CASE CONCERNING GABCÍKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA)

Judgment of 25 September 1997

In its Judgment in the case concerning Gabcíkovo-Nagymaros Project (Hungary/Slovakia), the Court found that Hungary was not entitled to suspend and subsequently abandon, in 1989, its part of the works in the dam project, as laid down in the treaty signed in 1977 by Hungary and Czechoslovakia and related instruments; it also found that Czechoslovakia was entitled to start, in November 1991, preparation of an alternative provisional solution (called "Variant C"), but not to put that solution into operation in October 1992 as a unilateral measure; that Hungary's notification of termination of the 1977 Treaty and related instruments on 19 May 1992 did not legally terminate them (and that they are consequently still in force and govern the relationship between the Parties); and that Slovakia, as successor to Czechoslovakia became a party to the Treaty of 1977.

As to the future conduct of the Parties, the Court found: that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the 1977 Treaty; that, unless the Parties agree otherwise, a joint operational regime for the dam on Slovak territory must be established in accordance with the Treaty of 1977; that each Party must compensate the other Party for the damage caused by its conduct; and that the accounts for the construction and operation of the works must be settled in accordance with the relevant provisions of the 1977 Treaty and its related instruments.

The Court also held that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the Parties could, by agreement, incorporate them through the application of several of its articles. It found that the Parties, in order to reconcile economic development with protection of the environment, "should look afresh at the effects on the environment of the operation of the Gabcíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms of the river.

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski; Registrar Valencia-Ospina.

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The complete text of the operative paragraph of the Judgment is as follows:

"155. For these reasons,

THE COURT,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. *Finds*, by fourteen votes to one, that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcíkovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judge Herczegh;

B. *Finds*, by nine votes to six, that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement;

IN FAVOUR: Vice-President Weeramantry; Judges Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: President Schwebel; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. *Finds*, by ten votes to five, that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution";

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

AGAINST: Judges Oda, Koroma, Vereshchetin, Parra-Aranguren; Judge ad hoc Skubiszewski;

D. *Finds*, by eleven votes to four, that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: President Schwebel; Judges Herczegh, Fleischhauer, Rezek;

(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. *Finds*, by twelve votes to three, that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer, Rezek;

B. *Finds*, by thirteen votes to two, that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer;

C. *Finds*, by thirteen votes to two, that, unless the Parties otherwise agree, a joint operational regime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer;

D. *Finds*, by twelve votes to three, that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Oda, Koroma, Vereshchetin;

E. *Finds*, by thirteen votes to two, that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and C of the present operative paragraph.

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer."

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President Shwebel and Judge Rezek appended declarations to the Judgment of the Court. Vice-President Weeramantry, Judges Bedjaoui and Koroma appended separate opinions. Judges Oda, Ranjeva, Herczegh, Fleichhauer, Vereshchetin and Parra-Aranguren, and Judge ad hoc Skubiszewski appended dissenting opinions.

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Review of the proceedings and statement of claims
(paras. 1-14)

The Court begins by recalling that proceedings had been instituted on 2 July 1993 by a joint notification, by Hungary and Slovakia, of a Special Agreement, signed at Brussels on 7 April 1993. After setting out the text of the Agreement, the Court recites the successive stages of the proceedings, referring, among other things, to its visit, on the invitation of the parties, to the area, from 1 to 4 April 1997. It further sets out the submissions of the Parties.

History of the dispute
(paras. 15-25)

The Court recalls that the present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabcíkovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years; they are referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978. It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the system was designed to attain "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". The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

The sector of the Danube river with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. Cunovo and, further downstream, Gabcíkovo, are situated in this sector of the river on Slovak territory, Cunovo on the right bank and Gabcíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (*see sketch-map No. 1*).

The 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabcíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (*see sketch-map No. 2*). The Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976. It also provided for the construction, financing and management of the works on a joint basis in which the Parties participated in equal measure.

The Joint Contractual Plan, set forth, on a large number of points, both the objectives of the system and the characteristics of the works. It also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system."

The Court observes that the Project was thus to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabcíkovo.

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The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at the same time as the Treaty itself. The Agreement made some adjustments to the allocation of the works between the parties as laid down by the Treaty. Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 to accelerate the Project.

As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

During this period, negotiations took place between the parties. Czechoslovakia also started investigating alternative solutions. One of them, an alternative solution subsequently known as "Variant C", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (*see sketch-map No. 3*). In its final stage, Variant C included the construction at Cunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. Provision was made for ancillary works.

On 23 July 1991, the Slovak Government decided "to begin, in September 1991, construction to put the Gabcíkovo Project into operation by the provisional solution". Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

The Court finally takes note of the fact that on 1 January 1993 Slovakia became an independent State; that in the Special Agreement thereafter concluded between Hungary and Slovakia the Parties agreed to establish and implement a temporary water management regime for the Danube; and that finally they concluded an Agreement in respect of it on 19 April 1995, which would come to an end 14 days after the Judgment of the Court. The Court also observes that not only the 1977 Treaty, but also the "related instruments" are covered in the preamble to the Special Agreement and that the Parties, when concentrating their reasoning on the 1977 Treaty, appear to have extended their arguments to the "related instruments".

