PART 1

'Traditional' Methods of Dispute Settlement

CHAPTER 1

The ICJ Judgment in the Gabčíkovo-Nagymaros Project Case and Its Aftermath: Success or Failure?

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1 Introduction

The unilateral diversion of the Danube in 1992 by (then) Czechoslovakia was qualified by the International Court of Justice (ICJ) as a breach of international law when it concluded 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."[1] That wrongful act continues, a quarter of a century since its start. As of June 2018, the case still appears on the docket of pending cases, making it the longest ever case of the Court. The Judgment of 25 September 1997, rendered after four years of trial, was accompanied by seven dissenting opinions, three separate opinions and two declarations, that is only three of the judges unconditionally identified with its dictum and the justification.

The aim of this chapter is to offer a possible reading of the Judgment and the ensuing – so far fruitless – negotiations from a Hungarian perspective.[2] As it will become clear in the chapter, one cannot speak of a unified "Hungarian position" in the dispute, as again and again at bilateral negotiations representatives of the Hungarian State presented positions which were/are incompatible with that submitted in the Court case. Both the Hungarian society and the political elite is divided concerning the desirable outcome, covering the

1 *Case Concerning the Gabčikovo-Nagymaros Project* (*Hungary v Slovaki*a) (Judgment) [1997] ICJ Reports 7, para 78.

2 The author has been involved in the dispute on the Hungarian side between 1989 and 2010, including as counsel for Hungary in the ICJ case. Therefore the reading of the judgment proposed in this chapter is not of the impartial observer but of someone who fully identifies with the standpoint the Hungarian party represented to the Court, and whose preferences coincided with those of the Hungarian Government as expressed before the litigation, during it and – with a year break in 1997–1998 – during the negotiations on the implementation of the Judgment until 2010. Naturally, every effort is made to remain faithful to the facts and only to offer possible interpretations within the established doctrines of international law and its relevant branches, such as environmental law, treaty law, law of state responsibility etc.

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whole spectrum from not operating the hydropower station at Gabčíkovo (and obviously not building a second barrage at Nagymaros), to calling for the realization of the original system with two barrages and peak operation. This internal division may be one of the reasons why a settlement with Slovakia has not been reached, as the latter seems to have much less internal strife concerning the Gabčíkovo section now in operation and the whole planned project in general.

The conclusion of the chapter is that the ambivalence of the judgment in regard of the necessary changes of the status quo of 1997 and the vague language guiding the parties future negotiations may have contributed to the impasse, but the essential cause of the failure lies in the incompatible attitude of the parties exacerbated by the volatility of the Hungarian position.

2 The Planned and the Realised Projects a Short Description

The planning of the "Gabčíkovo-Nagymaros System of Locks" or barrage system goes back to the 1950s, assuming earlier national plans on utilising the hydropower of the Danube are not taken into account.[3] The Joint Investment Programme, which contained all the important elements of the system was elaborated by 1964 and formally incorporated into an inter-agency agreement between the Czechoslovak and the Hungarian Water Management Authorities in 1967.[4] After the elaboration of the detailed plans for the realisation of the project in the form of the Joint Contractual Plan in 1976, the intergovernmental treaty fixing the main elements and the mutual obligations of the parties was adopted on 16 September 1977.[5]

As will be detailed below, the original project and the presently operating system are fundamentally different. This is relevant as the criticism concerning the diversion of the Danube in October 1992 by Czechoslovakia was levelled

3 The history of the planning of the project and the conclusion of the relevant agreements with the capstone of the intergovernmental treaty is described in detail in the Hungarian Memorial, para 3.02 – 3.40. *Case Concerning the Gabčikovo-Nagymaros Project* (*Hungary v Slovakia*) (Memorial of the Republic of Hungary) [2 May 1994] (Henceforth: HM). On the plans to create hydropower stations after the Trianon Peace Treaty see: János Vargha, 'Vízerő és Politika /Hydropower and politics/' in János Vargha (ed), *A hágai döntes /The decision in The Hague/* (Enciklopedia 1997) 221 – 286, paras 222 – 231.

4 HM (n 3) para 3.24.

5 Treaty concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks (Hungary and Czechoslovakia) (16 September 1977) 1109 UNTS 236; also published in 32 ILM 1247 (henceforth: the 1977 Treaty).

against the project as envisaged by the 1977 treaty and its implementing documents. During the litigation phase, both the original project and the unilaterally created situation by Slovakia, the "Variant C", were at issue before the Court. Since the Judgment has been delivered, the operation of Variant C, and the new proposals of technical solutions for the implementation of the Judgement developed by each party[6] have been in the centre of attention.

The 1977 Treaty envisaged a system of two barrages.[7] The upper section was to comprise a reservoir between Bratislava and the Hungarian village Dunakiliti where the weir and the dam would have stopped the flow of the Danube and diverted it into the 17 km long headrace canal leading to the Gabčíkovo hydropower station, created on agricultural land three km from the main riverbed. The plant included eight turbines with a total of 720 Megawatts capacity. It was meant to operate in peak-power mode, depriving the Danube from 97% of its average discharge when no electric energy was produced outside the peak period. From Gabčíkovo, an approximately eight km long tail race canal channelled the water back to the main riverbed. The 31 km-long section of the Danube between Szigetköz (Hungary) and Zitny Ostrov (Slovakia) bypassed by the headrace and tailrace canal would have been permanently deprived of the flow of the Danube, getting 50 m^3/sec of the 2000 m^3/sec on yearly average.

The lower section would have covered the section from the end of the tailrace canal at Sap until Nagymaros which lies in the scenic Danube Bend, with the impoundment stretching for 114 km, and a modest power station (and dam) at Nagymaros with 158 Megawatts capacity operating in continuous (flow of the river) mode. That section was only needed to keep water in the main riverbed and thereby enable navigation between the peak periods and to mitigate the huge water waves coming down in the peak hours.

In contrast, Variant C as it exists in 2018 comprises a diminished reservoir at Bratislava, with the downstream end at Čunovo, the site of the new, unilaterally constructed dam and weir. That installation on Slovak territory diverts the flow of the Danube into the headrace canal. The Gabčíkovo power station operates in continuous mode, by which it produces more energy than it would have had in peak mode. The hydropower station and dam at Nagymaros have not been completed and the site is restored.

6 No joint proposals emerged during the twenty years of negotiation on modalities for the implementation of the Judgment.

7 See the detailed description relying on the 1977 Treaty at paras 28–29 of the Judgments and the sketch-maps in para 18.

