 (emphasis added).

⁹² Obviously the landscape had to be disrupted in order to construct the reservoir, the bypass canal and the major structures. These "environmental" effects were understood and accepted by the parties, although as indicated at para. 9.73, below, even they were minimised through the selection of the least disruptive variants.

⁹³ 1994 Reports of the International Law Commission, A/49/10, p. 236.

⁹⁴ Ibid., p. 237.

Project and its effects - both positive and negative - in the 1977 Treaty, none of the numerous studies conducted prior to 1977 or since that year has indicated that the Project would cause significant environmental harm to Hungary or Slovakia. And, once again, Hungary has itself failed to offer a scintilla of scientific evidence to support its claims of impending environmental harm.

9.72 The ILC's commentary goes on to provide specific examples of treaty provisions that reflect due diligence obligations⁹⁵. It stresses such standards as the following: States shall use the "best practicable means at their disposal and [shall act] in accordance with their capabilities" (1982 United Nations Convention on the Law of the Sea); States are obliged "to take all practical steps" to prevent pollution (1972 London Dumping Convention); and States shall "take all appropriate measures" (1985 Vienna Convention for the Protection of the Ozone Layer).

9.73 Certainly at the time the Project was being planned, the parties took "all appropriate measures" to guard against environmental harm, using the "best practicable means [then] at their disposal" and acting "in accordance with their capabilities". For example, as recognised by Hungary⁹⁶, a number of variants of the proposed project were considered by the two countries. However, contrary to Hungary's assertion that "none of these plans considered the environmental impact of the project"⁹⁷, the environmental impact of different variants was, in fact, expressly taken into account in various studies and meetings during the process of deciding upon the optimal alternative⁹⁸. The variants that were eliminated were chiefly ones that would have required extensive construction in natural areas in the floodplain, thus sparing the floodplain from massive construction works. Instead, the major structures, *i.e.*, the bypass canal and the Gabčíkovo step, were situated outside the floodplain.

⁹⁵ Commentary to art. 7.

⁹⁶ Hungarian Memorial, para. 3.16, referring to "34 main and several subvariations of the projected technical plan."

⁹⁷ *Ibid.*

⁹⁸ See, for example, Report of the Joint Czechoslovak-Hungarian Sub-Commission, 4 April 1958, item IV, impact on the regime of ground waters and on agriculture, forestry and fisheries, Annex 45; Protocol on Negotiations between the Representatives of Water Management Agencies of Czechoslovakia and Hungary (concerning the Choice of the Optimal Variant), 23-31 August 1966, Annex 46, examining the impact on the countryside and biology; and the Report on Comparison and Estimation of Diversion and Competitive Variant, submitted at the Negotiations of Representatives of the Czechoslovak and Hungarian Ministries of Forestry of 19-28 June 1969, Annex 47, considering the impact of the "competitive" variant on the environment.

9.74 Furthermore, since the Project's planning stage, Czechoslovakia and Slovakia have conducted studies, have commissioned a major study⁹⁹, and have conducted monitoring of the effects of the Project according to the terms of the 1977 Treaty. Hungary itself conducted an environmental impact assessment of the Project in 1985 and also commissioned a major study¹⁰⁰. None of the evidence produced by these studies, or by the truly independent studies that have been conducted under EC auspices¹⁰¹, has indicated that environmental harm of the kind Hungary claims will occur has in fact occurred, or will occur. Indeed, the studies show that the Project is having the beneficial effects on the environment that were anticipated in its planning stages - at least to the extent that is possible without Hungarian participation¹⁰². Finally, as Hungary recognises in its Memorial, the Slovak Ministry of Environment attached 19 conditions to the authorisation of the implementation of the System by means of Variant "C", conditions that Hungary describes as being "primarily aimed at assuring the protection of underground water"¹⁰³. This demonstrates Slovakia's concern with the protection of water quality. In fact, even according to Hungary's own Memorial, all of these conditions save two have been met¹⁰⁴.

9.75 Article 21 of the ILC's draft articles on international watercourses is entitled "Prevention, reduction and control of pollution." Of particular relevance here is paragraph 2, which provides as follows:

"2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse.

⁹⁹ The HQI report, December 1990, Slovak Memorial, Annex 28.

¹⁰⁰ As to the 1985 Environmental Impact Study, see, para. 4.24 et seq., above; as to Hungary's commissioned study, the Bechtel report, see, Slovak Memorial, Annex 27.

¹⁰¹ See, Chapters VII and VIII, above.

¹⁰² See, Chapter VIII, above.

¹⁰³ Hungarian Memorial, para. 6.35. The conditions are summarised at para. 5.135 of the Hungarian Memorial, and discussed in para. 8.45, et seq., above.

¹⁰⁴ Although the Hungarian Memorial states that as of December 1993 few of these conditions had been complied with (Hungarian Memorial, para. 6.35), it in fact contradicts itself. Slovakia has in fact complied with the 19 conditions insofar as it is within its power to do so. The fact that the company operating Variant "C" was fined by Slovak authorities for non-compliance with one of these conditions demonstrates the seriousness with which Slovakia regards matters of environmental protection and shows it is making efforts to ensure that the conditions are met.

Watercourse States shall take steps to harmonize their policies in this connection¹⁰⁵."

This provision represents a flexible approach to the problem of pollution of international watercourses. The Commission's commentary explains that:

"the obligation to 'prevent . . . pollution . . . that may cause significant harm' includes the duty to exercise due diligence to prevent the threat of such harm. . . . The requirement that watercourse States 'reduce and control' existing pollution reflects the practice of States, in particular those in whose territories polluted watercourses are situated. This practice indicates a general willingness to tolerate even significant pollution harm, provided that the watercourse State of origin is making its best efforts to reduce the pollution to a mutually acceptable level. A requirement that existing pollution causing such harm be abated immediately could, in some cases, result in undue hardship, especially where the detriment to the watercourse State of origin was grossly disproportionate to the benefit that would accrue to the watercourse State experiencing the harm¹⁰⁶."

As explained in the commentary to Article 7, this means that watercourse States are required to use the best practicable means at their disposal to reduce and control pollution of the international watercourse in question.

9.76 As indicated in Chapter IV above, it is clear that in planning the G/N Project the parties took "all appropriate measures" to guard against pollution of the Danube and related groundwater that might result from the Project, providing a sophisticated system of monitoring in the Project design to allow for and correct any unanticipated adverse effects. In addition, in taking such measures the parties employed the best practicable means then at their disposal. Slovakia continues to take such measures and employ such means in respect of its efforts to reduce and control pollution from land based sources and to prevent pollution of groundwater as a result of water being impounded in the reservoir. Hungary does not.

9.77 In sum, it is difficult to imagine what more Czechoslovakia could reasonably have done to ensure that the G/N Project did not result in significant environmental harm, beyond the planned land use alterations caused by the actual construction of the Project and knowingly accepted by Hungary in the 1977 Treaty. Certainly the hundreds of studies leading up to the decision to proceed with the

¹⁰⁵ 1994 Reports of the International Law Commission, A/49/10, p. 289.

¹⁰⁶ Ibid., commentary to Article 21, para. (4), pp. 291-292.

Project, coupled with the Bioproject, its continual update, the HQI report, and the ongoing monitoring of environmental conditions, must qualify as the exercise of "due diligence" to prevent environmental as well as other kinds of harm.

9.78 Hungary's argument not only exaggerates the principle of prevention, it fails to find support in the facts. Hungary argues that "the Czechoslovak Government failed in its obligation to prevent environmental harm by refusing to take the necessary measures for this purpose, starting with the refusal to investigate in a satisfactory way the environmental effects of the Project"¹⁰⁷. This claim has no basis in fact. First, it ignores the numerous and extensive studies conducted prior to the conclusion of the 1977 Treaty¹⁰⁸. Second, it ignores the "Bioproject", whose two phases were completed in 1976 and 1984, respectively, and whose purpose was precisely to study the effect of the G/N System on the ecosystems of the surrounding area¹⁰⁹. Third, it ignores the independent studies commissioned by the parties, which found no evidence of environmental problems of the kind Hungary claimed to exist¹¹⁰. And finally, it ignores the system established pursuant to the 1977 Treaty to monitor environmental factors, which has disclosed nothing remotely suggesting an "environmental emergency" and whose functioning has been evaluated favourably by outside studies¹¹¹.

9.79 What does have a basis in fact is that it was Hungary that rejected Czechoslovak requests to join in discussions and meetings of experts of both countries with impartial outside experts¹¹²; it was Hungary that conducted, an environmental impact assessment in 1985 which, according to the Hungarian Memorial, "generally affirmed the Project"¹¹³; and it was Hungary that conducted no studies of appropriate detail after 1989 when it first raised its environmental claims¹¹⁴. This suggests that the only studies that would have been "satisfactory" to Hungary

¹⁰⁷ Hungarian Memorial, para. 6.69.

¹⁰⁸ Slovak Memorial, Annex 23.

¹⁰⁹ See, *ibid.*, para. 2.17, et seq. and para. 2.22 as to the 1986 update of the Bioproject.

¹¹⁰ See, the Bechtel (February 1990) and HQI (December 1990) reports, ibid., Annexes 27 and 28. See, also, Annex 22, hereto.

¹¹¹ See, Slovak Memorial, para. 5.62.

¹¹² See, Chapters V and VI, above.

¹¹³ Hungarian Memorial, para. 3.52.

¹¹⁴ See, para. 7.01, above.

would be ones that confirmed the result that Hungary had politically pre-ordained, namely, that the G/N Project would cause an environmental catastrophe.

The "Precautionary Principle"

9.80 In arguing that Czechoslovakia breached obligations of prevention under international environmental law, Hungary invokes the "precautionary principle"¹¹⁵. It must first be recognised that leading studies have concluded that the "precautionary principle" has yet to ripen into a norm of general international law:

"Despite its attractions, the great variety of interpretations given to the precautionary principle, and the novel and far-reaching effects of some applications suggest that it is not yet a principle of international law. Difficult questions concerning the point at which it becomes applicable to any given activity remain unanswered and seriously undermine its normative character and practical utility ... ¹¹⁶."

However, even as a non-binding, guiding precept, the "precautionary principle" contains nothing that is inconsistent with the conduct of Czechoslovakia and Slovakia in this case.

9.81 The "precautionary principle" was stated in the following way in Principle 15 of the Rio Declaration by the more than 170 States participating in the Earth Summit:

"Principle 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation¹¹⁷."

¹¹⁵ Hungarian Memorial, para. 6.64.

¹¹⁶ P. Birnie & A. Boyle, International Law and the Environment, Clarendon Press, Oxford, 1992, p. 98. See, also, P. Sands, "The 'Greening' of International Law: Emerging Principles and Rules" 1 Ind. Journal of Global Legal Studies (1994), p. 293, at p. 300: "There is no uniform understanding of the meaning of the precautionary principle among States and other members of the international community."

¹¹⁷ Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1, June 13, 1992, reprinted in 31 International Legal Materials (1992), p. 874. It is interesting to compare the formulation of the precautionary principle in the Ministerial Declaration of the Second World Climate Conference, November 7, 1990, which adds: "The measures adopted

9.82 It is readily apparent that this principle, as formulated by the international community, is not absolute. Indeed, it could not be, given the different needs, capabilities and circumstances of States. First, the "precautionary approach" is to be applied by States "according to their capabilities". This phrase indicates that States are to exercise due diligence to prevent harm to the environment in their developmental and other activities¹¹⁸. It can hardly be denied that Czechoslovakia and Slovakia did everything within reason to study possible alternatives and investigate potential impacts on the environment of the Project and of Variant "C"¹¹⁹.

9.83 Second, the formulation of the precautionary principle in Principle 15, as in most other instruments, applies not to all environmental harm, but only to threats of "serious or irreversible damage". Thus, for the principle to apply, a State must have identified a threat of serious or irreversible damage. If it has identified such a threat, the State is to take cost effective measures to prevent environmental degradation¹²⁰, even where it is not scientifically certain that degradation will in fact occur. The principle was first developed in the context of agreements to protect the stratospheric ozone layer, and thus to prevent catastrophic damage to all biological organisms on Earth¹²¹. It has been applied in State practice chiefly in those cases in which "serious or irreversible damage" may result from "the most dangerous

should take into account different socio-economic contexts." Reprinted in 1 Yearbook of International Environmental Law (1990), p. 473.

¹¹⁸ The tribunal in the Alabama claims arbitration stated that "due diligence" is "a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is exercising it." The Geneva Arbitration (The Alabama case), reported in J.B. Moore, Digest of International Arbitrations to which the United States has been a Party, vol. I (1898), pp. 572-73.

¹¹⁹ See, the discussion of the studies relating to the G/N Project in Chapter II of the Slovak Memorial.

¹²⁰ This would presumably require a cost benefit analysis to determine whether the financial and human cost of measures taken would yield a corresponding benefit in terms of environmental protection. In the present case, the policy of Czechoslovakia and Slovakia has been to do all they could to anticipate and avoid harmful impacts of the Project, and to restore environmental quality - e.g., in the branch system - rather than to take only measures that were cost effective, per se.

¹²¹ See, the Vienna Convention for the Protection of the Ozone Layer of 22 March 1985, Preamble, reprinted in 26 International Legal Materials 1520 (1987); and the Montreal Protocol on Substances that Deplete the Ozone Layer of 16 Sept. 1987, article I(A)(1), reprinted in 26 International Legal Materials 1541 (1987).

substances¹²², such as radioactive¹²³ and other forms of hazardous waste¹²⁴. Hungary, in contrast, seeks to give the principle sweeping application, so that it would apply to any alteration of the natural environment.

9.84 But it is clear from the foregoing examination of its terms that Principle 15 in no way suggests that lack of full scientific certainty prevents a State from going forward with a project; or that a project cannot go forward if it may entail some environmental harm; or even that there is an absolute prohibition of engaging in activities that may produce "serious or irreversible damage". Flexibility is built into the principle to take into account the differing circumstances and capabilities of countries as well as the need to avoid measures that would entail costs out of proportion to their benefit. The aim of the principle is to encourage States to study carefully the possible impacts of new activities and, if such study produces evidence - even if it does not amount to full scientific certainty - suggesting that an activity may cause serious or irreversible damage, to take precautionary measures to avoid such damage. Such a process was followed with regard to the G/N Project.

9.85 The hundreds of studies conducted by the parties in planning the G/N Project, and those completed during its construction and partial implementation, did not lead to the conclusion that the Project posed a risk of "serious or irreversible environmental damage"¹²⁵. Nor did the independent studies commissioned by the parties disclose such a risk¹²⁶. Nor, for its part, has Hungary provided Czechoslovakia and Slovakia with scientific data showing that the Project poses even the "ecological risks" it claims to exist, let alone scientific evidence that the Project poses a "threat of

¹²² This is the language used in the Ministerial Declaration of the Second International Conference on the Protection of the North-East Sea, London, 25 November 1987, para. VII, 27 International Legal Materials 835 (1988), at p. 838.

¹²³ See, e.g., the Convention for the Protection of the Marine Environment of the North Atlantic of 22 September 1992 ("OSPAR Convention") between France and the United Kingdom, Cmnd. 2265, Annex II (reprinted in 32 International Legal Materials 1069 (1993)).

¹²⁴ See, e.g., the Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 29 Jan. 1991 ("Bamako Convention"), art. 4(3)(f), (reprinted in 30 International Legal Materials 773 (1991), at p. 781.

¹²⁵ See, Chapter IV and VII, above. A summary of studies is also contained in the Czechoslovak Statement of 12 July 1989, Slovak Memorial, Annex 64, discussed in the Memorial at paras. 4.26, et seq., pp. 142, et seq. The Statement reviews the history of the scientific studies concerning the environment conducted both before and after the Project was initiated under the 1977 Treaty.

¹²⁶ See, Slovak Memorial, para. 2.23, et seq.

serious or irreversible damage"¹²⁷. In fact, Hungary conducted no new scientific studies in the three-year period, 1989-1991, during which it delayed the damming of the Danube. If Hungary seriously believed that the Project posed risks of grave environmental harm, surely it would have conducted the required studies and provided Czechoslovakia with scientific evidence to support its claims. It would also not have refused to sign the draft protocol of negotiations between the heads of the ESTC Committee on 3 May 1989¹²⁸. That draft protocol contained a list of four principles intended to form the basis of an agreement on environmental protection in the area of the G/N Project. The agreement was to have complemented the 1977 Treaty.

9.86 Thus, not only has Hungary failed to provide any convincing scientific data that the Project poses a threat of "serious or irreversible environmental damage", all available evidence points precisely in the opposite direction. That evidence indicates that the Project is having beneficial effects upon groundwater tables and forestry in Slovakia, and could have in Hungary with Hungary's cooperation. The evidence further indicates that the Project is having no adverse impact on surface and groundwater quality, and that the Project could, with Hungary's participation, lead to a restoration of river conditions approximating those that existed before the introduction of major river regulation schemes in the middle of the last century. Therefore, the first requirement for the application of the precautionary principle, indeed the requirement that triggers that principle, is not satisfied.

9.87 Yet, despite Hungary's failure to provide credible evidence to substantiate its ecological claims, it can hardly be said that Czechoslovakia adopted a passive, disinterested attitude with regard to those claims. Slovakia has demonstrated that Czechoslovakia actively sought not only scientific data concerning Hungary's allegations of environmental harm but also discussions concerning ways of meeting Hungary's concerns in the context of implementing the 1977 Treaty¹²⁹. This shows that Czechoslovakia was attempting in good faith to implement the Treaty, and in a way that took environmental considerations into account, as had indeed been true all along.

¹²⁷ See, the discussion of studies in Chapter VII and the discussion of Variant "C" in Chapter VIII, above. See, also, Slovak Memorial, para. 4.03. Hungary goes even further, claiming there was "imminent peril" to support its "state of necessity" justification for its attempted termination of the 1977 Treaty. Hungarian Memorial, para. 10.26, *et seq.* This claim is discussed in Chapter X, below.

¹²⁸ See, para. 4.44, *et seq.*, above.

¹²⁹ See, e.g., Slovak Memorial, para. 4.03; and the letter of 23 April 1992 sent by the Czechoslovak Prime Minister to the Hungarian Prime Minister, *ibid.*, Annex 108, and excerpted at para. 4.79. See, also, Chapters V and VI, above.

9.88 It is perhaps because Hungary is unable to furnish convincing scientific data supporting its claims concerning environmental harm that it in effect argues that its mere unsubstantiated claim that the Project may harm its environment requires Slovakia to prove that no harm will ensue¹³⁰. Hungary therefore contends that Slovakia should be required to do what is nearly impossible, namely, to prove a negative: that the Project will not cause damage to the environment.

9.89 Thus, Hungary on the one hand relies upon the precautionary principle, which counsels caution in the face of scientific uncertainty, but on the other hand claims that Czechoslovakia - a State, according to Hungary, "whose activities [were] likely to damage the environment of [Hungary], ... [had to] show that the [Project] [would] not have [environmentally harmful] effects"¹³¹ - i.e., that Czechoslovakia had to demonstrate with scientific certainty that the Project would not cause harm in order to be allowed to go forward. This argument is not only illogical, it has no foundation in the facts and is a distortion of international environmental law in general and of the precautionary principle in particular.

9.90 The most recent agreements and other instruments in the field of international environmental law take a more reasonable approach to the avoidance of harm from proposed activities¹³². According to this approach, where a project may cause harm to the environment, States should study the possibility thoroughly to avoid significant harm to other States and to protect the environment for future generations. A decision to proceed with the project should be based on the results of such studies; a mere unsubstantiated assertion that the project might be harmful should not prevent it from going forward. In the present case, Hungary's own studies indicated no threats of the kinds of environmental harm that Hungary now claims will ensue¹³³.

¹³⁰ Hungarian Memorial, para. 6.68.

¹³¹ Ibid. The relevant passage reads in full: "the State whose activities are likely to damage the environment of another State must show that the proposed action will not have such effects."

¹³² See, e.g., Principles 15 (precautionary principle), 17 (environmental impact assessment) and 19 (prior notification); and the Convention on Environmental Impact Assessment in a Transboundary Context of 25 Feb. 1991 ("Espoo Convention"), reprinted in 30 International Legal Materials 800 (1991).

¹³³ See, in particular, the 1985 Hungarian environmental impact assessment and the Bechtel report which are discussed in Chapters IV and VII, above.

9.91 Moreover, Hungary's argument is unfounded on the facts. It relies on an assertion of a likelihood that the activities of one State - here, Slovakia, according to Hungary - will damage the environment of another. Entirely aside from the fact that Hungary accepted any such likelihood in the 1977 Treaty, Hungary has failed to adduce convincing evidence that any likelihood of damage to its environment exists. Instead, Hungary seems to believe that its mere incantation of a "likelihood of environmental harm" will bring such a likelihood into being, or will at least force Slovakia to show that such a likelihood does not exist. Such a doctrine not only makes a mockery of the precautionary principle; it could have the dangerous consequence of thwarting, on the basis of absolutely no evidence, the legitimate efforts of States to develop.

9.92 In addition, Hungary's argument distorts the precautionary principle. As explained above, the precautionary principle does not operate to halt development when there appears the slightest hint that a project might cause any environmental harm; it provides that where serious or irreversible damage is threatened, States should not await full scientific certainty before taking reasonable precautionary measures. Slovakia would make several observations in this connection.

9.93 First, of the vast body of data collected by both parties, none suggests that the Project threatens serious or irreversible damage. This conclusion was confirmed in the two independent studies completed in 1990¹³⁴, and has been borne out by the environmental monitoring of the Project in operation conducted pursuant to the 1977 Treaty. As indicated above, the precautionary principle is triggered "when there are threats of serious or irreversible damage". Here, no such threats have been scientifically demonstrated to exist. On the contrary, of all of the investigations and monitoring that have been undertaken, none suggests that the Project will cause anything approaching the kind of environmental harm referred to by Hungary. In stark contrast to this body of evidence is Hungary's mere assertion that the Project will cause an "ecological emergency". An unsubstantiated assertion cannot be permitted to overcome years of study and investigation - in much of which Hungary in fact participated - whose results diametrically oppose the assertion.

9.94 Second, the monitoring system that is in place is designed to disclose any environmental problems that may arise. Any such problems can then be responded to in a timely fashion. And third, the operation of Variant "C" has shown

¹³⁴ The Bechtel and HQI reports, Slovak Memorial, Annexes 27 and 28, respectively.

that this system will also be effective to monitor the possible environmental effects thereof.

D. Hungary's Claim that it was Entitled to Terminate the 1977 Treaty because Subsequent Obligations under the General International Law of the Environment Precluded Performance of the Treaty

9.95 One of the grounds relied upon by Hungary as a basis for its purported termination of the 1977 Treaty is that "subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty"¹³⁵. This claim is dealt with in Slovakia's Memorial¹³⁶ and in the next Chapter of this Counter-Memorial, but is touched upon here because it implicates the environment. Hungary admits that its claim concerning the effect of subsequent obligations is in essence a repackaging of its arguments concerning an alleged fundamental change of circumstances¹³⁷, arguments that are also dealt with in the next Chapter. Just as those arguments are wide of the mark, so also is Hungary's claim concerning the effect of subsequent norms of general international law.

9.96 In advancing its claim concerning subsequent obligations under general international environmental law, Hungary in its 1992 Declaration refers in particular to: the maxim lex posterior derogat legi priori, lex specialis derogat legi generali¹³⁸; and "a number of important instruments including the Stockholm Declaration of 1972"¹³⁹. It declares that "States had [since 1977] come to accept that the primary consideration was that of prevention of substantial harm [to the territory of another State, or to areas beyond national jurisdiction]"¹⁴⁰. Hungary then states:

"Even assuming that the parties could by treaty exclude performance of general international law obligations subsequently arising -- which, since they were erga omnes obligations,¹⁴¹ is by no means clear -- the 1977 Treaty manifested no intention to do so. . . . If Czechoslovakia was

¹³⁵ Hungarian Memorial, para. 10.91 (emphasis in original).

¹³⁶ Slovak Memorial, paras. 8.106-8.114.

¹³⁷ Hungarian Memorial, para. 10.92.

¹³⁸ *Ibid.*, Vol. 4, Annex 82 (at p. 182).

¹³⁹ *Ibid.*, Vol. 1, para. 10.93.

¹⁴⁰ *Ibid.*, para. 10.94.

¹⁴¹ This rather odd point is dealt with in fn. 3, and in para. 9.67, above.

obliged under general international law not to carry out activities on its territory that would cause serious or substantial harm to Hungary, then Hungary was entitled to take action to remove any pretext for such conduct. Hungary's termination was forced by the other party's refusal to suspend work on Variant C. Hungary's conduct was a necessary and proportionate response to this refusal ...¹⁴²."

