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International Rivers and Lakes

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I. Commission of the European Communities: Proposal for a Council Directive on Water Policy

On 15 April 1997, the Commission of the European Communities submitted a proposal for a Council Directive establishing a framework for Community action in the field of water policy¹⁷. The proposed Directive addresses the protection of surface and groundwaters within the European Community, based on commonality of approach, objectives, principles and basic measures.

The key principle is to focus environmental water policy on the natural flows toward the sea occurring in river basins, taking into account natural interactions between surface and groundwater. The proposal includes qualitative and quantitative aspects of water resources management. It purports to coordinate all measures addressing environmental objectives related to water protection and sustainable uses of water. The impact of such measures shall be supervised and controlled within the framework of the river basin.

The Directive aims to prevent water degradation, to protect and improve quantitative and qualitative aspects of aquatic environments, and -- to the extent that they rely on water -- of terrestrial ecosystems. It thus links sustainable development to qualitative and quantitative attributes of water supply. As regards pollution control, the Directive relies on a "combined approach" linking pollution control at the source with the establishment of environmental standards.

The proposal comes in response to a petition by the Council and the Environmental Commission of the European Parliament, dating from June 1995, requesting an in-depth review of the water policies of the European Community based on the environmental policy principles of the Treaty and on the Fifth Action Programme of the Community "Towards Sustainable Development".

Background

The water policies of the European Community have evolved through several stages. The first consisted of establishing legislation dealing with water quality. It addressed surface water to be used for drinking water in the Member States (75/440/EEC); and subsequently bathing waters (76/160/EEC); fish life (78/659/EEC); mollusks (79/923/EEC); human consumption (80/778/EEC); dangerous substances (76/464/EEC); and groundwater (80/68/EEC).

Specific directives regarding hazardous substances were adopted during the 1990's, when the Community issued Directives on urban waste-water (91/271/EEC) and nitrates (91/676/EEC). A proposal on ecological quality was submitted in 1994, and an action programme for groundwater was adopted in 1996. Proposals to review the directives regarding bathing waters and water for human consumption were submitted in 1994 and 1995. A proposal integrating prevention and control of water pollution was adopted in 1996 (96/61/EC).

¹⁷ COM 97/0049 FINAL, SYN 97/0067, Brussels, 26 February 1997.

Objectives of the framework proposal regarding water policy

The four main objectives of a sustainable water policy are to ensure:

- Drinking water supply;
- Water supply for other economic needs;
- Environmental protection;
- Mitigation of adverse effects resulting from floods and droughts.

These four objectives are not always compatible. Environmental protection is especially vulnerable and requires special attention. If the subsidiarity principle is applied to the four above objectives, it does not yield the same results. It therefore appears that the main objective is to protect the environment. Moreover, fulfilling this objective will also significantly contribute to the realization of the first two, i.e. water supply for human consumption and economic needs. The fourth objective regarding flood and drought mitigation, however, appears to concern mainly local and regional activities, in which the role of the Community is less defined.

As this is a framework Directive, appropriate implementation structures will be required at national and regional levels. The Directive concentrates on environmental issues; the impact of climatic change is also considered.

The proposed framework Directive for water policy shall reach its objectives through four main instruments:

- A general framework for community, national and regional authorities to prepare coherent and integrated water policies;
- A "safety net" to identify areas not adequately treated at present, requiring measures, at adequate scale, to remedy the situation;
- A data base to assess the status of aquatic ecosystems and the stresses affecting them; and
- Transparency in disseminating information and the creation of a network for the exchange of data.

Structure of the proposal

The general objective of the proposal is to achieve efficient water resource management through the following steps:

- Management at river basin level;
- Assessing the specific characteristics of each river basin;
- Controlling surface and groundwaters within each river basin;
- Setting up measures to achieve stated objectives;
- Preparing basin management plans; and
- Keeping basin management plans accessible for public consultation.

