

Treaties in context IV

An interdisciplinary contribution to the course on the law of treaties

THE GABČIKOVO-NAGYMAROS PROJECT CASE



**Presented by Boldizsár Nagy
at the Mykolas Romeris University,
Vilnius, Lithuania, 2014**

The scheme of the talk

- The context: an increasing number of environmental law cases at the ICJ
- Description and history of the Gabčíkovo-Nagymaros project
- The concerns of Hungary
- Evaluation of the judgment of the ICJ
- Developments between 1997 and 2014 October the inability to reach an agreement
- The essence of the debate: competing paradigms
- Possible ways out – the role of the EU

Motto

„When technical questions are discussed, in particular concerning *cases related to environmental protection*, it seems to me that the files constituted by the parties are abusively technical and abstruse – or in any case, *incomprehensible for normally constituted jurists* who have only limited training in chemistry, geology or hydrographics.”

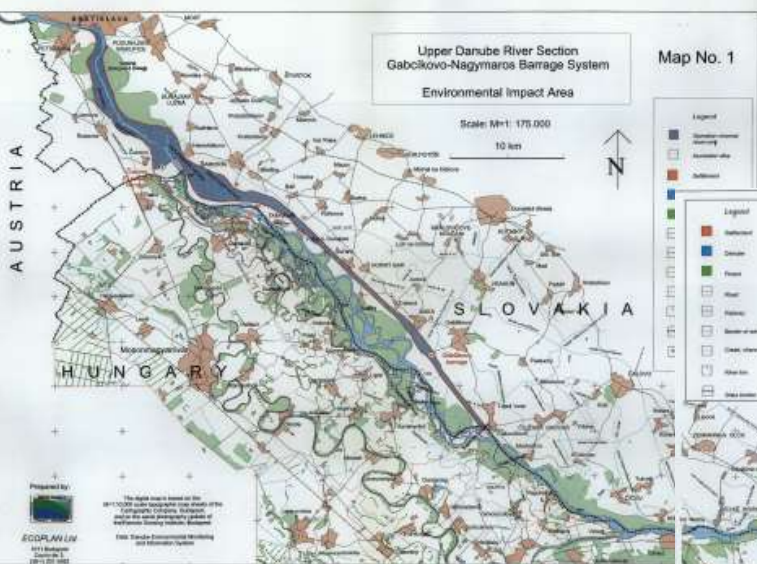
A. Pellet, 2008, at p. 282

A „flood” of environmental cases at the ICJ

Designation	Jurisdiction	Start	Completion / state of procedure
Pulp Mills on the River Uruguay (Argentina v. Uruguay)	Art. 60 of the 1975 Statute	4 May 2006	Judgment 20 April 2010
Aerial Herbicide Spraying (Ecuador v. Colombia)	Article XXXI of the Pact of Bogotá of 30 April 1948, and Art. 32 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.	31 March 2008	Revoked by Ecuador
Whaling in the Antarctic (Australia v. Japan)	Article 36, para 2, of the Statute	31 May 2010	Judgment, March 31 2014
Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)	Article XXXI of the Pact of Bogotá of 30 April 1948 and both parties acceptance of jurisdiction according to Article 36, para 2, of the Statute	18 December 2010.	United by the Court in 2013
Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)	Article XXXI of the Pact of Bogotá of 30 April 1948 and both parties acceptance of jurisdiction according to Article 36, para 2, of the Statute	21 December 2011	

A case decided but
unresolved: the Gabčíkovo-
Nagymaros Project case
(Hungary / Slovakia)

MAP OF THE AFFECTED AREA



Source: Hungarian Memorial, Annexes, Vol. 2.

The Danube, before the regulation in the late 19th century (started in 1886)