Suspension and abandonment by Hungary, in 1989, of works on the Project
(paras. 27-59)

In terms of Article 2, paragraph 1 (a), of the Special Agreement, the Court is requested to decide first

> "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

Gabcíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary".

The Court observes that it has no need to dwell upon the question of the applicability or non-applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties, as argued by the Parties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62. Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabcíkovo-Nagymaros Project.

Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".

The Court then considers the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

The Court observes, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It considers moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The following basic conditions set forth in Article 33 of the Draft Article on the International Responsibility of States by the International Law Commission are relevant in the present case: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcíkovo-Nagymaros Project related to an "essential interest" of that State.

It is of the view, however, that, with respect to both Nagymaros and Gabcíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time limits, without there being need to abandon it.

The Court further notes that Hungary when it decided to conclude the 1977 Treaty, was presumably aware of the situation as then known; and that the need to ensure the protection of the environment had not escaped the parties. Neither can it fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. Slowly, speeded up. The Court infers that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

In the light of the conclusions reached above, the Court finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

Czechoslovakia's proceeding, in November 1991, to "Variant C" and putting into operation, from October 1992, this Variant
(paras. 60-88)

By the terms of Article 2, paragraph 1 (b), of the Special Agreement, the Court is asked in the second place to decide

> "(*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".

Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

The Court observes that it is not necessary to determine whether there is a principle of international law or a general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabcíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabcíkovo-Nagymaros project and for the operation of this joint property as a coordinated single unit. By definition all this could not be carried out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics. The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied. Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act".

Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained." But the Court observes that, while this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act. The Court further considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

In the light of the conclusions reached above, the Court finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C insofar as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments
(paras. 89-115)

By the terms of Article 2, paragraph 1 (c), of the Special Agreement, the Court is asked, thirdly, to determine

> "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

State of necessity

The Court observes that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty.

Impossibility of performance

The Court finds that it is not necessary to determine whether the term "object" in Article 61 of the Vienna Convention of 1969 on the Law of Treaties (which speaks of "permanent disappearance or destruction of an object indispensable for the execution of the treaty" as a ground for terminating or withdrawing from it) can also be understood to embrace a legal regime as in any event, even if that were the case, it would have to conclude that in this instance that regime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to

proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives.

Fundamental change of circumstances

In the Court's view, the prevalent political conditions were not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Nor does the Court consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20 is designed to accommodate change. The changed circumstances advanced by Hungary are thus, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project.

Material breach of the Treaty

Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. The Court pointed out that it had already found that Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully. In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

Development of new norms of international environmental law

The Court notes that neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty; and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties (which treats of the voidance and termination of a treaty because of the emergence of a new peremptory norm of general international law (*jus cogens*)). On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan. The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

Finally, the Court is of the view that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination.

In the light of the conclusions it has reached above, the Court finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

Dissolution of Czechoslovakia
(paras. 117-124)

The Court then turns to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Vienna Convention on Succession of States in respect of treaties (in which a rule of automatic succession to all treaties is provided for) reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational regime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created

a situation in which the interests of other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.

The Court then refers to Article 12 of the 1978 Vienna Convention on Succession of States in respect of Treaties, which reflects the principle that treaties of a territorial character have been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States. The Court considers that Article 12 reflects a rule of customary international law; and notes that neither of the Parties disputed this. It concludes that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial regime within the meaning of Article 12 of 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself could not be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

Legal consequences of the Judgment
(paras. 125-154)

The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the past conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty. Now the Court has, on the basis of the foregoing findings, to determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*. The Court observes that it cannot, however, disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties. What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose insofar as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

The Court points out that the 1977 Treaty is not only a joint investment project for the production of energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature. The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. New norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty. Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a

reasonable way and in such a manner that its purpose can be realized.

The 1977 Treaty not only contains a joint investment programme, it also establishes a regime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a coordinated single unit; and the benefits of the project shall be equally shared. Since the Court has found that the Treaty is still in force and that, under its terms, the joint regime is a basic element, it considers that, unless the Parties agree otherwise, such a regime should be restored. The Court is of the opinion that the works at Cunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management regime. The dam at Cunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. It observes that re-establishment of the joint regime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty.

Having thus far indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force, the Court turns to the legal consequences of the internationally wrongful acts committed by the Parties, as it had also been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages.

The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

In the Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation. The Court observes, however, that given the fact, that there have been intersecting wrongs by both Parties, the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Cunovo complex, it must pay a proportionate share of the building and running costs.

Declaration of President Schwebel

I am largely in agreement with the Court's Judgment and accordingly I have voted for most of its operative paragraphs. I have voted against operative paragraph 1 B essentially because I view the construction of "Variant C", the "provisional solution", as inseparable from its being put into operation. I have voted against operative paragraph 1 D essentially because I am not persuaded that Hungary's position as the Party initially in breach deprived it of a right to terminate the Treaty in response to Czechoslovakia's material breach, a breach which in my view (as indicated by my vote on paragraph 1 B) was in train when Hungary gave notice of termination.