9.97 As will be demonstrated in the following discussion and in Chapter X, this argument misunderstands both the effect of subsequent rules of general international law and the nature of the principles of international environmental law that are relied upon.

9.98 It is well established that an obligation arising from an international agreement supersedes for the parties a prior inconsistent rule of general international law, unless the parties intend the contrary or unless the customary rule is a norm of *jus cogens*¹⁴³. A norm of *jus cogens* that emerged subsequent to the conclusion of a treaty would, under Article 64 of the Vienna Convention, invalidate the treaty if inconsistent with its provisions. However, Hungary makes no claim concerning norms of *jus cogens*, whether subsequent or prior to a treaty¹⁴⁴. In theory at least, rules of general international law other than *jus cogens* norms that develop subsequent to the conclusion of a treaty and that are more specific than the corresponding rules in the treaty may take precedence over inconsistent provisions of the treaty, but this will occur only where it is established that the parties to the treaty so intended¹⁴⁵. The latter situation has occurred rarely in practice¹⁴⁶. This is understandable, first, because of the well-known difficulty of proving the existence of a

¹⁴² Hungarian Memorial, paras. 10.95-10.96.

¹⁴³ The Permanent Court applied treaty provisions that were in conflict with rules of general international law in Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 16; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 4 at pp. 23-24; and the Lighthouses case between France and Greece, Judgment, 1934, P.C.I.J., Series A/B, No. 62, p. 4, at p. 25. See, also, Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J. Series A/B, No. 53, p. 22, at p. 76 (Judge Anzilotti, dissenting); and North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, pp. 3, at p. 24.

¹⁴⁴ This point is discussed in para. 8.107 of the Slovak Memorial.

¹⁴⁵ M. Akehurst, "The Hierarchy of the Sources of International Law," 47 British Yearbook of International Law (1974-75), p. 273, at p. 276; Restatement Third of the Foreign Relations Law of the United States, § 102, Comment j and Reporters' Note 4 (1987). If the intention is indicated by practice, "only such practice as shows an agreement of the parties may introduce a change in a treaty" G.I. Tunkin, Theory of International Law, Harvard University Press, Boston, 1974, p. 146.

¹⁴⁶ Restatement (Third), op. cit., Sec. 102, Reporters' Note 4.

new rule of general international law at the moment it was created, and second, because modification of treaties on the basis of alleged new customary norms could lead to instability in treaty relations. In fact, while the International Law Commission's Final Draft of the articles on the Law of Treaties would have permitted modification of a treaty "by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions"¹⁴⁷, even this form of establishing agreement was rejected by the Vienna Conference itself, precisely on the ground that such a rule would destabilise treaty relations¹⁴⁸.

9.99 The foregoing discussion demonstrates the following with regard to Hungary's claims concerning subsequent rules of international law: Any rules of general international environmental law that developed subsequent to the conclusion of the 1977 Treaty and that were both (a) more specific than and (b) inconsistent with the provisions of the Treaty could only displace those provisions if it were established that both parties to the Treaty - Hungary, on the one hand, and Czechoslovakia, then Slovakia, on the other - so intended. Not only have Czechoslovakia and Slovakia never had such an intention, but Hungary, far from seeking to establish such an intention on its own part, has sought unilaterally to terminate the treaty. Furthermore, the rules of general international law that are said to have developed subsequent to the 1977 Treaty are both consistent with that agreement - as demonstrated earlier in this Chapter - and of a highly general nature (Hungary refers to an obligation to prevent substantial environmental damage). In addition, it has also been shown that far from being inconsistent with general principles of international environmental law, the 1977 Treaty in fact represents a specific implementation of those principles in a concrete case.

9.100 Therefore, Hungary's claim concerning the effect of subsequent obligations under the general international law of the environment is unsound in theory and is not sustainable on the facts.

SECTION 4. Conclusions

9.101 Hungary's insistence on the general international law of the environment is misplaced for three reasons:

¹⁴⁷ Yearbook of the International Law Commission, 1966 Vol. II, Part 2, p. 236, art. 38.

¹⁴⁸ United Nations Conference on the Law of Treaties, Official Records, First Session, pp. 207-215.

- First, the applicable standards are those contained in the 1977 Treaty, not in the principles of general international law. The Treaty is consistent with these principles - in fact, it constitutes a specific application of them.

- Second, even if the general international law of the environment were applicable, Hungary misunderstands that law and misapplies it to the facts of the case. Hungary's absolutist approach to environmental protection would frustrate the legitimate efforts of States to develop. Further, Hungary mischaracterises the principles of prevention and precaution and misapplies them to the facts of this case.

- Finally, and perhaps most tellingly, Hungary provides absolutely no convincing scientific evidence to support its allegations and ignores the fact that the best evidence available supports not its alarmist claims but the position of Slovakia.

9.102 Hungary makes much of the principle that environmental harm should be prevented. Slovakia does not quarrel with this idea, but has shown in this Chapter the following.

9.103 Prevention of environmental harm has never been understood by the international community in the absolute sense in which it is used by Hungary to require a State to forego entirely the development of its natural resources. Instead, the principle of prevention must be understood as being part and parcel of the concept of sustainable development.

9.104 The G/N Project constitutes an example of an effort by co-riparian States to develop their shared water resources in a sustainable manner. It also permits the parties to allow the Old Danube to return gradually to its natural state - something that would have been impossible without the Project - thus actually improving the riverine environment.

9.105 Through such activities as monitoring the effects of the Project and participating in the PHARE project, Slovakia continues to do its utmost to anticipate and prevent any adverse effects of the Project upon the environment.

9.106 Prevention is best achieved by thoroughly studying the possible impacts of a project before it is begun, by building in measures to mitigate any potential harm that studies reveal, and by monitoring the project's effects after it has been put into operation so that unanticipated adverse effects can be dealt with. Nothing in the principles of environmental law relied upon by Hungary is inconsistent with this proposition.

9.107 Each of these steps was taken by Czechoslovakia and Hungary before entering into the 1977 Treaty. Numerous studies concerning the environmental impact of the G/N Project were conducted before Hungary and Czechoslovakia decided upon its final form; further studies were conducted during the Project's implementation.

9.108 After Variant "C" commenced operating, mitigation measures were taken, and Slovakia continues to monitor the effects of the Project on the environment and make needed adjustments. Thus Czechoslovakia and Slovakia have observed not only the letter, but also the spirit, of the principle of prevention.

CHAPTER X. HUNGARY'S JUSTIFICATION FOR ITS BREACHES OF THE 1977 TREATY

10.01. The justifications offered by Hungary in its 1992 Declaration for the suspension and subsequent abandonment of works, and then the purported termination of the Treaty, are elaborated, and sometimes reformulated, in Chapters 9 and 10 of its Memorial. Hungary mostly ignores the requirements of the Vienna Convention on the Law of Treaties on suspension and termination¹, and offers its own singular version of facts and law.

SECTION 1. The Suspension and Subsequent Abandonment of Works

10.02. Before arriving at its legal justifications, Hungary sets out "precisely the chain of events with respect to the suspension and abandonment of works"². Slovakia finds this far from precise. Indeed, the alleged chain of events deployed in paragraphs 9.01-9.17 of the Hungarian Memorial is misleading. It seeks to show the following key elements:

- (a) There were serious and environmental risks likely to be caused by the construction of the barrage at Nagymaros, and indeed by the implementation of the Project as a whole.
- (b) Czechoslovakia was unwilling to discuss these or to enter into arrangements for adequate ecological guarantees.
- (c) Czechoslovakia was threatening unilateral action from August 1989 and by April 1991 had fully determined to proceed with Variant "C". The decision to construct Variant "C" is said to precede the abandonment of work at Gabčíkovo.

Each of these is wrong.

¹ Slovakia, while accepting that breach of treaty incurs State responsibility, insists that it is the Vienna Convention which identifies the permitted grounds for suspension and termination. See, Slovak Memorial, paras. 8.09-8.25.

² Hungarian Memorial, para. 9.03.

10.03. Slovakia has explained the sequence of events in its Memorial³. This sequence is also shown graphically in Illus. No. CM-16. However, it may be convenient to offer its own "precise chain of events" in brief form at this juncture.

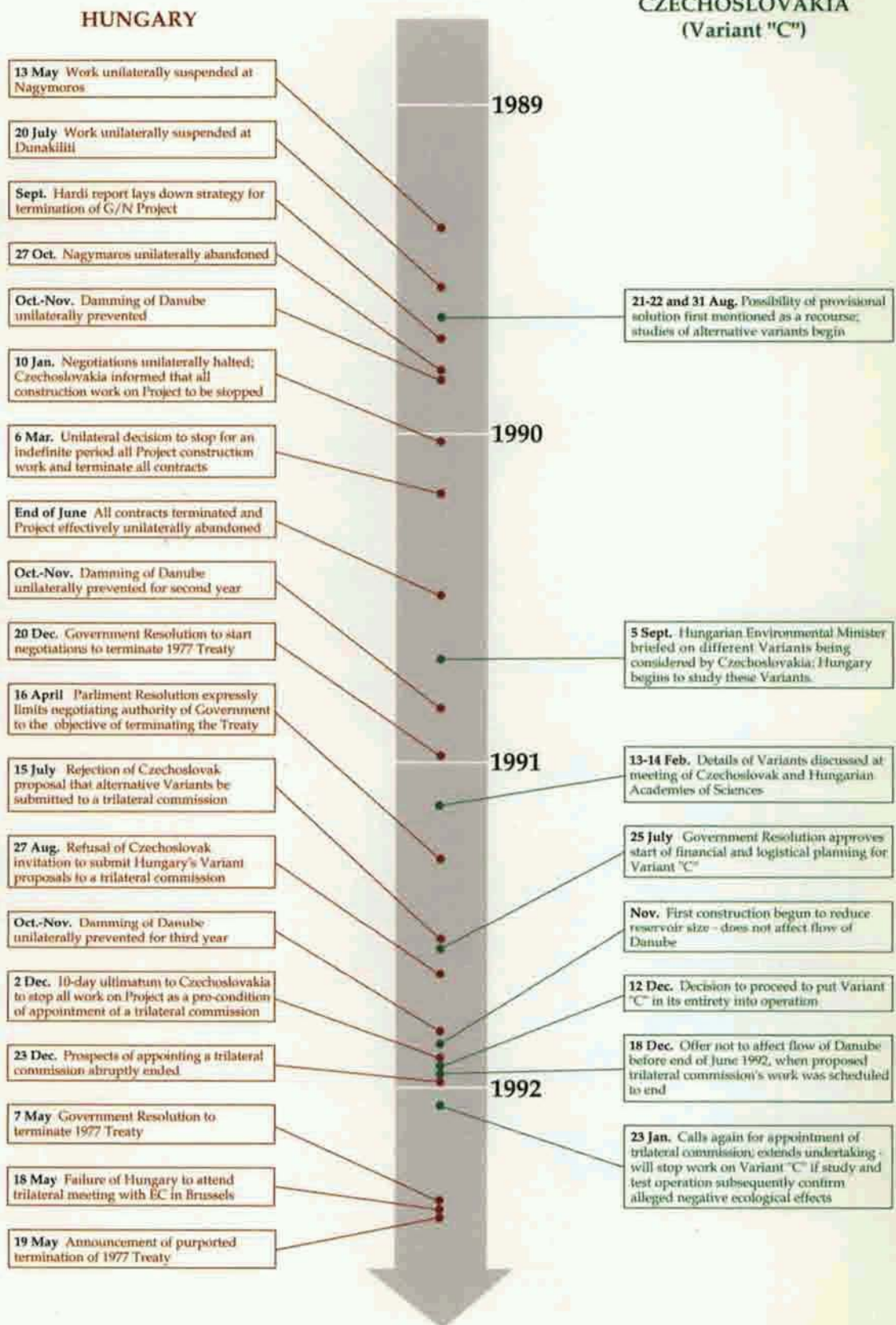
- 6 February 1989: Protocol to shorten the Project by 15 months, reached at Hungary's request.
- 13 May 1989: Hungary, without advance notice or consultation, suspends with immediate effect its work at Nagymaros; Czechoslovakia protests, and asks for the technical data on which the decision to suspend was based.
- 8-9 June 1989: Hungary affirms that it will continue its work obligations in the Gabčikovo sector.
- 26 June 1989: Hungary provides Czechoslovakia with documents stated to be the technical data necessitating the suspension.
- 13 July 1989: Czechoslovakia confirms its willingness to participate in expert discussions to be held on 17-19 July on issues relating to Nagymaros (having sought an earlier date)⁴.
- 20 July 1989: Hungary "extends" suspension of its work obligations at Nagymaros to 31 October and suspends also work at Dunakiliti until the same date. Czechoslovakia is notified orally.
- Hungary proposes that the entire Project should be delayed for 1-5 years⁵.
- 31 August 1989: Czechoslovakia states that if such proposals are proceeded with, it would have to protect itself with a

³ Slovak Memorial, paras. 4.12-4.38 and 6.62-6.71.

⁴ Ibid., Annex 64 (at p. 6).

⁵ Ibid., para. 4.35.

CHRONOLOGY OF DECISIONS AND ACTIONS (May 1989-May 1992)



temporary solution; and that it would expect compensation for the damage caused⁶.

- End October 1989: Hungary has unilaterally prevented the damming of the Danube as provided in the Project.
- 27 October 1989: Hungary adopts Resolution abandoning Nagymaros⁷.
- 30 October 1989: Czechoslovakia responds to Hungary's proposals at the meeting of Prime Ministers on 26 October (see, paragraph 5.36 above) by stating its willingness to cancel the acceleration provisions of the February 1989 Protocol to allow study of any adverse consequences of peak production; by stating that if fresh studies so indicated, a new agreement would also limit or exclude peak production; and that an agreement on further ecological guarantees be concluded by March 1990.
- 30 November 1989: Hungary states that only if and when
 - ecological guarantees are negotiated and concluded
 - peak power is eliminated and Nagymaros' indefinite suspension is acceptedwould it resume work for damming at Dunakiliti.
- 10 January 1990: Hungary makes clear:
 - that Nagymaros is abandoned and is not subject to negotiation
 - the Hungarian contracts concerning Nagymaros are to be terminated
 - all work on the Project is to be suspended pending discussions on modifying the Treaty
 - such "modifications" effectively envisaged Czechoslovakia negotiating the termination of the 1977 Treaty.

⁶ Ibid., para. 4.38.

⁷ See, para. 5.37, et seq., above.

- Mid-June 1990: Hungary abandons all construction work on the Project.

- 25 July 1991: Czechoslovakia decides to proceed with arrangements for finance and transportation of materials in relation to Variant "C".

10.04 The short point remains - and remains unaddressed in Hungary's Memorial - that on 6 February 1989 Hungary thought its interests so well served by the Project that it secured an acceleration of the timetable for its implementation. But a mere 96 days later it suddenly discovered the prospect of "ecological catastrophe", which apparently required unilateral suspension of work at Nagymaros, without even prior notification, let alone consultation. Hungary was not able to produce any scientific evidence in support of this decision, either before it was taken or at the time it was taken. The "evidence" eventually produced on 26 June was unimpressive⁸. And there is no suggestion that the "evidence" offered had arisen only subsequent to 6 February 1989.

10.05 The history of Hungarian prevarication before February 1989, and the manner and speed of the suspension of work at Nagymaros in May 1989, meant that uncertainty had been followed by a deliberate policy to abort the Project. Neither Hungary's history of events nor the legal justifications for suspension bear examination. They are understandably intertwined. But Hungary ignores entirely the Vienna Convention on the Law of Treaties and advances an entitlement based on necessity - which it examines only in the context of termination, believing that to be sufficient to justify suspension at earlier dates. Slovakia returns to these points below.

A. Suspension and Abandonment of the Works at Nagymaros

10.06 Hungary's summary at paragraph 9.18 of its Memorial of the factors which justified suspension and later abandonment is revealing. First, the Project timetable was not a matter to be taken seriously. Second, the key obligation in the Treaty was "to resolve difficulties". Even "this was subject to the overriding issue of the physical and environmental safety of the project". Third, if claims of serious risk of substantial damage to the drinking water of the population turned out to be justified, and if no technical answers could be found, a state of necessity would arise. And no question of financial compensation would arise for suspension - it could all be dealt

⁸ Slovak Memorial, paras. 4.12-4.25.

with "one way or another as part of the continuing system of adjustment practised by the parties".

10.07 Slovakia takes a very different view: the essential obligation of the parties under the 1977 Treaty is to implement its terms. Difficulties were not to be manufactured for non-scientific reasons. Any real problems must be scientifically shown, jointly studied and jointly addressed. The Treaty contained the mechanisms for ongoing provision of ecological guarantees. Neither suspension nor abandonment could be justified where no real risk had been demonstrated, where data evidencing the purported problem had not been shared, where the Treaty mechanisms for ensuring ecological standards had not been engaged in. The Project timetable was a contractual commitment. And unlawful suspension and abandonment was a breach of the Treaty which did indeed entail, inter alia, the duty to make financial compensation.

10.08 Slovakia makes the following observations in regard to the above. Where Czechoslovakia insisted upon Treaty performance - as, at the end of the day it had to, in relation to the key elements of the integrated Project - it is termed unyielding and unwilling to cooperate by Hungary. Where Czechoslovakia endeavoured to accommodate Hungarian timetable violations, by re-allocating work programmes and slowing down and then speeding up timetables to meet Hungary's requirements, it is said to accept that the Treaty obligation need not be taken seriously. The Court is simply informed that "(t)he timetable laid down for work on the Project had never been treated as a matter of strict legal obligation ... Delays ... had been negotiated before and could be negotiated again, as necessary"⁹.

10.09 This cavalier attitude towards treaty obligations ignores the fact that, in trying to move the Project forward as best it might in the face of previous Hungarian prevarications, Czechoslovakia had reserved its legal rights as to compensation¹⁰. The strong implication of Hungary's comment is that it could simply call delays as it chose, without penalty, regardless of the terms of the Treaty and its associated agreements, and regardless of the interests of its Treaty partner.

10.10 The reality is that Hungary arrogantly assumed that its pattern of non-compliance could continue for ever, and was mortified to learn that there was a point at which Czechoslovakia could be pushed no further, but would insist upon its

⁹ Hungarian Memorial, para. 9.18(2).

¹⁰ Slovak Memorial, paras. 4.37-4.38 and 4.48-4.49.

Treaty rights. That point was reached with the effective abandonment by Hungary of its work obligations on the Gabčíkovo section.

10.11 As to the "essential obligation on the parties under the Treaty" being the resolution of difficulties by negotiation¹¹, not only is that an incorrect statement of the essential obligation under the Treaty, but Slovakia has also shown in detail the consultations and negotiations that Czechoslovakia engaged in¹². That detailed analysis may be summarised thus: a State has no duty to set aside its entitlement to rely on the principle of pacta sunt servanda, to negotiate for the abandonment of a treaty in which it has made a huge investment, in order to accommodate apparent economic and political needs of the other party. Insofar as the Treaty itself provided for the possibility of technical changes in its implementation, Czechoslovakia (then Slovakia) has always been willing to participate in objective studies of Hungary's expressed anxieties, whether about the original Treaty project or Variant "C". It has also agreed to abide by such findings¹³. What Czechoslovakia (then Slovakia) has not been prepared to accept is suspension of performance by Hungary prior to such studies, or suspension of its own provisional variant prior to any such negative independent report. For Slovakia there can be no suspension of Treaty performance without joint objective ascertainment of facts that require such an action. Hungary has preferred suspension on the basis of unsupported allegations. It has not conducted its own studies to support its claim, and it has avoided objective studies of these allegations.

10.12 Thus there may be seen in the section of the Hungarian Memorial justifying the suspension of work at Nagymaros claims that "to construct the [Nagymaros] Barrage might cause irreparable environmental damage, including a serious risk to the drinking water supplies of Budapest"¹⁴; references to an "ecological state of emergency and ... serious environmental damage ... environmental

¹¹ Hungarian Memorial, para. 9.18(4).

¹² See, Chapter V, above.

¹³ See, para. 5.36, above, and Slovak Memorial, paras. 4.48-4.49. See, also para. 5.94, et seq., above.

¹⁴ Hungarian Memorial, para. 9.04.

catastrophe¹⁵; the "depriv[ation of] the people of its major city of safe water supplies"¹⁶.

10.13 Such excessive and imprecise allegations have not been substantiated by such impartial authoritative studies as exist, such as the Bechtel and HQI reports¹⁷.

10.14 Hungary takes the view that mere recitation of "fears" suffices and that it was for Czechoslovakia to disprove them: "No evidence was produced by Czechoslovakia to show that the fears in relation to drinking water supplies of Budapest were unfounded¹⁸." All of this - the fears, the failure of Czechoslovakia to disprove them - is said to entitle suspension until Czechoslovakia has agreed to modifications of the Treaty, or better still, to abandonment of the Treaty. This is described as being "on the basis of necessity".

10.15 As to the legal basis of necessity for suspension and abandonment at Nagymaros, Hungary satisfies itself with saying that if necessity was a sufficient ground for termination (on which it later deploys more detailed arguments of law), then it is certainly a sufficient ground for suspension: "A State entitled to take the greater step may first take a lesser step"¹⁹ and "once it became clear that future work on the Nagymaros barrage was subject to the most serious doubts ... the same principle of necessity that would justify termination of the Treaty justified investigation and negotiation...²⁰."

10.16 For reasons of convenience, Slovakia will reply to Hungary's arguments on necessity in the context of its claim to entitlement to terminate the Treaty. But this much can be said at this juncture: it cannot be right to say that if at a certain moment Hungary was entitled by reference to necessity to terminate the 1977 Treaty, it was thus entitled at an earlier stage to suspend the Treaty because of necessity. It is not a case of the larger encompassing the smaller. Hungary has to show that, on 13 May 1989, a state of necessity existed which justified immediate

¹⁵ Ibid., para. 9.05.

¹⁶ Ibid., para. 9.14.

¹⁷ Slovak Memorial, Annexes 27 and 28.

¹⁸ Hungarian Memorial, para. 9.29.

¹⁹ Ibid., para. 9.21.

²⁰ Ibid., para. 9.23.

unilateral suspension without consultation, or prior joint study, or independent analysis to that effect by experts such as those available from the EC. Even if Hungary was entitled by reason of necessity to terminate the Treaty on 19 May 1992 (which it was not), that can have no effect on the conditions for necessity being met for purposes of suspension of work obligations some three years earlier. The legal and factual situation in May 1992 could not retrospectively validate a suspension of work at Nagymaros in reliance on necessity in May 1989, nor an abandonment of work at Nagymaros in reliance on necessity in October 1989.

10.17 Slovakia has in fact shown in its Memorial both that no state of necessity existed in the Nagymaros sector in May 1989, nor in October of that year²¹. In the present Counter-Memorial Slovakia shows in detail that the studies carried out by Hungary prior to 1989 did not suggest that the Nagymaros barrage presented major environmental dangers²². And the two Ecologia Reports on which Hungary relied for its May 1989 suspension are shown by Slovakia to lack scientific weight and credibility²³.

10.18 Nor did Hungary seek to avert any alleged imminent peril: having expressed fears about water quality, it refused in May 1989 to sign the protocol proposed by the Joint Boundary Waters Commission to extend monitoring²⁴.

10.19 Finally, Hungary claims an entitlement to move from suspension to abandonment of its work at Nagymaros for various reasons²⁵. First, Czechoslovakia responded too quickly to the two alternative proposals put to it by Mr Nemeth²⁶. But one month was certainly long enough for serious study of these short and simple proposals, and to determine that they were unacceptable. Second, after suspension Czechoslovakia is said to have engaged only in programmes of direct interest to itself, such as the PHARE programme on the Gabčíkovo barrage. No concern is said to have been shown about the problems of peak power operation or about the Nagymaros barrage. But it was for Hungary to share with Czechoslovakia any studies made between 6 February 1989 (signature of the Protocol to shorten the construction

²¹ Slovak Memorial, paras. 8.38-8.42 and 8.45-8.48.

²² See, Chapter IV, above.

²³ See, para. 7.05, et seq., above.

²⁴ See, para. 4.42, et seq., above. See, also Slovak Memorial, para. 8.40.

²⁵ Hungarian Memorial, para. 9.29.

²⁶ Ibid., paras. 9.27 and 3.85.

timetable) and 13 May 1989 (decision to suspend work at Nagymaros) that Hungary claimed to show the need to suspend immediately without any further study and without consultation. Further, Czechoslovakia did endeavour to respond to the expressed anxieties of Hungary on the effect of peak power operations²⁷. And it was Hungary who refused to participate in the PHARE project, evidently because they feared impartial assessment of their motives in suspending Nagymaros and later Gabčíkovo. It is therefore absurd for Hungary to claim that the limitation of PHARE to Czechoslovak territory was because Czechoslovakia had no concern for Hungarian interests.