Source:
www.szigetkoz.biz

The overview of the original project



SKETCH-MAP No. 2

The Original Project

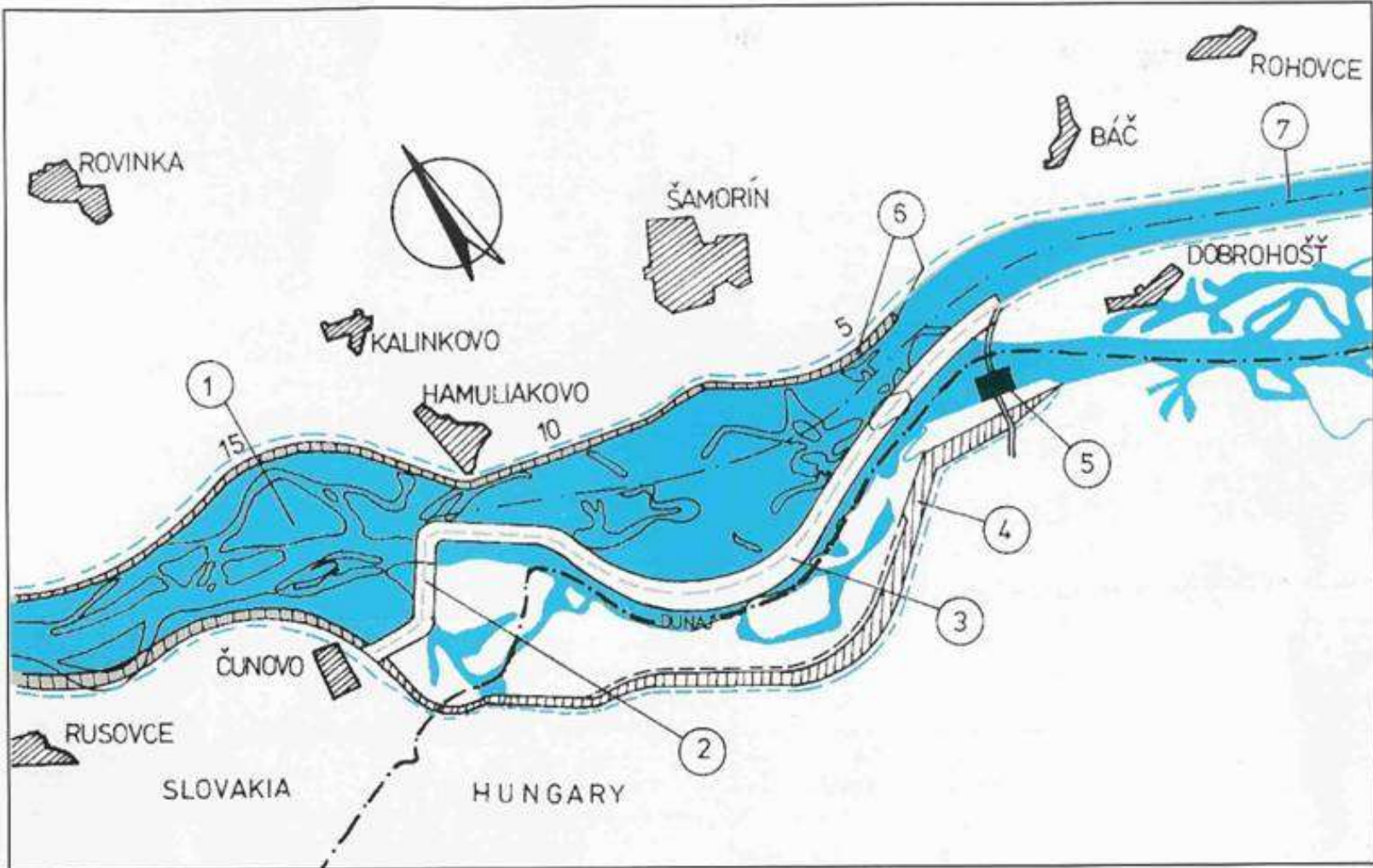
N.B.: This sketch-map has been prepared for illustrative purposes only

Sketch-map not to scale

The overview of Variant C



An closer look at the Variant C structures



LAYOUT OF THE RESERVOIR GABČÍKOVO DIMINISHED BY VARIANT „C“ STRUCTURES

1 - remaining reservoir, 2 - structures of the Čunovo complex /see separate figure and description in the text/, 3 - dividing dam 11 km long, 4 - original right-side dams of reservoir, 5 - Dunakiliti weir

Nagyymaros under construction 1992




Description

- Reservoirs:
 - Original Plan: Dunakiliti Reservoir 60km²
 - Variant C: Cunovo: 40 km² reservoir, dam, 3 sets of weirs, auxiliary shiplock, small power plant, (58 MW) 11 km long connecting dyke
 - Nagymaros: 100 km long producing 7 m fall! **Not built**
- By-pass canal:
 - 25 km long on/in fertile land (headrace canal: water: 15 meters above ground level - power station - tailrace canal dug into the land)
- Power station(s):
 - Gabčíkovo at 1821 rkm = 8 turbines 720 MW capacity, 2700 GWh output/year, 16-23 m fall of water, **planned peak** mode, **actually continuous**
 - Nagymaros at 1696 rkm 6 turbines, 158 MW capacity, 1600 GWh output/year, continuous mode **Not built**
- Purposes according to the 1977 Treaty:
 - energy production (3.700 GWh/year to be shared equally)
 - improvement of navigation
 - flood protection
 - infrastructural development

History *until the judgment of the International Court of Justice*

- 4 phases:
 - 1952-1977 planning
 - 1977 – 1989 construction with second thoughts
 - 1989 – 1992 suspension of works by Hungary unilateral diversion by (then) Czech-Slovak Republic
 - 1993 -1997/1998 the Gabčíkovo-Nagymaros Case in front of the ICJ: first judgment: 25 September 1997 (see: <http://www.icj-cij.org/icjwww/idocket/ihs/ihsframe.htm>)

The essence of the 1977 treaty

- Joint (50-50 %) investment and provision of equal amount of hydropotential
- Joint property of the main installations and their joint operation based on agreement
- Equal share in the (material and non-material) benefits, equal contribution to the operational costs and compensation of possible damages (in relation to the jointly operated installations)
- The project never met the return requirements of the National Planning Office,  in fact it would have been a manifestation of Socialist Internationalism

Major concerns in the eighties

Surface and subsurface waters.