In addition, the proposed framework Directive shall provide for:

- Water pricing that will ensure full cost recovery;
- A mechanism to inform national authorities and the Commission about specific problems;
- Measures to mitigate and combat accidental pollution;
- Procedures for simplified notification; and
- Procedural strategies against specific pollutants or groups of pollutants.

The Directive also aims to set up a Committee with horizontal responsibilities to satisfy future needs in water legislation within the European Community.

Relationship between the proposed Directive and other legislative acts of the Community

The proposal provides detailed explanations relating to its impact on existing water related directives.

International treaties

The Commission is organizing a community strategy to deal with international waters and the proposed Directive is intended to facilitate the implementation of United Nations Conventions related to transboundary waters. Although the Directive does not address sea waters, the Commission fully recognizes the importance of conventions related to the protection of regional seas.

Legal justification

The proposed Directive is based on the Treaty establishing the European Union, in particular its article 130s (1). Its objective is to maintain and improve the aquatic environment of the Community, and achieve at least an acceptable situation for surface- and groundwaters of the Community. Institutional arrangements and procedures shall be coordinated with a view to guaranteeing protection of the quantity and quality of Community waters.

The proposed Directive provides a framework within which the Member States individually and the Community as a whole may take steps for the protection and sustainable use of water, including transboundary waters. Coordination among administrative structures is to support coordination of measures to control discharges with quality objectives for aquatic environments. The proposed Directive also provides general guidelines on procedures for controlling qualitative and quantitative aspects of community waters.

Under the proposed Directive, Member States are to be individually responsible for establishing national procedures for authorizing water abstractions (e.g. licensing), to prevent overexploitation of surface and groundwater and the ensuing degradation of drinking waters which may be caused by lowering groundwater tables or reducing basic volumes of surface waters.

The main thrust of the Directive addresses qualitative water aspects, including quantitative aspects as a component of quality. This specific approach constitutes the basis for the legal justification of the proposal.

Calendar

According to the present calendar, the proposed Directive is to be adopted by the Council in late 1997. Several steps are provided for implementation in stages.

Integrated approach regarding pollution control

The Directive proposes common objectives and norms to be established throughout the Community. This approach shall be coordinated with limits to discharges under existing Community enactments. In case of disagreement among enactments, the most stringent shall prevail.

Coordination at river basin level

Member States are directed to establish river basin districts and basin management plans for each river basin; for international river basins, this should be done jointly by involved States (articles 3 & 4). Article 13 provides a more specific 'Programme of Measures' required of Member States to be established for the achievement of environmental objectives established by Article 4 of the Directive. Basic (compulsory) and supplementary measures shall be part of each river basin management plan, and shall include those measure required to implement European Community, national or local legislation. Another instance of the common approach is the requirement to use best available technologies to control discharges. Specific strategies may be used to deal with pollution problems resulting from specific contaminants.

Developments regarding dangerous substances have also taken place. It is recommended that such substances be treated on the basis of discharge limits based on best available technology. Contaminants to be included are listed in Annex VIII. Special measures are provided for cases of non-compliance with environmental quality norms. Strategies to deal with individual contaminants can be coordinated and new environmental norms and measures may be put in place as needed.

Diffuse pollution remains under discussion, as there are no simple solutions. In fact, the array of solutions is as varied as the number of problems. Specific directives on nitrates, sanitary products, and marketing of biocides shall remain in force. The marketing of dangerous substances may be subject to limitations. To upgrade existing quality norms, the framework Directive includes provisions to improve the coordination of efforts to deal with diffuse pollution.

Coordination within river basins

The Commission notes that there is general support for using the river basin as the natural unit for water protection and use. However, this may be implemented through coordination of measures, rather than the creation of a river basin authority.

The European Environmental Agency and the control process

As environmental data are crucial to the performance and discharge of responsibilities of the proposed Directive, the Commission maintained close contacts with the European Environmental Agency during its preparation.

Community co-financing

Increased community co-financing of environmental infrastructure is one of the important new developments among regional activities engaged in by European States. The European Investment Bank also has provided funding to the water sector. The proposed Directive is to strengthen data to determine investment needs, thus improving the regional planning process.