10.20 Neither reason offered by Hungary for the abandonment of its work obligations at Nagymaros is any more persuasive than the reasons offered for "suspension". On 6 March 1990, the Hungarian Prime Minister announced the suspension of all works. By then the Bechtel report had made clear that scientific analysis did not support the allegations of serious environmental risk. Hungary's "suspension" could not therefore have been prompted by environmental concerns.

B. Suspension and Later Abandonment of Works at Dunakiliti

10.21 The original suspension of works at Nagymaros did not affect works at Dunakiliti. However, when just over two months later Hungary "extended" the suspension of works at Nagymaros, it also suspended work on preparation for the damming of the Danube at Dunakiliti.

10.22 Hungary's Memorial refers to "the water resources of the Szigetköz aquifer"²⁸ - though there is no Szigetköz aquifer, as the aquifer underlies the whole region of the Danube lowlands, in both Slovakia (Žitný Ostrov) and in Hungary (Szigetköz). The second reference is to "the environment of the Szigetköz region, which was likely to be significantly harmed (in effect destroyed) by the discharge regime provided for in the 1977 Treaty, even as subsequently amended". Both these aspects are dealt with in detail in Chapter VII of Slovakia's Counter-Memorial²⁹.

10.23 But Hungary does not suggest that these anxieties were not present in May 1989, allowing work to continue at Dunakiliti, but manifested

²⁷ See, para. 5.36, et seq., above. See, also, Slovak Memorial paras. 4.48-4.49.

²⁸ Hungarian Memorial, para. 9.30.

²⁹ See, paras. 7.45, et seq., and 7.78, et seq., above.

themselves for the first time within the next two months, necessitating and entitling a suspension. Indeed, in Hungary's view the suspension of works at Dunakiliti was of a "minor character"³⁰ - making, it would seem, the necessity or justification even more problematic. In fact, the suspension at Dunakiliti had immensely damaging consequences, as it became entirely impossible to put the Project into operation. Slovakia returns to this matter below, at paragraphs 10.128 to 10.135.

10.24 The real reason for the July 1989 suspension did not rest on scientific considerations. It was, quite simply, a measure designed to bring pressure upon Czechoslovakia to accede to Hungary's demands over Nagymaros. And, as already shown (Chapter V), a progression towards total termination was under way. That reality is borne out by the preconditions that Hungary placed upon the resumption of work on the riverbed at the Dunakiliti reservoir. There had first to be concluded an inter-governmental agreement "to minimise the environmental risks present in the normal operation of the Dunakiliti Reservoir and the Gabčskovo hydroelectric power plant". A suggestion of binding arbitration to settle disputes under the new treaty proposed by Hungary presupposed that Czechoslovakia would simply agree to the abandonment of Nagymaros, without even any prior studies showing the need therefor³¹. But Czechoslovakia was prepared to accept an early agreement on guarantees, provided that Hungary resumed work at Dunakiliti at once³².

10.25 The only "new situation" that Hungary refers to, by way of explanation of a hardening of its position from suspension to effective abandonment, was the indication in August 1989 of interest by Czechoslovakia in alternative variants to the blocked Project. Hungary incorrectly describes this as "action being taken" on Variant "C", whereas no decision on Variant "C" was taken until nearly two years later, after a careful review of all the options - others of which might have been chosen if Hungary would have cooperated. Hungary strikingly confirms that it "refused to take part in any authoritative study to settle the future of the Gabčskovo project unless work on Variant C was first halted"³³. No decision as to Variant "C" had been taken prior to 25 July 1991 - but Hungary still refused to participate in the envisaged trilateral negotiations at that time.

³⁰ Hungarian Memorial, para. 9.31.

³¹ Czechoslovakia had in any event to delay resumption of Plenipotentiary meetings between the two sides, because of the so-called "Velvet Revolution", and the need for the formation of a new Government and the election of a new President.

³² See paras. 5.36, *et seq.*, above. See, also, Slovak Memorial, paras. 4.48-4.49.

³³ Hungarian Memorial, para. 9.37.

C. The Suspension and Later Abandonment of Works at Gabčíkovo

10.26 Hungary does not even suggest that there was a legal necessity (still less a justification under the Vienna Convention on the Law of Treaties) which justified the suspension and abandonment of works at Gabčíkovo. Rather "the larger scale winding-down of Hungarian works at Gabčíkovo, and their final abandonment at the end of 1991 was an integral part of the overall dispute which led Hungary to terminate the 1977 Treaty in May 1992"³⁴. Moreover by mid-1990, Hungary had already stopped all work save for maintenance³⁵.

10.27 Contrary to Hungary's assertions, the preparation for Variant "C", always provisional, did not preclude an agreed solution. Czechoslovakia was entirely willing to involve third parties, and indeed to participate itself in the trilateral expert group, and to have all aspects, including Variant "C", studied scientifically. Hungary, as has been shown above, and as it accepts itself³⁶, insisted upon the precondition of work on Variant "C" being stopped.

10.28 The situation may be summarised as follows: Hungary suspended work at Nagymaros without notification and on the basis of no serious scientific indicators. Other suspensions within the Treaty System followed, directed at getting Czechoslovakia to accept the full abandonment of the Nagymaros and peak power provisions of the Treaty. But when Czechoslovakia took action - which it had to do, in the absence of the damming at Dunakiliti weir - to bring what was retrievable of the Treaty into operation, Hungary would not even discuss Variant "C" - which exactly consisted of putting into operation the Gabčíkovo part without Nagymaros and without peak operation. There was, in reality, no pleasing Hungary, whose suspensions and abandonments were simply an integral part of its campaign to terminate the Treaty, and not themselves justified on scientific or legal grounds.

10.29 Hungary appears to think that it has no need to offer to the Court any proper legal analysis of the right to suspend and renege on its Treaty obligations. Hungary offers no legal grounds whatever for suspension and abandonment at Dunakiliti and at Gabčíkovo. "Necessity" is somewhat casually

³⁴ Ibid., para. 9.40.

³⁵ See, paras. 5.43-5.49, above. See, also, para. 5.55, above.

³⁶ See, para. 5.75, et seq., above, and Hungarian Memorial, para. 9.37.

offered as the ground for suspension and abandonment of work at Nagymaros, on the curious reasoning that if a later termination was justified by reason of necessity, an earlier suspension would thereby be retrospectively allowed by reason of necessity. There is absolutely no attempt to show that the legal grounds it identifies for necessity applied to the suspension and abandonment of obligations at Nagymaros, Dunakiliti and Gabčíkovo.

10.30 Thus, so far as suspension and abandonment is concerned, Hungary makes no real attempt at a legal justification even on the basis of its own main legal argument ("necessity"). There is not even the pretence of a justification on the basis of the real applicable law - namely, the provisions in the Vienna Convention on the Law of Treaties. As Slovakia has elaborated in detail in its Memorial, Article 57 of the Vienna Convention provides the indispensable threshold for a legal justification for suspension of those works for which Hungary was responsible under the 1977 Treaty.

10.31 Article 57 provides:

"Article 57 - Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties after consultation with the contracting States and contracting organisations."

Hungary clearly does not meet the requirements of either paragraph (a) or (b). It ignores all reference to this most fundamental applicable law, and treats suspension as if no legal justification need be offered at all, or (in the case of Nagymaros) unrigorous reference to a ground of necessity suffices and can set aside the operation of Article 57 in its entirety. Simply because a treaty, whose operation has been illegally suspended, is later declared terminated, does not cause the legal wrongs of the earlier suspensions to evaporate; nor does it obviate the need to present to the Court, in order for it to answer the question put to it in Article 2(1)(a) of the Special Agreement of 7 April 1993, legal arguments in relation to those suspensions.

SECTION 2. Hungary's Justifications for the Purported Termination of the 1977 Treaty

10.32 In Chapter 10 of its Memorial Hungary offers a series of justifications for the legality and effectiveness of its notice of termination of the Treaty on 16 May 1992. Hungary further claims that, even if the Treaty was not terminated with legal effect on 16 May 1992, it has been terminated by Czechoslovak repudiation in October 1992, or by the disappearance of Czechoslovakia on 31 December 1992.

10.33 Slovakia will address each of these elements in turn.

The Purported Termination on 16 May 1992: Hungary's Justifications

10.34 Hungary lists at paragraph 10.03 a series of justifications which it says were relied upon in the Declaration of 16 May 1992 as legal grounds for termination. Slovakia makes two preliminary observations. First, it notes that one identified ground no longer appears on the list. There is no further reference to or elaboration of the contention at paragraph 5, page 26 of the Declaration to Variant "C" entitling Hungary "to take lawful counter-measures (repressalia). The termination of bilateral treaties effective between two parties may constitute such a measure". Accordingly, Slovakia does not for the moment return to the submissions it advanced at paragraphs 8.98-8.105 of its Memorial.

10.35 Second, Slovakia insists again that termination must be justified by reference to the criteria in the Vienna Convention on the Law of Treaties. Slovakia has explained in detail in its Memorial why this is so³⁷.

10.36 Where two parties have entered into a treaty, the issue of termination of the treaty is dealt with by the law of treaties rather than by the law of State responsibility; and Articles 56 and 60-62 of the Vienna Convention govern. Further, as Slovakia has elaborated in its Memorial, the rules therein contained reflect well understood principles of general international law, leaving without legal relevance the dates upon which the Treaty parties ratified the Vienna Convention³⁸. It is crystal clear that the 1977 Treaty, as shown in Chapter II above, creates a joint and integrated investment, largely completed at the time of the purported termination, and also creates rights in rem. It is not a treaty to which a right of unilateral termination may be

³⁷ Slovak Memorial, paras. 8.09-8.25.

³⁸ Ibid., paras. 6.92-6.98 and 8.09-8.12.

implied by the nature of the treaty, as required by Article 56(1)(b). In any case, Hungary had to bring itself within the grounds permitted by reference to Articles 60-62.

10.37 Hungary offers no reasoned argument as to why the law of treaties governing entitlement to terminate should not be dispositive in this case. It merely confines itself to the brief observation that there should be no artificial separation between the law of State responsibility and the law of treaties³⁹. Slovakia had readily accepted, too, in its Memorial, that there should be no rigid separation of the law of treaties and the law of State responsibility⁴⁰, but again offers three important reasons why the legality of the termination of the 1977 Treaty falls to be determined by reference to the Vienna Convention on the Law of Treaties:

- Article 54, and Articles 56, 60, 61 and 62 are carefully formulated with the objective of underpinning the principle of pacta sunt servanda. Article 54 indeed assumes that in certain categories of treaty there is simply no right of unilateral termination⁴¹. And even where there is, the key conditions are to be met, and a State wishing to terminate simply must be able to bring itself within the provisions of Article 60, or 61, or 62.
- The idea of "State necessity" was deliberately not selected as a ground permitting termination. Material breach, impossibility of performance, fundamental change of circumstance all touch on some of the elements of "necessity to terminate".
- A separate ground of "necessity" is to move from the precise grounds in Articles 60-62, and to introduce more imprecise grounds. Indeed, interpreted as Hungary interprets it (on which see below) necessity can mean anything at all. To introduce necessity as a ground for termination would render nugatory the precise constraints of Articles 60-62. It must also again be said that the principle of necessity pulls in an entirely different direction from Articles 60-62 of the Law of Treaties. The law

³⁹ Hungarian Memorial, para. 9.19.

⁴⁰ Slovak Memorial, para. 8.23.

⁴¹ Ibid., paras. 6.92-6.102.

of State responsibility does not purport to provide an additional ground for lawful termination (effectively revising the Vienna Convention). The principle of necessity (like the principle of countermeasures) excuses an otherwise unlawful act. This is acknowledged by Hungary⁴². By contrast, Articles 60-62 of the Vienna Convention make termination entirely lawful. Hungary cannot, in logic, say that it has lawfully terminated the 1977 Treaty by reference to impossibility of performance, fundamental change of circumstances and material breach, and that this illegality is excused because it is in a state of necessity. Hungary speaks of its grounds for termination as being "cumulative"⁴³. But in truth, they are alternatives.

A. Necessity as a Justification for Termination

10.38 Nevertheless, Hungary makes "necessity" the centrepiece of its justification for termination. It has pride of place ahead of any justification by reference to the Vienna Convention (no doubt reflecting the difficulty Hungary has of coming within the provisions of the law of treaties).

10.39 Hungary draws attention to draft Article 33 adopted by the International Law Commission at its 32nd session and to the discussion that preceded it and to the International Law Commission's Report. Hungary seeks to draw comfort from the requirement that "an essential interest" of the State be involved, and that an example given in the Report is "to ensure the survival of the fauna or vegetation of certain areas on land or at sea, to maintain the normal use of those areas or, more generally, to ensure the ecological balance of a region". Slovakia notes that the International Law Commission's observations on necessity and the protection of the environment both assumed a grave and imminent danger thereto and were not at all addressed to the circumstances of this case. An imminent and indeed actual ecological disaster, such as the Torrey Canyon incident, might indeed allow the United Kingdom in that case to excuse what would otherwise be unlawful protective action in that it was taken beyond the waters over which it had jurisdiction. The example of the Russian Fur Seals Case given by Hungary⁴⁴ is analogous. But these are entirely

⁴² Hungarian Memorial, para. 10.06.

⁴³ Ibid., para. 10.04.

⁴⁴ Ibid., paras. 10.12-10.14.

removed from the circumstances in this case - where the parties concerned are in a treaty relationship, where the Treaty has its own provisions to ensure that there are no ecological catastrophes⁴⁵, and where it has its own dispute resolution provisions. There is nothing in the International Law Commission Report that suggests that a state of necessity can be invoked in these circumstances, without objective verification, to allow one party to ignore both treaty procedures and treaty obligations.

10.40 Hungary summarises the law of State responsibility as requiring the following: "(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"⁴⁶.

10.41 Hungary cites "a major economic threat ... to the population"⁴⁷ as one of the essential interests that justify the invocation of necessity. It is absolutely clear from the Russian Indemnity Case⁴⁸ that "economic threat" is not what is meant by a state of necessity. A State that has entered a treaty the fulfilment of which requires economic burdens to be shouldered cannot claim to terminate on grounds of state of necessity. State of necessity entails rather imminent threats to the very existence of a State or the serious imperilment of its internal or external situation⁴⁹. (Hungary from time to time seeks to meet that more rigorous standard by claims of danger to the life of millions of its citizens which, as has been seen, are totally unsubstantiated.)

10.42 Hungary's summary of the law of necessity simply ignores, as inconvenient, other crucial conditions stipulated in Article 33 of the International Law Commission draft articles. Article 33(1)(b) precludes reliance on a state of necessity if the act "seriously impair[s] an essential interest of the State towards which the obligation exists". It cannot be doubted that the repeated refusals to put work obligations into place, and the purported termination of the Treaty in the face of Czechoslovakia's investment and work record, seriously impaired an essential interest of Czechoslovakia. Its essential interest has been to prevent repeated flooding, and to

⁴⁵ Slovak Memorial, paras. 8.58-8.60.

⁴⁶ Hungarian Memorial, para. 10.16.

⁴⁷ Ibid., para. 10.18.

⁴⁸ United Nations Reports on International Arbitral Awards XI, 443.

⁴⁹ Ibid.

pursue its development in a sustainable and environmentally responsible way, and to obtain clean energy. And all of these interests were incorporated into the 1977 Treaty.

10.43 Further, Article 33(1)(b) precludes the invocation of necessity in the context of "a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation". The 1977 Treaty provisions for monitoring, adjustments to meet environmental risk, ongoing meetings, reliance on scientific data, the use of expert advice, all evidence that the parties were never intended to invoke states of ecological necessity as grounds for termination.

10.44 That being said, Slovakia will now proceed to analyse whether the situation at Nagymaros, Dunakiliti and Gabčikovo in May 1992 met the stated tests for a plea of necessity.

The Plea of Necessity in Relation to Nagymaros

10.45 Relying on its own definition of necessity, Hungary needs to show that in May 1992 there was at Nagymaros (1) a situation of an "absolutely exceptional nature", (2) the danger had an "imminent character" which threatened a major interest of Hungary, (3) that it was impossible to avert the danger by other means⁵⁰.

10.46 Hungary is unable to show that any state of emergency existed in respect of Nagymaros which would justify termination of the Treaty. The claims and the evidence have been fully addressed by Slovakia in both the Memorial and in the Counter Memorial⁵¹. It suffices here to make the following brief points.

10.47 There had been no grounds of necessity or imminent disaster that justified suspension or abandonment of works at Nagymaros in 1989. Hungary

⁵⁰ Hungarian Memorial, para. 10.16.

⁵¹ Slovak Memorial, paras. 4.20, 4.30, 4.33, 4.38, 4.53 and 4.58; *see*, also, Chapter VII, above.

speaks of the need "to defend the lives of millions of human beings"⁵² and of severe damage being "foreseen" to the "drinking water for millions of people"⁵³. But no evidence exists of an imminent risk of deteriorated water quality in the impounded section upstream of Nagymaros, which might in turn lead to a deterioration of the quality of the water filtering into the Budapest supply wells⁵⁴.

10.48 Any problems associated with dredging were in the past⁵⁵. Dredging in the Nagymaros-Budapest sector had been done by Hungary largely for commercial reasons, unrelated to the Nagymaros barrage. The five year research and development program of Budapest Waterworks did not suggest that there was any imminent risk that required the construction at Nagymaros to be terminated (or even modified)⁵⁶.

10.49 The strident claims of the need to protect millions of lives, creating a necessity to terminate the treaty, fits neither with the scientific facts, nor with the acknowledgment at many points in Hungary's Memorial that damage "could have" occurred⁵⁷; or that no detailed investigations to quantify the risks had been made⁵⁸; or with the assertion that the results would show up in the long term.

10.50 There was thus at Nagymaros no situation of "an absolutely essential character"; still less one presenting danger of an imminent character. As to the final condition cited by Hungary for the invocation of necessity, there was no imminent danger of an exceptional character that it was impossible to avert by other means. In the first place, all objective appraisal of any problems at Nagymaros was carefully avoided. Hungary admits that it failed to carry out adequate studies after 1989 (except the Bechtel report, which refuted Hungary's contentions and was duly suppressed). No attempt was made at Nagymaros to avert alleged dangers by any means other than abandonment and termination. This was, quite simply, because no state of necessity has ever existed at Nagymaros. Hungary's arguments have really

⁵² Hungarian Memorial, para. 10.21.

⁵³ Ibid., para. 10.19.

⁵⁴ See, para. 7.65, et seq., above. See, also Bechtel report, Slovak Memorial, Annex 27 (at pp. 209 and 213).

⁵⁵ See, para. 7.71, above.

⁵⁶ Hungarian Memorial, App. 3, p. 428.

⁵⁷ Ibid., p. 432.

⁵⁸ Ibid.

been economic and political, dressed in the convenient legal language of necessity. But Czechoslovakia (then Slovakia), which also had its share of economic hardship to bear, sought to carry out its obligations under the 1977 Treaty, for its long term development and the ecological interests of the region. Slovakia is entitled to require Hungary to do the same.

The Plea of Necessity in Relation to Dunakiliti

10.51 Nothing in any of the expert studies indicates that the damming near Dunakiliti weir in 1992 would represent a situation of an absolutely exceptional nature, which presented an imminent threat of disaster, which could only be averted by termination of the Treaty.

10.52 The initial suspension at Nagymaros was said by Hungary not to affect work in the Gabčíkovo sector. The imminent peril at Dunakiliti seems to have been discovered subsequent to 1989.

10.53 Hungary asserts that the impounding of water in the reservoir will cause deterioration of surface water quality and will increase infiltration of polluted water into the aquifer. Detailed replies to these alleged risks, including that of alleged post-damming eutrophication, are offered by Slovakia in Chapter VII above, where the analysis of the Committee for Water Management Sciences of the Hungarian Academy of Sciences, of the HQI report, and the Bechtel report are gathered⁵⁹. These assessments are affirmed by the EC expert findings, ex post facto, on the effect of damming. Such damage as Hungary identifies as a result of Variant "C" being put into operation is caused by its rejection of technical measures in the form of underwater weirs, exactly designed to mitigate any adverse effects of the operation.

10.54 As for seismicity, Hungary commissioned no scientific study whatever, even up to the moment of purportedly terminating the Treaty. They failed to meet their duty of care in the face of a perceived risk - and, in reality, thereby evidenced that it was a risk they did not really believe to exist.

10.55 We may conclude that no conditions remotely presenting a "necessity for termination" existed in 1992 in respect of Dunakiliti.

⁵⁹ See, paras. 7.31-7.44 and 7.51, et seq., above.

The Plea of Necessity in Relation to Gabčíkovo

10.56 At the time the purported termination of the Treaty was announced there were no factors relating to works on Gabčíkovo that conceivably triggered the doctrine of necessity. Work was suspended on this section later than at Nagymaros. That suspension itself cannot, as has been shown, be justified by any reference to necessity. Still less had negative factors so developed at Gabčíkovo in the ensuing months that by May 1992 termination was forced, as a necessity, upon Hungary.

10.57 In its very brief section on the "Imminent Nature of the Peril"⁶⁰ the constructions at Gabčíkovo are nowhere listed. The suspension of work at Gabčíkovo had been used as a heavy handed negotiating tactic. And the termination of the Treaty was equally motivated by factors wholly unrelated to the doctrine of necessity.

10.58 At the time of suspension of work at Nagymaros, Hungary indicated that work would continue at Gabčíkovo. But new work ceased in mid-1990 (although maintenance work continued until the end of 1991). Nothing in the first five months of 1992 had turned Gabčíkovo into an imminent peril of an exceptional nature that could be averted only by termination.

10.59 The reality is that the "imminent peril" perceived by Hungary was the successful realisation of Variant "C". But Variant "C" is just the reduced version of the Gabčíkovo sector of the Treaty Project. If nothing relating to this section under the Treaty could be described as an imminent catastrophe, then a fortiori the reduced version could not be so described. Hungary suggests⁶¹ that the commencement of operations on Variant "C" meant that "immediate and very substantial damage was sustained". Slovakia has already shown in Chapter VIII above that the experts monitoring work on Variant "C" have found no such substantial damage. Hungary adds to this unsubstantiated assertion "substantial risk of medium and long term detrimental effects, especially to groundwater, drinking water, forests, fisheries, agriculture, landscape, and [the] recreational values". Hungary accepts that so far as expressed fears about groundwater and drinking water are concerned, the original Project at Gabčíkovo and Variant "C" are interchangeable⁶². Slovakia has

⁶⁰ Hungarian Memorial, paras. 10.26-10.31.

⁶¹ Ibid., para. 10.27.

⁶² Ibid., para. 10.28.

shown⁶³ that each one of these allegations are not scientifically supported by the most expert studies, whether for Gabčikovo or for the limited version represented by Variant "C".

10.60 It may be concluded that no state of necessity existed at Gabčikovo nor was one created by the comparable but more limited Variant "C"⁶⁴.

B. Fundamental Change of Circumstances as a Justification for Termination

10.61 Hungary and Slovakia are agreed that in order for any change of circumstances to give rise to a ground for termination "it is also necessary that it should have resulted in a radical transformation of the extent of the obligations still to be performed": Fisheries Jurisdiction Case⁶⁵. In that case the obligation was a jurisdictional one imposed by the 1961 Exchange of Notes, and the Court found it to have been unaltered by any changed circumstances. The series of propositions advanced by Hungary in paragraph 10.70 seem to Slovakia not at all to advance its case, even if Slovakia could accept (which it does not) that it is not also required that change should be "extraordinary or of a singular character"⁶⁶. The requirements of Article 62 are not an à la carte menu. Only if one can meet all of the provisions might it be possible for the principle of pacta sunt servanda to be stood aside.

10.62 Even if fundamental change can refer to the burden of obligations and not just to physical obligations, there is still a critical factor to be borne in mind. Performance has thereby to be not only more onerous than before, but also "something essentially different from that originally undertaken"⁶⁷. Adverse economic circumstances, financing difficulties, political dislocations may make a treaty burden somewhat heavier - but they don't change the obligations under the 1977 Treaty into something essentially different from those undertaken, whether by reference to burden or to obligations of performance.

⁶³ See, Chapters VII and VIII, above.

⁶⁴ Hungary allegedly continued with work at Gabčikovo for five months before purportedly terminating the Treaty for "necessity". As a matter of law, a state of necessity in any event excludes one's own conduct.

⁶⁵ See, Hungarian Memorial, para. 10.68 and Slovak Memorial, para. 8.77.

⁶⁶ Hungarian Memorial, para. 10.70(10).

⁶⁷ Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3, at p. 21.