At the same time, I fully support the conclusions of the Court as to what should be the future conduct of the Parties and as to disposition of issues of compensation.

Declaration of Judge Rezek

Judge Rezek considers that the 1977 Treaty is no longer in existence, since it has been abrogated by the attitude of the two Parties. From that conclusion, however, he infers consequences very similar to those which the majority infers from the continued existence of the treaty. First, there is what has been accomplished, and accomplished in good faith. There is, also and above all, the very principle of good faith which must lead here to the fulfilment of reciprocal duties remaining from a treaty which has not been implemented through the reciprocal fault of the two Parties.

Separate opinion of Vice-President Weeramantry

Judge Weeramantry agreed with the majority of the Court in all their conclusions.

However, in his separate opinion, he addressed three questions dealing with aspects of environmental law — the principle of sustainable development in balancing the competing demands of development and environmental protection, the principle of continuing environmental impact assessment, and the question of the appropriateness of the use of an *inter partes* legal principle such as estoppel in the resolution of issues with *erga omnes* implications such as a claim that environmental damage is involved.

On the first question, his opinion states that both the right to development and the right to environmental protection are principles currently forming part of the corpus of international law. They could operate in collision with each other unless there was a principle of international law which indicated how they should be reconciled. That principle is the principle of sustainable development which, according to this opinion, is more than a mere concept, but is itself a recognized principle of contemporary international law.

In seeking to develop this principle, the Court should draw upon prior human experience, for humanity has lived for millennia with the need to reconcile the principles of development and care for the environment. Sustainable development is therefore not a new concept and, for developing it today, a rich body of global experience is available. The opinion examines a number of ancient irrigation civilizations for this purpose. The Court, as representing the main forms of civilization, needs to draw

upon the wisdom of all cultures, especially in regard to areas of international law which are presently in a developmental phase. Among the principles that can be so derived from these cultures are the principles of trusteeship of earth resources, intergenerational rights, protection of flora and fauna, respect for land, maximization of the use of natural resources while preserving their regenerative capacity, and the principle that development and environmental protection should go hand in hand.

In his opinion, Judge Weeramantry stresses the importance of continuous environmental impact assessment of a project as long as it continues in operation. The duty of environmental impact assessment is not discharged merely by resort to such a procedure before the commencement of a project. The standards to be applied in such continuous monitoring are the standards prevalent at the time of assessment and not those in force at the commencement of the project.

The third aspect of environmental law referred to is the question whether principles of estoppel which might operate between parties are appropriate in matters such as those relating to the environment, which are of concern not merely to the two Parties, but to a wider circle. Questions involving duties of an *erga omnes* nature may not always be appropriately resolved by rules of procedure fashioned for *inter partes* disputes. Judge Weeramantry draws attention to this aspect as one which will need careful consideration.

Separate opinion of Judge Bedjaoui

Judge Bedjaoui considers that the majority of the Court has not sufficiently clarified the question of applicable law and that of the nature of the 1977 Treaty. On the first point, he states that an "*evolutionary interpretation*" of the 1977 Treaty can only be applied if the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties is respected, and that the "*definition*" of a concept must not be confused with the "*law*" applicable to that concept, nor should the "*interpretation*" of a treaty be confused with its "*revision*". Judge Bedjaoui recommends that subsequent law be taken into account only in very special situations. This applies in the present case. It is the first major case brought before the Court in which the ecological background is so sensitive that it has moved to centre stage, threatening to divert attention from treaty law. International opinion would not have understood had the Court disregarded the new law, the application of which was demanded by Hungary. Fortunately, the Court has been able to graft the new law on to the stock of Articles 15, 19 and 20 of the 1977 Treaty. Nor was Slovakia opposed to taking this law into consideration. However, in applying the so-called principle of the *evolutionary interpretation* of a treaty in the present case, the Court should have clarified the issue more and should have recalled that the general rule governing the interpretation of a treaty remains that set out in Article 31 of the 1969 Vienna Convention.

As for the *nature* of the 1977 Treaty and its related instruments, in Judge Bedjaoui's view this warranted more attention from the majority of the Court. It is a crucial question. The nature of the Treaty largely conditions the succession of Slovakia to this instrument, which constitutes the substance of the applicable law, and which remains in force despite *intersecting violations* by both Parties.

The 1977 Treaty (including related instruments) has the threefold characteristic

— of being a *territorial treaty*,

— of being a treaty to which Slovakia validly *succeeded*, and

— of being a treaty which is still *in force today*.

In substance, Judge Bedjaoui does not share the opinion of the majority of the Court as to the legal characterization of Variant C, which he considers to be an offence, the unlawfulness of which affects each of the acts of the construction of this variant. The construction could be neither innocent nor neutral; it bore the stamp of the end purpose of Variant C, which was the diversion of the waters of the river. It is therefore not possible to separate construction on the one hand and diversion on the other; Variant C as a whole is unlawful.

On a different subject, Judge Bedjaoui considers that both Parties, Hungary just as much as Slovakia, have breached the 1977 Treaty. The situation created by them is characterized by *intersecting violations* countering each other. However it is not easy to determine the links of cause and effect in each case with certainty. The acts and conduct of the Parties sometimes intercut. A deep mutual distrust has unfortunately characterized relations between the parties for many years.