- Drying up of the last inland delta in Europe, comprising several hundred square kilometers (Szigetkoz and Zitny Ostrov) with an unusually dense branch system in the flood plain area supporting unique wetlands.
- Substantive deterioration of water quality including the danger of eutrophication.
- Threat of profound changes is the aquifer. The aquifer under the Hungarian side contains approx. 5.4 km³ ground water of potable quality with the sustainable capacity of 750 million litres per day. The Slovak side's similar resources are even larger
- Reduction of the quantity and impairment of the quality of the water produced by the bank filtered wells located between the Nagymaros Barrage and Budapest and supplying 2/3 of the drinking water needs of the 2 million inhabitants living in the Hungarian capital.

Major concerns in the eighties

- Destruction of the rare, at large territories natural or semi natural conditions, including the **devastating impact on the flood plain ecosystems** entailing the disappearance of species and **reduced biodiversity**.
- Decrease of **agricultural and forestry production** on several hundred km² surface area, the disappearance of aquatic habitats significantly **impairing fisheries, the loss of recreational values** including the transformation of the Danube Bend into an industrial area.

Flood security, engineering risks, lack of appropriate impact assessment,

- Lack of adequate **environment impact assessment** and the inappropriate seismic research and calculations serving as the basis of design.
- Variant C has further contributed to the list of damages and risks:
Flood security is fragile;
International **navigation** on the Danube has become **blocked repeatedly for weeks;**
severe degradation of the main river channel accompanied the drastic and unpredictable reduction of water flow.

HUNGARIAN REPLY, 1995 SUMMARISING PARA 1.102 (REFERENCES OMMITTED)

As to Nagymaros:

- The Barrage would have threatened **the reliable drinking water supply of Budapest**, diminishing the output of the bank-filtered wells and affecting the quality of the extracted water. It would have **thoroughly changed a unique landscape**, decreasing its touristic value; **drowned Roman and other archaeological sites** and about two dozen islands; caused **river morphological problems**, and drastically **affected the flora and fauna of the riparian zones extending to 300-350 km** on both sides of the river and its tributaries. By contrast, **claimed benefits of navigation and flood protection could have been achieved in other and less costly ways.**

HUNGARIAN REPLY, 1995 SUMMARISING PARA 1.102 (REFERENCES OMMITTED)

- *As to Gabčíkovo:*

The Hrusov-Dunakiliti reservoir faced a significant danger of eutrophication, with qualitative deterioration of water recharge into the subsurface waters, in the long run putting at risk a huge drinking water reserve in the deeper layers of the aquifer under Zitny Ostrov and the Szigetkoz. The Original Project would have had devastating impacts on floodplain ecosystems, with consequent severe effects on biodiversity of flora and fauna. Yearly agricultural and forestry losses would have amounted to several hundred million HUF on the Hungarian side alone, associated with lack of natural sub-irrigation and soil quality deterioration. Certain structures including dykes were exposed to larger seismic risk than had been taken into account in the design of the Project.

THE CASE IN THE INTERNATIONAL COURT OF JUSTICE

The Gabčíkovo-Nagymaros Project Case in front of the ICJ 1993-1997

- Varied methods of peaceful settlements of disputes (EC mediation, formal third party settlement)
- Enormous importance for the international community
 - for the first time two Central European States go to the Court – i.e. submit a dispute to an unbiased third party compulsory settlement
 - Test whether the environmental consciousness of the 80s and 90s enters the formal intergovernmental world
- Remarkable differences in handling the case in front of the Court

Jurisdiction: special agreement (compromise of 7 April 1993)

(a) whether the Republic of Hungary (RoH) was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the RoH;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the "provisional solution" and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

Jurisdiction: special agreement (compromise of 7 April 1993)

c) what are the **legal effects** of the notification, on 19 May 1992, of the **termination** of the Treaty by the RoH.

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

The Gabčíkovo-Nagymaros Project Case in front of the ICJ 1993-1997

- Steps:
 - Three written rounds (memorial, counter-memorial, reply, 10, 7, 6 months respectively) last submitted on 20 June 1995.
 - 22 volumes, 24 kilos, 9000 pages altogether
 - Oral hearing: 1997 March and April
 - Visit by the Court (between oral rounds)
 - Judgment: 25 September 1997
- Events in the meantime:
 - 1994 futile bilateral talks
 - 1995 temporary agreement on the water management regime, guaranteeing 20 % of the average discharge to Hungary

Working in a team of lawyers

- National – international participants
- The narrow circle of lawyers acting in front of the ICJ
- The selection of the lawyers
- Team work
 - primus inter pares
 - the allocation of tasks
 - deadlines
 - technical details (confidentiality)
 - rehearsals

The experts and the annexes

- Mobilising the domestic expert community
- The production of scientific annexes -
language barriers, time barriers, costs
- Print and delivery

