

DISSENTING OPINION OF JUDGE PARRA-ARANGUREN

1. Although I have voted for the operative part of the Judgment, with the exception of paragraph 1, point C, my favourable vote does not mean that I share each and every part of the reasoning followed by the majority of the Court in reaching its conclusions.

I

2. I have voted against paragraph 1, point C, of the operative part of the Judgment for the following reasons.

3. At the time of Hungary's suspension and later abandonment of works, some of those works were largely completed, especially at the Gabčíkovo section of the barrage system. As a result of Hungary's violations of its obligations under the 1977 Treaty, Czechoslovakia was entitled to terminate it, according to general international law, as codified in Article 60 of the 1969 Vienna Convention on the Law of Treaties. However, Czechoslovakia did not exercise that right and decided to maintain the 1977 Treaty in force.

4. Nonetheless, Hungary was not willing to continue to comply with its treaty obligations, and the Hungarian Government decided on 20 December 1990, that

“The responsible ministers and the Governmental Plenipotentiary should start negotiations with the Government of the Czechoslovak Federal Republic on the termination of the 1977 Treaty by mutual consent and on the conclusion of a treaty addressing the consequences of the termination.” (The Hungarian Parliament ratified this decision on 16 April 1991 — Memorial of Hungary, Vol. 4, Ann. 153, p. 366, and Ann. 154, p. 368.)

5. As is acknowledged in the Judgment (see para. 72), the position adopted by Hungary made the situation very difficult for Czechoslovakia, not only because of the huge sums invested so far, but also because of the environmental consequences of leaving unfinished and useless the constructions already in place and, in some sections of the barrage system, almost complete.

6. Besides, it is easy to understand the impossibility for the Czechoslovak Government to justify the petition of substantial amounts of money necessary to minimize the environmental damage and degradation of the region, in the event that the existing constructions were left in their unfinished state, as described by the Czechoslovak Federal Committee for

Environment in its "Technical-Economic Study on Removal of the Water Work Gabčıkovo with the Technique of Reclaiming the Terrain", dated July 1992 (Reply of Slovakia, Vol. II, Ann. 3).

7. For these reasons, Czechoslovakia decided to finish the works that Hungary had yet to complete in Czechoslovak territory, according to the 1977 Treaty, i.e., the construction of the tailrace canal of the bypass canal and of a connecting dyke from this canal to the site of the Danube's damming close to the Dunakiliti weir (Art. 5, para. 5 (b), of the 1977 Treaty). Considering Hungary's refusal to finish the constructions it had begun, in my opinion the decision taken by Czechoslovakia was lawful, because the 1977 Treaty was in force between the parties, and Czechoslovakia took over Hungary's role in order to guarantee the achievement of its object and purpose.

8. There were some other works under Hungarian responsibility to be finished in Hungarian territory, and Czechoslovakia could not finish them without violating the territorial sovereignty of Hungary, unless Hungary gave its consent for the completion. Since Hungary had decided to negotiate only the termination of the 1977 Treaty, there was no possibility of obtaining its authorization in order to finish those constructions already started.

9. Faced with this situation, which came into existence because of the internationally wrongful acts committed by Hungary by violating its obligations under the 1977 Treaty, in my opinion Czechoslovakia was entitled to take the necessary action, not only to realize its object and purpose, but also to solve, in the best possible way, the ecological and economic problems caused by the unfinished constructions. Therefore, Czechoslovakia was legally justified in adopting the "provisional solution" referred to in Article 2, paragraph 1 (b), of the Special Agreement (hereinafter "Variant C"), i.e., a temporary solution that could be reversed as soon as Hungary resumed compliance with its obligations under the 1977 Treaty.

10. This temporary character was established by the European Communities-Czechoslovakia-Hungary Report of the Working Group of Independent Experts on Variant C of the Gabčıkovo-Nagymaros Project, dated 23 November 1992, where it is stated that:

"In principle, the ongoing activities with Variant C could be reversed. The structures, excluding some of the underground parts like sheet piling and injections, could in theory be removed. The cost of removing the structures are roughly estimated to at least 30 per cent of the construction costs." (Memorial of Hungary, Vol. 5, Part II, Ann. 14, p. 434.)

11. Variant C provided for the construction of a weir complex at Čunovo, 10 kilometres up from Dunakiliti (as originally planned), with a reservoir of reduced proportions behind, and for a new section of dykes connecting the weir with the bypass canal and the right-side dyke on Czechoslovak territory. Furthermore, the Danube had to be dammed; the Project had to be put into operation, and some other ancillary structures at Čunovo were to be completed, such as navigation locks and a hydroelectric power plant.