On the ground, these *intersecting violations* gave rise to a reality which the majority of the Court did not deem it useful to characterize. For Judge Bedjaoui it seemed necessary and important to note that these intersecting violations created *two effectivités* which will continue to mark the landscape of the region in question.

Judge Bedjaoui indicated *the significance to be attached to taking account of the effectivités*. In this case, taking account of the *effectivités* is not tantamount to a negation of the title. The title does not disappear; it merely adapts and does so, moreover, through involving the responsibility of the authors of these *effectivités*, who will be liable for all the necessary compensation.

These *effectivités*, adapted as they have been or will be to fit the mould of a new treaty, may have breached and exceeded the existing law, but the law reins them in and governs them again in three ways:

— these *effectivités* do not kill the Treaty, which survives them;

— these *effectivités* do not go unpunished and entail sanctions and compensation;

— and above all, these *effectivités* will be "recast", or inserted into the Treaty, whose new content to be negotiated will serve as a *legitimizing text* for them.

Judge Bedjaoui finally turns to the necessity for the Parties *to negotiate again and to do so in good faith*. The renegotiation must be seen as a strict obligation, exactly like the good faith conduct it implies. This obligation flows not

only from the Treaty itself, but also from general international law as it has developed in the spheres of international watercourses and the environment.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma stated that he supported the Court's findings that Hungary was not entitled to suspend and subsequently to abandon the works on the Project for which the Treaty had attributed responsibility to it, and that the Treaty continues to be in force. These findings, in his view, were not only in accordance with the Treaty but with the principle of *pacta sunt servanda*, one of the foremost principles of international law and indeed an integral part of it. In Judge Koroma's view a contrary finding would have suggested that at any time a State might unilaterally repudiate any treaty when it found its obligation to be inconvenient; this, he maintained, would seriously undermine the principle of *pacta sunt servanda* and the whole treaty relationship.

While he shares the Court's understanding of Hungary's concern about the effects of the Project on its natural environment, he agreed that the material before the Court could not justify the unilateral repudiation of the Treaty.

Judge Koroma, however, disagreed with the finding of the Court that Czechoslovakia was not entitled to put Variant C into operation. He felt that this finding did not give sufficient weight to the provisions of the Treaty, nor to the financial damage and environmental harm that Czechoslovakia would have incurred and endured had the Project been left uncompleted as Hungary's action dictated. He regarded Variant C as a genuine attempt to implement the Treaty so as to realize its aim and objective.

He also did not agree that the Court appeared to treat the consequences of the Parties' "wrongful conduct" as if they were equivalent.

Dissenting opinion of Judge Oda

Judge Oda has voted against operative paragraph 1 C, since, in his view, not only the construction, but also the operation of the Cunovo dam was simply the execution of the Project as described in the 1977 Treaty between Czechoslovakia and Hungary concerning the Gabcíkovo-Nagymaros System of Locks. He considers that the provisional solution, Variant C, was the only possible option for fulfilment of the original Project on the river Danube. Judge Oda does not understand why the Court decided that, while the construction of Variant C — that is to say, the Cunovo dam — is lawful, the operation of it is a wrongful act.

Judge Oda made a clear distinction between the Joint Contractual Plan (JCP), as the execution of the Project, and the 1977 Treaty, which underlies the whole Project and which had been worked out over a period of several decades. The JCP, which is similar to a "partnership" contract should have been subject to amendment and revision, as proved necessary, in a more flexible manner.

The fundamental purpose of the 1977 Treaty was, in his view, to carry out the construction of the bypass canal and of the power plants at the dams of Gabcíkovo and Nagymaros. Firstly, Hungary's failure to perform its treaty obligations cannot be justified on the basis of the new international norm of environmental protection. The whole Project and the 1977 Treaty, in particular, were undoubtedly sketched out in the 1970s with due consideration for the environment of the river Danube. There is no proof with which to overturn this assumption. Secondly, it was not a violation of the Treaty for Czechoslovakia to proceed to the provisional solution — Variant C — as the only option open to it in order to carry out the basic Project in the event of Hungary failing to fulfil its obligation to construct the Dunakiliti dam.

With regard to future negotiations between the Parties on the modalities of the execution of the Judgment, as agreed upon in the Special Agreement, Judge Oda suggests that the JCP be modified in order to include the work on the Cunovo dam which enabled the whole Project to be accomplished. As far as the environment is concerned, the Parties should proceed to an assessment of the environment of the river Danube in an effort to seek out technological solutions limiting or remedying any environmental damage caused by Czechoslovakia's construction of the bypass canal and Hungary's abandonment of the Nagymaros dam.

The damages and losses suffered by Czechoslovakia owing to Hungary's failure to fulfil its Treaty obligations must be compensated. However, Hungary's abandonment of the Nagymaros dam, though that dam formed a part of the whole Project, did not cause any practical damage to Czechoslovakia. Hungary must bear a part of the cost of construction of the Cunovo dam, as that work gave life to the whole Project. It may well be admitted, however, that the whole Project (that is, the bypass canal and the Gabcíkovo power plant on that canal) are simply of benefit to Czechoslovakia and Slovakia, and that Hungary has nothing to gain from it. This point should be taken into account when the matter of compensation for loss and damage to be paid by Hungary to Slovakia is considered.