Success/ failure from a Hungarian point of view

Goal	Judgment	Pratcice/Reality
<p>Stopping the operation of the hydro-power station at Gabčíkovo, returning the full water discharge into the main riverbed</p>	<p>Does not exclude this</p> <p>It all dependes on whether Gabčíkovo can operate (after adjustments) in an environmentally sustainable mode</p> <p>„In order to evaluate the environmental risks, current standards must be taken into consideration.” (para 140.) It appears ... that, ... Variant C could be made to function in such a way as to accommodate the satisfaction of essential environmental concerns(para 146. pont)</p>	<p>The present provisional mode of operation, based on a ptemporary technical agreement concluded in 1995 does not satisfy environmental standards and EU requirements</p>
<p>Regaining control over international navigation between Rajka and Szap</p>	<p>The Judgment acknowlwdges Hungary’s right the participate in the operation of the system if it so wihses. Operation of the system includes control over navigation.</p>	<p>Slovakia has exclusive controls over navigation in the reservoir and the by-pass canal.</p>

Success/ failure from a Hungarian point of view

Goal	Judgment	Practice/Reality
<p>The suspension and subsequent termination of the construction be recognised as lawful or at least as a breach of obligation which was triggered by a state of necessity and therefore not being a wrongful act.</p> <p>The installation should only operate if the functioning is environmentally sound, meeting applicable environmental standards</p>	<p>Recognises that conservation of drinking water reserves is an essential interest enabling the invocation of a state of necessity</p> <p>-Recognises the peril to those reserves, but does not consider the peril imminent and denies that there were no means to avoid the peril.</p> <p>- notes that Hungary had helped, by act or omission to bring it about the peril, therefore „would not have been permitted to rely upon that state of necessity” (Paras 53 -57)</p> <p>- In order to evaluate the environmental risks, current standards must be taken into consideration. The parties „must look afresh” at the impacts and find a solution for the environment including surface and subsurface waters (paras 140-141)</p>	<p>Water reserve at the lower (Nagymaros) section are not endangered,</p> <p>In relation to the upper (Gabčíkovo) section the investigations envisaged by the water framework directive (2000/60/EC) and the planned „strategic impact assessment were supposed to assess the imminence and gravity of the peril,</p>

Success/ failure from a Hungarian point of view

Judgment

Practice/Reality

did not (completely) terminate in 1992 as
negotiation by Hungary was premature
breached the treaty.

Negotiations in
1997-1998 led to
initialling an
agreement
unrelated to the
judgment.

declare that both Parties
negotiate in good faith a
account of what
on the

After its
abandonment new
rounds of
negotiations
started in 1998
ended till

remains
ground (C)

Then operative

that the treaty is to

Rather it orders the parties

- To negotiate in good faith in

the prevailing situation, .. to ensure

of the objectives of the Treaty (Para 10)

- To establish (not: re-establish) a joint operation

regime „unless the Parties otherwise agree” (Para 10)

155 (2) C)

- See Also Paras 132-133 explaining that the facts on

the ground are the basis of future obligations

sign

the 1977 Treaty has largely been stripped of its material content, but remains ready to accommodate new commitments by the Parties. (Separate opinion of Judge Badjaoui, para 61.)

Success/ failure from a Hungarian point of view

Goal	Judgment	Practice/Reality
<p>Nagymaros (a second hydropower station) be not built</p> <p>The elimination of peak-mode operation</p>	<p>The negotiations on the achievement of the objectives of the treaty must be conducted „in the light of the prevailing situation.” (Para 155 (2) B)</p> <ul style="list-style-type: none"> - It could be a miscarriage of justice to prescribe in 1997 „what might have been a correct application of the law in 1989 or 1992” -The Court cannot ignore that: <ul style="list-style-type: none"> ◦ the Gabčíkovo power plant has been in operation for nearly five years, ◦ the reservoir is significantly smaller and is formed by a dam which is built not at Dunakiliti but at Cunovo, ◦ the plant is operated in a run-of-the-river mode and not in a peak hour mode ◦ Nagymaros has not been built ◦ with the effective discarding by both Parties of peak power operation, there is no longer any point in building it <p>(all these in para 134)</p>	<p>Nagymaros has not been buoilt, the site is restored</p> <p>Slovakia still wishes a second barrage and desires peak-power operation</p>

Success/ failure from a Hungarian point of view

Goal	Judgment	Practice / reality
<p>Nagyymaros (a second hydropower station) be not built</p> <p>The elimination of peak-mode operation</p> <p>(Continued)</p>	<p>„[T]hat part of the obligations of performance which ... were not yet implemented before 1992 — have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated(para 136.)</p> <p>What is required in the present case by the rule pacta sunt servanda, ... is that the Parties find an agreed solution within the co-operative context of the Treaty. Good faith, „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,” (Para 142)</p>	<p>See previous slide</p>