In terms of costs, control and reaping the benefits, the 1977 treaty envisaged a "single and indivisible operational system".[8] Costs of construction and operation were to be born equally, control over the operation of the indivisible system and over navigation was to be shared and based on agreed operational procedures, and the electric energy produced at Gabčíkovo and at Nagymaros was to be shared equally.[9] The present reality is a far cry from these assumptions. Variant C is controlled and operated unilaterally by Slovakia, all the electric energy is appropriated by Slovakia, and navigation takes place in the bypass canal under the exclusive control of Slovakia. Hungary's significant investments into the Gabčíkovo power plant and the right bank dyke of the reservoir, as well as its investment in digging the tailrace canal appear as sunken costs. Its hydropower used at Gabčíkovo for electric energy production is not compensated in any manner.

3 A Possible Reading of the ICJ Judgment

The short description above is necessary to understand the respective positions of the parties and the import of the ICJ Judgment.

The Judgment has a bifurcated character: on the one hand it contributed to the interpretation of core issues of international law and generated a wealth of literature.[10] On the other hand, despite all of its principal statements it did

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8 1977 Treaty, art 1.

9 ibid arts 5 (1), 9 (1–2), 10 (1), 18.

10 It is symbolic that in Daniel Bodansky, Jutta Bruneé and Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford 2006) it is by far the most frequently cited case, accumulating twice as many references as the second, the Trail Smelter case. (XIV, XVI).

From the early literature the five articles published in the Yearbook of International Environmental Law (Volume 8, 1997 Jutta Brunnée and Ellen Hey /eds/ OUP 1998), 'Symposium: The Case Concerning the Gabcikovo-Nagymaros Project' should be mentioned: Charles B Bourne, 'The Case Concerning the Gabcikovo-Nagymaros Project An Important Milestone in International Water Law'; A E Boyle, 'The Gabcikovo-Nagymaros Case: New Law in Old Bottles'; Paulo Canelas de Castro, 'The Judgment in the Case Concerning the Gabcikovo-Nagymaros Project: Positive Signs for the Evolution of International Water Law'; Jan Klabbers, 'The Substance of Form: The Case concerning the Gabcikovo-Nagymaros Project, Environmental Law, and the Law of Treaties'; Stephen Stec and Gabriel Eckstein, 'Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabcikovo-Nagymaros Project'. The Leiden Journal of International law produced a „thematic issue" (11 Leiden Journal of International Law (1998) including: Malgosia Fitzmaurice, 'The Gabcikovo-Nagymaros case: the law of treaties'; Jan Klabbers, 'Cat on a hot tin roof: the World Court, state succession, and the Gabcikovo-Nagymaros case'; and Johan G Lammers, 'The Gabcikovo-Nagymaros

AQ1: The closing parenthesis is missing in the sentence "11 Leiden Journal of International Law". Please provide the same.

not engender the actual resolution of the dispute and the cessation of the wrongful acts.

This section is not about an overall assessment of the impact of the Judgment on international law and doctrine. Rather, it offers a reading guided by the goals of the Hungarian party.

Hungary's goal before the delivery of the Judgment was twofold. The first related to environmental concerns, most prominently to the threat to the underground freshwater resources which was paramount. Among the environmental concerns the devastation of the ecologically extremely valuable areas in the upper section and of the recreational and aesthetic value both there and at the Danube Bend were also important. Second, threats of technical failure due to hazards related to the engineering design and execution as well as certain economic losses were also factors in Hungary's decision to distance itself from the original project.[11] In terms of law, Hungary's submissions – which remained unchanged in the three rounds of written pleadings and at the end of the oral procedure – requested the Court to adjudge and declare that 1) Hungary was

case seen in particular from the perspective of the law of International watercourses and the protection of the environment'. Case notes appeared in several journals, including the AJIL (Peter H F Bekker (1998) 92 AJIL 273), the ICLQ (Phoebe N Okowa (1998) 47 ICLQ 688).

From the ensuing literature a narrow selection would include (in chronological order): Daniel Reichert-Facilides, 'Down the Danube: the Vienna Convention on the Law of Treaties and the Case concerning the Gabcikovo-Nagymaros Project' (1998) 47 ICLQ 837; Philippe Sands, 'Watercourses, Environment and the International Court of Justice: The Gabcikovo-Nagymaros Case' in S M A Salman and Laurence Boisson de Chazournes, *International watercourses: enhancing cooperation and managing conflict* (World Bank 1998); Steve Stec, 'Do Two Wrongs Make a Right? Adjudicating Sustainable Development in the Danube Dam Case' (1999) 29 Golden Gate U L Rev 317; John Fitzmaurice, 'The ruling of the International Court of Justice in the Gabcikovo-Nagymaros Case: a critical analysis' (2000) 9 European Environmental Law Review 80; Cesare P Romano, *The Peaceful Settlement of International Environmental Disputes A pragmatic Approach* (Kluwer 2000); Steven M Schwebel, 'The Judgment of the International Court of Justice in the case concerning the Gabcikovo-Nagymaros project (Hungary/Slovakia)' in *Resolution of international water disputes: papers emanating from the Sixth PCA International Law Seminar, November 8, 2002* Permanent Court of Arbitration, International Bureau (Kluwer 2003); Stephen Deets, 'Constituting interests and identities in a two-level game: understanding the Gabcikovo-Nagymaros Dam conflict' (2009) Foreign Policy Analysis 37; Marcel Szabó, 'The Implementation of the Judgement of the ICJ in the Gabčíkovo-Nagymaros Dispute' (2009) V Iustum Aequum Salutare 16; Gábor Baranyai and Gábor Bartus,'Anatomy of a deadlock: a systemic analysis of why the Gabčíkovo-Nagymaros dam dispute is still unresolved' (2016) 18 Water Policy 39.

11 A reliable summary of the Hungarian concerns related to the original project and to Variant C appears in the HM at paras 5.30–5.137.

entitled to suspend and later abandon the construction; 2) Czechoslovakia was not entitled to proceed to its unilateral "provisional solution", *i.e.* Variant C; and 3) the notice of termination of the 1977 treaty effectively ended the treaty relationship. As Variant C had been in operation since 1992, the submissions also extended to the remedies requested: the recognition of Slovakia's responsibility for damage and loss suffered by Hungary and its nationals, and the declaration of the duty to make reparation in respect of them in an amount to be determined in a separate procedure if need be. The submission ended in demanding *in integrum restitutio*: the return of the water to the main riverbed and the restoration of the Danube "to the situation it was in prior to the putting into effect" of Variant C. The Hungarian submissions left the installations on the Slovak side unaffected: they did not deal with the fate of the bypass canal and the Gabčíkovo plant.[12] Obviously the reservoir would vanish if there was no impoundment by dams.

An interesting element of the Hungarian strategy – having repercussions on the negotiations after 1997 – was that it did not address alternatives. The pleadings nowhere pointed to the option of retaining in operation some of the installations. Certainly it was assumed that another treaty, replacing the 1977 treaty would have to be concluded to settle the accounts and develop a technical plan for the navigational and other issues, such as flood protection, but that was not seen as part of the legal process in front of the ICJ.