Dissenting opinion of Judge Ranjeva

Judge Ranjeva disagreed with the majority of the Court in that in paragraph 155 1 C the Judgment restricts the unlawfulness of Variant C to its being put into operation and maintained in service to date. Judge Ranjeva first remarks that there is a contradiction in terms of logic between subparagraphs B and C of this same paragraph of the operative part. How can the construction of this Variant C be acknowledged to be lawful at the same time as putting it into operation is declared to be unlawful? The Judgment, in his opinion, came to this conclusion because it restricted the significance of the reciprocal wrongs ascribable to Hungary and to Czechoslovakia and Slovakia to the sole issue of the obligation to compensate for the consequences of the damage; in so doing, the Court resurrected a rule of Roman law, the rule of Pomponius. However the Court failed to examine the significance of these intersecting wrongs on

another point: the causality in the sequence of events leading to the situation which is the subject of the dispute before the Court. For Judge Ranjeva, the circumstances of fact against a background of chaotic relations marked by distrust and suspicion not only made it difficult to identify the original cause of this situation but above all resulted in the fact that a wrong committed by one of the Parties triggered off a wrong committed by the other. Taking a position counter to the linear analysis of the Court, for the author it is not a matter of several wrongs which merely succeed each other but of distinct wrongs which gradually contributed to creating the situation which is the subject of the present dispute. The conclusion drawn by Judge Ranjeva is that the unlawfulness of the Hungarian decision, a decision which was undeniably unlawful, was not the cause but the ground or motive taken into consideration by Czechoslovakia then by Slovakia in order to justify their subsequent conduct. The second conclusion reached by the author relates to the lawfulness of Variant C. In his opinion, the distinction made between proceeding to the provisional solution and putting into operation is in fact an artificial one; it would have been plausible if there had been true equipollence between these two elements and if one of the elements could not absorb the other. Proceeding to the provisional solution was significant only if it was carried through. Thus the unlawfulness of Variant C, for Judge Ranjeva, resided not so much in its construction or commissioning, or even in the diversion of the Danube, but in replacing an international project by a national project; Variant C could not be related to any obligation under the 1977 Treaty once the Court rightly dismissed the idea of an approximate application or of an obligation to limit damage in treaty law.

Dissenting opinion of Judge Herczegh

The dissenting opinion exhaustively presents the case for the existence of a state of necessity on the part of Hungary with regard to the construction of the Nagymaros dam. It holds that not only the putting into operation by Czechoslovakia of the "provisional solution", called "Variant C", but also the proceeding to this solution constituted a serious breach of the 1977 Treaty. Hungary was therefore justified in terminating the Treaty. Judge Herczegh consequently voted against the points of the operative part which refer expressly to the Treaty, but voted for mutual compensation by Slovakia and by Hungary for the damage each sustained on account of the construction of the system of locks forming the subject of the dispute.

Dissenting opinion of Judge Fleischhauer

Judge Fleischhauer dissents on the Court's central finding that Hungary's notification of 19 May 1992 of the termination of the 1977 Treaty did not have the effect of terminating it, as the notification is found to have been premature and as Hungary is said to have forfeited its right to terminate by its own earlier violation of the Treaty. The Judge shares the finding of the Court that Hungary has violated its obligations under the 1977 Treaty when it suspended, in 1989, and later abandoned, its share in the works on the Nagymaros and on part of the Gabcíkovo Project. He also agrees with the conclusion that Czechoslovakia was not entitled to put into operation, as from October 1992, Variant C, a unilateral solution which implies the appropriation by Czechoslovakia and later Slovakia, essentially for its own use, of 80 to 90 per cent of the waters of the Danube in the Treaty area, and is therefore not proportionate. However, he is of the view that when Czechoslovakia, in November 1991, moved into construction of Variant C, the point of no return was passed on both sides; at that point in time it was certain that neither would Hungary come back to the Treaty nor would Czechoslovakia agree to further delaying the damming of the Danube. The internationally wrongful act therefore was not confined to the actual damming of the river, but started in November 1991, more than six months prior to Hungary's notification of termination. Judge Fleischhauer thinks, moreover, that Hungary, although it had breached the Treaty first, had not forfeited its right to react to Variant C by termination of the Treaty, because international law does not condone retaliation that goes beyond the limits of proportionality. In situations like this, the corrective element rather lies in a limitation of the first offender's right to claim redress. As he considers the validity of the Treaty as having lapsed, he has voted against the conclusions of the Court on the consequences of the Judgment inasmuch as they are based on the continuing validity of the Treaty (2 A, B, C, E). In his view the installations on Slovak territory do not have to be dismantled, but in order to lawfully continue to use them Slovakia will have to negotiate with Hungary a water-management regime. Hungary does not have to construct Nagymaros any more, but Slovakia is no longer committed to the joint running of the Project.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin takes the view that Czechoslovakia was fully entitled in international law to put into operation from October 1992 the "provisional solution" (Variant C) as a countermeasure so far as its partner in the Treaty persisted in violating its obligations. Therefore, he could not associate himself with paragraph 155 1 C of the Judgment, nor fully with paragraph 155 2 D.