10.63 Hungary cites the Fisheries Jurisdiction Case for the proposition that a change in the law can constitute a fundamental change of circumstances. The Court acknowledged there that "changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty"⁶⁸. But the object and purpose of the Treaty would have had to have disappeared - and that object and purpose was to be deduced both from the text and entire history of negotiations. There are no relevant "changes in the law". The duty of environmental concern was already a component element of the 1977 Treaty. Further, the developing law of the environment certainly does not cause the objects and purposes of the Treaty - flood control, clean and improved energy, better navigation - to have "disappeared".

10.64 Try as it may to draw what it can from the very cautious jurisprudence on the Court on rebus sic stantibus, there is simply nothing in the Fisheries Jurisdiction Case or elsewhere that sustains the proposition that "a perceptible increase in risk of great damage" constitutes a fundamental change of circumstance⁶⁹. Fundamental change is concerned with proven realities and not with so-called "perceptions of increases in risk" - and in any event, no scientific evidence exists to support this hypothesis of increased risk.

10.65 Hungary claims to find support for its entitlement to terminate the 1977 Treaty on grounds of rebus sic stantibus in the case concerning Rights of Passage over Indian Territory⁷⁰. The Court felt no need to address the question. The citation offered by Hungary which is said to concede that India could in the future rely on fundamental change is in fact directed to a different point, that of the critical date. And, contra the assertion that Judge Klaestad criticised the Court for "rather artificially avoiding dealing with [fundamental change]"⁷¹, his short comment also concerned the critical date. Judge Armand-Ugon, in his dissenting opinion, stated that the right of passage was "incapable of exercise" in the present situation (which would certainly not describe Slovakia's rights under the Treaty). Judge Quintana, it is true, in his dissent invoked in terms the principle of rebus sic stantibus - because, on the particular facts as he saw them, Portugal no longer claimed the right which underlay the Treaty of

⁶⁸ Ibid., pp. 61-62.

⁶⁹ Hungarian Memorial, para. 10.70(7).

⁷⁰ Rights of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960, p. 6.

⁷¹ Hungarian Memorial, para. 10.66.

Punem. So "[t]he Treaty of Punem was no more". It hardly needs to be said that there is no relevant analogy - there is no suggestion that the 1977 Treaty "is no more" because of a failure of Czechoslovakia (then Slovakia) to claim the underlying right. In any event, there is nothing in the Judgment of the Court in the Rights of Passage Case that upholds Hungary's arguments.

10.66 Hungary's application of the law of changed circumstances to the present case requires comment. Hungary lists as the purposes of the Treaty⁷²:

"socialist integration"

"a single and indivisible operational system"

"a joint investment"

"a framework treaty, requiring revision"

"a treaty consistent with environmental protection"

and finds that none of these exist and that there has thus been a fundamental change of circumstance entitling Hungary to terminate the Treaty.

10.67 In its Memorial Slovakia made the important point that the essential elements of the Treaty are to be ascertained not just from its text but from the history of negotiations.

"Socialist integration"

10.68 Although there is a reference to "socialist integration" in preambular paragraph 2, this was clearly not the essential purpose of the Treaty. The idea of a barrage system for that part of the Danube even predated the communist era, even if during that period some ritual reference to socialism and COMECON often became necessary⁷³. In any event, the 1977 Treaty is manifestly not about either Marxist politics or Marxist economics. The end of socialism and the introduction of democracy unfortunately cannot of themselves eliminate the problems that the Treaty was designed to rectify. This aspect has been elaborated above at paragraph 2.12.

10.69 Hungary states that the Project has not become a force for integration, but has been the most serious source of conflict between the parties. The

⁷² Ibid., para. 10.73.

⁷³ See, para. 2.05, et seq., above.

difficulties between the parties, caused by Hungary's refusal over the years to perform its obligations, do not constitute a "changed circumstance" within the sense of Article 62 of the Vienna Convention. Nor is the unavailability in recent years of COMECON-based loans. Even graver "economic dislocations" caused by changing political circumstances do not release a party from its contract obligations⁷⁴.

10.70 In order to create the impression that there was a fundamental change subsequent to 1977, Hungary portrays an image of social and political upheaval, but actually relies on no more than two concrete events; the non realisation of a Soviet "loan" for 100 million roubles and the change to a free market economy⁷⁵. No doubt Soviet assistance, which was to be directed to the construction of the Nagymaros barrage, would have lightened Hungary's burdens under the Treaty. But it is very evident that if this "loan" had been vital to Hungary's participation in the Treaty, it would have been finalised prior to the signature of the Treaty, instead of several months later. During negotiations, Hungary never made the availability of the loan a precondition for concluding the 1977 Treaty. In any event, the "loan" was in fact in the form of assistance on design, the delivery of equipment, the provision of experts for consultation, such services to be provided on credit⁷⁶. The "loan" could therefore have served little purpose until the basic structure of the Nagymaros step was complete - an event which, of course, never occurred. The basis of Hungary's argument appears as weak on the facts as it is in law.

10.71 As to the change into the free market system, Hungary conveys the impression in the text of its Memorial that this happened in and around 1989, that is alongside Hungary's withdrawal from the Project⁷⁷. However, Hungary admits in a footnote that "the change can be dated... to 1 January 1991", that is 18 months after Hungary's unilateral suspension of works⁷⁸. A fundamental change that post-dates a breach can hardly be a legitimisation of that breach.

⁷⁴ Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20. For Slovakia's view of this point, see, Slovak Memorial, para. 8.69.

⁷⁵ Hungarian Memorial, para. 10.74.

⁷⁶ See, Agreement between Hungarian People's Republic and the Government of the USSR, 30 November 1977, Hungarian Memorial, Vol. 3, Annex 23, p. 296.

⁷⁷ Hungarian Memorial, para. 10.74.

⁷⁸ Ibid., fn 77.

10.72 Hungary seeks to imply that a general adverse change in its economic circumstances can somehow be translated into an entitlement to terminate for reasons of rebus sic stantibus. At various points it is implied that changing investment priorities effectively amount to a fundamental change of circumstances in the international law sense of the term. Thus Hungary states that new methods of power production had become "available, which could produce power at considerably lower cost"⁷⁹. Furthermore, Hungary now argues that the political and economic changes of the late 1980s "led to significant reductions in demand in electric power". Aside from the fact that Hungary still imports large amounts of electricity, it cannot be said that a State may claim fundamental change of circumstances whenever it miscalculates its long term energy requirements, or finds alternative energy sources available elsewhere⁸⁰.

10.73 "A single and indivisible operational scheme" is said to have disappeared with the suspension of the barrage at Nagymaros, thus providing a changed circumstance allowing termination. The self-serving nature of this argument hardly needs pointing out. Slovakia notes first of all that what causes the failure of the intended single and indivisible scheme seems for Hungary to vary according to convenience. For purposes of its rebus sic stantibus argument, it is its own action in abandoning Nagymaros. And Article 62(2)(b) is explicit that a fundamental change can in any event not be invoked if it is the result of a breach by the party invoking it. Nemo auditur propriam turpitudinem allegans. But elsewhere it is said - even when Nagymaros had already been suspended - to be the planning for Variant "C" that would prevent an integrated scheme⁸¹.

10.74 The intention was indeed that the objective of the Treaty, including importantly optimum energy output, could best be realised by a single integrated System in which Gabčikovo and Nagymaros would each play its part. But other Treaty purposes - an improving energy situation, flood control and better

⁷⁹ Ibid., para. 10.74. See, also, the Hardi report, which commented in 1989: "... there is absolutely no need for increases in energy generating capacities in Hungary's energy network up until 1995 because of the reserves available." Ibid., Vol. 5 (Part I), Annex 8 (at p. 158).

⁸⁰ Hungary also formulates the position that a "fundamentally new situation would arise" if the 1977 Treaty's Articles relating to protection of water quality and the natural environment could only be fulfilled "by expenditures which would make the Project completely uneconomic". Ibid., Vol. 1, para. 4.20. Although Hungary is not sufficiently sure of this argument to offer it in Chapter 10 as one of the legitimate reasons for its termination of the 1977 Treaty, it does reflect most closely the real anxieties of Hungary in its various Project assessments.

⁸¹ Ibid., para. 9.09.

navigation - could still be achieved in reduced scale through putting into effect, as nearly as possible, the Gabčskovo section plans. This is what Variant "C" has done. It is not correct that, with Nagymaros abandoned, the entire object and purpose of the Treaty is lost.

10.75 Hungary offered, in October 1989, to implement its Treaty obligations if Nagymaros was dropped⁸². But if it really regarded Nagymaros as an essential integral part of the Treaty, without which the Project lost all its purpose, why was this offer ever made⁸³?

10.76 The "joint investment" is said by Hungary to have become a "gigantic investment fiasco" - which in turn is said to be a fundamentally changed circumstance allowing termination. Slovakia again observes that heavy financial burdens - and indeed, changing economic conditions - are clearly not a ground for the invocation of rebus sic stantibus. Furthermore, one of the Treaty partners, Czechoslovakia, was willing to shoulder undoubted economic burdens in order to achieve longer term developmental and environmental benefits. These sacrifices are not to be thrown away, nor Czechoslovakia's assumption of burdens ignored, by Hungary's loss of interest in honouring its Treaty obligations. Moreover, in Slovakia's view, the Project remains economically viable and abandonment of the works at this stage would be both economically and environmentally disastrous.

10.77 "A framework treaty requiring revision in the light of`research, exploration and planning operations" - this is said first of all to be an essential purpose of the Treaty, a concept not easy to understand. Further, "required revision" of the Treaty is said to be found in Articles 5(3), 5(4) and 5(5). These articles do not so provide. They simply refer to research, exploration and planning operations being required for the drawing up of the joint contractual plan (Article 5(3) and 5(4)). The joint contractual plan was to allow the Treaty to be implemented, not for its terms to be revised. These articles fall within Chapter III, "Realisation of the System of Locks". What has occurred from the outset is for ongoing technical adjustments to be made in the manner of implementing the successive stages of the Plan, so that the best current standards will always obtain and any problems can be resolved. Slovakia has shown how this rolling system of adjustment works in practice⁸⁴ - responsibly realising the

⁸² See, para. 5.35, et seq., above.

⁸³ Hungary of course resiled immediately when it seemed that Czechoslovakia might agree to its offer.

⁸⁴ See, for example, para. 4.31, et seq., above.

Treaty, not revising its essential elements. The Treaty scheme was thus not an "immutable norm" for Czechoslovakia in the sense of an unwillingness always to adapt the means of implementation and to deal with scientifically evidenced problems. But it is true that Czechoslovakia then Slovakia have, unlike Hungary, taken seriously the principle of pacta sunt servanda and the realisation of the treaty provisions.

10.78 "A treaty consistent with environmental protection" - this basic purpose is said to be found in Articles 5(5)(a)(5), 4(5)(b)(13), 15 and 19. Certainly the preservation and indeed improvement of water quality, and the general quality protection of the environment have always been important elements of the Project, which contains its own mechanisms for attainment and monitoring. Hungary relies, as a fundamentally changed circumstance, on the observation that the Treaty "had become, according to Hungary, a prescription for environmental disaster" (emphasis added). This assessment was indeed "according to Hungary", as the claims of unacceptable risk to the drinking water of Budapest are simply not objectively verified by any of the responsible bodies.

10.79 Hungary also refers to the Treaty forcing it to accept the environmental degradation of its wetlands. All development entails a certain environmental impact. These improvements were what Hungary had agreed to, though throughout its Memorial there are scattered references to a right to its "original environment". The fact of a certain inevitable impact upon the wetlands (though certainly not "destruction") as a result of measures knowingly entered upon for broader common objectives (including environmental ones) is not a changed circumstance authorising termination.

10.80 It is significant that Hungary does not include the implementation of Variant "C" as a fundamentally changed circumstance⁸⁵. It implicitly acknowledges that Variant "C" simply represents a partial application of the agreed Treaty terms. What is even more revealing is that Hungary admits in terms that the real reason for termination was Variant "C":

"This [Variant C] was the trigger for the Hungarian action terminating the Treaty, in the sense that it was the essential reason why Hungary took that step rather than continuing to negotiate with Czechoslovakia on an agreed termination or modification of the Treaty. As Prime

⁸⁵ Hungary thus - by referring to the abandonment of Nagymaros - refers not to Czechoslovakia's conduct as constituting grounds of rebus sic stantibus, but to its own conduct. This strange legal argument in any event ignores the requirement that a fundamental change of circumstances does not relate to the conduct of either party.

Minister Antall's letter of 19 December 1991 makes clear, it was the repeated refusal of Czechoslovakia to suspend work on Variant C that was the trigger for Hungarian action. But having decided to act, Hungary was entitled to invoke all grounds for termination of the 1977 Treaty then available to it under international law⁸⁶.

10.81 Hungary thus admits that it did not regard the "changes" it itemises as so fundamental that the Treaty was without purpose (the test in Article 62 of the Vienna Convention). Had it not been for Czechoslovakia's attempt to achieve at least in part the Treaty purposes, no purported termination would have followed. But it is, according to Hungary, perfectly in order to invoke grounds that were not relevant to its decision, and were not the grounds for its decision. Hungary perceives no problems of good faith in this attitude.

10.82 There is a related point. There is a well-known debate (to which Hungary refers in paragraphs 10.83-10.84 of its Memorial) as to whether a change in fundamental circumstances affords a right to terminate, or a right to invoke termination. But Hungary cannot contend that the doctrine of fundamental change is not a right of invocation but a basis of decision sua sponte, while at the same time conceding that its list of "changes" was not the basis of its decision to terminate.

C. Impossibility of Performance

10.83 In its Memorial, Slovakia suggested that Hungary's claim to be able to terminate by reference to impossibility of performance was really an argument of force majeure or necessity, which failed on two counts: first, an entitlement to terminate a treaty must be justified by reference to the law of treaties and not the law of State responsibility⁸⁷. Second, even were the law of State responsibility appropriate and applicable, the Russian Indemnity Case relied on by Hungary is clear that unlawful non-performance for reasons of force majeure or necessity will be excused only if the existence of the invoking party is imperiled or a comparable level of danger exists⁸⁸.

10.84 Slovakia has examined Hungary's elaboration at paragraphs 10.41-10.53 of its Memorial of this ground for termination and is frankly perplexed. It now seems that in reality what Hungary describes as impossibility is in fact error. The

⁸⁶ Hungarian Memorial, para. 10.77.

⁸⁷ See, para. 10.36, above.

⁸⁸ Slovak Memorial, paras. 8.61-8.63.

examples given by Hungary - an agreement for a nuclear reactor in the mistaken belief that the technology to be used is safe - clearly has nothing to do with impossibility as a ground for termination. If this is Hungary's claim it is governed by Article 48(1) of the Vienna Convention on the Law of Treaties:

"A State may ... invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State ... to be bound by the treaty."

Hungary appears to be saying that it was mistaken in its belief in 1977 that, as a matter of scientific fact, the Project could be safely constructed without great damage and catastrophic risk to its drinking water and environmental safety.

10.85 One may wonder why Hungary has constructed the artificial arguments relating to impossibility, rather than rely on Article 48. The answer is surely that the ground of error goes to invalidity and not to a right to terminate. Article 48 falls within section 2 of the Vienna Convention "Invalidity of Treaties". And the error has to be one assumed to exist at the time of conclusion of the treaty. For Hungary the dilemma is that it affirmed its willingness to be bound - and therefore, all its assumptions about the factual situation obtaining - as late as February 1989, when it asked for construction of the Project to be accelerated. And it does not suffice for Hungary to avoid all of these inconvenient issues of law by saying that if "new scientific knowledge or understanding [that] renders a project unsafe, dangerous or unsustainable is error rather than impossibility, then Hungary should be equally entitled to rely on error ... International law is not a system of fixed formulas"⁸⁹. But international law is not a system of rules which are interchangeable and whose content is identical. And error is not a ground for termination.

10.86 That is so even if - which Slovakia does not at all accept - there existed at the time of the conclusion of the Treaty facts which have been shown to be erroneous and which formed an essential basis of Hungary's consent to be bound⁹⁰.

10.87 The only basis for invoking impossibility as a ground for termination is to be found in Article 61 of the Vienna Convention. Its terms present

⁸⁹ Hungarian Memorial, para. 10.53.

⁹⁰ The long list of pre-1977 studies, Slovak Memorial, Annex 23, reveal that all aspects of the Project were studied thoroughly and that no such "error" existed. See, also, paras. 4.06-4.07, above.

enormous problems for Hungary. Article 61(1) requires the impossibility of performance to result from "... the permanent disappearance or destruction of an object indispensable for the execution of the treaty". The International Law Commission clearly had in mind physical disappearance or destruction⁹¹; Hungary can but contend that the list of examples it offered was not "exhaustive of the categories of impossibility". At the same time, if Hungary rejects the physical connotation of "the permanent disappearance or destruction", and refers instead to the disappearance of the object and purpose of the Treaty⁹², its claim slides into that of fundamental change of circumstances. This is in effect admitted by Hungary⁹³.

10.88 Article 61(2) also presents problems for Hungary, as it stipulates that:

"Impossibility of performance may not be invoked by a party as a ground for terminating ... a treaty if the impossibility is the result of a breach by that party ... of an obligation under the treaty"

Hungary counters this awkwardness by making general allusion to the fact that not all of the Vienna Convention is customary international law, and that Hungary and Czechoslovakia were not party to it in 1977. But no analysis follows to persuade the Court that Article 61(2) was a new concept, introduced for the first time into the Vienna Convention, and the claim could be made on the basis of customary law.

10.89 Hungary then appears to accept that it may have engaged in wrongful acts⁹⁴, but defensively insists that these must have caused the impossibility of performance for it to be deprived of a right to terminate. Mystifyingly, it then tells Czechoslovakia that it can rely on impossibility of performance even if Variant "C" is a breach of the Treaty⁹⁵.

10.90 This manner of arguing is so extraordinary that Slovakia wishes only to observe that the grounds of Article 61(1) are not met (and nor can they be simply ignored by offering instead comments on force majeure and necessity). Therefore legally one simply does not arrive at Article 61(2). But in any event, any

⁹¹ Yearbook of the International Law Commission, 1963, Vol. II, pp. 206-207.

⁹² Hungarian Memorial, para. 10.50.

⁹³ Ibid., para. 10.49.

⁹⁴ Ibid., para. 10.55.

⁹⁵ Ibid., para. 10.56.

permanent destruction or disappearance - for example, if the existing structures at Nagymaros were damaged⁹⁶ - would clearly have been caused by Hungary.

D. Hungary's Misconception Relating to Subsequent Obligations under International law

10.91 Slovakia has in its Memorial offered its views on the Hungarian arguments in its Declaration of 1992 relying on lex posterior legi derogat priori, lex specialis derogat legi generali⁹⁷.

10.92 Hungary's formulation of these arguments in its Memorial calls only for three further brief comments. First, it is another example of Hungary offering the same arguments for almost any head of international law. Here Hungary acknowledges that developments in international environmental law are part of the fundamental change argument; but they are also the basis for the lex posterior argument. Second, neither in the Declaration nor in its Memorial does Hungary suggest that the developments constitute jus cogens that override the Treaty - still less that they constitute jus cogens that has emerged since February 1989, when Hungary asked for acceleration of the timetable for construction. Third, the remarks at paragraph 10.96 of the Hungarian Memorial -

"If Czechoslovakia was obliged under general international law not to carry out activities on its territory that would cause serious or substantial harm to Hungary, then Hungary was entitled to take action to remove any pretext for such conduct" -

are the language of self-help or reprisals, not of grounds for termination under the law of treaties.

E. The Fiction of "Breaches" by Czechoslovakia and Slovakia

10.93 Hungary confirms in its Memorial that it relies on material breach by Czechoslovakia as a basis for the termination of the 1977 Treaty. In its 1992 Declaration, material breach was said to arise out of the failure of Czechoslovakia to fulfil the obligations in Articles 15 and 19 of the Treaty, whereby the quality of water was not to be impaired by the construction and operation of the barrage system, and obligations for the protection of nature were to be complied with.

⁹⁶ Hungary plans to demolish the coffer dam protecting the Nagymaros site. See, para. 1.22, above.

⁹⁷ Slovak Memorial, paras. 8.106-8.122.

The provisional solution of Variant "C" was described as an "even more severe breach"⁹⁸. In the Memorial, however, Hungary has now found a new "material breach" - namely, breach of contractual obligations under the 1976 Joint Contractual Plan Agreement. These are said to be "anticipatory breaches" that were of "a continuing character" and are represented by the failure to make the adjustments to the barrage system that Hungary now says are necessary.

10.94 Slovakia has addressed both the law and the facts in relation to material breach in its Memorial, and at paragraphs 8.81-8.97 dealt specifically with the fulfilment of Czechoslovakia's and Slovakia's duties for the protection of nature and water quality and the absence of any breach of the Treaty through the implementation of Variant "C". Accordingly, Slovakia restricts itself to a few brief observations arising out of Hungary's Memorial.

10.95 The recently discovered breach of the Joint Contractual Plan Agreement is another example of Hungary searching around for any and every legal argument, ex post facto, to justify its termination - when it has frankly conceded that its termination had nothing whatever to do with any such alleged violation. This attitude evidences a lack of confidence that the stated reason for termination - Variant "C" - is justifiable in international law.

10.96 The central focus of Hungary's interpretation of the 1976 Joint Contractual Plan Agreement is Czechoslovakia's obligation to carry out "the complex examination of the effect of the barrage on the environment"⁹⁹. It is alleged that Czechoslovakia breached this obligation and that:

"Potential environmental impacts of the construction were assessed by Czechoslovakia only between 14 September and 12 November 1990."

This is quite incorrect. Two points must be made. First, an assessment of environmental impact was carried out by both sides immediately prior to the signature

⁹⁸ Hungary's 1992 Declaration, Hungarian Memorial, Vol. 4, Annex 82 (at p. 179).

⁹⁹ See, ibid., Vol. 1, para. 6.31.

of the 1977 Treaty¹⁰⁰. The practice after this date clearly shows that each party considered itself responsible for the study of environmental impacts in its own territory¹⁰¹. Second, at no stage prior to its current Memorial, not even in its 1992 Declaration, has Hungary alleged that Czechoslovakia had a greater responsibility in relation to environmental research. Hungary's argument is truly astonishing not only because it runs counter to the conduct of the parties after 1977 but also because it is inconsistent with the emphasis Hungary places on the joint nature of the 1977 Treaty, and the need for cooperation.

10.97 In any event, Hungary presents a misleading interpretation of the 1976 Agreement's provisions. In its attempt to show that Czechoslovakia was primarily responsible for the examination of the Project's impact on water quality and the environment, no mention is made of Hungary's corresponding obligations. While it is true, for example, that Czechoslovakia was given responsibility for hydrological and hydraulic examination of the section between Bratislava and Rajka (the first village on Hungarian territory downstream of Bratislava), Hungary had exactly the same responsibility for the section between Rajka and Budapest. In other words, responsibility was often allocated according to territorial ownership. In other areas, the Joint Contractual Plan Agreement provided that the responsibility should be shared as, for example, the responsibility in terms of research into the Project's impacts on drinking water resources. Unsurprisingly, however, the impact of the planned dredging downstream of Nagymaros on Budapest's drinking water supplies came solely within the ambit of Hungary's research teams¹⁰².

10.98 Further, the 1976 Agreement, by Articles 5 and 6, establishes the joint responsibility of both parties for the drafting of the Joint Contractual Plan, which is further confirmed in Appendix 2 to this Agreement whereby: "If necessary, further research and studies may be performed with mutual consent"¹⁰³.

10.99 It must also be recalled that the 1976 Agreement was an interim agreement, superseded by the 1977 Treaty, which makes no distinction between the parties as to their responsibility regarding the protection of the environment.

¹⁰⁰ See, paras. 4.02-4.07, above.

¹⁰¹ See, paras. 4.09-4.10, 4.14 and 4.24, et seq., above.

¹⁰² See, para. 7.68, above.

¹⁰³ Hungarian Memorial, Vol. 3, Annex 18 (at p. 226).

10.100 Detailed further responses to the charges of material breach regarding the obligation to protect water quality and nature are to be found in Chapters IV and VII above. Slovakia has further demonstrated, in its Memorial at Chapter VII and in its Counter-Memorial at Chapter XI below, that Variant "C" is not in breach of the 1977 Treaty, but rather is the best possible approximate application of the Treaty.

10.101 Although Hungary does not include this in its section on material breach as a justification for termination, there are frequent references throughout the Memorial to Slovakia's alleged wrongdoing in failing to negotiate or "cooperate", based upon the erroneous assumption that a treaty party is under a legal obligation to cooperate in negotiating an amendment to a treaty - or indeed, in negotiating the very termination of the treaty. This aspect is dealt with in Chapter IX above.