Ultimately, the Judgment came down with a simple compromise: Hungary need not build the Nagymaros barrage, Slovakia need not give up the Čunovo dam and the continuous operation of the Gabčíkovo hydropower station. Both

12 Hungary also requested the court to adjudge and declare that the 1977 Treaty had never been in force between Hungary and Slovakia, due to the disappearance of one of the state parties to the bilateral Treaty, namely Czechoslovakia. The Court did not pronounce on the principle of continuity, according to which there would be automatic succession of the Treaty, but came to the conclusion that the 1977 Treaty created a territorial regime according to Art 12 of the 1978 Vienna Convention on succession of states in respect of treaties, and therefore Slovakia was a successor to it. In para 123 the Court 'observes that Article 12, in providing only, without reference to the Treaty itself, that rights and obligations of a territorial character established by a Treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force'. The Court replaced the plain text meaning with the intentions of the drafters. Otherwise it ought to have found that the 1977 Treaty was not (and had never been) in force between Slovakia and Hungary. For a critical review of the succession issues, sharing the view that the Court's argument was less than convincing but noting that it may nevertheless represent a wise decision, see Klabbers (n 10) 355.

parties are obliged to incorporate contemporary environmental standards into the retained treaty framework, which has to be renegotiated in light of the fact that some installations envisaged by the 1977 treaty have not been built, while others, not envisaged by it, became operating elements of the system. Moreover, both parties have breached the 1977 treaty and both owe reparations to the other, but the Court suggested that both parties renounce or cancel all financial claims and counter-claims derived from the wrongful acts.[13]

3.1 *The Hungarian Objectives and the ICJ Judgment*

As already noted, most academic commentaries evaluate the Judgment from the point of view of its contribution to international law[14] or as an illustration of international relations and political science theories, especially dealing with conflicts and their peaceful resolution.[15] This section adopts a different

13 Slovakia does not share this interpretation. It believes that the realisation of the object and purpose of the 1977 Treaty maintained in force by the Court entails the duty to tolerate the continued operation of the Čunovo dam and requires the construction of a second dam, preferably at Nagymaros in order to start peak mode operation after an impact assessment. The continuous wrongful act manifesting itself in the operation of Variant C is understood as a countermeasure for the non-building of Nagymaros. Cosmetic adjustments of the water flow and further dams in the main riverbed in the upper section can satisfy the environmental requirements. The Slovak position is well exposed in: Plenipotentiary of the Slovak Republic for Construction and Operation, 'Complex statement of the Slovak Republic governmental delegation how to fulfill the objectives of the 1977 Treaty on base /sic – BN/ of the International Court of Justice judgement and statement of the Slovak part of the working group for water management, ecology, navigation and energy' (October 2002) http://www.gabcikovo.gov.sk/old.gabcikovo.gov.sk/doc/st2002/statementEng.htm (Accessed 27 June 2018). Illustrative of Slovakia's position is the following quote from the Complex statement: 'From point of view of the Slovak Party the basic negotiation problem is the fact, that Gabčíkovo part of the Project was already put into operation and partially fulfils the Treaty objectives. The Nagymaros part of the Project was not jet constructed and besides the part of partial flood protection does not fulfil the 1977 Treaty objectives. The Nagymaros part of the Project is the key question at further decision-making. Its construction, non-construction, construction of substitutes to fulfil the objectives of the 1977 Treaty, heavy fortification of the Danube riverbed from Sap to Budapest to ensure at least to certain level navigation, and others, should be agreed before preparation of the proposal of implementation of the International Court of Justice Judgment. This is important also from the point, that on this decision will be based all further negotiations including the 1977 Treaty objectives fulfilment, start of the joint Čunovo regime, identification of damages and its compensation, settlement of accounts for the construction and of works, and others'.

14 See the articles referred to in n 10.

15 See eg Deets (n 10) or Miklós Sükösd, 'Democratization, Nationalism and Eco-Politics: The Slovak-Hungarian Conflict Over the Gabcikovo-Nagymaros Dam System on the Danube' in Ellen Petzold-Bradley, Alexander Carius, Árpád Vincze (eds) *Responding to Environmental*

approach: it reads the Judgment from the perspective of the Hungarian objectives and investigates whether the Judgment supports the Hungarian position or undermines it?

3.1.1 Harmony between the Judgment and the Hungarian Goals

If read from the perspective of the Hungarian objectives, the Judgment fulfilled half a dozen of the Hungarian goals.

3.1.1.1 *Nagymaros and Peak Operation*

Logically the fate of the second dam and peak operation are connected as the rationality behind adding the dam at Nagymaros to the system was not so much the additional energy production but the possibility of peak operation, that is the production of energy when demand and price is highest. Yet these constitute two separate goals. Peak operation would entail a lot of environmental harm even if the second dam would be located at a neutral location, not threatening the water supply of Budapest. A stand-alone dam without the function of enabling peak operation of the upstream hydropower station in the Danube Bend would still threaten the freshwater supply of the capital of the country and ruin the recreational value, not to speak about the Roman and other archaeological values submerged due to the impoundment.[16] The impounding of the Danube on a more than 100 km long section would have caused serious deterioration in the environmental conditions, especially in fish life.

Between the findings on the parties' behaviour and the dispositif, the Judgment contains 23 paragraphs (paras 132–154) which are not declarative but prescriptive, determining the rights and obligations of the parties to guide them when seeking agreement on the modalities of the execution of the Judgment.[17]

The Court was confronted with the complicated task of maintaining the principle of *ex injuria jus non oritur*[18] while at the same time accepting the "factual situation as it had developed since 1989".[19] It had two options if it wanted to legalise the operation of the Čunovo-Gabčíkovo complex and the non-construction of the second dam. First, it could have decided that the 1977

Conflicts: Implications for Theory and Practice' (Kluwer 2001); Milovan Vukovic and others, 'Cooperation over International Water Resources: a Case from the Danube River Basin' (2014) 3 Slovak Sociological Review 320.

16 HM, points 5.57-5.29, 5.84 – 5.98.

17 Judgment (n 1) para 131.

18 ibid recalled in para 137.

19 ibid para 133.

Treaty remained in force – the material breaches of both sides and the Hungarian termination notwithstanding. This would have implied that Gabčíkovo could be maintained but a legal inroad for Čunovo and an absolution for not building Nagymaros ought to have been found. Conversely, the Court could have found that the 1977 treaty was no longer in force, which would have automatically resolved the Nagymaros problem, but then justification had to have been found why Gabčíkovo (and Čunovo) were to legally remain in operation without the backing of a treaty allowing the diversion of the water. It was a policy choice but in either case some stretching of the law was needed.[20] The Court opted for confirming *pacta sunt servanda* and rewrote the 1977 treaty.