Water tariffs

Water prices must reflect costs, including environmental and management costs. Article 7 of the Directive provides for the economic assessment of different water uses, in order to obtain realistic data about the costs of different water uses within river basin districts. Article 12 requires that water prices more accurately reflect costs. Appropriate pricing is both a management and an economic instrument.

Components of water costs within the Directive include service costs, environmental costs and depletion costs. Externalities are especially relevant to proper costing. According to the Directive, total service costs are to be recovered in full by 2010. Article 12 also requires that environmental costs be reflected in water pricing. Economic assessment for costing and pricing purposes shall take place at the river basin level. While differences between separate river basins are acceptable, assessments are to be based on common methodologies. The proposed Directive also considers costs and other effects relating to its implementation.

II. Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes

First Meeting, Helsinki, 2-4 July, 1997^{2/}

The Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes gathered for their first meeting in Helsinki from 2 to 4 July, 1997. The meeting examined possibilities to provide services to the parties, to facilitate the implementation of the Convention. Services could cover technical assistance in water legislation; the settlement of disputes; and assessment of the implementation of the Convention. Several means for the exchange of information are also being considered. The draft workplan includes programme elements based on advisory services on legal instruments, activities on compliance monitoring, advice on laboratory quality management and accreditation, and a pilot project on assessing and monitoring transboundary waters. These programme elements have been suggested by countries with economies in transition, but other entities may also benefit from advisory services.

The Meeting of the Parties may request the Bureau to develop a mechanism, with the assistance of the Secretariat and in consultation with the Task Force on Legal and Administrative Aspects, to provide services for conflict prevention and resolution, and dispute settlement; to identify other areas for good services, including capacity development; and to seek funding for good services.

The meeting also considered Draft Rules of Procedure for the meeting of the parties.^{3/} Under the Rules, decisions are to be taken by consensus; however, failing consensus, decisions are taken by majority of parties present, except in certain cases, such as amendments to the Convention, where decisions by consensus are required.

The implementation of the Convention may be handled through existing administrative areas, especially priority sectors such as integrated management of water and related ecosystems; land based pollution control; human health and water supply; joint bodies; and assistance to countries in transition in relation to water agreements.^{4/}

The Meeting also drafted terms of reference for the Bureau relating to its work between meetings of the governing bodies.^{5/} Under the terms of reference, the Bureau will: carry out the tasks entrusted to it at the Meeting of the Parties; carry out appropriate consultations; and take initiative to strengthen adherence to the Convention; liaise with governing bodies of other environmental conventions, financial institutions, environmental policy-making bodies, and non-governmental organizations, and take other appropriate measures to facilitate the implementation of the workplan.

^{2/} From MP.WAT/1977/4 - 28/4/97

^{3/} MP.WAT/1997/1

^{4/} MP.WAT/ 1997/3

^{5/} MP.WAT/1977/10

There are provisions for organs to implement the workplan^{6/}. Terms of reference for the working group on water management have been drafted. Based on relevant elements of the workplan, the working group shall be responsible for inter-sectoral issues of water management related to the prevention, control and reduction of transboundary environmental impacts. It shall examine experience, draw up recommendations, codes of conduct and other soft law instruments. It also examines policies and methodologies regarding transboundary impacts and assess their implications; assists the meeting of the parties in developing response measures and promotes the harmonization of national rules and regulations in specific areas. It manages the implementation and adjustment of the work plan. It takes initiatives to strengthen the implementation of the Convention and provides advice to task forces and expert groups. It has the duty to ensure consistency with the ECE work programmes.

III. Questions Raised on Bilateral Water Works in South America -- *Itaipu and Yaciret*^{7/}

The Paraguayan press has voiced concerns about procedures related to revenues, debts and profits from two binational projects shared by Paraguay and Brazil, *Itaipu*, and by Paraguay and Argentina, *Yaciret*.