Success/ failure from a Hungarian point of view

Goal	Judgment	Practice/Reality
<p>The main riverbed should receive appropriate amount of water and discharges should follow the natural pattern, including floods.</p> <p>Gabčíkovo should operate in an environmetally sound way.</p>	<p>-the Project's impact upon the environment is a key issue(para 140.)</p> <p>- „The Perties 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”. (Para 140)</p> <p>- each party was entitled to withdraw quantities of water exceeding those agreed in the plan thereby reducing it share in the electric power. (Para 56)</p>	<p>The parties at their negotiations were seeking but not finding the „satisfactory solution”</p> <p>The present situation is far from it.</p>
<p>Hungary should enjoy a reasonable and equitable share from the water flow of the river</p>	<p>The present discharge regime violates that right. Even as a putative countermeasure it can not be justified. (Paras 78, 85-86.)</p>	<p>It is a continuous wrongful act of Slovakia, which is not neutralised by the 1995 Agreement on certain provisional technical measures, as that is only a damage-mitigating step, but does not affect the illegality of the situation</p>

Success/ failure from a Hungarian point of view

Goal	Judgment	Practice/Reality
<p>The wrongfulness of Variant C be declared</p> <p>All damages caused by the diversion of the Danube by Slovakia be compensated</p>	<p>Variant C is fully illegal, there is no circumstance or legal base excluding its wrongful putting into operation and use ever since 1992 (Paras 78, 81, 146.)</p> <p>„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. (Para 155. (2))</p>	<p>Slovakia withholds the compensation</p>
<p>Unilateral operation and utilisation be replaced by joint operation and utilisation, unless the Parties otherwise agree</p>	<p>The joint regime must be restored, unless the parties otherwise agree (Paras 144, 155 (2) C)</p>	<p>There is no joint operation. Slovakia alone is in control</p>

The (very short) essence of the judgment (as seen in Hungary)

- Nagymaros (the second dam) need not be built – no peak operation
- Gabčíkovo may be operated, but only in an environmentally sustainable manner
- The treaty has not terminated, but remains as a shell, the content of which is to be renegotiated
- The joint control over what will remain of the project must be re-established unless otherwise agreed
- Claims for damages be mutually cancelled

Developments between 1997 and October 2014

First round of bilateral talks October 1977 – February 1998

The parties abandon the judgment and by February 1998 draft a treaty which would entail building a second barrage.

Due to the outburst of public condemnation the draft never gets signed by Hungary, and the governing Socialist-liberal coalition loses the elections in April 1998, partly because of this issue.

Second round of bilateral talks: November 1998 – April 2002

In September 1998 Slovakia returns to the Court trying to enforce the signing of the abandoned bilateral draft framework agreement.

After elections in Slovakia the two conservative governments resume talks and agree that the case become dormant at the ICJ. That is why it is on the list of pending cases still in 2012.

9 plenary meetings and 4+6 (legal and technical) working group meetings take place until 2002 April

In December 1999 upon Slovak request Hungary transmits approx. 1000 pages containing a draft Agreement and detailed technical suggestion for the alternatives of the project without the second barrage to be investigated.

Developments between 1997 and October 2014

- in December 2000 Slovakia essentially refuses to enter into negotiations on the new alternatives and wishes to return to the original project, including a second barrage in the Danube Bend
- 2001: Futile efforts in plenary, finally two working groups are established (a legal and an environmental-technical) but due to debates on their mandate no actual work is done.
- 2002 Elections in Hungary and Slovakia: negotiations do not continue until April 2004

Third round of bilateral talks: April 2004 – April 2010

- April 2004: resuming talks: agreement on three working groups (legal, environmental-technical, economic.) Deadline for agreement on working group level: December 2005
- No substantive progress made
- The reports presented in January 2006 find that no agreement on the desired measures is achieved. The working groups dissolve.

Developments between 1997 and October 2014

- October 2006 negotiations at plenary level resume – speeding up is planned
- December 2006 second plenary meeting – Slovakia hands over a draft agreement suggesting the „suspension” of the obligation to build a second dam in exchange of the legalization of Cunovo.
- February 2007 Hungarian proposal for a framework agreement extending to environmental goals, property relations and a clear statement on limiting the scheme to Gabčíkovo.
- 2007-2008 No getting closer on the legal issues – negotiations dormant on the agreement
- 2007 July: working group level agreement on conducting a common „strategic environmental assessment” led by a 6 member Steering Committee, confirmed by plenary in November 2007
- 2007-2008 Drafting of the statute of the Steering Group – adopted on 12 August 2008.

Developments between 1997 and October 2014

The task of the Steering Committee is to formulate common proposals of technical measures in harmony with the preparation of the River Basin Management Plan and to organise their Strategic Environmental Assessment in the section of the Danube affected by the Judgment of the International Court of Justice in the case of the Gabčíkovo - Nagymaros Project which ensure the fulfilment of the recent environmental norms and its requirements endorsed by the Judgment.

Developments between 1997 and October

- Joint research never materialized
- Hungary prepares a „Preliminary Feasibility Study” outlining possible restoration scenarios to be subjected to (further, common) environmental impact assessment by February 2009.
- Slovakia comments it, without preparing its own, due to financial difficulties
- 2010 Spring: the Final Feasibility Study is handed over.
- This leads to tensions in Hungary as no wider domestic coordination precedes it. The head of the Hungarian negotiation team is dismissed, negotiations come to a halt.