10.102 Continuing the search for new grounds to justify its termination, Hungary now claims that Czechoslovakia has repudiated the 1977 Treaty, within the meaning of Article 60(3)(a) of the Vienna Convention, through the implementation and operation of Variant "C". Hungary does not offer any legal analysis as to why Variant "C" should be regarded as a repudiation of the Treaty, satisfying itself with telling the Court: "Variant C amounted to a repudiation by Czechoslovakia of the Treaty ... as clear a repudiation as one might wish."

10.103 But Hungary must do more than simply allege repudiation. Repudiation is to be distinguished from both termination and a rejection of the binding nature of a treaty. Termination is the lawful ending by one party of the treaty and its application to both parties, on grounds and in accordance with procedures specified in Articles 60-62 of the Vienna Convention. By contrast, States sometimes insist that they are not bound by a treaty at all, for reasons extraneous to any entitlements under Articles 60-62¹⁰⁴. Repudiation is different again - it is the rejection, either explicitly or through action, of the entirety of the obligations of a treaty that is in force and applicable, and is necessarily unlawful unless it can be otherwise justified under the law of treaties:

"States still from time to time repudiate their treaties, but there is no doubt that such repudiation is a violation of international law unless it can be justified on one or another of the accepted grounds for securing release from the obligations to comply with the treaty. States accept

¹⁰⁴

Thus South Africa insisted - incorrectly - that it was not bound by the post-war Mandate over South West Africa.

this by invariably attempting to justify their repudiation by reference to one or more of those accepted grounds¹⁰⁵."

10.104 Czechoslovakia (then Slovakia) has never, of course, referred to any of the grounds in Articles 60-62 to claim that it is released from its own obligations to comply with the 1977 Treaty.

10.105 A repudiation by conduct will require the demonstration of a determination "to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship"¹⁰⁶. Czechoslovakia did not engage in deliberate and persistent violation of obligations designed to terminate its relationship with Hungary. On the contrary, it sought to keep Hungary engaged in the Treaty relationship.

10.106 The Court has made clear that a claim of repudiation must consist of more than sweeping general claims. In the ICAO Council Case it said :

"Even if the allegation, because of its generality, is to be regarded as one of conduct on the part of Pakistan amounting to a complete 'repudiation of the treaty' (see para.3(a) of Article 60 of the Vienna Convention), it would still be necessary to examine the treaties in order to see whether, in relation to their provisions as a whole, and in particular those relating to the 'safety of air travel' which India herself invoked ... Pakistan's conduct must be held to constitute such a repudiation¹⁰⁷."

10.107 Hungary has made no attempt whatsoever to demonstrate that, in relation to the provisions of the 1977 Treaty as a whole, or to the clauses on environmental protection in particular, Slovakia's conduct must be held to constitute a repudiation.

10.108 And it cannot. Indeed, Hungary's complaint in the context of its argument on changed circumstances is exactly that "the framework treaty ... had become, according to Czechoslovakia, an immutable norm"¹⁰⁸. It seems that

¹⁰⁵ R.Y. Jennings and A. Watts, Oppenheim's International Law, 9th ed., Longmans, London, Vol.I, pp.1249-50.

¹⁰⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 47.

¹⁰⁷ Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 46, at p. 67.

¹⁰⁸ Hungarian Memorial, para. 10.74(4).

Czechoslovakia is at one and the same time too wedded to the Treaty, and rejects it entirely.

10.109 All of Czechoslovakia's and Slovakia's efforts have been directed to securing Hungarian compliance with the Treaty, and putting it into operation - and not in turning their back on the Treaty and walking away from it. That is exactly why Variant "C" cannot be regarded as a repudiation of the 1977 Treaty. As was made amply clear to Hungary from the outset, Czechoslovakia was both determined to and entitled to seek to put the Treaty into effect to the maximum extent possible. The manner in which Variant "C" accomplished this has been described elsewhere.

F. Hungary's Claim that the Treaty has been Terminated through the Disappearance of one of the Parties

10.110 This extraordinary claim appears for the first time in Hungary's Memorial.

10.111 Slovakia's detailed response is to be found in Chapter III above.

G. The Inappropriateness of Hungary's Claims on Human Rights

10.112 Although Hungary does not claim to be able to terminate the 1977 Treaty on grounds of human rights violations by Czechoslovakia, there are many allegations throughout the Memorial of such violations. They not only have no legal relevance, but they are inappropriate, unwarranted and offensive.

10.113 At paragraph 10.24 Hungary justifies its suspension on the grounds that "a state must protect the life" of its population. It then continues by suggesting that the protection of life "should also be interpreted to include the 'right to environment' as provided by numerous texts". There is no threat to the life of the population of Hungary. Nor is the right to life simply a reworking of the "right to environment". For Hungary any arguments can be deployed, regardless of substantiation, and any legal concept can be called any other legal concept, if it is thought to serve some purpose. So impossibility can be interchanged with force majeure, rebus sic stantibus with error, the right to life with developing environmental law.

10.114 It is cynical - indeed grotesque - to invoke Article 25 of the International Covenant on Civil and Political Rights for the proposition that it requires a "responsible government" and "developing democracy" to consider the safety of its population and the quality of its water and the cost-effectiveness of its energy policy¹⁰⁹. Of course, governments should do that - but it has nothing to do with Article 25 of the Covenant, nor has the Committee on Human Rights suggested it has.

10.115 Hungary too makes great play of the fact that it is a democracy and apparently thereby seeks to plant the idea that the invocation of environmental arguments is necessarily correct if employed by democratic governments; and that Hungarian internal structures are to be contrasted with those of Czechoslovakia and then Slovakia, with implications for the value of the respective legal arguments of each side. Thus in paragraph 10.39 we find references to Hungary as a "well governed state", and in paragraph 10.76 to its duties as a "responsible government" and "developing democracy". The position is that both Hungary and Slovakia are democracies that have emerged from a long period of one party rule; both are responsible governments who seek to protect present and future generations within their countries. Part of democratic responsibility is for governments to ensure that data on which they rely is objective, even if it is unpalatable to certain interest groups within the country, and to eschew propaganda.

10.116 Slovakia shares with Hungary the belief that the emerging human right to the environment requires each generation to preserve and pass on its environmental patrimony to the next generation¹¹⁰. But that is not an environmental patrimony that necessarily eschews all change, or rejects all development, or insists upon pastoral idyllism at the expense of other important environmental considerations.

SECTION 3. Hungary's Breaches Confirmed

10.117 Hungary's Memorial offers the following truism: "In international law things done in compliance with a treaty are lawful as between the

¹⁰⁹ Ibid., para. 10.76.

¹¹⁰ Ibid., para. 10.38.

parties to the treaty"¹¹¹. To it might be added the following: that non-compliance with a treaty is unlawful and constitutes an internationally wrongful act which entails the responsibility of the author of the act. In the present case, Hungary has constantly violated the 1977 Treaty since 1989, its breaches becoming progressively more pronounced as it arrived at the Treaty's purported termination; and there can be no legal justification, either for the suspension and subsequent abandonment of works or for the unilateral "termination" of the Treaty, as Sections 1 and 2 above have shown.

10.118 In fact, Hungary itself recognises this fact - but in the context of wrongly equating its attitude to that of Czechoslovakia and then of Slovakia. For example, the Hungarian Memorial contends that: "[i]mmediately prior to the succession [1992] neither Hungary nor Czechoslovakia were complying with the 1977 Treaty, and since the succession, neither Hungary, nor the Slovak Republic has done so"¹¹². This is a direct admission of responsibility. However, it covers only partially the very numerous breaches of international law attributable to Hungary which, as Slovakia has shown in its Memorial, commenced well before 1992 and related to a very large and diversified series of legal obligations¹¹³. The Hungarian Memorial does not contradict the Slovak Memorial's demonstration of Hungarian breaches in a convincing manner. Hence, it does not appear useful to repeat this demonstration, except to clarify certain matters where Hungary gives an incorrect or false account. In so doing, despite the integrated character of the Project, which Hungary has compromised by its numerous breaches, it is useful if Slovakia distinguishes between breaches tied to Nagymaros (A) and breaches tied to Gabčikovo (B).

A. Breaches in Relation to Nagymaros

10.119 By suspending and then abandoning work at Nagymaros, and in even foreseeing the dismantling of what had already been built, Hungary clearly breached the fundamental obligations imposed on it by the 1977 Treaty and under general international law.

10.120 By virtue of Article 5(5) of the Treaty, whose detailed provisions were made more concrete in the Joint Contractual Plan, Hungary is responsible for the whole of the Nagymaros weir system, all the downstream

¹¹¹ Ibid., para. 11.02.

¹¹² Ibid., para. 10.120 (emphasis added).

¹¹³ Slovak Memorial, paras. 6.55-6.165.

installations and the majority of those upstream. These comprise obligations essential to the realisation of the joint investment, as Hungary itself has correctly recognised:

"...the Nagymaros Barrage was essential to the Original Project, which was, as demonstrated in Chapter 4, conceived as 'a single and indivisible operational system of works'. In concept, in operation and in terms of any possibility of an economic return from this 'joint investment', the Nagymaros Barrage was a key element. Without it, peak power production would not be possible, and a principal economic advantage of the Original Project would disappear¹¹⁴."

10.121 Thus, in suspending and then stopping the work at Nagymaros, Hungary has, by even its own admission, ruthlessly and unilaterally held up the bringing into being of the "single and indivisible operational system" that the two parties had agreed upon. It is ridiculous for Hungary today to invoke the "serious and sustained doubts as to the environmental and other risks associated with the Nagymaros Barrage"¹¹⁵ and have reproached Czechoslovakia in 1989 for not having carried out the supposedly necessary studies¹¹⁶ when, as provided for in Article 5 of the Treaty and Appendix 2 of the 1976 Joint Contractual Plan Agreement, it was Hungary - and Hungary alone - who had the duty to carry out the relevant studies concerning the Nagymaros site and related protective structures. This duty included:

- "The examination of the change of the bed as a consequence of peak-flow of the power plant, taking into consideration points of view of energy, navigation, water management and construction ... at the Nagymaros Barrage"; and
- "The complementation and evaluation of the examinations relating to the effect of the dredging in the downstream water at Nagymaros taking into consideration the wells of the waterworks in Budapest¹¹⁷."

Hungary can hardly hide behind the tardy discovery of its own shortcomings. And, if they are established, they constitute a further example of Hungary's failure to comply

¹¹⁴ Hungarian Memorial, para. 10.75.

¹¹⁵ Ibid.

¹¹⁶ Ibid., para. 9.28.

¹¹⁷ Ibid., Vol. 3, Annex 18 (at pp. 224 and 226).

with its Treaty obligations. It cannot be accepted for Hungary to try to impute the blame for this to Slovakia who was not the cause of it.

10.122 And here again, the motives advanced by Hungary for its suspension and then termination of the Nagymaros works are a mere pretext. In its Memorial, Hungary states that at the beginning of October 1988:

"...not even the construction pit was completed at Nagymaros. Only the coffer dam surrounding the future construction site was being prepared¹¹⁸."

This is interesting and revealing from a dual standpoint:

- First, it amounts to a Hungarian admission of the delay in carrying out its obligations, for in the circumstances it was impossible for the first unit of the Nagymaros hydroelectric plant to come on line in 1993 as provided for in the 1983 Protocol (and, a fortiori, for this to happen in 1992 as provided for, at Hungary's request, in the 1989 Protocol); and as Slovakia has shown in Chapter II above, the parties' respect of the Project timescale was obligatory;
- Second, Hungary cannot justify these delays on the basis of supposed doubts as to the ecological impact of the Project. At the time Hungary had no such doubts. It was indeed insisting on an acceleration of work that was finally accepted by Czechoslovakia in the 1989 Protocol. The conclusion from this is self evident: the alleged "doubts as to the environmental and other risks associated with the Nagymaros Barrage" are an excuse invented a posteriori and in no way justify Hungary's own breaches.

10.123 Furthermore, Hungary was well aware of the obligation it was under, which its Memorial has not succeeded in completely hiding, for there Hungary:

¹¹⁸ Ibid., Vol. 1, para. 3.63.

- States that in 1989 it carried out studies on "the amount of compensation to be paid to Czechoslovakia" in case of the abandonment of Nagymaros¹¹⁹;
- Affirms that it "was always prepared to compensate for costs caused by the alteration of the Barrage System"¹²⁰, even if in reality, and contrary to what appears at paragraph 7.98, Hungary never allowed negotiations of any kind to take place concerning compensation for the abandonment of work at Nagymaros;
- Highlights - not without exaggeration - having made successive proposals as to compensation¹²¹;
- Recognises (rather uncomfortably) that the termination of the 1977 Treaty requires "an account of work properly done in accordance with its terms", which appears to imply an indemnification, although it is ingenuously claimed that "this had nothing to do with any issue of State responsibility on the part of Hungary"¹²².

10.124 Both Czechoslovakia and Slovakia have consistently rejected the suspension¹²³ and abandonment of Nagymaros¹²⁴, and the compensation it has sought therefor, certainly does not imply, contrary to what Hungary would like to conclude, that "the Czechoslovak [then the Slovak] Government no longer considered the completion of the works at Nagymaros as a requirement"¹²⁵. Indeed it was, and remains, an indisputable Treaty obligation to be fulfilled. Both Czechoslovakia (then Slovakia) demanded that, in the event of the non-execution of such a requirement,

¹¹⁹ Ibid., para. 3.73.

¹²⁰ Ibid., para. 7.97; see, also, para. 9.18(7).

¹²¹ Ibid., para. 9.24.

¹²² Ibid., para. 11.09.

¹²³ This was made very clear by the Czechoslovak Government as soon as 15 May 1989; See, para. 5.16, above.

¹²⁴ See, for example, Hungarian Memorial, para. 3.99 and 3.147. See, also, paras. 5.39-5.40, above.

¹²⁵ Ibid., para. 3.148. See, para. 5.92, above.

Hungary must respect the fundamental "principle of international law that the breach of an international engagement involves an obligation to make reparation in an adequate form"¹²⁶. Far from exonerating Hungary from liability, these demands are based on the conviction that Hungary has failed to meet its obligations.

10.125 These breaches did not concern merely the construction of the Nagymaros weir and related installations. The weir was only the means to attain the objectives of the Treaty: the production of hydroelectricity (at Nagymaros but also peak power at Gabčíkovo which abandoning Nagymaros made impossible), the improvement of navigation (particularly difficult in this sector of the Danube due to Hungary's failure to carry out its obligations)¹²⁷, the fight against floods and, more generally, the preservation and improvement of the environment. In unilaterally stopping the construction at Nagymaros, Hungary breached at one and the same time all of the fundamental obligations relating to achieving those objectives.

10.126 The same is true of Hungary's plan to destroy the coffer dam at Nagymaros¹²⁸, which had been built to preserve the small amount of work already carried out, and which Hungary wrongly claims not have been part of the jointly owned property of the Project¹²⁹. Hungary is wrong because the coffer dam is an integral part of the Nagymaros works; its dismantling involves, in turn, the disappearance of the construction pit¹³⁰, and constitutes a serious threat to the environment.

10.127 Aside from these breaches of many of its primary Treaty obligations, Hungary has breached its secondary obligations under both the Treaty and general international law in unilaterally proceeding to the suspension of Nagymaros, then to its abandonment without any consultation with its Treaty partner, and in refusing to enter into meaningful negotiations¹³¹ - even as to the compensation due to

¹²⁶ Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21 (emphasis added).

¹²⁷ See, para. 7.115, et seq., above and Annex 48, hereto.

¹²⁸ According to Hungarian newspapers the dam should be breached in November 1994 and the working site at Nagymaros should be flooded by that time. See, Magyar Hirlap, 19 October 1994, Annex 49.

¹²⁹ Hungarian Memorial, para. 11.14.

¹³⁰ Slovak Memorial, para. 6.131.

¹³¹ Hungary showed a real lack of good faith in proposing negotiations then retracting them every time it realised Czechoslovakia was ready to enter into meaningful negotiations. See, e.g., paras. 5.36, 5.41-5.44, and 5.93, above.

Czechoslovakia (and now to Slovakia) under Article 26 of the Treaty and even though Hungary has, intermittently, recognised its liability¹³².

B. Breaches in Relation to Gabčíkovo and the Reservoir

10.128 Although the construction of Gabčíkovo was principally Czechoslovakia's responsibility, Hungary nevertheless was responsible for the construction of the Dunakiliti-Hrušov headwater installations, the Dunakiliti weir, part of the tailwater canal of the bypass canal, the deepening of the bed of the Danube below Sap (Palkovičovo), the improvement of the old bed of the Danube and for providing certain operational equipment of the Gabčíkovo system of locks¹³³.

10.129 As opposed to what happened regarding the Nagymaros works, Hungary fulfilled to a large degree its obligations here up to the time it suspended work at Dunakiliti, in July 1989:

"...[t]he Dunakiliti weir itself was already virtually complete by this stage. This suspension related to the filling of the Dunakiliti dam, to the collection of material and to other preparations for the actual diversion of the Danube"¹³⁴.

Hungary attempts to use the progress of these construction works to disguise the importance of its breaches in relation to Gabčíkovo¹³⁵. This is completely wrong: Hungary's breaches prevented the filling of the reservoir and then the bypass canal; hence, the putting into operation of the entire Gabčíkovo operation was prevented at the same time. The joint investment was paralysed, and Czechoslovakia's own enormous investment faced the prospect of being totally lost.

10.130 As at Nagymaros, Hungary's breaches did not only mean that the constructions were not completed; for Hungary at the same time prevented the objectives of the Treaty from being attained: production of electricity, the improvement of navigation, the fight against floods and the protection of the environment. Hungary's failure to fulfil its obligations relating to the environment were particularly serious here. The unfilled reservoir and canal threatened to become a

¹³² See, para. 10.123, above.

¹³³ Article 5(5)(b) of the 1977 Treaty and Article 2 of the Agreement on Mutual Assistance.

¹³⁴ Hungarian Memorial, para. 9.06.

¹³⁵ Ibid., para. 9.31.

giant, unsanitary cesspool, while the Danube riverbed continued to sink, leaving no regular flow into the side arm system in the territories of both States. This, in turn, complicated the problem of irrigation; and flood protection was by no means dealt with satisfactorily¹³⁶. Other specific measures of environmental protection, constituting an integral part of the Project, were also abandoned as a result of Hungary's decision to suspend and then terminate work at Gabčikovo¹³⁷.

10.131 Hungary's failure to meet its own environmental protection obligations under the Treaty and under general international law contrasts with its ecological stance first adopted in 1985 relying on the Hungarian Academy of Sciences' 1985 Opinion. But the Academy also expressed concern that "the non-building of additional environmentally-necessary installations ... could have fatal consequences and generate irreversible ecological processes"¹³⁸. In stopping work on the Project, Hungary also put a stop to these supplementary measures to which the Treaty parties had agreed.

10.132 Hungary's neglect of its environmental obligations did not end with its purported termination of the Treaty. Hungary complains of the drying up of the river branches in its territory¹³⁹, but this problem is easily remedied by the construction of submerged weirs in the old riverbed and the diversion of waters into the right bank branches. This is not a mere suggestion of improvement made by Czechoslovakia (then Slovakia); in the Joint Contractual Plan, as drafted in 1977, it is stated under the section devoted to the "Regulation of the old Danube bed" that:

"In the event of need bottom sills can be constructed in the old Danube bed. By means of this solution, on the basis of the experience of the barrage operation, such water levels can be produced equal to the low waters prior to the construction"¹⁴⁰.

And, during the 8-9 June 1989 meeting of Plenipotentiaries, both Treaty parties agreed to the proposal made by the Joint Expert Group to include this solution as a precise matter in the Joint Contractual Plan¹⁴¹. Therefore, Hungary's refusal to proceed with

¹³⁶ See, Slovak Memorial, para. 6.141.

¹³⁷ See, paras. 7.83-7.84, and 7.100-7.101, above.

¹³⁸ Hungarian Memorial, Vol. 5, Annex 3.

¹³⁹ *Ibid.*, Vol. 1, para. 5.22.

¹⁴⁰ *Ibid.*, Vol. 3, Annex 24 (at p. 326). The reference to "bottom sills" is a reference to underwater weirs.

¹⁴¹ Slovak Memorial, Annex 58.

such relatively inexpensive measures is clearly a breach of its obligations concerning environmental protection and reveals a willingness by Hungary to allow the degradation of an ecologically important area in a vain attempt to convince the Court of the dangers of the Project and of Variant "C". Moreover, the drying up of the branches has nothing to do with them. In fact, the Project (and Variant "C") provide for the revitalisation of the side arms, not their drying up, contrary to Hungary's contentions¹⁴².

10.133 More generally, it is apparent that Hungary's suspension and then termination of works in the Gabčíkovo sector was pure blackmail intended to induce Czechoslovakia to agree to renounce Nagymaros and the related peak production of electricity as a first step to the complete abandonment of the G/N Project¹⁴³. Hungary's alleged concern for the environment, a mere pretext in the case of Nagymaros, was in relation to Gabčíkovo entirely non-existent. Hungary openly recognises this cynical tactic:

"On 11 October 1989, Prime Minister Németh proposed that the two Parties abandon the Nagymaros Barrage by way of an agreement which would incorporate complex environmental, water quality and technical guarantees for all the major installations which would be maintained in non peak-load production mode. If Czechoslovakia adopted this suggestion Hungary would continue to prepare the closure of the Danube and would actually close it after the conclusion of the agreement¹⁴⁴".

The "deal" - which was really an ultimatum¹⁴⁵ - was simple: the continuation of works in the Gabčíkovo sector (including Dunakiliti) in exchange for the abandonment of

¹⁴² See, paras. 7.84 and 8.11, et seq., above.

¹⁴³ See, para. 10.24, above.

¹⁴⁴ Hungarian Memorial, para. 3.96. Hungary did not annex the text of these proposals to its Memorial as it should have (Article 50 of the Rules of Court). *Emphasis added.*

¹⁴⁵ Here again Hungary gave no prior notice of the intent to suspend or terminate Gabčíkovo; nor, a fortiori, did it enter into consultation with Czechoslovakia in this respect (see, paras. 5.18-5.53, above).

Nagymaros and of peak power production (with Czechoslovakia also agreeing to Hungary's environmental guarantees). In the event, Czechoslovakia agreed to the guarantees to be negotiated but not to the abandonment of Nagymaros¹⁴⁶. The draft treaty project of November 1989 submitted by Hungary was based on this simple quid pro quo¹⁴⁷.

10.134 Thus, Hungary's breaches in the Gabčíkovo sector do not even have the artificial excuse of concern over environmental protection. They amount to an ill-disguised attempt to force Czechoslovakia's hand into abandoning the Nagymaros part of the Treaty.

10.135 In this dispute, Hungary has continually presented Czechoslovakia with a series of faits accomplis - by its manifold, unilateral decisions and ultimatums and its total disrespect of the cooperative nature of the Project whose integrated character Hungary rightly emphasises. Despite Czechoslovakia's good faith and its genuine concern to ensure workable measures for environmental protection, Hungary has acted in a high-handed way, refusing to proceed to perform the works which the Treaty parties had jointly agreed was in their mutual interest.

SECTION 4. Conclusions

10.136 Hungary's real grounds for suspension, clearly evidenced by the vagaries of its own conduct, were financial.

10.137 A major stated ground for termination was Variant "C". But the real decision to terminate occurred long before even the planning of Variant "C", and the public announcement of termination was some five months before the actual start of its operation.

10.138 No legal grounds are offered for suspension, save by reference to the later termination.

10.139 The grounds offered for termination of the Treaty either require Variant "C" to be shown as a fundamental breach of the Treaty, making impossible the

¹⁴⁶ See, Slovak Note of 30 October 1989, Slovak Memorial, Annex 76.

¹⁴⁷ Hungarian Memorial, Vol. 4, Annex 30. Moreover, as explained in Chapter V above (see, paras. 5.35-5.36 and 5.38), this offer by Hungary was a mere ploy in order to cajole Czechoslovakia into agreeing to drop Nagymaros as a step along the path towards abandonment of the G/N Project, which had, in fact, already been decided by Hungary.

realisation of its objects and purposes, or require a plethora of other grounds, irrelevant to the decision to terminate, to be accepted in law and in reference to the facts. Some grounds are mutually inconsistent.

10.140 Hungary has shown no justification in international law for suspending and terminating the Treaty.

10.141 The suspension and purported termination constitute violations of legal obligations, along with other violations of Hungary's legal obligations towards Czechoslovakia and Slovakia.

10.142 By suspending and then abandoning work at Nagymaros, Hungary is in breach of the 1977 Treaty and general international law.