Itaipu

In the case of the binational project shared between Paraguay and Brazil, *Itaipu*, the Paraguayan press claims that the Bilateral Investigation Commission of the National Congress of Paraguay needs to be informed about the contents of the regulations in Annex C of the Treaty, and also of the terms of the minutes of the meeting of the Administrative Council of *Itaipu* of 29 March 1997, to verify compliance with the terms of the agreement of 26 April 1973.

A Paraguayan congressman claims that there is a need to verify whether regulations and minutes of the meeting conform to the terms of the *Itaipu* Treaty, or whether modifications have been introduced that require ratification by Parliament.

Yaciret

Regarding the *Yaciret* project shared with Argentina, the Paraguayan press claims that withholding funds by the National Energy Secretariat of Argentina is not in conformity with the law, since the Argentinean dependency compulsorily retained funds from income from sales to Cammesa, which operates the Argentinean wholesale market, without consulting with *Yaciret* Binational. The Treaty contains no rules regarding the priority of retaining funds to pay project debts. The Paraguayan press argues that the procedure is an open violation of the *Yaciret* Treaty, which establishes that *Yaciret* Binational has the exclusive right to manage funds and income from energy sales.

^{6/} MP.WAT/1977/11

^{7/} From Noticias, Asuncion, Paraguay, 14 May 1997, p.28.

The two above cases raise important questions about production and dissemination needs and payment of debts, in situations where one of the parties to a binational project is a creditor vis-a-vis the other.

IV. Water Supply Between Arizona and Mexico^{8/}

The Environmental Cooperation Commission (ECC) of NAFTA is to begin an independent investigation of water scarcity in the San Pedro River Conservation Area, on the border between Mexico and Arizona. The area is a sanctuary for migratory birds and fragile natural forest species. According to Mr. Victor Lichtinger, Executive Director of the ECC, water scarcity may generate border problems and damage the environment, as well as obstruct economic development. The report to be produced by the investigation may ensure sustainable water utilization.

The investigation is being conducted in response to a request by the Southwest Center for Biological Diversity. The Council of the ECC acknowledged the importance of the San Pedro area for migratory birds. The ECC was created by the Agreement for Environmental Cooperation of North America. The report is being prepared according to the provisions of article 13 of the Agreement.

^{8/} From Internet, 27 May 1997 <msilva@ccemtl.org>

V. The Convention on the Law of the Non-Navigational Uses of International Water Courses

Pursuant to General Assembly Resolution 51/206 of 17 December 1996, the Working Group met for a second session from 24 March to 4 April 1997 to finalize discussions on the elaboration of a framework Convention on the law of the non-navigational uses of international watercourses. The Report of the Working Group,⁹¹ contains 37 articles and an Annex containing procedures for dispute settlement.

Scope of the Convention

The Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of such watercourses and their waters. Navigation is not included within scope of the Convention, except insofar as other uses affect navigation or are affected by navigation (art. 1).

Article 2 defines specific terms, including "regional economic integration organization"; "watercourse State"; "international watercourse"; and "watercourse".

Article 3 establishes a number of important principles:

- a) The Convention does not affect existing agreements, unless specifically stated;
- b) However, parties to existing agreements may consider harmonization of such agreements, when necessary, with the basic principles of the Convention;
- c) Individual watercourse States may enter into individual agreements, adjusting the framework agreement to the characteristics and uses of each particular case;
- d) Agreements must identify the waters to which they apply. They may be applied to entire watercourses, parts thereof, specific projects, programmes and uses, except insofar as the agreement adversely affects to a significant extent, uses by other watercourse States, without their express consent;
- e) Consultations with a view to negotiations in good faith are required in order to adjust the application of the Convention to specific situations;
- f) Agreements do not impinge upon the rights and obligations of watercourse States which are not parties to specific agreements.

⁹¹ United Nations. General Assembly. *Convention on the Law of the Non-Navigational Uses of International Watercourses: Report of the Sixth Committee Convening as the Working Group of the Whole*. 11 April 1997. 24 p. (A/51/869).

Article 4 states that every watercourse State is entitled to participate at negotiations and to become a party to agreements applying to the entire watercourse as well as to participate in relevant consultations.