According to the Judgment, the factual situation had to be placed within the context of the preserved and developing treaty.[21] This development meant that "[w]hat might have been a correct application of the law [including the 1977 treaty] in 1989 or 1992 … could be a miscarriage of justice if prescribed in 1997."[22] The Court could not ignore certain facts, among others 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."[23] Production of energy had no absolute priority, it competed with the other objectives of the project, including environmental protection.[24] There were obligations related to the construction of the System of Locks which have been overtaken by events if they were not implemented before 1992. "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."[25] That meant ordering the construction of Nagymaros would be out of touch with reality as that obligation of performance had been overtaken by events. The Court in the same paragraph empowered itself to abstain from returning to the 1977 treaty with regard to Čunovo. The judges believed they did not have to order that "Čunovo

20 ibid para 114 is telling: 'The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance'. Klabbers (1998) offers interesting insights into further motivations for finding that the 1977 Treaty was in force. Klabbers (n 10) 32–3. Romano (n 10) 256 observes that 1977 Treaty 'despite all evidence, was miraculously still alive'.

21 ibid para 133.

22 ibid para 134.

23 ibid.

24 ibid para 135.

25 ibid Para 136.

… be demolished when the objectives of the Treaty can be adequately served by the existing structures."[26] To corroborate the above the Court added: "The 1977 Treaty never laid down a rigid system, … the subsequent positions adopted by the parties should be taken into consideration."[27] The dispositif nowhere calls for the construction of a second dam, rather it prescribes that the negotiations to be started between the parties are to be conducted "in good faith in the light of the prevailing situation."[28] An indirect but important evidence for assuming that the Court's vision of the future excluded the Nagymaros section is that it ruled that a joint operational regime is to be established only if the parties do not agree otherwise.[29] A unilateral regime is inconceivable with two barrages working in tandem, but located in two different countries. Parties may only consider whether they wish to operate Gabčíkovo in a joint regime or leave it to Slovakia.

Although the Court did not (fully) accept the Hungarian justification for not completing the Nagymaros barrage,[30] nevertheless it found that at the time of the Judgment ordering Hungary to build it would be out of touch with reality and therefore a miscarriage of justice. If there is no second dam there is no peak operation.[31] This conclusion is supported by academic authorities.[32]

3.1.1.2 *Gabčíkovo Operating in an Environmentally Sustainable Manner and Adequate Water Quantity and Dynamics Assured in the Main Riverbed and the Side Arms*

Hungary handed over its termination notice the same year as the Convention on the Protection and Use of Transboundary Watercourses and International

26 Marcel Szabó in his 2009 study misquotes para 136 and that leads him to consider two meanings of 'when' ('in the event' or 'considering') which according to him is a source of discrepancy between the Hungarian and the Slovak position as the latter claims that the abandonment of Nagymaros according to the Judgment would only be legal in the event (when) the objectives of the Čunovo can be adequately served by the existing structures. Slovakia claims they cannot, Nagymaros is needed. But the analysis in the main text above shows that "when" in para 136 only relates to the non-demolition of Čunovo, not to the construction of Nagymaros. Szabó (2009) (n 10) 19.

27 ibid para 138.

28 ibid para 155 (2) B.

29 ibid para 155 (2) C.

30 It accepted that the danger invoked by Hungary could qualify as threat to essential interests. On this issue see point 3.1.2.2.

31 In reality a minor manipulation of peak and non-peak output at Gabcikovo is possible, but that is not comparable with the planned operation generating several metres high waves.

32 Bekker (n 10) 277; Reichert-Facilides (n 10) 850.

Lakes was signed, just one year after the adoption of the Convention on Environmental Impact Assessment in a Transboundary Context. Environmental consciousness was at its height and the country. Hungary did not oppose clean energy production,[33] it wanted to save the immense freshwater reserve in the aquifer below Szigetköz and Zitny Ostrov, and it tried to preserve the rare habitats and species of the branch system and the main riverbed.[34]

The calculations evaluating the operational mode envisaged by the Joint Contractual Plan suggested that the only option to avoid large scale irreversible damage was to not operate Gabčíkovo. After the visit to the site,[35] the Court searched for a viable compromise. The Court spectacularly avoided the weighing of the scientific evidence produced by the parties.[36] Instead it hypothesized that there must be an environmentally sound mode of operation. Regretfully, the compromise assumed to exist 21 years ago was not found by the parties in their negotiations. Hungary would be perfectly satisfied if it existed and the prophetic words of the Court, so frequently quoted ever since, could be reflected on the ground:

> 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. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate

33 On 26 February 1992 the Hungarian Prime Minister, József Antall, addressed a letter to his Czechoslovak counterpart Marian Calfa in which he did not challenge the validity of the 1977 Treaty and proposed further scientific studies (instead of Czechoslovakia unilaterally completing Variant C, which was well under way) to find out if an environmentally sound mode of operation existed. Hungarian Counter-Memorial, volume 4, Annex 75.

34 HM, 5.75–5.90.

35 Peter Tomka and Samuel S Wordsworth, 'The First Site Visit of the International Court of Justice in Fulfillment of Its Judicial Function' (1998) AJIL 133–140.

36 See Judgment (n 1) para 140 concerning the whole project and para 55 in respect of the Nagymaros reservoir. From the academic comments see: Stec (n 10) 377.

> 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.[37]

The Court – without using the term "environmental impact assessment"[38] – ordered the parties to together "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."[39]

The Court pointed out that "newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles … require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan … the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan."[40]

Profitable in economic terms, environmentally sound and adjusted to the most recent environmental norms, accompanied by a mutually satisfactory volume of water released into the main riverbed, yes, that is what Hungary wanted and still wants.

3.1.1.3 *Hungary Is Entitled to Its Sovereign Share in the Water Flow, Ensuring Reasonable and Equitable Access*

The right to reasonable and equitable use, rooted in international water law,[41] can be decoupled from the requirement of environmentally sound operation. After the agreement on a new operational mode or even during

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37 Judgment (n 1) para 140. Quoted among others in: Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 387 European Journal of International Law 3897, fn 35.

38 Unlike in the later *Case concerning pulp mills on the river Uruguay* (*Argentina v Uruguay*) (Judgment) [2010] ICJ Reps 14, paras 203–266 and in *Certain activities carried out by Nicaragua in the border area* (*Costa Rica v Nicaragua*)/*Construction of a road in Costa Rica along the San Juan river* (*Nicaragua v Costa Rica*) (Judgment) [2015] ICJ Reps 665, para 101 and throughout the case.

39 ibid para 140.

40 ibid para 122.