10.143 Hungary is also in breach of its obligations on the Gabčíkovo section; and is preventing the objectives of the 1977 Treaty from being realised.

10.144 In its abandonment of construction, Hungary is failing to meet environmental requirements within the Treaty and its obligations under general international law.

CHAPTER XI. VARIANT "C": ITS RATIONALE AND EFFECTS

11.01 In Chapter VII of its Memorial, Slovakia addressed the question of the lawfulness of Variant "C". This discussion was directed at the allegations and contentions concerning Variant "C" set out by Hungary at the time of its purported termination of the 1977 Treaty, on 19 May 1992, in the detailed factual and legal explanation of its action contained in the so called "1992 Declaration".

11.02 Hungary's Memorial has now supplemented the 1992 Declaration. Before considering the latest presentation of Hungary's legal argument, Slovakia wishes to remind the Court of the erroneous nature of many of the major factual assertions on which the Hungarian Memorial bases the contention that Variant "C" is unlawful. This has been shown in Chapters V, VI and VIII above. The present Chapter will respond to Hungary's argument (set out in its Chapter 7) that Variant "C" was a violation of the 1977 Treaty and other related treaties, as well as a breach of general international law.

SECTION 1. Variant "C" Does Not Conflict with the 1977 Treaty or any Other Related Treaty

11.03 Hungary's Memorial contends that Variant "C" entailed a "diversion of the Danube" carried out on 24 October 1992, which was in breach of the 1977 Treaty, the 1976 Joint Contractual Plan Agreement, the 1976 Boundary Waters Management Agreement and the 1976 Agreement on Cooperation and Mutual Assistance along the Czechoslovak-Hungarian Border. As a preliminary point, it must be noted that the international agreement to which Hungary accords the greatest emphasis (in its Chapter 7) is the 1977 Treaty. Yet, according to its analysis, the Treaty had been legitimately terminated five months before the diversion of the Danube. This, at best, manifests a lack of confidence in the validity of the purported termination.

A. The Adoption of Variant "C" was not in Violation of any Treaty Obligation to Cooperate

11.04 The Hungarian Memorial advances the argument that Variant "C" involves the unilateral operation of the G/N Project and, thus, violates the joint system established under the 1977 Treaty¹. It also asserts that the 1976 Boundary Waters Management Agreement "plainly prohibits unilateral operation", citing various provisions of

¹ Hungarian Memorial, paras. 7.06-7.07.

this Agreement in support². Hungary argues that the relevant provisions of these treaties set out procedures to be followed in the management of commonly shared waters, namely, supply of prior information, consultation, negotiations and joint agreement³. The relative performance of the parties is then compared and it is asserted:

"Hungary has continually upheld its duty to consult and negotiate, especially from 1989 onward, as shown throughout this Memorial⁴."

The analysis of the events and evidence in Chapters V and VI above has established the total falsity of this assertion⁵.

11.05 The Hungarian Memorial also contends that, with particular regard to Variant "C", Czechoslovakia did not comply with the treaty obligations to cooperate, citing as an example:

"[Czechoslovakia's] unwillingness to interrupt the works on Variant "C" pending a negotiated settlement, despite the invitations made by Hungary from 1989 onwards...⁶."

But the reference to "1989 onwards" is wholly misleading. There were no works to be interrupted before November 1991, and even then the activity did not affect the flow of the Danube. Nor was there progress on a negotiated settlement. On 10 January 1990, Hungary's Prime Minister abruptly terminated negotiations, and it was not until 20 December 1990 that the Hungarian Government authorised the resumption of negotiations, and then only for the limited purpose of terminating the 1977 Treaty.

11.06 Thus, the only settlement in prospect was not to be "negotiated" but imposed. The Hungarian Memorial nonetheless makes reference to "successive Hungarian

² Ibid., para. 7.08.

³ The allegation of a failure to supply information is considered in detail at para. 6.07, et seq., above.

⁴ Hungarian Memorial, para. 7.11.

⁵ No genuine steps were taken by Hungary towards consultation or negotiation prior to any of the following of Hungary's unilateral actions: (i) to suspend work at Nagymaros, (ii) to suspend work at Dunakiliti, (iii) to terminate all construction work at Nagymaros and all related contracts, (iv) to terminate all construction work on the Project and all related contracts, (v) to prevent the damming of the Danube for three years in a row, and (vi) announcing the termination of the 1977 Treaty - in a Resolution that it attempted to keep secret from Czechoslovakia while it made a final, desperate attempt to prevent the damming of the Danube for a fourth year.

⁶ Hungarian Memorial, para. 7.12.

concessions, from the spring of 1989 through May 1992"⁷. This is so far removed from the actual facts as to belong in a world of make-believe. The position of the Hungarian Government became more, not less, intransigent as the dispute developed. Simply, as shown in Chapter V above, it failed to meet the applicable international standards of good faith in its dealings with Czechoslovakia after this dispute developed.

11.07 The Hungarian Memorial's final argument in support of its contention that Variant "C" violated Czechoslovakia's obligation to cooperate is that there were "significant differences" between the Original Project and Variant "C"⁸. It mentions the only two technical differences: the reduced size of the reservoir, and the changed location of the damming of the Danube. But these were minor in terms of the operation of Variant "C" and the functions it was to perform, which were basically identical to the Gabčikovo section of the Treaty Project. Hungary resents the control by Czechoslovakia that Variant "C" represented. But, through Variant "C", the completion and putting into operation of the Gabčikovo section of the Project could no longer be blocked unilaterally and in breach of the 1977 Treaty by Hungary.

B. Variant "C" Does Not Violate Czechoslovakia's Treaty Obligations to Protect the Environment

11.08 In its sub-section entitled "Obligations to Protect the Environment", Hungary contends that Variant "C" "blatantly contradicted the provisions of the 1977 Treaty"⁹. It points to Article 15 of the Treaty which provides that the quality of water in the Danube shall not be impaired, adding that this Article "required as a minimum the prohibition of pollution". The validity of this interpretation need not even be considered for present purposes: it has been definitively proved that Variant "C" is not a source of pollution¹⁰.

11.09 It is also alleged that the supposed obligation imposed on Czechoslovakia under Article 19 of the Treaty and Appendix 2 of the Joint Contractual Plan to "establish the impact of the Original Project on the environment" was never carried out and that this failure carries over to Variant "C"¹¹. Again, this is wrong both as to the facts and as

⁷ Ibid.

⁸ Ibid., paras. 7.15-7.16.

⁹ Ibid., para. 7.17.

¹⁰ See, para. 7.62, above.

¹¹ Hungarian Memorial, para. 7.18.

to the law¹². Both Treaty parties conducted detailed studies into potential environmental impact in the 1970s and 1980s. Hungary's contention ignores completely such major studies as Czechoslovakia's Bioproject and Hungary's 1983-1985 Environmental Impact Assessment¹³. And the consideration of Variant "C" was accompanied by a whole new series of studies¹⁴.

11.10 Variant "C" is also blamed for "actual and potential environmental damage"¹⁵. Chapter VIII above has responded to this contention showing that any deterioration of environmental conditions, *i.e.*, the "actual" damage on Hungarian territory, is self-imposed. On Slovak territory, Variant "C" has led to real benefits to the environment. Those benefits are available to Hungary, too.

SECTION 2. Hungary's Misconception as to the Effect of Variant "C" on the Boundary Between Slovakia and Hungary

11.11 In its 1992 Declaration, Hungary made the argument that the provisional solution contravenes the Danube Convention of 1948 and infringes the inviolability of Hungary's frontiers¹⁶. Slovakia addressed these assertions in its Memorial¹⁷. The Hungarian Memorial deals with this issue but fails to carry the matter forward¹⁸.

11.12 The Parties are agreed that the 1977 Treaty was not a boundary treaty even though it includes a boundary clause (Article 22)¹⁹. It dealt with the boundary issue insofar as that became necessary because of the intended system of weirs and bypass canal envisaged by the Treaty. Beyond rkm 1842 in the Dunakiliti-Hrušov headwater area there were to be minor adjustments to allow a straight line to be drawn. This would be effected, subsequent to the construction of the G/N System, by a separate treaty. This has yet to occur.

¹² The inaccuracy of this interpretation has been demonstrated at paras. 10.93-10.100, above. It is difficult to follow the logic of Hungary's argument at para. 7.18 that the general protection of nature obligation imposed on both parties by Article 19 of the 1977 Treaty is "particularly related" to Appendix 2 to the 1976 Agreement in the Joint Contractual Plan. This last, according to Hungary's interpretation, imposed environmental research obligations only on Czechoslovakia.

¹³ See, Chapter IV, above.

¹⁴ See, e.g., Slovak Memorial, Annex 36.

¹⁵ Ibid., para. 7.20.

¹⁶ Ibid., Vol. 4, Annex 82 (at pp. 179 and 181).

¹⁷ Slovak Memorial, paras. 7.48-7.62.

¹⁸ See, Hungarian Memorial, paras. 4.37-4.39 and 7.28-7.43.

¹⁹ See, para. 2.35, et seq., above.

11.13 Other than that, although the frontier was now characterised in somewhat different terms from those previously employed in the Peace Treaty of Trianon of 1920, the Peace Treaty of Paris of 1947 and the Treaty Concerning the Regime of State Frontiers of 1956, it remained the same. In particular, Article 22(1)(a) of the 1977 Treaty provided that the frontier between rkm 1840 and rkm 1811 would remain unchanged, and be defined by the centre line of the present main navigation channel of the Danube. This was to be so "subsequent to the construction of the System of Locks". That System envisaged a bypass canal on Czechoslovak territory.

11.14 The bypass canal, put into effect by Variant "C" in the face of Hungarian non-cooperation, thus clearly leaves the frontier unaffected, located still on the centre line of what had been the main navigation channel when the Treaty was agreed in 1977. This reality is stubbornly ignored by Hungary when it complains that from 1920 onwards the border line had lain with the main navigable channel²⁰. Hungary complains that Variant "C" substitutes a new artificial main navigable channel for the Danube, on Slovak territory. But this is merely to complain about what was agreed to by Hungary in 1977 - and has nothing whatever to do with the question of frontiers, because Article 22 clearly states that the frontier stayed where it had previously been.

11.15 It seems that Hungary wilfully seeks to manufacture a legal controversy, when there is none, in order to claim that Variant "C" fails to respect and protect the agreed boundary line. Hungary refers to "[t]he statement in Article 22(1)(a) of the 1977 Treaty that 'the position of that frontier shall be defined by the centre-line of the main navigation channel of the river'²¹. But Article 22(1)(a) does not so provide. It provides that the "frontier shall be defined by the centre line of the present main navigation channel"²² - and even when a bypass canal would have been built on Czechoslovak territory. And that is what has happened and it is, mystifyingly, only Hungary that doubts it.

11.16 Nor can Hungary manufacture a legal problem through seeking to find in Article 22 distinctions between minor changes and changes to the character of the Danube as a border river²³. Hungary contends that Czechoslovakia acted inconsistently with Article 22 of the 1977 Treaty because:

²⁰ Hungarian Memorial, para. 7.40.

²¹ Ibid., para. 7.37.

²² Emphasis added.

²³ See ibid., para. 7.31.

"First, its action on the border line was unilateral; second, Variant C shifted the main navigation route from the old bed of the Danube to a new channel, ten kilometres long, located exclusively on its territory²⁴."

And that, says Hungary, changed the character of the border in a way unauthorised by the 1977 Treaty²⁵.

11.17 As shown in Illus. No. CM-17, Variant "C" shifted the main navigation route not to "a new channel, ten kilometres long, located exclusively on its territory", but to a new channel, always envisaged under the Treaty as being exclusively in Czechoslovak territory, commencing ten kilometres upstream. The Treaty parties had, in effect, mutually agreed to dissociate henceforth the boundary and the new main channel. If this is a change in the character of the frontier, it is one that had been mutually decided by the parties - Article 22(1) of the 1977 Treaty specifically providing that the "Contracting Parties have ... agreed on ... changes in the character of the State frontier ...".

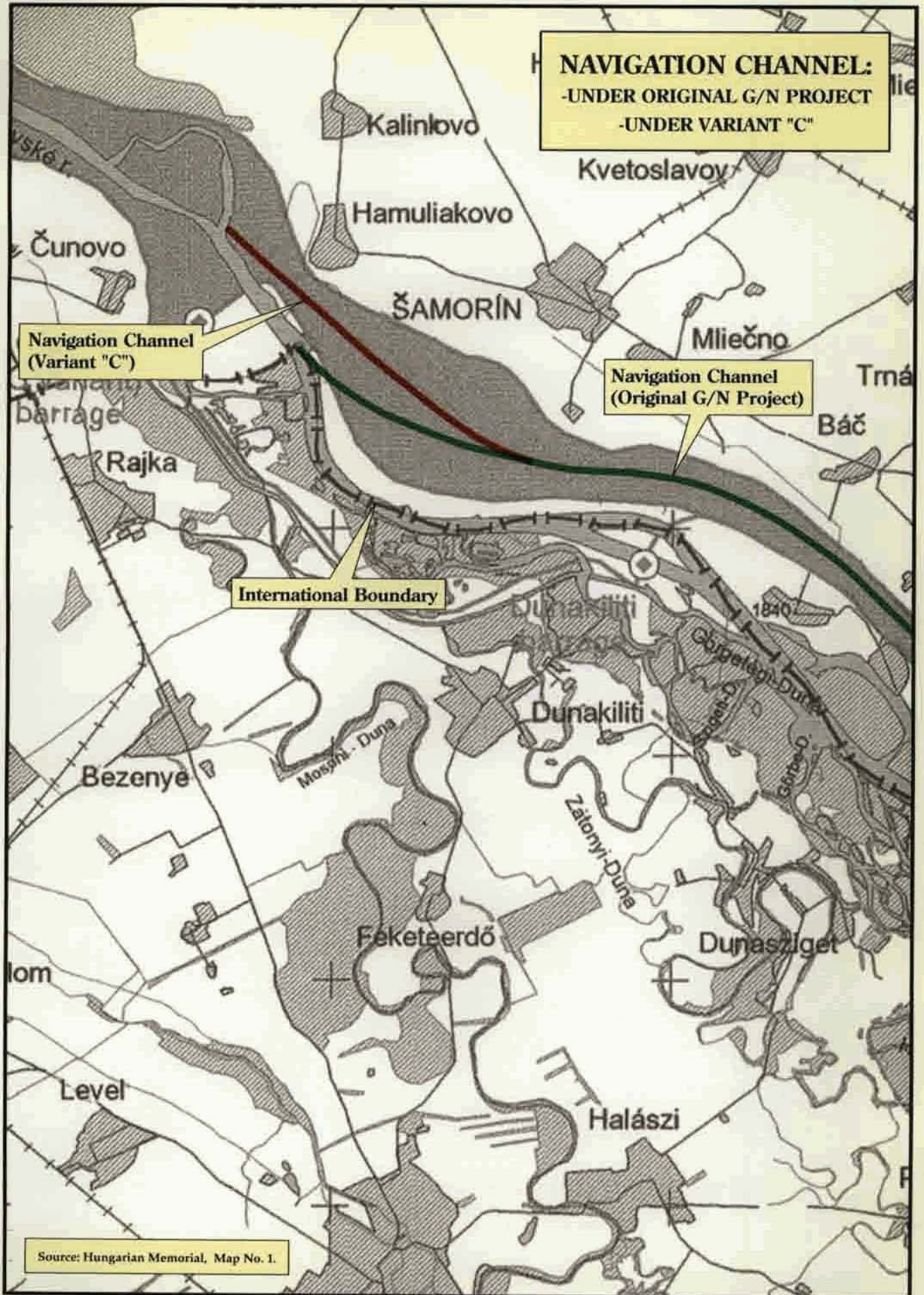
11.18 It follows that Hungary has lost any right to complain that Variant "C" implements the agreed dissociation. But the borderline itself has not been changed at all²⁶. Hungary's assertion that Czechoslovakia's "action on the borderline was unilateral" is thus devoid of any sensible meaning. In the first place, a bypass canal was an agreed provision under the 1977 Treaty, not a unilateral invention. The original Project envisaged that the navigation channel would remain on Czechoslovak territory even when it left the bypass and went into the reservoir. More particularly, though, there has been no "action on the borderline". It is impossible to understand how leaving a border exactly where it was, in accordance with a treaty provision, is unilateral action that fails to protect an agreed boundary line²⁷.

²⁴ Ibid.

²⁵ The claim is also that Czechoslovakia by Variant "C" breached Article 4(3) of the 1976 Boundary Waters Management Agreement which required that the parties give "a prior approval" to a "water management activity, which would result in a change in ... the character of the State border". Quoted at ibid., para. 7.35. But such consent was given by the 1977 Treaty in terms of the shift of the main navigational channel from the boundary river to the bypass canal. Variant "C" merely implements this shift.

²⁶ The small changes envisaged by Article 22 were never brought into operation. See, para. 11.12, above.

²⁷ Hungarian Memorial, paras. 7.28, et seq.



Specially prepared for presentation to the International Court of Justice.

SECTION 3. Variant C Does Not Contravene the Principles Governing the Equitable Use of International Watercourses

A. General

11.19 Hungary in its Memorial advances certain arguments based on the principle of equitable use of international watercourses²⁸. The principle of equitable use is said to go to quantity and to quality; Slovakia is said to be in violation of both aspects in regard to the diversion of the Danube under Variant "C".

11.20 Slovakia has in Chapter IX of this Counter-Memorial addressed considerations of environmental law generally. But the way in which Hungary formulates these arguments in respect of Variant "C" is remarkable and merits further attention.

11.21 First and foremost, as Slovakia has pointed out in its Memorial²⁹, the lawfulness of Variant "C" falls to be tested by reference to the 1977 Treaty. Unless the law relating to watercourses represents a peremptory norm with which the 1977 Treaty is incompatible, the principle of pacta sunt servanda requires the rights and obligations of the parties to be tested by reference to the 1977 Treaty.

11.22 The principle of equitable use of shared resources is not a later peremptory norm that overrides the 1977 Treaty. It is a principle that is wholly reflected in the Treaty. The equitable use of the Danube was determined contractually by the parties; and the agreed quantities of water that the parties would receive after the construction of the Project, and the mechanisms for ensuring water quality, are all integral elements of the Treaty regime. Hungary has dishonoured the Treaty obligations - obligations fully compatible with the contemporary principle of equitable use of shared resources - and then invokes the same principle of equitable use of shared resources to declare unlawful Slovakia's attempt to put the Treaty into operation so far as possible.

11.23 Nonetheless, Slovakia, responding to Hungary's 1992 Declaration in its Memorial, offered a systematic review of the customary international law on shared watercourses to show that Variant "C" was in fact in conformity with such law³⁰. Hungary, by contrast, carefully ignores the fact that the law of shared watercourses is an integral whole. It

²⁸ Ibid., paras. 7.69-7.82.

²⁹ Slovak Memorial, para. 7.41, et seq.

³⁰ Ibid., paras. 7.72-7.86.

treats the question of notification and consultation, and of harm, as if they are topics of international law separate from the topic of the equitable use of international watercourses.

11.24 But equitable use, harm, and consultation are not disparate sets of rules. They are component, balancing elements of the unitary topic of the international law of the non-navigational use of international watercourses. Hungary, however, ignores the unity of the law. By reciting odd phrases carefully picked for the purpose, norms relating to damage are dealt with in one part of its argument; norms relating to consultation and cooperation in another part; and norms on equitable use in yet another part. The essence of the customary rules is that all these elements form an integrated whole. Violation of the law of shared watercourses is not to be found by the recitation of snippets of resolutions under each of these three headings, avoiding the implications of the relationship of each of the legal elements to each other.

11.25 Insofar as Hungary is willing at all to perceive the law of international watercourses as other than a series of separate, unrelated rules, it seeks to avoid the consequential difficulties by asserting that the "no appreciable harm" principle has a primacy. The standard formulated by the International Law Commission in its draft articles adopted in 1994 on 2nd reading is that of "no significant harm". But in any event, it is clear from the accompanying commentary that this argument is not correct.

11.26 The extract cited of Professor McCaffrey's views does not support Hungary's interpretation³¹. Professor McCaffrey's comment that the

"...primacy of the 'no harm principle' means that the fundamental rights and obligations of States with regard to their uses of an international watercourse are more definite than they would be if governed in the first instance by the more flexible (and consequently less clear) rule of equitable utilisation"

rather affirms what is repeated in the Commentary to the adopted Articles, namely, that it was felt not sufficient for the questions of harm and damage to be addressed only indirectly through the provisions on equitable use. A specific and clear formulation was required³². But the formulation arrived at in Article 7 is not an absolute prohibition of appreciable harm. It is a due diligence obligation in relation to significant harm.

³¹ Hungarian Memorial, para. 7.79.

³² 1994 Report of the International Law Commission, A/49/10, p. 236.

B. The Duty Regarding Environmental Damage in the Context of International Watercourses

11.27 Hungary contends that "one of the basic norms of international law" is that States must:

"...ensure that activities within their jurisdiction or control do not cause damage to the environment of other states³³."

This principle is said to be formulated as a rule of international law in Principle 21 of the 1972 Stockholm Conference Declaration on the Human Environment. The same principle is said to be found in the Lake Lanoux Case of 1957, in the Helsinki Rules on the Uses of the Waters of International Rivers of 1966, in the resolution of the Institut de Droit International of 1972, in the Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 March 1992, and in the International Law Commission's Draft Articles on the Law of the Non-Navigational Uses of International Watercourses.

11.28 The principle is thus stated to be an obligation not to cause damage to the environment of other States, to be deduced as a "basic norm of international law" by selected snippets of diverse instruments (many of them addressing a wide variety of issues). This is not a serious deployment of the legal considerations relevant for the determination of the issues before the Court. In particular, it suggests the existence of an absolute prohibition of all damage; it ignores the existence of the 1977 Treaty³⁴, and the true character of Variant "C" as a limited implementation of that Treaty, and the relationship of the alleged rule of customary law to the Treaty entered into by the parties; and it simply presupposes the existence of damage caused by Variant "C".

11.29 But the mere assertion of damage and the proclamation of an alleged obligation not to cause damage to the environment of other States do not assist the Court in a serious analysis of the legality of Variant "C".

11.30 So far as damage is concerned, Hungary merely proclaims that "it is evident that the diversion of the Danube has caused, and risks causing, substantial environmental damage to Hungary"³⁵. Severe adverse changes in the water regime are cited,

³³ Hungarian Memorial, para. 7.45.

³⁴ The interpretation of the duty regarding environmental damage is incumbent upon the parties under the Treaty. See, paras. 2.27, et seq., and 9.67, et seq., above.

³⁵ Hungarian Memorial, para. 7.56.

although as Slovakia has shown this is not supported by any of the expert findings³⁶. Reference is made to "the introduction of polluting substances", though these are nowhere specified³⁷. And - in a technique frequently resorted to by Hungary - it is then suggested that the "extent of the damage may be manifest only in the future".

11.31 But there is, apparently, an absolute duty to prevent this unproven and hypothetical damage. It first needs to be said - as is readily acknowledged by serious environmental studies - that the various resolutions and principles emerging from the myriad of meetings and forums concerned with the environment comprise what is for the moment largely "soft law". In a passage that refers specifically to several of the instruments said by Hungary to evidence a "no damage fundamental norm", Birnie and Boyle prudently say:

"The 'soft law' approach allows states to tackle a problem collectively when they do not want too strictly to shackle their freedom of action. On environmental matters this might be either because of scientific evidence is not conclusive or complete but none the less a cautionary attitude is required, or because the economic costs are uncertain or overburdensome³⁸."

11.32 Principle 21 of the Stockholm Conference is an important principle directed at reminding States of the importance of respect for the environment of other States. Its application to particular circumstances remains to be defined in the specific case.

11.33 Much more relevant than this abstract statement of principle is the specific law on damage that has been developed in the context of international watercourses (a reality recognised in Recommendation 51 of the Action Plan of the Stockholm Conference). And of course the work of the International Law Commission, building on and elaborating the resolutions of the International Law Association and the Institut de Droit International, represents the most detailed and thorough analysis of the issues.

11.34 It is clear that, so far as international watercourses are concerned, there is no absolute prohibition of damage, nor even a total prohibition of "serious consequence"³⁹. The obligation is more complex:

³⁶ See, paras. 7.51, *et seq.*, and 8.21, *et seq.*, above.

³⁷ The Hungarian Memorial refers back to para. 6.16 for an answer, but none is to be found there.

³⁸ See, P. Birnie and A. Boyle, International Law and the Environment, Clarendon Press, Oxford, 1992, at p. 28.

³⁹ Trail Smelter Award (1935), 3 United Nations Reports of International Arbitral Awards, p. 1911, at p. 1965.