Watercourse States whose use of watercourses may be affected to a significant extent by the implementation of specific agreements, are entitled to participate in consultations on the agreement and, where appropriate, in the negotiations thereof in good faith with a view to becoming a party thereto, to the extent that their use is thereby affected.

General principles

Article 5

Article 5 lays down the cornerstone principles of the Convention, acknowledging the paramount principle of international water law: equitable and reasonable utilization and participation. Watercourse States shall specifically use and develop international watercourses with a view to optimal and sustainable utilization, taking into account the interests of all watercourse States, consistent with adequate protection of the watercourse.

Watercourse States have a right to participate in the utilization of a watercourse and a duty to cooperate in its protection and development.

Article 6

Article 6 lists factors relevant to "equitable and reasonable utilization". The list is not exhaustive, and includes natural and economic factors and circumstances; social and economic needs; population dependent on the watercourse; effects on other States; existing and potential uses; conservation, protection, development, economy of use of water resources of the watercourse and the cost of measures taken to such effect; availability of alternatives of comparable value to particular planned or existing uses.

The article emphasizes that application of article 5 requires that parties enter into consultations, when need arises, in a spirit of cooperation.

Conclusions and decisions based on this article need to strike a balance, where all relevant factors shall be taken into account and compared with each other. Factors are to be considered together with conclusions reached.

Article 7

Article 7 imposes an obligation not to cause significant harm. This is a preventive obligation, but also an obligation to mitigate actual harm when it has occurred, and to discuss compensation where appropriate. In all cases, due regard shall be given to the principles of articles 5 and 6.

Article 8

States have a general obligation to cooperate in good faith in order to attain optimal utilization and adequate protection of international watercourses. Joint mechanisms and commissions are to be specially considered when determining the manner of implementation of such cooperation.

Article 9

Requires that States regularly exchange data and information regarding the condition of water courses. Such information includes quantitative, qualitative and forecast data. Reasonable costs resulting from data collection and processing may be requested from the watercourse State requiring information.

Article 10

Article 10 states that no use has inherent priority; that conflicts shall be resolved through articles 5 to 7, and that in any case special regard shall be given to the requirements of vital human needs.

Planned measures

According to articles 11 and 12, States shall exchange information on planned measures, and notify other watercourse States of planned measures with possible adverse effects. Study and evaluation procedures of notified measures are subjected to a six month period, which shall be extended, at the request of the notified State, in cases of special difficulties, for another six months (Article 13). During the reply period, the notifying State shall cooperate with the notified State, by providing information and data, and by not implementing or allowing the implementation, of the notified measure (article 14). Replies to notifications shall be made as early as possible, stating reasons for findings of inconsistency with articles 5 or 7 through documented explanations (art.15). Absence of reply to notification, empowers the notifying State to proceed with implementation, according to notification, subject to obligations resulting from arts. 5 and 7 (art. 16). Replies with findings of inconsistency with the provisions of arts. 5 and 7 shall be consulted and negotiated in good faith. The notifying State shall, if requested, refrain from implementation, for a period of six months unless otherwise agreed (art. 18). A State believing that another watercourse State is planning measures with a potential adverse effect may request, with a documented explanation, the application of art. 12. Lacking agreement on the request, art. 17 applies. Consultations and negotiations according to art. 17 create the obligation to refrain from implementation, for six months, if so requested (art 19).

Under certain circumstances, immediate implementation of planned measures is allowed (public health, safety, or other equally important interests) subject to arts. 5 and 7. The Convention requires a formal declaration of urgency. Consultations and negotiations according to art. 17 shall be promptly entered into, if requested by watercourse States (art.19)

Protection, preservation, management

Watercourse States have the individual and, where appropriate, joint obligation to protect and preserve the ecosystems of international watercourses (art. 20). This obligation includes the duty to prevent, reduce and control pollution that may cause significant harm to other watercourse States or their environment, including harm to human health and safety, to water uses for any beneficial purpose, or to the living resources of the watercourse. Policies in this connection shall be harmonized (art.21). Measures and methods to prevent, reduce and control pollution shall be consulted, with a view to reaching agreement. Such agreements may include: joint water quality objectives and criteria; establishment of techniques and practices to address point and non-point

pollution; establishing lists of substances to be prohibited, limited, investigated, or monitored (art. 21).