Developments between 1997 and October 2014

- April 2010: elections in Hungary. The new conservative government does not set up a negotiating structure.
- Fall 2011: the President of the International Court of Justice summons the parties to the Hague and inquires about their intentions with the longest pending case.
- 2012 April: Marcel Szabó appointed as government plenipotentiary entitled to negotiate the implementation of the 1997 judgment. 2012 December: László Székely replaces Mr Szabó.
- 2013 June: László Székely, government plenipotentiary: „negotiations are largely at that point where we left them in 2002” [when his first appointment as government commissioner ended]
- 2014 July: Gábor Baranyai replaces Mr Székely with the same mandate
- 2011 – 2014: Informal contacts between appointed representatives – no formal negotiations on the merits

Zoltán Illés, the responsible state secretary on the project, in May 2011

Q.: *Nineteen years ago Slovakia unilaterally diverted the river from its original bed on a stretch of the Danube... Are the two countries any closer to agreement on what should happen to that sensitive stretch?*

A.: To give a direct answer, no. The International Court of Justice (ICJ) in the Hague made a very clear and exact decision on this. ... both sides have to agree on electricity production, navigation and flood control, keeping in mind that the priority is nature protection. I think the outcome of such a decision is very obvious. 50 per cent of the water according to all international agreements belongs to Hungary, 50 per cent of the average water amount belongs to Slovakia.

BY THE GREEN DANUBE

Zoltán Illés talks to
Nick Thorpe about Red Sludge,
Green Rivers, and Power Generation
Hungarian Review, 2011/3, pp. 5-10

Competing paradigms

AXIS OF EVALUATION	HUNGARY	SLOVAKIA
PERSPECTIVE	Long term	Short term
VALUE ASSESSMENT	Discount rate low: high present value of future drinking water, near natural conditions	Discount rate high: hardly any value in the present of assets, resources to be consumed in remote future. Does not want to invest <i>now</i> for a return in fifty years
CARE FOR POSTERITY	Care for future generations, their life supporting systems and basic natural resources	Does not contemplate the situation of generations to come. "They should care for themselves, as we do for ourselves" -mentality.
RISK-MANAGEMENT	Adoption of the precautionary principle regulating prudent behaviour in circumstances of uncertainty: according to this principle the lack of full and final scientific proof of future damage does not entitle to go ahead; projects should be stopped even if there is "only" a high probability but not a certainty of the damage.	Belief in the technical fix: man is master of the universe, whatever he destroys, he can correct nothing is irreversible. A mere likelihood of immense future loss is not a reason to endure a qualitatively smaller, but certain present loss.

Competing paradigms

AXIS OF EVALUATION	HUNGARY	SLOVAKIA
MARKET ECONOMY OR ELSE	Goods with no market value (the beauty of a landscape, the presence of irreplaceable archeological sites, the richness of biodiversity) are nevertheless valuable , they deserve sacrifices including financial efforts.	Market economy dictates "reasonable market behaviour" tradeable goods like energy, navigational improvement have priority over symbolic
SURVIVAL VS. GROWTH	The goal is: balance with nature sustainable existence (not necessarily development in terms of growth).	The goal is modernization in industrial terms, growth, expansion, domination over nature.
POLITICS	There are no hidden political objectives with the stopping of the project.	Confessed and unstated political goals dominate the decision to proceed.

Back to the context

- The Court's judgment in the Pulp Mills (Argentina v. Uruguay) case in 2010 (see annex)
- The European Union's potential role

The EU's potential role

- Substantive law:
 - The Water Framework Directive of 2000
(2000/60/EC directive, OJ L 327/1)
 - The secondary legislation on environment and nature protection (Birds directive /79/409/EEC/, Habitat directive, /92/43/EEC/, etc.)
- The Danube Region Strategy (2011) COM(2010) 715 final
- Dispute settlement
 - The Court of Justice of the European Union aspiration to monopolise the interpretation of the EU law – the Mox case (Case C-459/03, Commission v Ireland)

Solution in sight?

The EU's increased recognition of the major rivers' (and water-bodies') environmental and ecological services may lead to an action by the Commission – e.g. an infringement procedure against both states

or

the dispute remains unresolved for a long period.

The return to the ICJ – not last because of *Mox* and the difficulties with „fact-intensive” cases – is unlikely.

Selected literature relating to this talk

Symposium: *The Case Concerning the Gabčíkovo-Nagymaros Project*. All in: *Yearbook of International Environmental Law*, Volume 8, 1997 Jutta Brunnée and Ellen Hey (eds.) OUP, 1998

Charles B. Bourne: The Case Concerning the Gabčíkovo-Nagymaros Project An Important Milestone in International Water Law

A. E. Boyle: The Gabčíkovo-Nagymaros Case: New Law in Old Bottles

Paulo Canelas de Castro: The Judgment in the Case Concerning the Gabčíkovo-Nagymaros Project: Positive Signs for the Evolution of International Water Law

Jan Klabbers: The Substance of Form: The Case concerning the Gabčíkovo-Nagymaros Project, Environmental Law, and the Law of Treaties

Stephen Stec & Gabriel Eckstein: Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabčíkovo-Nagymaros Project

Leiden Journal of International law „thematic issue” Leiden Journal of International Law ; 11 (1998) 2 ,

Lammers, Johan G.: The Gabčíkovo-Nagymaros case seen in particular from the perspective of the law of International watercourses and the protection of the environment pp. 287-320.