"Watercourse states shall exercise due diligence to utilise an international watercourse in such a way as not to cause significant harm to other watercourse states⁴⁰."

11.35 In the context of international watercourses the issue of damage does not exist in isolation. It is one of the elements in an integrated approach, where there are multiple and sometimes conflicting legitimate uses by the watercourse States. As the Commentary of the International Law Commission notes:

"...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 criteria in balancing the interests at stake."

11.36 Slovakia makes the following observations. First, Hungary and Czechoslovakia had achieved agreement on equitable and reasonable utilisation, inter se, through the provisions of the 1977 Treaty. Second, notwithstanding the importance of those equitable uses to Czechoslovakia (and to Hungary) - to provide energy, to control flooding, to improve navigation - and notwithstanding the massive expenditure directed to their attainment, Hungary had made their attainment impossible. Third, the partial attainment of some of the benefits through Variant "C" remains an equitable use of the watercourse by Slovakia. Fourth, that factor would be taken into consideration even if Variant "C" caused significant harm.

11.37 But there is no significant harm caused by Variant "C". On the contrary, it has produced benefits, as described, inter alia, in Chapter VIII, above. Further, Slovakia in any event also meets the "due diligence" test in relation to any such harm, because:

"It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur. It is an obligation of conduct and not of result. What the obligation entails is that a watercourse state whose use causes significant harm can be deemed to have breached its obligation 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...⁴¹."

⁴⁰ The Law of Non-Navigational Uses of International Watercourses, Article 7(1) in 1994 Report of the International Law Commission, A/49/10, p. 236.

⁴¹ Ibid., Para. 4 of Commentary to Article 7.

The vast number of technical studies commissioned by Czechoslovakia before the introduction of Variant "C"; the alteration of specifications in the light of such studies; the agreement to appraisal by the EC experts; and the agreement of Czechoslovakia to be bound by their findings - all attest to the full meeting by Czechoslovakia (and then Slovakia) of the due diligence test.

11.38 There is a further point: the "due diligence" test is said by the International Law Commission to be deduced from international watercourse treaties. These treaties expect prevention of damage "as far as practicable"⁴², and for "all practical steps" to be taken, or "all appropriate measures" to be taken. This last is in fact the test of the 1992 Convention on the protection and use of transboundary watercourses and international lakes⁴³ - an instrument cited by Hungary⁴⁴. Slovakia is not a party to this treaty (which is not yet in force); but it is a party, along with Hungary, to the 1977 Treaty, which contains its own provisions for resolving any environmental considerations⁴⁵. The International Law Commission Articles are provisions to guide States in the absence of treaties, or provisions recommended to form the basis of watercourse treaties. The 1977 Treaty and the related instruments have their own mechanisms to minimise damage to the environment. Compliance with these procedures is the guarantee of due diligence.

11.39 Hungary misrepresents the contemporary international law on international watercourses, relying on Article V(2)(K) of the Helsinki Rules, to the effect that what is a reasonable and equitable share of the resource will depend, *inter alia*, upon "the degree to which the needs of a basin state may be satisfied without causing substantial injury to a co-basin state". But Article 6 of the International Law Commission's articles on factors relevant to equitable and reasonable utilisation contains no such provision. This is exactly because a separate article on harm - Article 7 - has now been drafted, with its different emphasis on a due diligence test in relation to significant harm.

11.40 Further, while Article 6 lists indicative, non-exhaustive factors, it does not preclude the taking into account also of relevant circumstances. The Commentary to Article 6 makes clear that "what is an equitable and reasonable utilisation in a specific case "will therefore depend on a weighing of all relevant factors and circumstances"⁴⁶. The

⁴² See, the London Treaty, Article 4-(10), UN Publication No. 163, V. 4.

⁴³ Article 2(12). 31 International Legal Materials (1992), p. 1312.

⁴⁴ Hungarian Memorial, para. 7.51.

⁴⁵ As Hungary itself acknowledges; see, para. 2.27, *et seq.*, above.

⁴⁶ 1994 Report of the International Law Commission, A/49/10, p. 231.

circumstance that Slovakia, having fulfilled its contractual obligations for the shared use of the Danube, finds itself precluded from benefit because of Hungary's conduct, is a circumstance to be taken into account in any assessment of Variant "C" by reference to concepts of equitable use.

11.41 The Commentary also describes as "instructive"⁴⁷ the finding in the Donauversinkung Case that:

"The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other⁴⁸."

Slovakia believes this to be a fortiori when any "advantage" is in fact merely the partial implementation of what the parties had previously agreed, the benefits of which are available to Hungary also if it chooses to avail itself of them.

11.42 The no significant harm obligation is formulated in Article 7 of the International Law Commission Draft articles as a due diligence obligation, and Slovakia would only be in breach of it if its use of the waters was not equitable and if it intentionally or negligently caused significant harm to Hungary in that use. Variant "C", being a partial implementation of what had been agreed by the parties in the 1977 Treaty, is definitionally an equitable use. There has been no intentional or negligent causing of significant harm to Hungary. There has been no intention on Czechoslovakia's (then Slovakia's) part to harm the interests of Hungary - the intention has been to mitigate the harm done by Hungary's failure to implement its treaty obligations. Instead it is Hungary that has caused harm to itself by refusing to permit the recharge of the branch system on its side of the Danube. Nor has there been a negligent causing of significant harm. The scientific care taken in the preparation and implementation of Variant "C" has been demonstrated by Slovakia elsewhere⁴⁹.

11.43 Nor is it true, as Hungary claims⁵⁰ that Czechoslovakia ignored the environmental impact of Variant "C" on Hungary, even if consideration was given to the impact upon Czechoslovakia. No discrimination has occurred in this regard. The problem is

⁴⁷ Ibid., at p. 242.

⁴⁸ Württemberg and Prussia v. Baden, 3 Annual Digest of Public International Law Cases (1927-1928), p. 128, at p. 131.

⁴⁹ See, Chapters VII and VIII, above, and Slovak Memorial, Chapter V.

⁵⁰ Hungarian Memorial, paras. 7.66-7.68.

not discrimination against Hungary in the implementation of Variant "C". In fact the entire area of the Mosoni Danube has already benefited. The problem is rather Hungary's refusal to proceed with necessary investments for optimum use of water flow, because it would rather suffer certain damage than be seen to rely on the G/N Project or even the more limited Variant "C".

11.44 Any obligations of conduct are thus met. But in any event, even if the obligation was one of result, there has been no significant harm done to Hungary.

C. Variant "C" Does Not Violate Legal Principles Relating to Shared Resources

11.45 Hungary states that the quality of the shared water resource must not be impaired. Leaving aside the fact that this is an oversimplified statement of the interlocking rights and obligations of watercourse States to participate in, develop and protect their shared resource, by reference especially to draft Articles 5-8 adopted by the International Law Commission, it must once more be said that Hungary has failed to show such impairment. Hungary satisfies itself with stating that the water resource is not to be "polluted or its characteristics changed in such a way that users cannot benefit from it"⁵¹ - but does not provide any evidence that either of these events have occurred. As so often, Hungary then falls back on speculating about the future - the harm will apparently only become apparent at some time in the future:

"There is no doubt that the diversion of the Danube caused substantial injury to Hungary, the longer term dimensions of which will manifest themselves only over a number of years"⁵².

Hungary's technique here is to couple unsubstantiated assertion about the present with equally unsubstantiated explanations that the evidence of damage will be revealed in the future.

11.46 Hungary also claims violation of the principle of equitable use of shared resources through what it terms a "dramatic decrease" in the quantity of Danube water it receives since the construction of Variant "C". But this is simply to give a falsified impression of the situation. Downstream of the Variant "C" dam structures, the Danube becomes a boundary river, it does not flow solely into Hungary. It is not suddenly the case that Slovakia has the lion's share of the Danube's water and Hungary an unjust trickle. The parties to the 1977 Treaty agreed that the major part of the Danube's flow would go into the bypass canal for

⁵¹ Ibid., para. 7.72.

⁵² Ibid. para. 7.81.

a limited distance. This was their decision on how to use equitably the Danube's resources. They agreed that 50 m³/s (subsequently increased to 50-200 m³/s) should flow down the old channel. Slovakia now directs a greater flow into the old channel i.e., greater than the mutually agreed allocation of the shared resource. Hungary's claim is ill-founded⁵³.

D. The Duty to Consult and Cooperate in the Context of International Watercourses

11.47 This duty under general international law has been examined above in Chapter IX. Even were a duty to consult and cooperate to exist other than by reference to the duties specified under the 1977 Treaty, no issue arises here. As fully discussed above in Chapter VI, this is because Hungary has simply refused to participate in those talks concerning Variant "C" in which a detailed examination could have taken place. A duty upon one State to consult and cooperate can only be breached if the other State does not itself refuse to know.

SECTION 4. Hungary's Misconception Concerning Permanent Sovereignty over Natural Resources

11.48 Hungary invokes the notion of permanent sovereignty over natural resources to support its claim that Variant "C" is unlawful under international law⁵⁴.

11.49 Hungary never explains how the Danube constitutes simultaneously a shared natural resource (in respect of which one corpus of international law rules apply) and a natural resource over which Hungary has sovereignty (and in respect of which a separate corpus of rules would apply). Nor can the puzzle be explained by reference to "internal renewable water resources"⁵⁵ as the only such internal water resources in issue in this case are those that constitute part of the international watercourse system of the Danube. Quite simply, the concept of permanent sovereignty over natural resources has no useful relevance in this case: insofar as matters are not in any event fully determined by reference to the 1977 Treaty, it is the principles relating to shared resources that apply.

⁵³ Hungary also claims that Czechoslovakia has dredged excess amounts of gravel from the Danube riverbed (in Czechoslovakia) and that this has adversely affected the Danube's hydraulic system in Hungary. In fact, it is Hungary's excessive dredging of gravel near Budapest that has had the real negative consequences on the Danube as a water resource. See, paras. 7.70-7.71, above.

⁵⁴ Hungarian Memorial, paras. 7.83-7.87.

⁵⁵ Ibid., para. 7.85.

11.50 Hungary refers to the great importance for it of both the quantity and quality of the water. These are indeed important matters for both Parties. However, Hungary apparently seeks to draw some superior entitlement in relation to water, partly because of its "economic dependence and long-term reliance" on water, and partly through the doctrine of permanent sovereignty over natural resources.

11.51 As to the former, Hungary invokes "rights resulting" and "legal consequences" arising from this economic dependence and long-term reliance, citing the Fisheries Jurisdiction Cases. It is uncertain just what these "rights" and "legal consequences" are said to be. In the Fisheries Jurisdiction Cases the Court spoke of preferential rights of a coastal state being a non-static concept as a function of exceptional dependency⁵⁶. Any such claim by Hungary (insofar as that is being made for preferential water rights) is unacceptable, for several reasons. First, Hungary and Slovakia are not in an analogous position to the United Kingdom and Iceland - Slovakia is not a "long distance" State, but an immediate neighbour. Second, Hungary has not shown at all the "exceptional dependence", in contradistinction to Slovakia, on the resource. Third, as the Court itself pointed out "preferential rights ... are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other states...⁵⁷". Finally, the Parties have agreed by treaty as to what the arrangements are to be between them. Those arrangements contain no trace of preferential water rights for Hungary.

11.52 The references to Articles 1(2) of the two International Covenants on Human Rights and to General Assembly Resolution 3281 carry matters no further forward. The reality is that these resolutions were directed to problems that had arisen regarding resources within the sole jurisdiction of one State, where overseas capital and influence had played a role in their exploitation. General Assembly Resolution 1803(XVII) - the landmark point of departure for the concept of permanent sovereignty over natural resources - makes no reference at all to shared natural resources. Nor indeed does General Assembly Resolution 3201(S-VI), the Declaration on the Establishment of a New International Economic Order. Its paragraphs on permanent sovereignty speak of its free and full exercise of the inalienable right to exercise effective control over the resource and to exploit it with means suitable to its own situation (paragraph 4 (e)). It is clearly not concerned with shared watercourse rights at all.

11.53 The first reference to a shared natural resource in the series of resolutions on permanent sovereignty in fact appears in General Assembly Resolution

⁵⁶ Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3, at p. 30.

⁵⁷ Ibid., p. 31.

3281(XXIX), the Charter of Economic Rights and Duties of States. And the mention of shared natural resources is immediately followed by reference not to the detailed rules that comprise the concept of permanent sovereignty over natural resources, but to their own, very different provision (in Article 3):

"In the exploitation of natural resources shared by two or more countries, each state must cooperate on the basis of a system of information and prior consultations to achieve optimum use of such resources without causing damage to the legitimate interests of others."

This is exactly what the 1977 Treaty provided for and Variant "C" at least partially realised. And, when it speaks of shared resources, General Assembly Resolution 3281(XXIX) does not use the language of sovereignty or preferential rights at all, but the language of agreement and regard for the interests of others.

SECTION 5. The Lawfulness of Variant "C" Does Not Depend on its Being a Countermeasure Even Though Variant "C" Would Qualify As Such

11.54 In its Memorial, Hungary states: "The unilateral diversion of the Danube by Czechoslovakia cannot be justified as a countermeasure, precluding the wrongfulness of a breach of international law⁵⁸." But the construction of Variant "C" entails no "breach of international law" and Slovakia has no need to preclude wrongfulness by reliance on countermeasures and has never done so.

11.55 As is clear from Slovakia's Memorial, the temporary solution adopted by Slovakia was to give such effect as was possible to the 1977 Treaty, on its own territory, in the face of Hungary's abandonment of its treaty obligations in violation of the principle of pacta sunt servanda. Far from this being a measure whose wrongfulness has to be precluded by the invocation of countermeasures, it represents the minimum achievement of what Slovakia is entitled to under the 1977 Treaty; and conflicts with no norms of international law. The 1977 Treaty still being in effect, Slovakia is entitled to perform its stipulations. And Variant "C" also serves to mitigate the enormous losses falling upon Slovakia due to Hungary's breaches of the 1977 Treaty.

11.56 Variant "C" achieves, as best it can in the face of Hungary's Treaty violations, what had been agreed by both parties in 1977. It does so by action within Slovak territory (i) which protects the rights of both parties under the Treaty, (ii) which is

⁵⁸

Hungarian Memorial, para. 7.88.

environmentally responsible and (iii) which violates no other obligations of international law incumbent upon Slovakia.

11.57 Although they succeed in bringing into effect, in limited form, what the Treaty parties had agreed to, the mechanisms of Variant "C" are nonetheless reversible should Hungary decide itself to comply with its obligations under the 1977 Treaty. And not only are Hungary's allegations of damage - present or future - wholly unsubstantiated at the scientific level, but rather Hungary has in fact received substantial benefits. For example, this is already evident in the Mosoni Danube, which flows solely on Hungarian territory and now receives an assured flow of 20 m³/s whereas, prior to Variant "C"'s implementation it was without flow for much of the year. And perhaps more important, Szigetköz is now for the first time safe from the threat of devastating floods.

11.58 But even if Variant "C" did represent an illegal act under the Treaty (which it does not), it could still be justified as a countermeasure precluding wrongfulness, by reference to the criteria enunciated by Hungary⁵⁹.

11.59 Hungary first refers to the need for a prior illicit act⁶⁰. Hungary's breaches of its treaty obligations - fully comprising the "prior illicit act" required for reliance on countermeasures - are specified in detail in Chapter VI of Slovakia's Memorial and have been considered again in Chapters V and VI above. Hungary's justifications of its conduct, offered in its 1992 Declaration, are refuted in detail in Chapter VIII of Slovakia's Memorial. The further attempt at justification in Chapter 9 of Hungary's Memorial is replied to in Chapter X of this Counter-Memorial. Slovakia thus limits itself here to matters referred to by Hungary in Section D of Chapter 7 of its Memorial in asserting an absence of prior illicit act.

11.60 Hungary contends that "prior to the unilateral decision" concerning Variant "C" - not indicating what decision is referred to - "Hungary committed no wrongful act", and attempts to establish the legality of its conduct by reference to an "intended and

⁵⁹ Slovakia expressed its own views on the legal requirements of countermeasures at paras. 8.102-8.105 of its Memorial, making reference to certain procedural matters. The procedural element of countermeasures has not finally been resolved by the International Law Commission and is still the subject of debate in the Commission. See, for example, O. Schachter, "Dispute Settlement and Countermeasures in the International Law Commission" 88 American Journal of International Law (1994), 471. It is noted here that Czechoslovakia attempted to obtain third party involvement in resolving the dispute, and specifically in considering Variant "C" and other alternatives, through a trilateral commission, whose appointment was blocked by Hungary. See, para. 5.75, *et seq.*, above. The hope of Czechoslovakia was that Hungary would eventually perform its treaty obligations - Czechoslovakia was thus interested above all in the technical justification of Variant "C", through its assessment by a trilateral commission on which the EC was well disposed to serve.

⁶⁰ Hungarian Memorial, paras. 7.90-7.98.

clearly manifested ... will to achieve an agreed solution based on good faith negotiations"⁶¹. It has been demonstrated in detail in Chapters V and VI above - confirming the same conclusions set out in the Slovak Memorial but in the light of the additional evidence produced with Hungary's Memorial - how Hungary's conduct after the dispute developed was directly contrary to this standard of conduct proposed by Hungary in its Memorial, and that Hungary's singleminded purpose almost from the start was the abandonment of the G/N Project for economic (and subsequently political) reasons.

11.61 In asserting the absence of a prior illegal act that would have justified countermeasures, Hungary attempts to rely on Article 27 of the 1977 Treaty, distorting completely the clear meaning of the text of this Article, as has been fully discussed above in Chapter II⁶².

11.62 Hungary's refusal to allow a tripartite commission (to include EC experts) to examine environmental problems that Hungary contended would be created by Variant "C", has been described above and in the Slovak Memorial. Nor was it the case, as Hungary's Memorial contends, that Hungary was undertaking repeatedly to "arrange meaningful negotiations" while Czechoslovakia sought rather to proceed with the Gabčíkovo works "as rapidly as possible, in other words to reach a point of no return"⁶³. Czechoslovakia proceeded with its work under the Treaty in accordance with the timetable established for the Project, no more and no less. In a rapid succession of unilateral acts Hungary suspended and then terminated all work on the Project and then limited the scope of any negotiation with Czechoslovakia to the termination of the Treaty.

11.63 Hungary's acts starting in May 1989 were clearly prior illicit acts that could have justified countermeasures. Particularly in its Chapter 7, the Hungarian Memorial gives an astonishing account of Hungary's actions, beginning with its unilateral suspension of work at Nagymaros on 13 May 1989. The 13 May suspension was not a fait accompli, says Hungary, but only one of the "selective interim measures over some of the works taking place under its authority, for a period of a few months"⁶⁴. These "selective measures" are claimed to have been "limited in both scope and time", and the Hungarian Memorial goes on to make this truly remarkable statement:

⁶¹ Ibid., para. 7.92. See, also, para. 5.03, above.

⁶² See, para. 2.22, et seq., above.

⁶³ Hungarian Memorial, para. 7.96.

⁶⁴ Ibid., para. 7.94.

"Provisional in character, they were aimed at avoiding any irreversible damage to drinking-water resources or the environment, while, at the same time, facilitating conditions for negotiating revisions of the 1977 Treaty⁶⁵."

There was nothing provisional about the Hungarian Resolution of 27 October 1989 unilaterally abandoning construction work at Nagymaros - or the unilateral abandonment of all work on the Project by mid-June 1990 and the cancellation of all contracts. The letter of Hungary's Prime Minister of 10 January 1990 terminating the negotiations that had started in July 1989 concerning environmental guarantees and possible Treaty revisions was hardly an act "facilitating conditions for negotiating revisions of the 1977 Treaty". And Hungary had provided absolutely no evidence of "irreversible damage to drinking water resources or the environment"⁶⁶.

11.64 All the unilateral acts of Hungary that successively suspended and terminated the carrying out of Hungary's obligations under the 1977 Treaty were illicit acts. They occurred prior to even the approval of financial and logistical planning for Variant "C" by the Czechoslovak Government on 25 July 1991. Hungary's final illicit act - its purported unilateral termination of the Treaty itself on 19 May 1992 - occurred five months before the damming of the Danube by Czechoslovakia, which was the first action taken under Variant "C" that affected the flow of the Danube and which Hungary contends at the beginning of Chapter 7 constituted the unlawfulness of Variant "C".

11.65 Hungary insists that the financial damage done to Slovakia does not constitute a prior illicit act, because it "was always prepared to compensate for costs caused by the alteration of the Barrage System"⁶⁷. The diplomatic history tells a different story. At one moment Hungary states that the termination of the 1977 Treaty requires an "account of work properly done"⁶⁸ - but quickly adds that this has nothing to do with any issue of wrongfulness⁶⁹. In 1989, Hungary had offered that if Czechoslovakia would agree to abandoning Nagymaros (notwithstanding the provisions of the 1977 Treaty), then there could

⁶⁵ Ibid. The account set out in para. 7.95 concerning the intervention of EC Commissioner Andriessen is entirely inaccurate as shown in Chapter VI, above. See, para. 6.17, et seq., above.

⁶⁶ In February 1990, Hungary received the Bechtel report, which failed to find any threat to the quality of drinking water - a fact that Hungary kept secret. Surely to continue to maintain their position that the Project posed a serious threat to drinking water, and not to disclose to Czechoslovakia the contrary view set out in the Bechtel report, was conduct entirely inconsistent with the standard of good faith that Hungary claims to have met in these negotiations.

⁶⁷ Hungarian Memorial, para. 7.97.

⁶⁸ Ibid., para. 11.09.

⁶⁹ Ibid., para. 11.09.

be agreement "upon allocating the losses of the Project"⁷⁰. This is hardly compensation by Hungary for its own defaults as envisaged in the 1977 Treaty. And on 1 September 1989 Hungary refused compensation for suspension unless Czechoslovakia engaged in negotiations for treaty revision⁷¹. In October 1989, Prime Minister Németh was insisting that the suspension was "strictly lawful" and that Czechoslovakia's claims for compensation had no basis⁷².

11.66 It will be noticed also that the Hungarian Parliamentary Resolution of 16 April 1991, restricting the mandate of the Government in its negotiations with Czechoslovakia to the termination of the 1977 Treaty, makes no mention whatever of the payment of compensation⁷³. The evidence shows that the most that Hungary ever had in view was a mutual bearing of "losses" from termination of the Project, not a payment of compensation by itself for loss and damage caused by its non-performance and purported termination. Indeed, the draft treaty it proposed on 22 April 1991 to replace the 1977 Treaty specified:

"Lost profits do not constitute damages. Losses shall be borne by the State parties equally. The State Party whose losses exceed one half of the total amount is entitled to reimbursement of the difference"⁷⁴.

Thus, it is totally misleading to speak of Czechoslovakia implementing Variant "C" "while negotiations over compensation were continuing"⁷⁵. There were no such negotiations taking place.

11.67 All of these reasons - the failure scientifically to substantiate the environmental allegations; the rejection of impartial scientific analysis of the allegations; the preference for media manipulation to reliance on scientific analysis; the failure to address the possibility of ameliorations within the mechanism of Article 27 of the Treaty; the insistence on suspension of works and then termination of the Treaty as a precondition to any substantive talk on environmental issues - all of them attested to the reality that Hungary neither intended nor "manifested its will to achieve an agreed solution based on good faith negotiations"⁷⁶.

⁷⁰ Ibid., para. 3.96.

⁷¹ Ibid., para. 3.89.

⁷² Ibid., para. 3.93.

⁷³ Ibid., para. 3.121.

⁷⁴ Ibid., para. 3.126. It is perhaps not surprising that Hungary was not willing to countenance compensation, given its complaints of economic hardship (before it became useful to rely instead on alleged environmental considerations).

⁷⁵ Ibid. para. 7.98.

⁷⁶ Ibid., para. 7.92.

Taken together with the refusal to countenance compensation, there clearly existed prior illegal acts by Hungary that would have entitled Czechoslovakia to recourse to countermeasures, had it needed to excuse an otherwise illegal act.

11.68 Hungary suggests that, quite apart from the absence of a prior illicit act, Variant "C" would have failed as a countermeasure. Variant "C", in Hungary's view, "cannot have been the appropriate response to the cautious, provisional and partial suspension of works decided by Hungary during the spring of 1989"⁷⁷. But setting aside for the moment this misrepresentation of the events of the spring of 1989, Variant "C" was only being studied by Czechoslovakia along with other variants starting in July 1989. No decision was taken as to Variant "C" until 25 July 1991 - and then only to proceed with financial and logistical planning. By then Hungary's actions in respect to the Project were hardly "cautious", "provisional", or "partial". Hungary had abandoned the Project. Variant "C" was not put into operation until 24 October 1992 - six months after Hungary's termination announcement and after three years of postponement of the damming of the Danube. This act by Czechoslovakia was surely "appropriate". It was the only means of utilising the Gabčíkovo step and the bypass canal which it had constructed at great cost.