12. Hungary has pointed out that those are not the only differences between Variant C and the 1977 Treaty Project, because Variant C is not operated jointly and because Hungary was never informed, even less consulted, by Czechoslovakia as to its specifications and all other technical details, before and during its construction and putting into operation.

13. The Judgment follows those arguments. It remarks that

“the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works”;

and that this

“element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros project and for the operation of this joint project as a co-ordinated single unit”.

Then it concludes:

“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.” (See para. 77.)

14. The aforementioned conclusion overlooks the fact that Czechoslovakia did not exclude Hungary from the Project; on the contrary, Hungary excluded itself of its own volition and violated the obligations imposed upon it by the 1977 Treaty. Information, consultation, joint operation and joint control only make sense if Hungary were willing to cooperate but, at that time, Hungary would only consider the termination of the 1977 Treaty. Therefore, the existing differences were the direct consequence of the attitude assumed by Hungary in respect of the 1977 Treaty, and should be considered consistent with the requirement set up by the Judgment, because they are “within the limits of the treaty” (see para. 76).

15. In my opinion, as stated before, Czechoslovakia was entitled to proceed as it did. The conduct of Czechoslovakia may not be characterized as an internationally wrongful act, notwithstanding the differences between Variant C and the 1977 Treaty; Variant C can be justified

because of the right of Czechoslovakia to put into effect the 1977 Treaty as best it could, when Hungary violated its treaty obligations.

16. Even though Variant C could be characterized as an internationally wrongful act, Czechoslovakia was entitled to take countermeasures as a reaction to Hungary's violation of its obligations under the 1977 Treaty in suspending and later abandoning the works at Nagymaros and Gabčíkovo. Article 30 of the International Law Commission's Draft on State Responsibility, which codifies general international law, provides:

“The wrongfulness of an act of a State not in conformity with an obligation of that State toward another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.”

17. All the conditions required by Article 30 of the International Law Commission's Draft on State Responsibility are met in the present case. Variant C was conceived as a provisional and reversible solution (see para. 10 above), which may be explained as an attempt to induce Hungary to comply with its 1977 Treaty obligations and it cannot be considered a disproportionate reaction. Therefore, even assuming that the construction and the putting into operation of Variant C could be characterized as an internationally wrongful act committed by Czechoslovakia, its wrongfulness would be precluded because it was a legitimate countermeasure.

18. The Judgment takes a different view and

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

19. However, “the withdrawal of water from the Danube” is regulated by Article 14 of the 1977 Treaty. Not only Article 14 but also all the Treaty provisions that may support the conduct of Czechoslovakia, continued by Slovakia, have to be applied to determine whether or not it was lawful, since the Judgment acknowledges that the 1977 Treaty and related instruments are in force between the parties.

20. In my opinion, it is not necessary to choose between the aforementioned grounds to justify the action undertaken by Czechoslovakia, continued by Slovakia, because the juridical consequences are the same, i.e., the building and putting into operation of Variant C was not an interna-

tionally wrongful act committed by Czechoslovakia; and Slovakia, as its sole successor State, has not committed any internationally wrongful act in operating Variant C to date.

II

21. A substantial number of Judges, myself among them, asked for a separate vote on each of the two issues included in paragraph 2, point D, of the operative part of the Judgment. However, the majority decided, severely curtailing freedom of expression, to force a single vote on both questions, based upon obscure reasons which are supposed to be covered by the confidentiality of the deliberations of the Court.

22. Since there was no other choice left, I reluctantly decided to vote in favour of paragraph 2, point D, notwithstanding my opinion that the building and putting into operation of Variant C was not an internationally wrongful act committed by Czechoslovakia; and that Slovakia, as its sole successor State, has not committed any internationally wrongful act in maintaining its operation to date. My decision can only be explained as a way out of the dilemma confronted by me because of the determination adopted by the majority of the Court, in a very peculiar way, and shall be understood within the context of the 1977 Treaty, and related instruments, i.e. by applying Article 14, paragraph 3, of the 1977 Treaty, in the event "that the withdrawal of water exceeds the quantities of water specified in the water balance of the approved joint contractual plan". However, in principle, Slovakia shall not compensate Hungary on account of the putting into operation of Variant C by Czechoslovakia and by its maintenance in service by Slovakia, unless a manifest abuse of rights on its part is clearly evidenced.

23. In my opinion, paragraph 2, point 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 with 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.

(Signed) Gonzalo PARRA-ARANGUREN.