Fitzmaurice, Malgosia: The Gabčíkovo-Nagymaros case: the law of treaties ibid, pp. 321-344

Klabbers, Jan: Cat on a hot tin roof : the World Court, state succession, and the Gabčíkovo-Nagymaros case ibid., pp. 345-355

Selected literature relating to this talk

- Kazhdan, Daniel: : Precautionary Pulp: Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle
- Kovács Péter: Quelques considérations sur l'appréciation et l'interprétation de l'arrêt de la Cour Internationale de Justice, rendu dans l'affaire Gabčíkovo-Nagymaros
in: German Yearbook of International Law, vol. 41 (1998) Duncker and Humblot, Berlin, 1999, pp. 252–266.
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- Pellet, Alain: The Anatomy of Courts and Tribunals
The Law and Practice of International Courts and Tribunals 7 (2008) pp. 275 – 287
- Szabó, Marcell: The implementation of the judgment of the ICJ in the Gabčíkovo–Nagymaros dispute, *Iustum Aequum Salutare* vol. V (2009) No. 1. pp. 15–25.
- Reichert-Facilides, Daniel: Down the Danube : the Vienna Convention on the Law of Treaties and the Case concerning the Gabčíkovo-Nagymaros Project. *International and Comparative Law Quarterly*; vol. 47, (1998) 4, pp. 837-854
- Zinke, Alexander: DANUBEPARKS Strategy on Conservation and Navigation, 2011
http://www.danubeparks.org/files/781_DANUBEPARKS_ConservationNavigation.pdf visited 4 April 2012

Further useful – or informative - links

- www.bosnagymaros.hu
- www.Gabčíkovo.gov.sk
- www.szigetkoz.biz

Thanks!

Boldizsár Nagy
Eötvös Lorand University and Central
European University
Budapest
www.nagyboldizsar.hu

ANNEXES

- **A FEW KEY PROVISIONS OF THE JUDGMENT IN THE GABČIKOVO-NAGYMAROS PROJECT CASE**
- **OBSERVATIONS CONCERNING THE PULP MILLS CASE**

Annex I.

Paragraphs of the 1997 judgment

Environmentally conservative?

Rights and duties of the parties after the judgment

§ 134.

„What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, **could be a miscarriage of justice if prescribed in 1997**. The Court **cannot ignore the fact** that the **Gabcíkovo power plant** has been **in operation for nearly five years**, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at **Cunovo**, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has **Nagymaros not been built**, but that, with the effective discarding by both Parties of peak power operation, **there is no longer any point in building it.**”

Environmentally conservative? Rights and duties of the parties after the judgment

„§ 140.

- It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.
- 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.”

Environmentally conservative?

Rights and duties of the parties after the judgment

(Para 140 continued)

- „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.
- Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. **Owing to new scientific insights and to a growing awareness of the risks for mankind** — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, **new norms and standards have been developed**, set forth in a great number of instruments during the last two decades.”

Environmentally conservative? Rights and duties of the parties after the judgment

(Para 140 continued)

- „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. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.
- 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 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 on both sides of the river.”

The operative paragraph – the judgment, para 155

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 Gabčíkovo 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;

The operative paragraph – the judgment

(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 régime 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; ■

The operative paragraph – the judgment

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.

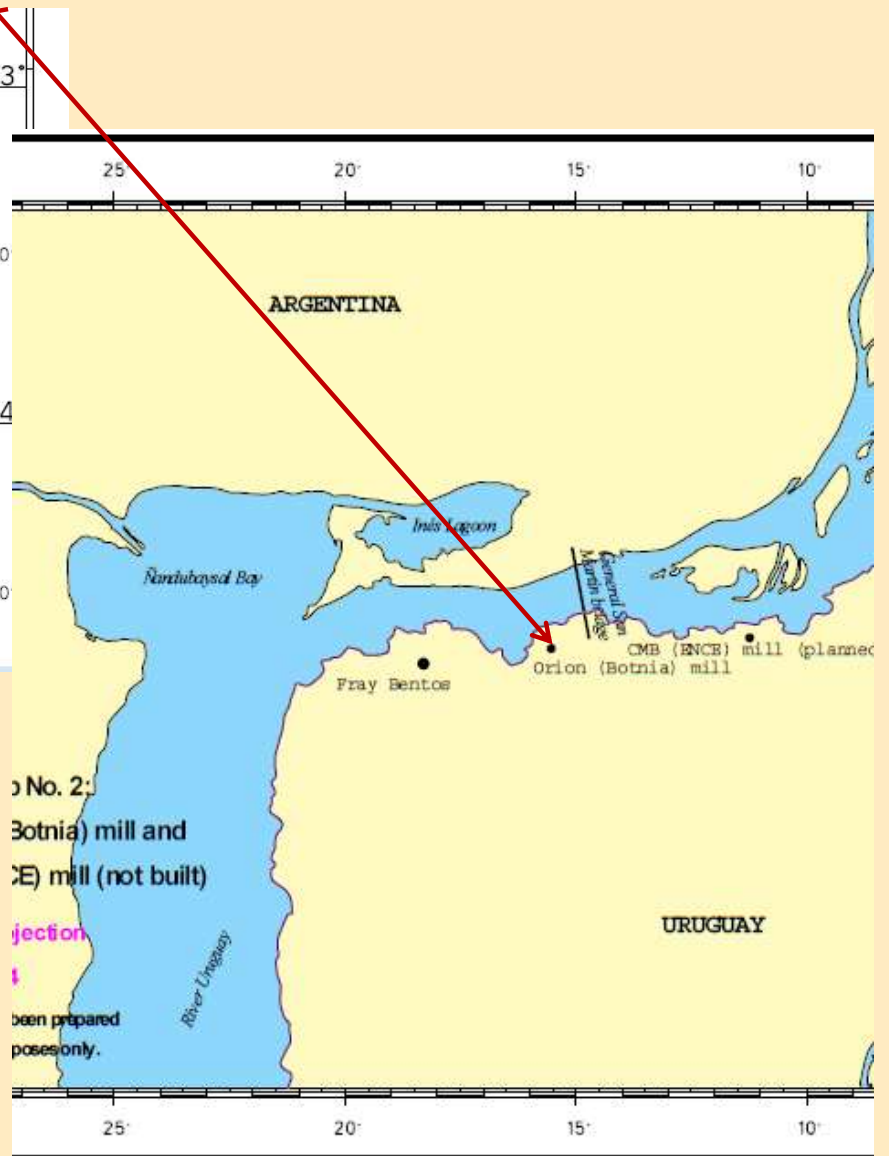
Annex II.

Observations on the Pulp Mills case

Pulp Mills judgment

- Uruguay has breached its procedural obligations under the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction
- Uruguay has not breached its substantive obligations under Statute to
 - not impair the régime of the river or the quality of its waters
 - co-ordinate measures to avoid changes in the ecological balance
 - prevent pollution and preserve the aquatic environment

The location of the disputed plant (in 2012 no longer Botnia, Orion but UPM Pulp Mill)



No. 2:
Botnia) mill and
(E) mill (not built)

jection

been prepared
poses only.

Important findings of the Court

- „A State is **obliged to use all the means** at its disposal **to avoid** that activities which take place in its territory, or under its jurisdiction, **cause significant damage to the environment** of another State. This ‘is now part of the corpus of international law relating to the environment’” (para 101) referring to (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29*).
- Optimum and rational utilization = a balance between the Parties’ use of the river for economic and commercial activities + obligation to protect it from any damage to the environment (para 175)
- **Equitable and reasonable utilisation**
(taking into account the interests of the other riparian State in the shared resource + taking into account the environmental protection of the other)

+
- the **balance** between economic development and environmental protection

= **sustainable development.**” (para 177)

Important findings of the Court

- The obligation to preserve the ecological balance consists not only in the adoption of a regulatory framework, but also in the observance as well as enforcement of the measures adopted.
- The Court referring back to the Nagymaros case repeats 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” (para 185)

Important findings of the Court

Due diligence to preserve the environment and prevent pollution entails

not only the **adoption of** appropriate **rules and measures**,
but also

a certain level of **vigilance in the enforcement** of those
rules and measures

and the exercise of administrative control applicable to
public and private operators

such as the **monitoring of activities**. (para 197)

Important findings of the Court

Due diligence

Duty of vigilance

+

Duty of prevention



if a party plans works liable to affect

the régime of the river

or

the quality of its waters

then that party must undertake environmental impact assessment

because there is a „**practice**, which in recent years has gained **so much acceptance** among States that **it may now be considered** a requirement **under general international law** to undertake an **environmental impact assessment** where there is a risk that the proposed industrial activity may have a **significant adverse impact** in a transboundary context, in particular, on a shared resource.” (para 204)

Similarities and differences between the Gabčíkovo and the Pulp Mills case and the judgments

Similarities	Differences
Threat to the environment is serious concern: prevention and vigilance needed	EIA declared to be an international legal obligation in Pulp Mills (In Gabčíkovo parties should „look afresh”...)
„Fact-intensive” cases: legal outcome is dependent on competing scientific-technical assessment (of uncertainty)	In Pulp Mills: genuine engagement with the scientific and technical arguments (Albeit: Al-Khasawneh and Simma dissenting!)
Sustainable development: (imagined) balance between economic and environmental interests	Pulp Mills: explicit reference to EU secondary law in a case between two non-member states.
The precautionary principle not applied by the Court	
Public participation has low status	