11.69 Moreover, Variant "C" by definition also met the countermeasures requirement of proportionality - because it was no more than an attempt to bring the Treaty into partial operation. As Hungary itself notes in its Memorial⁷⁸, Czechoslovakia described the intended measures as the taking of "such actions on the sovereign territory of the CSFR which will ensure the amount of water for the Gabčíkovo Barrage according to the Treaty of 16 September 1977". To try to put a treaty at least partially into effect cannot seriously be described as a disproportionate response to the violation that prevented the treaty objectives from being effected in the first place.

11.70 Variant "C", which is nothing more than a partial realisation of what had been agreed to by the parties, could not conceivably violate the principle of proportionality in the Naulilaa Case and affirmed in the International Law Commission Reports on State Responsibility and in the Case Concerning Military and Paramilitary Activities in and against Nicaragua⁷⁹. In none of these was it suggested that a countermeasure exactly tailored to give

⁷⁷ Ibid., para. 7.91.

⁷⁸ Ibid., para. 7.102.

⁷⁹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.

partial effect to a violated treaty obligation would be a disproportionate response to a breach of such an obligation.

11.71 Nor is the Hungarian argument for disproportionality advanced by asserting that Variant "C" "has and will produce a very serious impact in the short, medium and long term, to the aquifer and ground water, surface water, soil and the entire environment balance of the Szigetköz region"⁸⁰. Slovakia has shown in its Memorial that such imprecise and sweeping claims are based on no objective scientific studies⁸¹; and in the present Counter-Memorial Slovakia shows to the Court that expert monitoring has revealed no such serious impact to date, nor predicted such serious impacts for the future⁸².

11.72 Thus to invoke "the right of life itself", and the "serious degradation of water resources" as "an attack on the most fundamental human right"⁸³ is simply to abuse the vocabulary of human rights and to debase the significance of the right to life.

11.73 Hungary finally concludes that Variant "C" fails as a countermeasure because it unilaterally modifies the agreed character of the borderline. Slovakia has fully addressed this matter at paragraphs 7.51-7.62 of its Memorial and at paragraph 2.39 above.

11.74 Slovakia reiterates that Variant "C" is not an otherwise illegal act, the wrongfulness of which it must seek to preclude. But even if it fell to be characterised as a countermeasure, it meets the test that Hungary advances.

SECTION 6. Conclusions

11.75 Variant "C" was Czechoslovakia's legitimate response to Hungary's unlawful acts, not vice versa:

- Czechoslovakia's initial consideration of Variant "C" (together with other alternative variants) did not occur until after Hungary's unilateral suspension of work at Nagymaros and at Dunakiliti; hence these initial breaches of the 1977 Treaty by Hungary could in no sense have been in response to Variant "C";

⁸⁰ Hungarian Memorial, para. 7.113.

⁸¹ Slovak Memorial, para. 5.52, et seq.

⁸² Sec., paras. 7.62 and 8.21, et seq., above.

⁸³ Hungarian Memorial, para. 7.114.

- By the time the first construction activity began on Variant "C" (in November 1991), the Hungarian Government had terminated all works on the Project (by mid-1990), had resolved to terminate the 1977 Treaty (20 December 1990), had limited the negotiations with Czechoslovakia to the subject of the termination of the Treaty, and had unilaterally prevented the damming of the Danube under the agreed Treaty schedule for a third year;
- When on 19 May 1992 Hungary made its termination announcement, the flow of the Danube had not yet been affected; the actual damming of the Danube, affecting its flow for the first time, occurred five months later, on 24 October 1992;
- The damming of the Danube on 24 October 1992 permitted the Gabčíkovo section of the Project to go into operation without the Nagymaros section, the functions carried out under Variant "C" being those agreed under the Treaty Project. The channeling of Danube waters into the bypass canal was not illegal, having always been envisaged under the Treaty and, in any event, the Danube continues to flow also in its old riverbed.

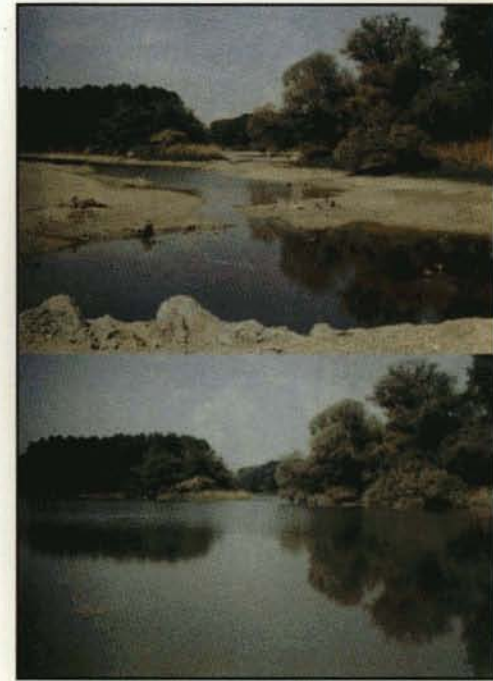
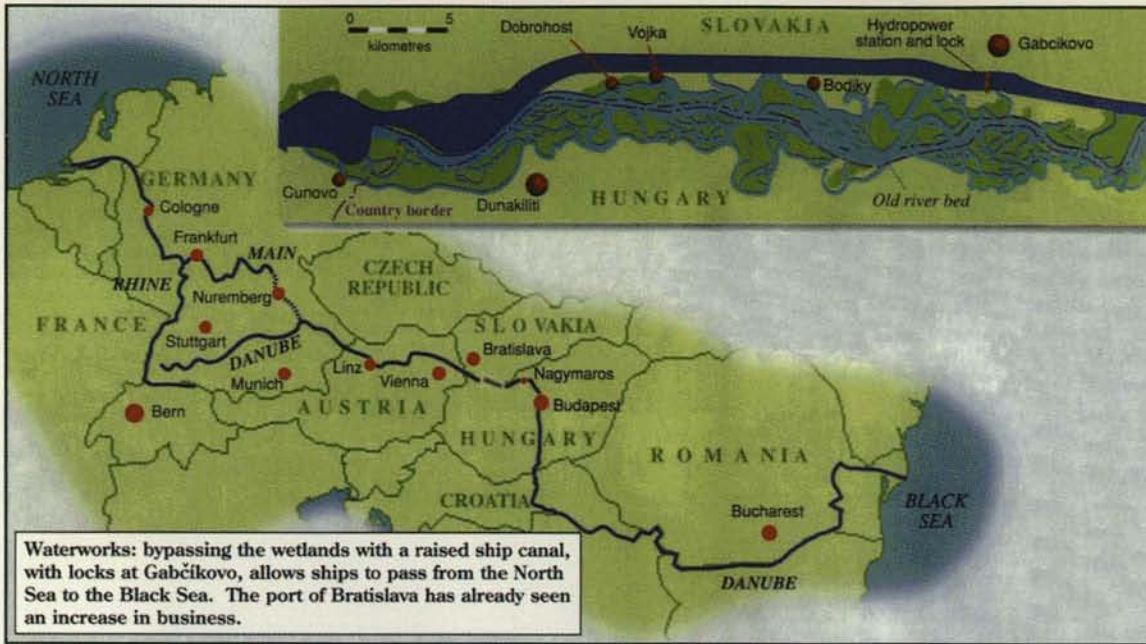
11.76 Variant "C" has absolutely no impact on the position of the boundary between Slovakia and Hungary and, insofar as it effects a change in the character of the boundary, this had been specifically agreed to in the 1977 Treaty.

11.77 The 1977 Treaty constitutes the practical application by Czechoslovakia and Hungary of the principle of equitable use of shared resources. The approximate application of the Treaty by means of Variant "C" remains an equitable use of the Danube and, moreover, there is no significant harm caused by Variant "C".

11.78 Hungary's arguments derived from the concept of permanent sovereignty over natural resources are not relevant to this case, which relates to the development of a shared resource.

11.79 Because Variant "C" is not a breach under international law, Slovakia did not in its Memorial seek to preclude the wrongfulness of any breach by reference to countermeasures. However, by application of the criteria of a countermeasure as enunciated

by Hungary in its Memorial, Variant "C" could be presented as a justified countermeasure to Hungary's illegal acts.



Before and after: river branches that used to be empty for up to 11 months of the year are now permanently filled with water.

Source: *New Scientist*, 17 Sept. 1994. Captions taken from magazine.

PART V

**DEFECTS IN HUNGARY'S ANALYSIS OF THE LEGAL CONSEQUENCES
OF THE DISPUTE**

**CHAPTER XII. THE LEGAL CONSEQUENCES OF THE CONDUCT OF THE
PARTIES**

12.01 The widely-divergent views of the Parties as to the legal consequences of their conduct stem from their totally different analyses of events and, in particular, their opinions on whether Slovakia is a successor State in relation to the 1977 Treaty. Hungary's rejection of Slovakia as a successor State has forced it into a sort of "acrobatic" legal argument in place of straightforward statements of legal principle and reliance on the legal obligations normally assumed by a successor State. Thus, instead of simply arguing that Slovakia has assumed the obligations of Czechoslovakia under the 1977 Treaty, Hungary is compelled to argue that Slovakia "adopted" the breach (Variant "C") by Czechoslovakia, that Slovakia has secondary - but not primary - obligations and that title to property passes under the rules of inheritance of State property rather than succession to treaty rights. For this reason, a comparison of the views of the two Parties, point by point, becomes almost impossible. A clearer picture will emerge if the two views are set out separately.

SECTION 1. The Republic of Hungary's View of Those Consequences

12.02 Hungary's whole perception of events is based upon four premises.

- (i) That the 1977 Treaty was lawfully terminated by Hungary on 19 May 1992.
- (ii) That until 31 December 1992 - the date of Czechoslovakia's dissolution - any responsibility rested entirely with Czechoslovakia.
- (iii) That Slovakia was neither a Party to the 1977 Treaty, nor a successor to Czechoslovakia in respect of any rights and obligations under the Treaty.
- (iv) That, accordingly, the liabilities of Slovakia arise not from the Treaty but from the fact that Slovakia chose to "adopt" and continue the breach of international law perpetrated by Czechoslovakia - that is the construction and operation of Variant "C" - and Hungary therefore

seeks remedies against Slovakia in respect of this quite separate act of "adoption".

12.03 It will be immediately obvious that Hungary's primary aim is to isolate Slovakia from the 1977 Treaty. For if Slovakia has neither rights nor obligations under the Treaty, it follows - at least in Hungary's view - that Slovakia is not entitled to charge Hungary with any breach of the Treaty, nor to justify Variant "C" as the best available means of implementing the Treaty in the face of a fundamental breach by Hungary. The reasoning is fundamentally flawed. As Chapter X has demonstrated, the purported termination of the Treaty by Hungary was illegal, and without effect on the rights of Czechoslovakia. Moreover, as Chapter III has shown, Slovakia is in law the successor to Czechoslovakia in respect of the 1977 Treaty, and fully entitled to invoke whatever rights, claims or remedies Czechoslovakia could itself have invoked had the federation of the Czech and Slovak republics continued.

12.04 Hungary's characterisation of events leads Hungary to postulate two main categories of "claims".

A. Claims Consequent Upon Termination of the Treaty

12.05 Proceeding from its assumption that its termination of the Treaty was lawful, Hungary notes that termination does not affect rights created prior to termination by reason of the execution of the Treaty. Article 70(1)(b) of the Vienna Convention on the Law of Treaties provides that the termination of a treaty:

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

It is on this basis that Hungary identifies three heads of claims which may have survived termination.

"Accrued Rights"¹

12.06 Under this head Hungary concedes that the Court can decide "whether either party to the 1977 Treaty was in breach of that Treaty, to the extent necessary to determine any of the issues specified in Article 2 of the Special Agreement"². It is an extraordinary concession. How can the Court decide issues of breach as between Hungary and

¹ Hungarian Memorial, paras. 11.06-11.07.

² Ibid., para. 11.07.

Czechoslovakia in a case to which Slovakia, not Czechoslovakia, is a party if, as Hungary assumes, Slovakia is not a party, or a successor, or a beneficiary under the Treaty? This highly questionable assertion simply reflects the lack of realism in Hungary's premises.

12.07 Then we are told the Court can determine whether Slovakia "adopted" the illegal conduct of Czechoslovakia in constructing Variant "C"³. This requires a finding that the conduct of Czechoslovakia in constructing Variant "C" was illegal. But how can the Court make a finding of illegality against a State not party to these proceedings⁴?

12.08 And, thirdly, we are told that the Court can determine and take account of Slovakia's own breach in relation to the alleged failure to implement a water management regime under Article 4 of the Special Agreement. What this has to do with rights accrued under the 1977 Treaty prior to its termination is not clear to Slovakia. But, in any event, this is not part of the Court's task under Article 2 of the Special Agreement⁵.

Claims for Work Done Under the Treaty⁶

12.09 Hungary apparently refers to claims by Czechoslovakia and goes on to say that Hungary has no information on the internal arrangements between the Czech and Slovak Republics: but Hungary will return to the issue at the Counter-Memorial stage.

12.10 On Hungary's own premise that Slovakia cannot invoke the Treaty this is an astonishing head of claim, for any claim by Czechoslovakia against Hungary under the Treaty can have nothing whatever to do with this case. Indeed, if neither the Czech Republic nor the Slovak Republic are "successors" in relation to the Treaty, why should Hungary now contemplate paying either in relation to work done under the Treaty? There is a clear contradiction between this part of Hungary's Memorial and Hungary's treatment of succession. It would seem almost as though the drafters of Hungary's Memorial were compelled to react against the complete artificiality of that premise. They recognised that Hungary would face claims, under the Treaty, by Slovakia and that it was impossible to ignore these claims.

³ Ibid.

⁴ Of course the dilemma disappears once the Court adopts the Slovak thesis that, in law, Slovakia and Czechoslovakia are for the purposes of this case one and the same party.

⁵ See, para. 1.40, et seq. above.

⁶ Hungarian Memorial, paras. 11.08-11.11.

Property Rights

12.11 Hungary quite correctly refers to the provisions of Article 8 of the 1977 Treaty as providing for joint ownership of certain properties forming part of the overall G/N Project⁷. Moreover, Hungary concedes that Slovakia has a legal interest in such joint properties, but not as successor to the Treaty! The basis of Slovakia's interest is presumed to lie either in the bilateral arrangements made between the Czech and Slovak Republics on dissolution of the federation (arrangements of which Hungary claims to be unaware) or the rules of State succession with respect to public or State property⁸. These joint properties existed at Nagymaros and Gabčikovo.

Nagymaros

12.12 As to the properties in question, Hungary makes a clear distinction. Nagymaros is said to raise no problem, since it was never built. As to the "coffer dam", this is regarded as a temporary structure, forming part of the "preparatory construction stage", and therefore not subject to joint ownership under Article 8(1)(d) of the Treaty, but covered rather by Article 8(3)⁹. As the Court is aware, Slovakia has formally rejected this argument in its Note Verbale of 13 July 1993¹⁰.

12.13 The Hungarian argument is fallacious and could just as well apply to Gabčikovo which was not completed on the date of Hungary's purported termination of the Treaty. Article 8(3) refers to "other works", meaning works other than those identified in Article 8(1), and these include, as item (d), "The Nagymaros series of locks". So the issue is simply whether the coffer dam is to be regarded as part of "the Nagymaros series of locks". There is in fact no basis for confining "joint ownership" to the finished construction, excluding preparatory works. The purpose of the scheme for joint ownership was to identify the major parts of the G/N Project, to assess and broadly equalise their construction costs as between the two parties, and then to place these major components under joint ownership. If the construction of the coffer dam is a part of the cost of construction of the Project, there is no reason why it should not be under joint ownership.

⁷ Ibid., paras. 11.12-11.16.

⁸ Ibid., para. 11.15.

⁹ Ibid., para. 11.14.

¹⁰ Ibid., Vol. 4, Annex 121. See, also, para. 10.126, above.

Gabčíkovo, Dunakiliti and the Bypass Canal

12.14 Hungary has no hesitation in claiming joint ownership of these components of the Project, and sees the disposition of these properties as being a task for the Court, in the absence of agreement between the Parties. For Hungary the only complication is the conversion of two of these jointly-owned properties into use as part of the "unlawful diversion" of Variant "C"¹¹.

12.15 Hungary's position lacks nothing in audacity. As to Gabčíkovo and the bypass canal, these were constructed at the cost of Czechoslovakia on Slovak territory, and are now operated and maintained entirely at Slovakia's cost. The "input" of Hungary has been modest as regards Gabčíkovo itself, being largely confined to the tailrace canal and work on the right bank of the river.

12.16 On what basis, one may ask, does Hungary now assert a right of joint ownership against Slovakia? It cannot be the 1977 Treaty since Hungary views Slovakia as a stranger to that Treaty, having neither rights nor obligations. The enigma illustrates, once again, the difficulties facing Hungary in pleading a coherent case now that Hungary refuses to accept Slovakia as a successor to the 1977 Treaty. Slovakia is fully prepared to adhere to the idea of joint ownership of those properties identified in the Treaty, but only on the basis of full implementation of the 1977 Treaty. Unhappily, that is not the present situation. The Court will therefore have to determine the respective ownership rights of the Parties in its overall consideration of remedies, taking into account the actual investment of the Parties in such properties, the relative performance by the Parties in respect of such properties, the relative performance by the Parties of their treaty obligations, and any rights of set-off or counterclaim.

B. Claims Consequent Upon Slovakia's "Adoption" of the Alleged "Illegal" Diversion of the Danube by Czechoslovakia by Means of Variant "C"

12.17 In what appears, superficially, as a rather orthodox claim based on State

¹¹ Hungarian Memorial, Vol. 1, para. 11.16. The notion that Gabčíkovo was converted for use as part of Variant "C" is simply perverse. On the contrary, Variant "C" was designed as the only feasible way of bringing Gabčíkovo into use.

responsibility¹², Hungary claims cessation¹³, restitutio in integrum, damages¹⁴, and guarantees against non-repetition¹⁵.

12.18 In fact, however, the claim is not what it might at first appear. It rests on two assumptions: (i) that Czechoslovakia committed an unlawful act in constructing Variant "C" and (ii) that Slovakia since independence has "adopted" and continued this unlawful diversion of the Danube.

12.19 As regards the second of these assumptions, Slovakia would not deny its responsibility for Variant "C", although this arises not so much from an "adoption" of the acts of Czechoslovakia as from the fact that, as part of Czechoslovakia, Slovakia was at all times a party to, and responsible for, not only the 1977 Treaty but acts performed in pursuance of that Treaty. Slovakia is content to have the construction and operation of Variant "C" treated as its own acts as a party to the 1977 Treaty. Where Slovakia cannot agree is at the point at which Hungary would treat the construction of Variant "C" as unlawful, and its operation by Slovakia as the adoption of this unlawful act without reference to the Treaty.

12.20 As regards the first of these assumptions, it is of the greatest importance to realise that Hungary's allegation of an international wrong by Czechoslovakia is fundamental to Hungary's case. The allegation is repeated, like a refrain, throughout Hungary's pleadings¹⁶. And, clearly, if there was no "wrong" by Czechoslovakia, but only a lawful act of approximate performance of the 1977 Treaty, it would be impossible for Hungary to argue that Slovakia's continuation of a lawful act had somehow become unlawful¹⁷. So the assumption of an unlawful act by Czechoslovakia is fundamental to Hungary's case.

12.21 The difficulty for the Court in proceeding on the basis of that assumption lies in three factors. First, according to Hungary the "wrongdoer",

¹² Ibid., paras. 8.37-8.38.

¹³ Ibid., paras. 8.39-8.42.

¹⁴ Ibid. paras. 8.43-8.50. Hungary makes no attempt to evaluate or even identify any "damages", merely making the point that environmental damage will occur over time, in the future (ibid., para. 8.26, et seq.).

¹⁵ Ibid., paras. 8.51-8.52.

¹⁶ See, for example, ibid., paras. 8.11, 8.17, 8.18, 8.21, 8.22 and 11.19.

¹⁷ Hungary's argument does not venture so far, since Hungary argues that Czechoslovakia's acts were in any event unlawful under the Treaty. But, clearly, Hungary's aim in "isolating" Slovakia from the Treaty is to permit Hungary to argue that even if Czechoslovakia had acted lawfully under the Treaty, that would not avail Slovakia, since Slovakia's responsibility falls to be determined exclusively by general international law.

Czechoslovakia, no longer exists and no State has succeeded to the 1977 Treaty so as to be able to assume the rights of Czechoslovakia which formed its justification for Variant "C". Second, the Czech Republic is not a successor to the Treaty, nor a party to this case. Third, the Slovak Republic is a Party to this case, but, not being a successor State in relation to the 1977 Treaty, cannot invoke its provisions by way of justification for the original "wrongful" act, or its "adoption" by Slovakia. Thus, in Hungary's view, the Court must accept the allegation by Hungary that Variant "C" was a breach of the Treaty, since Slovakia is not entitled to invoke the Treaty and Hungary's breaches of that Treaty to justify Variant "C".

12.22 The conclusion is highly unsatisfactory, for it invites the Court to assume the wrongful act by Czechoslovakia and denies to Slovakia even the right to argue on the basis of the 1977 Treaty that Czechoslovakia committed no unlawful act¹⁸. Slovakia therefore has no hesitation in rejecting the entire premise on which it is founded. As shown in Chapter III, the solution consistent with both justice and law is to accept Slovakia as successor State in relation to the 1977 Treaty - and to allow Slovakia to justify Variant "C" on its merits by reference to that Treaty.

SECTION 2. The Slovak Republic's View of Those Consequences

12.23 The view of Slovakia is based upon premises quite different to those advanced by Hungary. In essentials, Slovakia's premises are the following:

- (i) That Hungary's suspension and subsequent abandonment of performance of its obligations under the 1977 Treaty were a fundamental breach of that Treaty.
- (ii) That Hungary's purported termination of the Treaty on 19 May 1992 was without legal justification and invalid.
- (iii) That Hungary therefore violated the rights of Czechoslovakia.
- (iv) That, faced with Hungary's breach, Czechoslovakia was fully entitled to construct and operate Variant "C" as the best available means to fulfil (at least partially) the 1977 Treaty.

¹⁸

Even in the Robert E. Brown Case, United States v. Great Britain, United Nations Reports of International Arbitral Awards (1923) Vol. VI, p. 120 where an allegation of delict was made against the South African Republic, and that Republic ceased to exist as a State, the United States, as claimant, made no attempt to deny that Great Britain was a successor State, or could not justify the conduct of the South African Republic. In fact, Great Britain was held to be the successor, but such succession did not cover delictual or "tortious" liability.

- (v) That, in respect of rights and obligations arising from the 1977 Treaty, the Slovak Republic is the legal successor to Czechoslovakia and, accordingly, is fully entitled to continue with the operation of Variant "C" and to seek all appropriate remedies for the breaches by Hungary, including an order for performance by Hungary of its treaty obligations and compensation for non-performance in the past or in the future.

12.24 As explained in Chapter IX of Slovakia's Memorial, in consequence of these breaches, Slovakia is entitled to seek from the Court a declaration that these breaches have indeed been committed; and, further, to seek restitution both in the sense of an order that the breaches should cease and in the sense of an order that Hungary must resume and complete performance of its obligations under the Treaty.

12.25 Moreover, in consequence of the real and extensive damage caused to Slovakia by the breaches, Slovakia is entitled to claim compensation. In this connection, whilst Slovakia agrees with Hungary¹⁹ that it is premature to invite the Court to embark upon quantification of these damages, Slovakia - unlike Hungary - has already illustrated in some detail²⁰ the damages Slovakia has already incurred as well as the damages which are clearly foreseeable in consequence of Hungary's breaches.

12.26 Slovakia would wish to place on record its rejection of Hungary's position on damages which Hungary states thus:

"Due to the difficulties of evaluating the costs of the environmental damage, the Court should determine, as precisely as possible, the categories of damage and the methodology and criteria for which compensation shall be established by both Parties and performed by Slovakia²¹."

It is the task of the Claimant, not the Court, to prove the damage it claims, and if Hungary is unable to identify any real damage it should say so.

¹⁹ See, Hungarian Memorial, para. 8.47.

²⁰ See, Slovak Memorial, paras. 9.34-9.47.

²¹ Hungarian Memorial, para. 8.48.

SUBMISSIONS

On the basis of the evidence and legal arguments presented in the Slovak Memorial and in this Counter-Memorial, and reserving the right to supplement or amend its claims in the light of further written 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).....
Dr. Peter Tomka
Agent of the Slovak Republic

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