According to the Court's jurisprudence, established wrongful acts justify "proportionate countermeasures on the part of the State which ha[s] been the victim of these acts ..." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment, I.C.J. Reports 1986*, p. 127, para. 249). In the view of Judge Vereshchetin, all the basic conditions for a countermeasure to be lawful were met when Czechoslovakia put Variant C into operation in October 1992. These conditions include: (1) the presence of a prior illicit act, committed by the State at which the countermeasure is targeted; (2) the necessity of the countermeasure; and (3) its proportionality in the circumstances of the case.

Recognizing that the test of proportionality is very important in the regime of countermeasures, Judge

Vereshchetin believes the Court should have assessed and compared separately: (1) the economic and financial effects of the breach as against the economic and financial effects of the countermeasure; (2) the environmental effects of the breach as against the environmental effects of the countermeasure; and (3) the effects of the breach on the exercise of the right to use commonly shared water resources as against the effects of the countermeasure on the exercise of this right.

Judge Vereshchetin makes his assessment of those effects and observes in conclusion that even assuming that Czechoslovakia, as a matter of equity, should have discharged more water than it actually did into the old river bed, this assumption would have related to only one of the many aspects of the proportionality of the countermeasure, which could not in itself warrant the general conclusion of the Court that Czechoslovakia was not entitled to put Variant C into operation from October 1992.

Dissenting opinion of Judge Parra-Aranguren

My vote against paragraph 1 C of the operative part of the Judgment is the consequence of the recognition that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works which were its responsibility, in accordance with the Treaty of 16 September 1977 and related instruments. Because of that the position of Czechoslovakia was extremely difficult, not only for the huge sums invested so far but also for the environmental consequences of leaving unfinished and useless the constructions already in place, almost complete in some sections of the Gabcíkovo Project. Faced with that situation, in my opinion, Czechoslovakia was entitled to take all necessary action and for that reason the construction and putting into operation of the "provisional solution" (Variant C) cannot be considered an internationally wrongful act. Therefore, in principle, Slovakia shall not compensate Hungary on the account of the construction and putting into operation of "the provisional solution" (Variant C) and its maintenance in service by Slovakia, unless a manifest abuse of rights on its part is clearly evidenced.

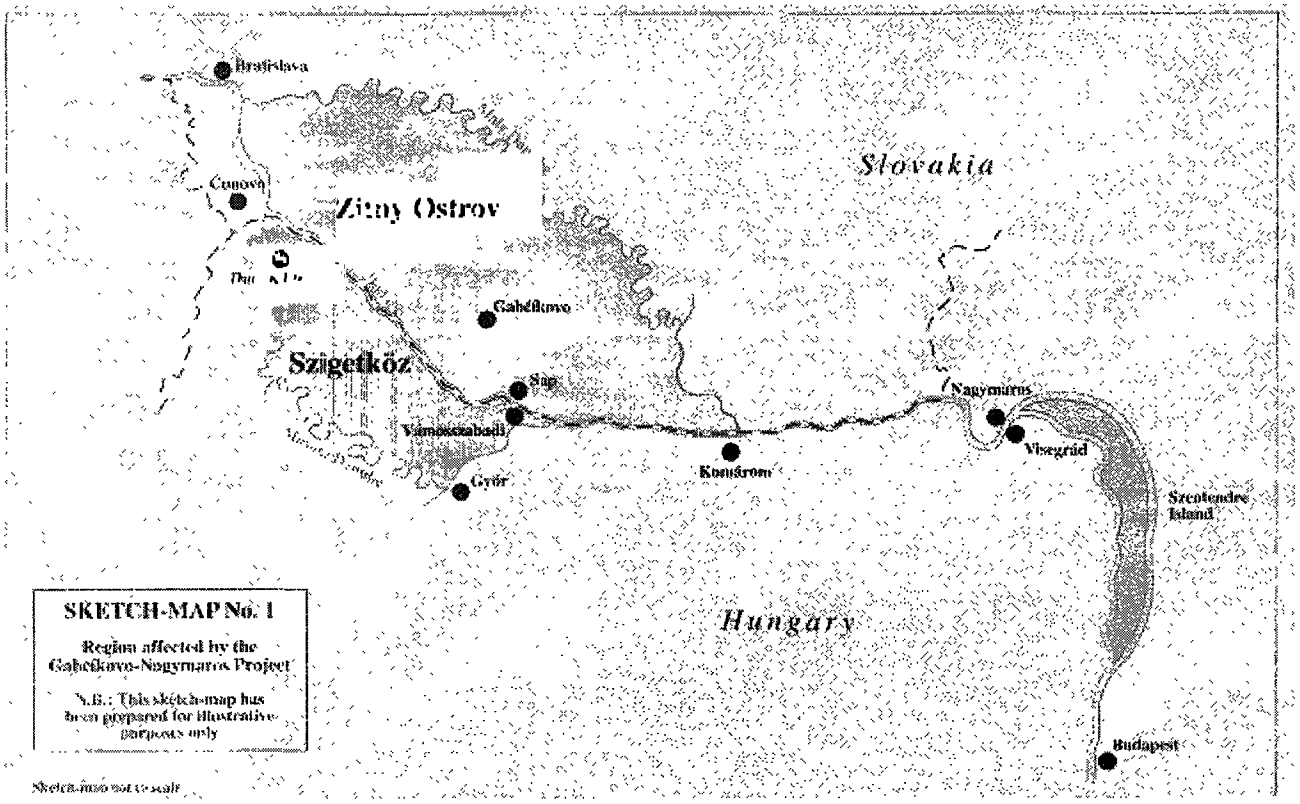
In my opinion, paragraph 2 A, of the operative part of the Judgment should not have been included, because the succession of Slovakia to the 1977 Treaty was neither a question submitted to the Court in the Special Agreement, nor is it a legal consequence arising out of the decision of the questions submitted by the Parties in its Article 2, paragraph 1. Furthermore, the answer of the Court is incomplete, since nothing is said in respect to the "related instruments" to the 1977 Treaty; and it does not take into consideration the position adopted by the dissenting judges who maintained that the 1977 Treaty was no longer in force.