Introduction of alien or new species, which may have effects detrimental to the ecosystem, resulting in significant harm to other watercourse States, is to be prevented (art 22). Environmental duties are extended to the protection and preservation of the marine environment (art. 23).

Management of international watercourses is a main concern of the Convention, which suggests consultations and joint mechanisms to this effect. Management includes planning of sustainable development; promotion of rational and optimal utilization, protection and control of watercourses (art. 24). Regulation of water flows is also addressed (art. 25), in which watercourse States should participate on an equitable basis, sharing costs. The Convention further requires safe operation and maintenance of installations and facilities, as well as their protection (article 26).

Harmful conditions and emergency situations

Harmful conditions, whether resulting from natural causes or human conduct, shall be prevented and mitigated through all appropriate measures (art.27).

Situations causing serious harm, or posing an imminent threat to cause harm, resulting suddenly from natural or human causes are considered emergencies, to be notified without delay by the watercourse State within whose territory it originates (art. 28). All practicable measures to prevent, mitigate and eliminate harmful effects resulting from the emergency shall be taken immediately. A similar duty applies to contingency plans (art. 28).

Miscellaneous provisions

At times of armed conflict, international watercourses and their installations shall enjoy the protection accorded by international law at times of armed conflicts, and shall not be used in violation of such principles and rules (art. 29). In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall resort to accepted indirect procedures (art. 30). Nothing in the present Convention obliges a watercourse State to provide data or information vital to its national defence or security (art. 31).

In dealing with significant transboundary harm, or serious threat thereof, a watercourse State shall not, unless otherwise agreed, discriminate on the basis of nationality or residence or place where injury occurred, in granting affected parties access to judicial or other procedures, or rights to claim compensation, or other relief, in respect of significant harm caused by activities carried on within its territory. The principle applies to natural as well as to juridical persons (art. 32).

Disputes are to be settled by peaceful means; including negotiations, good offices, mediation, conciliation, joint watercourse institutions, arbitration, or the submission of the case to the

International Court of Justice. Fact finding commissions are to be established, with access to data and information, to report on disagreements according to majority rule. Parties to the Convention may agree, when ratifying the Convention, on certain jurisdictional mechanisms such as submission to the International Court of Justice or Arbitration.

Final clauses

Final clauses include formal provisions and annexes on arbitration.

VI. International Court of Justice Renders Judgement in Dispute Between Hungary and Slovakia on the Gabčíkovo-Nagymaros project^{10/}

The International Court of Justice rendered judgement on 25 September 1997 in a protracted dispute between Hungary and Slovakia over the construction and operation of dams on the river Danube. The ICJ judgement found both States in breach of their legal obligations. It called on both countries to carry out the relevant treaty between them while taking account of the factual situation that has developed since 1989.

In 1977, Hungary and Czechoslovakia had concluded a treaty (the 1977 Treaty) to build dam structures at Gabčíkovo in Slovakia and at Nagymaros in Hungary with the purpose to generate electric power, control floods and improve navigation on the Danube. In 1989, Hungary suspended and subsequently abandoned work on the project, alleging that it entailed grave risks to the Hungarian environment and the supply of water to Budapest. Slovakia (successor to Czechoslovakia) denied these allegations and insisted that Hungary carry out its treaty obligations. It planned and subsequently put into operation an alternative project only on Slovak territory, the operation of which affected Hungary's access to the water of the Danube.

In its judgement, 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;
- 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;
- Hungary's notification of termination of the 1977 Treaty and related instruments on 19 May 1992 did not legally terminate them (and they are consequently still in force and govern the relationship between the Parties); and
- 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;

^{10/} ICJ/549 26 September 1997.

- 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;
- Each Party must compensate the other Party for the damage caused by its conduct; and
- 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 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 Gabčíkovo 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".

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