41 Sands (n 10) 105–6.

the ongoing material breach by Slovakia in the form of Variant C, Hungary is entitled to an equitable and reasonable use of the river, which is a shared resource forming the border between the two countries along more than 140 river km.

The Court shared this view. After recalling the community of interests of all riparian states announced in the Territorial Jurisdiction of the International Commission of the River Oder case[42] and stressing that the perfect equality of the states in the non-navigational uses of an international watercourses is a principle "as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses", the Court turned to the guiding statement, according to which "Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube – with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz – failed to respect the proportionality which is required by international law."[43]

The Court also recalled that even according to the 1977 treaty the parties were entitled to withdraw water from the hydropower station at the expense of their share in the produced electric energy.[44] That was a clear confirmation of Hungary's demand for an adequate volume and appropriate dynamics of the water arriving in the main riverbed: either based on its right anchored in the 1977 treaty or due to the principle of equitable and reasonable use, according to which no existing or planned use enjoys preference. The Court corroborated the sovereignty over shared natural resources when it declared that even though Hungary may have breached the 1977 treaty when it withdrew its consent to the diversion of the Danube, "that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse."[45]

One may also recall the synergies between the entitlement to equitable and reasonable use and the call for a satisfactory solution for the volume of water to be released into the main riverbed.[46]

42 *Territorial Jurisdiction of the International Commission of the River Oder* (UK v Poland) (Judgment) [1929] PCIJ Rep Series A No 23, 27.

43 Judgment, para 85.

44 ibid para 56.

45 ibid para 78.

46 As discussed in the previous subheading.

3.1.1.4 *Variant C Remains Illegal until Settlement of the Dispute and All Its Resulting Damages Must Be Compensated for by Slovakia*

Slovakia made several efforts to justify Variant C. They all failed. First, the existence of the purported rule of "approximate application" was not decided by the Court, as it was so obvious that even if it existed (which is more than debatable) it would not apply to the case as Slovakia did not remain within the bounds of the 1977 treaty when creating Variant C.[47] Mitigation of damage as an excuse justifying Variant C was also done away with by the Court in two short paragraphs stressing that a wrongful act cannot be excused as mitigation of damage.[48] The third argument not really used in the written pleadings[49] was that of justifying Variant C as a countermeasure. The Court left no doubt as to its inapplicability: "The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", so the dispositif declared that "that Czechoslovakia was not entitled to put into operation, from October 1992, this 'provisional solution' " 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."[50]

3.1.1.5 *The Unilateral Operation of the Existing System Must Be Replaced with a System Based on the Agreement of the Parties* (*Not Necessarily a Common Operation*)

Although it should not be taken for granted that Hungary wishes to return to the operation of the Gabčíkovo barrage, that option ought to be available once an environmentally sound and at the same time profitable operational regime is found.[51] The Court agreed, noting that "By associating Hungary, on an equal

47 Judgment, para 76.

48 ibid paras 80–81.

49 The Slovak Reply still clearly declared that '6.46 Because Czechoslovakia was and Slovakia is entitled to secure the objects and purposes of the Čunovo for the Gabcikovo-Nagymaros Project in the face of Hungary's failure to perform its obligations, Slovakia does not see Variant "C" as a countermeasure'.

50 Judgment, para 155 (1) C and 155 (82) D.

51 The legal position of the hydropower station is subject to bitter litigation within Slovakia, between Vodohospodárstva Vystavba and Slovenské elektrárne, a.s. See: Vodohospodárstva Vystavba: Annual Report, 2016, Bratislava, 2017, 25. The Gabčíkovo barrage is before a major overhaul, expected to cost 144, 5 million Euros 'Gabcikovo turns 25' Slovak Spectator, 3 November 2017, <https://spectator.sme.sk/c/20686327/gabcikovo-turns-25.html> (Accessed 30 June 2018). Compare the 144 million cost of the renovation with the profit, achieved in 2016: 1, 2 million Euros. Vodohospodárstva Vystavba: Annual Report (2016) 10.

footing, in its operation, management and benefits, Variant C will be transformed from a de facto status into a treaty-based régime."[52] The Court stressed the right of both parties to "participate in the use and in the benefits of the System of Locks in equal measure"[53] and noted that "re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources …"[54] At the same time the option not to re-enter the system was also granted: "unless the Parties agree otherwise, such a régime should be restored."[55] The dispositif confirms this reading.[56]

3.1.2 Hungarian Goals Not Achieved

Some of the Hungarian objectives were not supported by the Judgment. Since the purpose of this chapter is not to critically review the Court's argumentation only short comments will accompany the dismissal of certain Hungarian claims.

3.1.2.1 *The Return of All the Water Flow into the Main Riverbed* (*Stopping Gabčíkovo*) *and the Return of International Navigation into the River Forming the Border between the Two Countries*

There were two essential grounds for demanding the non-operation of Gabčíkovo: its expected harmful impact and the material breach of Czechoslovakia, later adopted by Slovakia, entitling Hungary to terminate the 1977 treaty.

In respect of the first, the Court acknowledged the dangers to the environment but believed that an operational regime may be found which keeps the barrage alive and still is compatible with the environmental and nature protection requirements of the day. It considered that the perils invoked by Hungary may be grave, but were uncertain and not imminent and could have been responded to with action other than stopping the construction.

The material breach line of argument will be taken up below in the context of treaty termination.

Navigation by definition occurs in the by-pass canal, at least for large ships. Control over them is at the moment exclusively in Slovak hands. Ports between

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52 Judgment, para 146.

53 ibid.

54 ibid para 147.

55 ibid para 144. Para 154 makes clear that the option is that of Hungary: 'If Hungary is to share in the operation and benefits of the Čunovo complex, it must pay a proportionate share of the building and running costs'.

56 ibid para 155 (2) C '… unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Čunovo of 16 September 1977'.

Čunovo and Sap on the Hungarian side of the main riverbed lost most of their function, and they can serve only yachts and other small boats.

3.1.2.2 *The Acceptance of the Suspension and Later Stop of Works at Nagymaros and Elsewhere in 1989*

Hungary believed that its suspension of the construction at Nagymaros and later at Dunakiliti were justified by the grave and imminent perils threatening the drinking water supply of Budapest and the subsurface water reserves in the upper section, as well as other concerns and did not seriously impair an essential interest of Slovakia so the criteria of invoking a state of necessity as formulated by (then) article 33[57] of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts prepared by the International Law Commission were met. The Court accepted that essential interests were threatened and also that the imminent peril may lie in the future, as long as it is certain and inevitable.[58] However, in the end the Court did not find the perils certain and believed that Hungary had the means to avoid them.[59]

3.1.2.3 *The Formal Termination of the 1977 Treaty*

After three years of futile bilateral negotiations and seeing the structures of Variant C taking shape, on 19 May 1992 Hungary submitted its notice of termination of the 1977 treaty with effect as of 25 May 1992. Of the five proposed grounds for termination (impossibility of performance, state of necessity, fundamental change of circumstances, material breach, and development of new norms of environmental law) that were rejected by the Court, three will be reflected upon here[60]

First, the Court's dismissal of the fundamental change of circumstances argument has historic dimensions. At its core lied the clash of paradigms: Hungary saw the project as a Socialist venture, a symbolic expression of Socialist economic integration and brotherhood, which was less than a simple modernist project of a profit making industrial venture as it never entailed profit, not even according to the less demanding Socialist accounting techniques.[61]

57 In the final (2001) version of the Draft it became Art 25.

58 Judgment, paras 53–54.

59 The limited understanding of the magnitude of the problem is reflected in the somewhat naïve proposal of the Court. Speaking of the Nagymaros section the Court submitted – without any supporting evidence – that Hungary 'could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner'.

60 For a fuller treatment see Fitzmaurice (n 10).

61 HM, 10.75.

Czechoslovakia and then Slovakia viewed it as an economic undertaking albeit without any proof of its profitability if all the costs associated with it and opportunity costs were taken into account. The Court's Judgment is silent on the economic viability of the original project and of Variant C. The interesting point is that the Court saw history unlike Hungary: it believed that the disappearance of the Socialist system from the region was not such a fundamental change as to justify termination[62]

The argument on the non-applicability of material breach as a ground for the termination of the 1977 treaty according to the 1969 Vienna Convention on the Law of Treaties, which was considered as the expression of customary law,[63] is the Achilles heel of the Judgment. The Court separated the construction of Variant C from its putting into operation and declared that only the latter was a material breach of the 1977 treaty.[64] The whole outcome of the case depended on this manoeuvre. If the Court was to find that Czechoslovakia's material breach had occurred before the notice on termination, the termination would have been upheld. As Lammers in his fine analysis following his disagreement with the separation of construction and putting into operation remarks: "The Court's decision to distinguish between the construction phase and the putting into operation of Variant C and to consider the former lawful and the latter unlawful enabled it to arrive at a much more 'balanced' and therefore 'politically' palatable decision than would otherwise have been possible."[65]

The concepts of material breach and breach of obligation leading to an internationally wrongful acts are connected, so the moment of the completion of the material breach is to be established on the basis of breach of

62 Judgment, para 104. 'The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. 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. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.'

63 ibid para 46.

64 Judgment, para 155 (1) B, The majority adopting this idea was close to minimal majority. The vote on this provision of the dispositif was 9:6.

65 Lammers (n 10) 315–6.

obligations by composite acts, such as building and putting into operation Variant C.

The International Law Commission in its commentary to Article 15 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of 2001 on a breach of obligation by composite acts stresses that "[t]he status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined".[66] This means that the first deed forming part of Variant C (in 1991 or earlier) constituted part of the material breach. Before the actual diversion in October 1992, by the time of the notification on termination of the 1977 treaty, May 1992, Czechoslovakia had erected or was in the process of completing several elements of Variant C, which were totally incompatible with the original project.[67] The composite act was then completed with the diversion of the Danube. Therefore, the Court in all likelihood erred when finding that the works executed by May 1992 "could have been abandoned if an agreement had been reached."[68]

The Court – probably recognizing the weakness of the argument – added a second defence for the denial of termination. It is a clean hands doctrine of a sort. Relying on a quote from the Factory at Chorzów Judgment of the PCIJ,[69] which speaks of one party with its illegal act preventing the other party from fulfilling its obligation, the Court claimed that "Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct."[70] However, the Chorzów factory Judgment operated on the basis of a clear causality whereas the present Judgment uses "as a result", which may refer to causality but may also simply mean sequentiality, the reaction to the previous act. The Czechoslovak reaction to Hungary's breach did not have to consist of constructing Variant C. Czechoslovakia could have demanded a

66 International Law Commission Yearbook (2001) Volume II Part 2, 63.

67 Think of the 11 km long dyke on the right side of the extended headrace canal, which is in the middle of what ought to be the reservoir. Similarly the dam and weirs at Čunovo are absolutely incompatible with the original project. Nothing was meant to be provisional and could not be. Further details in the Hungarian Counter-memorial, especially 3.117–8.

68 Judgement, para 41.

69 *Case concerning the Factory at Chorzów* (Jurisdiction) [1927] PCIJ Series A No 9, 31.

70 Judgment, para 110.

judicial settlement instead or reacted in many other ways. Variant C was one of the many options none of which inevitably flowed from the Hungarian termination.[71]

Finally, the development of subsequent norms of international environmental law, in Hungary's assessment required action incompatible with the 1977 treaty and ought to have been given priority over the treaty and therefore lead to its orderly termination. The Court instead decided that all those new norms may be integrated into the system through the Joint Contractual Plan, by agreement of the parties.[72] The best advice it had for the event of a lack of agreement on what these norms required was to invoke a third party to find a solution.[73]

3.2 *Balance: the Judgment and the Hungarian Objectives*

In light of the above it can safely be asserted that all the major objectives of Hungary related to the area and its resources and wealth were supported by the Judgment. The Court found that Nagymaros and peak operation was not necessary. So the obligation to construct it terminated on 25 September 1997. The upper section, the Čunovo Reservoir and the Gabčíkovo Hydropower Station must operate according to the most recent norms of environmental and nature protection law, now including the whole EU acquis. The main riverbed of the Danube must be supplied with a satisfactory volume and dynamic of water.

On the purely legal front, the Hungarian aspirations fared less well. The 1977 treaty survived the mutual breaches.[74] Hungary must compensate Slovakia for the absence of Nagymaros, to the extent this absence is considered illegal. On the positive side is the finding that Slovakia must compensate for all the injuries of the continuous wrongful act of operating Variant C. Hungary regained the right to be part of the project if it so wants, entailing shared operational control and harvesting the benefits.

71 The Dissenting opinion of Judge Fleischhauer and the Declaration by the President of the Court Judge Schwebel, among others, prove the viability of this analysis as they also challenge the clean hands argument of the Court.

72 Judgment, para 112.

73 ibid para 113.

74 I fully agree with Judge Bedjaoui's assessment in his separate opinion: 'The situation may be analysed as follows: … the 1977 Treaty has largely been stripped of its *material content*, but remains a *formal instrument*, a receptacle or shell ready to accommodate new commitments by the Parties …', para 60 of the Separate Opinion.

4 Bilateral Interactions 1997–2018

The almost 21 years of bilateral negotiations on the modalities of implementation of the Judgment (or on a settlement outside of the frame of the Judgment) have been fruitless. There was no tangible change in the situation on the ground as a result of a substantive agreement between the parties. Naturally there were frequent interventions in the water management system as well as in the environment in a broader sense, but they all were either unilateral or harmonised in other fora, for example in the bilateral border commission.

From a Hungarian perspective, the negotiations between 1997 and 2018 may be divided into three phases:

1) 1997 September–1998 April: this is the "betrayal of the Judgment" period, when a new Hungarian delegation, excluding anyone from the team running the case and forming the Hungarian policy before September 1997 – took a 180 degree turn and – pushing aside the Judgment – negotiated the text of a bilateral agreement which practically would have reinstated the original project of the system of two barrages.[75]
2) 1998 April–2010 April: this is the "period of limited hope and growing hopelessness" after the elections in the spring of 1998 in Hungary, yet another negotiating team was set up – now relying on the core of the ICJ team – and started to negotiate a settlement, entailing an environmentally sound operation of Gabčíkovo and sorting out the consequences of the abandonment of the Nagymaros barrage. Whereas the period between the fall of 1998 and the spring of 2001 carried the hope that a real agreement could be achieved, based on the Judgment and the de facto situation, that hope waned after the summer of 2001. Hungary again saw an opportunity in the accession of both countries to the EU and accepting the water and environment-related acquis, but disappointment came fast.
3) 2010 April–present: this is the "stagnation, secrecy, effort to rekindle" period, starting with the coming to power of Fidesz and Viktor Orbán.

75 The terminology is inconsistent. The UNTS translation speaks of a 'system of locks', the engineering literature frequently calls the installation 'steps'. Journalists and academics frequently call the originally planned two systems 'dams'. In reality the barrages to be constructed consisted of dams, impounding the water, reservoirs, hydropower stations, ship locks and weirs to regulate the water flow, one at Gabcikovo (in Hungarian: Bős), the other at Nagymaros. Barrage here either refers to the whole complex or simply to the dam, the hydropower station and the ship lock. Occasionally I use the narrower term 'hydropower station'.

Negotiation has been ongoing, but almost totally secluded from the public eye. No conclusive results have been reported yet.

A more detailed look at these periods will serve as a preliminary answer to the central question of this study: why is the dispute approaching its 30th anniversary without a solution in sight, notwithstanding the collapse of the Socialist system, the accession to the EU, and the effective handling of the minority question? Does the content of the Judgment play a role in the inability of the parties to reach an agreement?

4.1 *The Betrayal of the Judgment (1997 September–1998 April)*

The best source for reconstructing what happened during these six months is the Slovak Request for an additional Judgment, submitted to the ICJ on 3 September 1998 and a Hungarian study by the former ICJ judge sitting on the case, the late Géza Herczegh.[76] Appendix II of the Request recounts the telling history of the negotiations, including 11 plenary meetings between 22 October 1997 and 27 February 1998 not to mention the frequent meetings of the half a dozen expert groups. In these few weeks the head of the Hungarian delegation, Mr János Nemcsók "according to the instructions of Prime Minister Horn" moved from firm resistance to the second barrage to its principal acceptance.[77] Indeed the whole government communication in this period depicted the Judgment as a defeat to the Hungarian position and suggested that it would have been better not to turn to the court.[78] The negotiations ended in initialling a "Framework Agreement" with Slovakia, on 27 February 1998. The main thrust of the agreement was the building of a second barrage either at its original location or five river km upstream (at Pilismarót).[79] The Framework Agreement contained rules on benefitting from the produced electricity and bearing of costs. The share in the used hydropotential and water flow was ignored. In a peculiar way Hungary was obliged to reimburse half of the costs

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76 *Request for an additional Judgment pursuant to article 5(3) of the Special Agreement of 7 April 1993,* submitted by the Slovak Republic in the Gabcikovo-Nagymaros Project Case on 3 September 1998. The document is not available on the ICJ website, nor does it appear on the internet, but is on file with the author. Géza Herczegh, 'Bős-Nagymaros' (in Hungarian) (2004) 2 XLII Valóság 1.

77 Herczegh (n 77) 17.

78 Boldizsár Nagy and Katalin Győrffy, 'Iránytű nélkül' [Without a compass] (1998) 5 Beszélő 26.

79 Framework Agreement between the Government of the republic of Hungary and the Government of the Slovak Republic on the principles of the implementation of the Judgment of the International Court of Justice of 25 september, 1997 in the case concerning the Gabcikovo-Nagymaros Project. *Request* (n 77) Appendix I, Annex 1.

of Slovakia's grave violation of international water law causing considerable damage: Variant C.

The Framework Agreement was a *pactum de contrahendo*. It envisaged that no later than 2000 a formal treaty duly ratified by the parties would replace the 1977 Treaty, containing the obligations codified in the Framework Agreement. That of course entailed that – even if provisionally – an agreement between governments which did not even envisage approval, but was to enter into force upon signature, would have practically amended an interstate treaty duly ratified by the respective constitutional bodies.

This was a clear and unambiguous betrayal of the letter and the spirit of the Hungarian goals and pleadings in the ICJ case.[80]

The content of the negotiations was largely hidden from the public eye and the Agreement was to be signed before its publication.[81] Nevertheless, the political protest against the idea of a second dam was growing and the Hungarian Government on 5 March 1998 decided to postpone the signature of the Framework Agreement.[82] The Hungarian newspaper Népszava published the full text on 11 March 1998 (for which the editor-in-chief was threatened with criminal charges) leading to further large scale protests. The issue became a hot topic in the electoral campaign and may have influenced its outcome:[83] the socialist-liberal party alliance lost its majority in parliament in May 1998 and the right-conservative FIDESZ (already led by Viktor Orbán) formed the new government.

4.2 *The "period of limited hope and growing hopelessness"* (*1998 April–2010 April*)

Negotiations on the modalities of the implementation of the Judgment were resumed on 27 November 1998, after the elections in Slovakia in September also led to political change.[84] That happened amidst a pending "new" process in front of the ICJ. Albeit the 25 September 1997 Judgment was final, the parties in the Special Agreement bringing the case to the Court[85] provided that if they

80 Heczegh (n 77) 17; Szabó (n 10) 16; Baranyai and Bartus (n 10) 44.

81 '[T]he Parties started to make preparations for the signing ceremony, which was proposed to take place [on 12 March 1998] in London …' History of the negotiations. *Request* (n 77) Appendix II, 16.

82 Declaration of the Government of Hungary in Request (n 77) Appendix I, Annex 5.

83 Herczegh (n 77) 19; Deets (n 10) 50.

84 Vladimir Meciar the left-populist Prime Minister was replaced by the conservative – centre Mikuláš Dzurinda.

85 Slovakia and Hungary Special Agreement for submission to the International Court of Justice of the differences concerning the Gabcikovo-Nagymaros Project (Signed in Brussels on 7 April 1993) 1725 UNTS 226.

were unable to reach agreement within six months, "either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."[86] Slovakia submitted such a request less than a year after the rendering of the Judgment.[87]

4.2.1 A Non-Archaic Torso: the Fate of the Request for an Additional Judgment

Slovakia was angered by the Hungarian decision not to sign the Framework Agreement initialled on 27 February 1998, and Vladimir Meciar, the Slovak Prime Minister, instructed the lawyers working for Slovakia to expose Hungary in front of the ICJ.