Dissenting opinion of Judge ad hoc Skubiszewski

While agreeing with the Court in all its other holdings, Judge ad hoc Skubiszewski is unable to concur in the broad finding that Czechoslovakia was not entitled to put Variant C into operation from October 1992 (Judgment, para. 155, point 1 C). The finding is too general. In his view the Court should have distinguished between, on the one hand, Czechoslovakia's right to take steps to execute and operate certain works on her territory and, on the other, her responsibility (and, subsequently, that of Slovakia) towards Hungary resulting from the diversion of most of the waters of the Danube into Czechoslovak territory, especially in the period preceding the conclusion of the Hungarian-Slovak Agreement of 19 April 1995.

The withdrawal of Hungary from the Project left Czechoslovakia with the legal possibility of doing on her territory what she was allowed to do by general law on international rivers. As a whole, the "provisional solution" was and is lawful. That evaluation is not changed by one element of it, i.e., sharing of the waters of the Danube, which called for redress and remedy. Having recognized the serious problems with which Czechoslovakia was confronted as a result of Hungary's action, the Court should have applied equity as part of international law. It would then arrive at a holding that would have given more nuance to its decision.

Notwithstanding the Parties' mutual legal claims for compensation much speaks in favour of a "zero option" (Judgment, para. 153). That option should facilitate the settlement of the dispute.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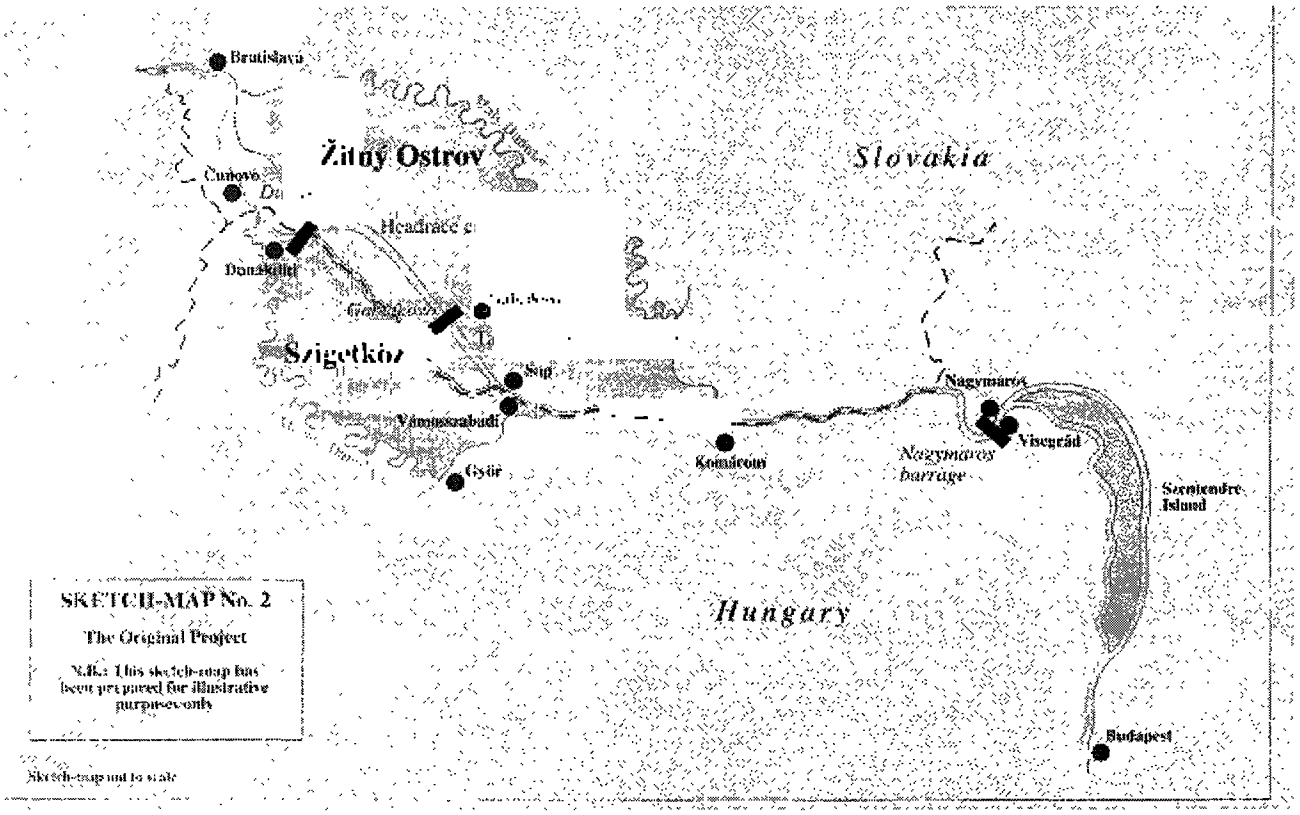
Gabčíkovo
Szigetköz
Sap
Nagymaros
Vámosszabadi
Visegrád
Komárom
Győr
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 1
Region affected by the Gabčíkovo-Nagymaros Project
N.B.: This sketch-map has been prepared for illustrative purposes only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Žitný Ostrov
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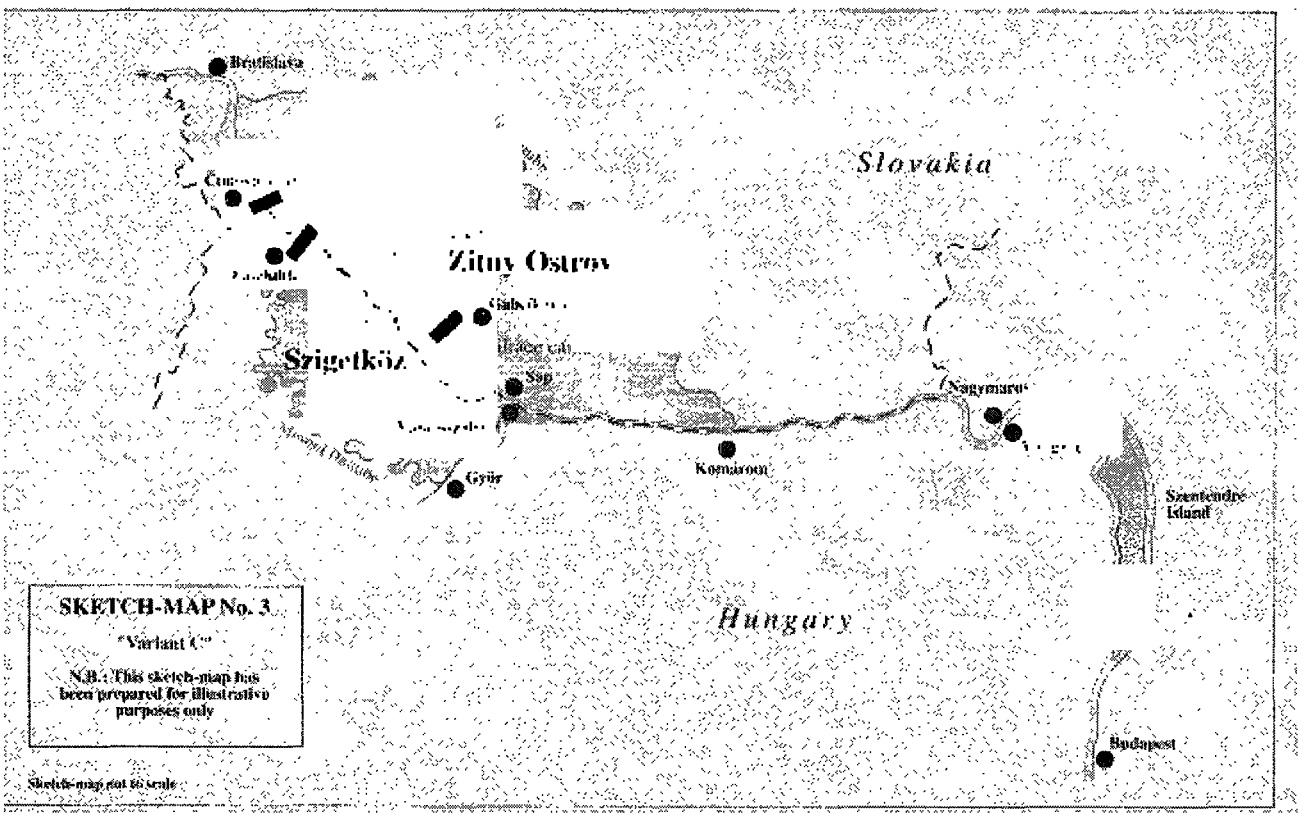
Čunovo
Szigetköz
Sap
Nagymaros
Vámosszabadi
Visegrád
Komárom
Nagymaros barrage
Győr
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 2
The Original Project
N.B.: This sketch-map has been prepared for illustrative purposes only


Bratislava
Slovakia
Žitný Ostrov
Szigetköz
Sap
Győr
Komárom
Nagymaros
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 3
"Variant C"
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale