

Treaties in context VII.

An interdisciplinary contribution to the course on the law of treaties

TREATY TERMINATION AND THE GABČIKOVO-NAGYMAROS PROJECT CASE



**Presented by Boldizsár Nagy
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Termination of treaties

On the basis of the parties' will

On the basis of international law

Event

Denun-
ciation
/
withdrawal

Consent
of
parties

New
treaty

Breaches
(material)

War

Fundamental
change of
circumstances

State
succession

Impossibility of
performance

Time

Condition

Performing?

Physical/
conceptual

Legal (jus cogens)

Denunciation, withdrawal

Denunciation – bilateral, withdrawal –
multilateral

If treaty silent? General rule: No right,

Exceptions:

„it is established that the parties intended to
admit the possibility” (EU before Lisbon?)

„may be implied by the nature of the treaty”
(VC, § 56)

(not such nature: HR covenants, territory
transfer, of such nature: trade agreements)

Gabčíkovo?!

Consent of the parties (to suspend or terminate)

No formality (new treaty on termination) required

Warsaw Pact, Comecon: terminated by treaty
Termination among some parties only is conceivable

Question: domestic procedures (see. Slides on Hungarian law)

IMPOSSIBILITY OF PERFORMANCE

Article 61

Supervening impossibility of performance can be invoked if:

„[T]he impossibility results from the **permanent disappearance or destruction** of an **object** indispensable for the execution of the treaty.”

(If temporary: suspension).

May not be invoked ...if the impossibility **is the result of a breach** by that party either of an obligation **under the treaty or of any other** international **obligation** owed to any other party to the treaty.

Physical or non-physical?

Consider: legal assistance agreement when diplomatic relations are broken

Clausula rebus sic stantibus – the fundamental change of circumstances

Circumstances of the time of the conclusion of a treaty

Fundamental

Unforeseen

Change

Invoke as ground for termination or withdrawal, if

the existence of those circumstances constituted an **essential basis** of the consent of the parties to be bound by the treaty; and

the effect of the change is **radically to transform** the extent of **obligations** still to be performed under the treaty

No invocation of fcc if

Treaty establishes a boundary

Result of previous breach by invoking party of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Material breach

Material breach

Repudiation

the violation of a provision essential to the accomplishment of the object or purpose of the treaty

ground for terminating the treaty or suspending its operation in whole or in part

No invocation of material breach

in order to suspend/terminate humanitarian treaties

**TREATY LAW ARGUMENTS
POTENTIALLY JUSTIFYING**

**SUSPENSION AND TERMINATION ON
THE HUNGARIAN SIDE**

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – IMPOSSIBILITY

Hungary

Impossibility of performance – impossibility **need not be physical** but may concern purpose and object of the investment.

Hungary's position is that it could not "be obliged to fulfil a **practically impossible task**, namely to construct a barrage system on its own territory that would cause irreparable environmental damages". By May 1992, the object essential to the Treaty **an environmentally acceptable barrage system had permanently disappeared**.

The chance to have a joint regime with controls as envisaged by the Original Project were also lost as Variant C was NOT a temporary solution

The permanent disappearance of the object was **not caused by any breach** of treaty on the part of Hungary.

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – IMPOSSIBILITY

Slovakia

Denies that impossibility of performance may relate to a **non-physical** object.

Accuses H. of confusing fundamental change of circumstances and subsequent impossibility

Court

(**Judgment**, paras 102.103):

Primarily physical (in the Court's interpretation the Conventions drafters did not mean non-physical) ↔ H.R.: ILC removed +physical from before „object” when drafting

The **régime** of an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly **had not definitively ceased to exist.**

Hungary contributed to its occurrence by its own breaches

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – FUNDAMENTAL CHANGE OF CIRCUMSTANCES

Hungary

The essence of the treaty

socialist integration

a single and indivisible operational system

a joint investment

a framework treaty, requiring revision

a treaty consistent with environmental protection

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – FUNDAMENTAL CHANGE OF CIRCUMSTANCES

Hungary

Cumulative impact of:

COMECON (+ Warsaw Treaty) gone

Planned economy replaced by market economy

C Variant and non-construction of the Nagymaros barrage made the „single and indivisible operational system” not realisable

New findings reveal that instead of environmental protection and regional development the project would bring the opposite

Change of Czechoslovak behaviour: immutability replaced flexibility

„The effect of the change is radically to transform the extent of obligations still to be performed under the treaty” not applicable as not customary law

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – FUNDAMENTAL CHANGE OF CIRCUMSTANCES

Slovakia

Does not deny

the rule's existence

that the disappearance of Socialism, was an important change
but

decouples the project from Socialism and claims it was a neutral
economic investment.

SCM. 10.68: „In any event, the 1977 Treaty is manifestly not about
either Marxist politics or Marxist economics” ↔ H.R. 3.83
showing that the project did not meet the even the Socialist
investment return requirements

Does not accept that the dramatic development of environmental
law after 1977 is an unforeseen fundamental change.

THE VERY DIFFERENT TREATMENT OF SOCIALISM

The Hungarian Memorial devoted 17 pages to the pre-history, the role of COMECON and the involvement of the Soviet-Union.

The Slovak Memorial written in parallel does not have a chapter on the history of decision making and the chapter on the history of the project does not contain the following words: „COMECON”, Socialist” „Soviet”

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – FUNDAMENTAL CHANGE OF CIRCUMSTANCES

Court

3 short paragraphs without explaining **why** the position taken by the court would be correct

Socialism:

„In the Court’s view, the prevalent political conditions were thus **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”

Judgment, para 140

Environmental developments:

not „completely unforeseen” + can be **incorporated into the treaty system** through articles 15,19,20.

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – MATERIAL BREACH

Hungary

Czechoslovakia violated the 1977 treaty by **refusing to perform certain environmental investigations** and thereby give the environmental articles of the 1977 Treaty a contemporary meaning

The Czech and Slovak Republic violated the treaty by **constructing Variant C** and **diverting** the Danube

Slovakia has adopted the acts of its predecessor and continues the violation by its deviating the Danube to its own territory and maintaining in operation the upper section.

**Unilateral
repudiation
of the 1977
treaty**

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – MATERIAL BREACH

Slovakia

Claims that what has been prescribed by the 1977 treaty was accomplished by Czechoslovakia, and the requirements of more recent environmental law (on impact assessment, e.g.) did not supersede the 1977 treaty – ignoring them is not a violation

Variant C was not a breach, but „an **approximate application**” of the treaty

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – MATERIAL BREACH

Court

Judgment para 107 „Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. **The failure** of the parties to agree on those means **cannot**, on the basis of the record before the Court, **be attributed solely to one party**. The Court **has not found sufficient evidence** to conclude that Czechoslovakia had **consistently refused to consult with Hungary** about the desirability or necessity of measures for the preservation of the environment.”

Violation of other treaties in force between the parties (environmental treaties) **does not entitle to terminate this**, only to countermeasures (para 106)

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT TERMINATION OF TREATY – LEGAL ARGUMENTS – MATERIAL BREACH

Court

Approximate application: The Court challenges the existence of the rule (para 76) (*details on later slides*)

Variant C: clear breach of the 1977 Treaty

„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.”

IF VARIANT C IS A MATERIAL BREACH OF THE 1977 TREATY WHY COULD HUNGARY NOT RELY ON IT?

Court

Separates construction and diversion of water

Para 108.” „As the Court has found in paragraph 79 above, 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”

Hungarian declaration relying on breach
premature (1992 May – Diversion: October)

IF VARIANT C IS A MATERIAL BREACH OF THE 1977 TREATY WHY COULD HUNGARY NOT RELY ON IT?

Court

Para 110: „It is, .. a principle generally accepted ..., that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, **if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation** in question, or from having recourse to the tribunal which would have been open, to him.”
(Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31.)

Hungary, by its own conduct, **had prejudiced its right to terminate the Treaty**; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.”

But: did Hungary's breach cause the need to violate the 1977 Treaty by Slovakia? No!

**NON -TREATY LAW ARGUMENTS
POTENTIALLY JUSTIFYING**

**SUSPENSION AND TERMINATION ON
THE HUNGARIAN SIDE**

AND

**THE DIVERSION OF THE DANUBE ON
THE (CZECH)SLOVAK SIDE**

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT
Suspension of works – legal arguments –state of necessity

Draft Articles on State responsibility: (then) Article 33 (with slight changes now: Art, 25 of the Draft). State of necessity as suspension ground

1. A state of necessity **may not be invoked** by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State **unless**:
 - (a) the act was the **only means** of safeguarding **an essential interest** of the State against a **grave and imminent peril**; and
 - (b) the act did **not seriously impair an essential interest** of the State towards which the obligation existed.

2. In any case, a state of necessity **may not be invoked** by a State as a ground for precluding wrongfulness:
 - (a) if the international obligation with which the act of the State is not in conformity arises out of a **peremptory norm** of general international law; or
 - (b) if the international obligation with which the act of the State is not in conformity is laid down by a **treaty which**, explicitly or implicitly, **excludes** the possibility of invoking the state of necessity with respect to that obligation; or
 - (c) if the State in question **has contributed to the occurrence** of the state of necessity.”

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT

Suspension of works – legal arguments - necessity

Hungary's starting points

1. The threats placed on the **drinking water supply of Budapest** and in long term in Szigetköz, deterioration of the unique environment together with other risks (earthquake, dyke rupture)

Czechoslovakia's inflexible attitude refusing any substantive negotiations **on investigating the risks** and amending the 1977 treaty.

3 criteria

Essential interest affected

Imminent peril

Impossibility to avert the danger **by other means**

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT

Suspension of works – legal arguments - necessity

Slovakia

Accepts the rule, but denies applicability on the basis of facts

Considers the suspension of construction as breach of the 1977 Treaty

Court:

Confirms the rule

Admits that essential interests are at stake

Assumes that those interests can be protected in other ways

Claims that Hungary contributed to the state of necessity

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT
UNILATERAL DIVERSION OF THE DANUBE (VARIANT C) – LEGAL
ARGUMENTS

**Slovakia
on Variant C**

2 ½ arguments:

In written pleadings:

„Approximate application”

Damage mitigation

In oral phase (half-heartedly)

Countermeasure

THE CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT

Unilateral diversion of the Danube – legal arguments

Hungary

Denies the existence of the „doctrine” of approximate application (neither customary law nor general principle of law according to ICJ Statute 38 (1) c)

Denies that the principle of damage mitigation is a general principle of law.

Even if it were, it would not entitle to breach of law – unilateral diversion

Points out that if it were a countermeasure it would contradict to „approximate application” +
was not preceded by a breach
is not proportional

Claims that the construction and operation Variant C constitutes a material breach of the 1977 Treaty

THE CASE CONCERNING THE GABCÍKOVO- NAGYMAROS PROJECT

Unilateral diversion of the Danube – legal arguments

Court

Does not decide if approximate application exists, but states that even if it did, it could only justify a measure within a treaty – unilateral diversion is not within the 1977 Treaty

Principle of damage mitigation

Does not justify breach of treaty

Is not a general principle, maximum an accounting method

Variant C can't be a countermeasure because it is not proportionate

ADDITIONAL ARGUMENTS

Hungary

State succession led to the termination of the Treaty as **there is no automatic succession** in bilateral treaties if the other party resists (new Central European practice)

Slovakia

Insisted on the Treaty

Automatic succession + ipso jure continuity of treaties of a territorial or localized character".

Court

Remains silent on automatic succession, but declares that

The 1977 Treaty ***"must be regarded as establishing a territorial régime 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 cannot be affected by a succession of States"***

Recommended readings

- Arnold D. **McNair** [Lord Mc Nair]: The Law of treaties, Oxford: Clarendon, 1961
- György **Haraszti**, : Treaties and the fundamental change of circumstances, Recueil des Cours, Volume 146 (1975 /III), Pp 1-94
- Paul **Reuter**: Introduction to the Law of Treaties, London, Kegan, 1995
- Ian **Sinclair** [Sir]: The Vienna Convention on the Law of Treaties 2nd ed. Manchester University Press, 1984
- Nancy **Kontou** : The Termination and Revision of Treaties in the Light of New Customary International Law, Oxford: Clarendon, 1995
- Jan **Klabbers**: The Concept of Treaty in international Law, The Hague: Kluwer, 1996
- Boldizsár **Nagy**: A felek és a Nemzetközi Bíróság jogi álláspontja a Gabčíkovo (Bős) – Nagymarosi perben (The position of the parties and the Court in the Gabčíkovo /Bős/ - Nagymaros case) Vargha János (ed.): A hágai döntés. (The Hague decision) Budapest: Enciklopédia. 1997. 141 – 178 p (In Hungarian)
- Mark E **Villiger**.: Commentary on the 1969 Vienna Convention on the Law of Treaties Martinus Nijhoff, Leiden, 2009
- Olivier **Corten** and Pierre **Klein**. (eds): The Vienna Conventions on the Law of Treaties: A Commentary. Oxford: Oxford UP, 2011.
- Oliver **Dörr** and Kirsten **Schmalenbach** (eds).: The Vienna Convention on the Law of Treaties: A Commentary. Berlin: Springer, 2012
- Anthony **Aust**: Modern Treaty Law and Practice, 3rd ed Cambridge: CUP, 2014

Thanks!

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