The submissions accompanying the Request were of the most interesting nature. They were totally unrelated to the dispositif of the original Judgment. Instead, the first submission requested the Court do adjudge and declare that Hungary bore responsibility for the "failure of the Parties so far to agree on the modalities for executing the Judgment", the second demanded that the Court corroborate the (Slovak) position according to which the parties ought to take measures ensuring the objective of the 1977 in the "whole geographic area and the whole range of relationships covered by that Treaty", and the third asked the Court to declare that the parties had to proceed by way of a Framework Agreement to be concluded before 1 January 1999 and by way of a treaty to enter into force by 30 June 2000. Also in total disregard of the 1997 Judgment the fourth submission called for a new Judgment obliging the parties to comply with the "spirit" and the "terms" of the 1977 Judgment if the Framework Agreement does not materialise.

The Hungarian written statement, submitted as a response on 7 December 1998[88] objected to all of these submissions, claiming they were inadmissible as they did not correspond to Art 5(3) of the Special Agreement enabling a request for a second Judgment only in order determine modalities of the implementation of the original Judgment.

Until the summer of 2017, no further steps were taken as the parties have on 27 November 1998 in a joint letter informed the Court that they resumed their negotiations and did not wish the pending Request to progress. On 14 December 1998 the Court in its response acknowledged the receipt of that letter and requested to be kept informed by the parties.

86 ibid art 5.
87 ICJ Press Release (1998) No 98/28.
88 Not in the public domain, on file with the author.

In a press release, dated 21 July 2017[89] the Court announced that by letter dated 30 June 2017, the Slovak Government requested that the Court "place on record the discontinuance of the proceedings [instituted by means of the Request for an additional Judgment in the case] and … direct the removal of the case from the List". The Agent of Hungary responded on 12 July 2017 and stated that his Government did "not oppose the discontinuance of the proceedings instituted by means of the Request of Slovakia of 3 September 1998 for an additional Judgment".

The effort of the Slovak Republic to use the ICJ as a leverage against Hungary, mainly in order to serve domestic political purposes remained an unfinished project. The legal body of the Request was certainly not an archaic torso: later lawyer generations hardly will copy it.

4.2.2 The Period of Hope (1998–2001)

Once the new procedure in front of the ICJ was put on hold and the negotiations resumed hopes for an agreed solution emerged.[90] The starting position for both countries was new.

AQ2

Hungary had to consider the option not addressed during the litigation: how to cope with the fact that Gabčíkovo was there to stay. Could it operate in an environmentally sound way? What was the water-management regime that could lead to an ecologically tolerable or even good condition in the area affected by the by-pass canal? No less intriguing was the issue of the financial claims. If Hungary contributes less than 50 percent of the hydropotential used to generate electricity and its investment share in the operating installations diminishes, what share of the produced energy should accrue to it? Another complex issue was the fate of the compensation to be offered for not building and operating Nagymaros.

Slovakia had to confront that its operation of the Variant C was a continuous wrongful act, for which it owed reparation. It had to admit that the present discharge into the main river-bed was not satisfactory. The mode of operation Gabčíkovo hydropower station had to be changed so as to satisfy the environmental, and within that ecological, requirements of the day. It also had to permit Hungary to return to the system and to the controlling board.

89 ICJ Press Release (2017) No 2017/31.

90 An invaluable source of information on the period between 1997 and 2002 is the non-published study of György Kovács, who was the scientific coordinator of the Hungarian litigating and later of the negotiating team. György Kovács, *'A "Bős – nagymarosi vízlépcső" ügyének jelenlegi helyzete'* [*The present situation of the "Bős /Gabcikovo/ -Nagymaros Barrage*] (30 April 2003) manuscript on file with the author.

AQ2: The closing double quotation mark is missing in the sentence "Bős /Gabcikovo/…" ; Please provide the same.

Neither party had prepared studies answering these emerging questions in the Court procedure.

The source of hope was that two like-minded governments were now negotiating in a new frame which permitted a win-win outcome: the restoration of a jointly controlled and operated system that would generate clean energy without endangering the natural resource. The bitter and politicised dispute could therefore end in a progressive, environment-friendly solution, and the industrial, growth-oriented mentality of Slovakia and the post-industrial environmentalist attitude of Hungary could reach a meaningful compromise.[91]

Further concrete hope emerged when on 14 May 1999, the parties agreed that Hungary would elaborate a complex proposal containing the "main elements and parameters of the system to be established, taking into account its impacts and the meeting of the goals of the [1977] Treaty, first of all on the environment, on flood protection, energetics and navigation."[92] Intensive work started on the Hungarian side as the task was novel: to find alternatives that would retain Gabčíkovo and at the same time provide an acceptable water regime for the main riverbed and the ecosystems around. Also all the above mentioned questions of settling the investment ratios and – perhaps – the compensation for the wrongful acts needed to be taken care of.

The new proposal to settle the dispute was handed to Slovakia on 9 December 1999. It contained economic calculations concerning different variants (including one with a second dam), detailed technical proposals covering both the upper and the lower sections. The main component of the 1,300 pages long document – from this study's perspective – was a complete draft agreement and a detailed explanatory note to it, describing the main elements of the envisaged settlement and answering the questions raised above.[93] The essence of the proposal was the legalisation of the Čunovo dam and the formal abandonment of the idea of a second dam (Nagymaros). Consequently, the proportion accruing to the respective states from the energy produced at Gabčíkovo had to be recalculated. For this purpose the draft agreement suggested to apply agreed relative weights both for the investment share and for the relative contribution to the energy production of the utilised hydropotential, without

91 I have elaborated on this juxtaposition in Boldizsár Nagy, 'The Danube Dispute: Conflicting Paradigms' (1992) 128 The New Hungarian Quarterly 56.

92 Protocol of the negotiations held in Budapest on 14 May 1999. On file with the author. Author's translation from Hungarian.

93 Reproduced in Kovács (n 91) 239–254.

numerically determining them. In terms of sharing the water discharge between the hydropower station and the main riverbed, the proposal did not fix percentages of the water discharge, but defined the environmental and ecological parameters that ought to be satisfied. The draft was seen as a framework agreement, enabling the joint elaboration of the final technical solution, and the development of the accounting methodologies to be included in a detailed treaty replacing the 1977 treaty. Compensation was to be renounced on both sides, as suggested by the Judgment.

The Slovak side' response came a year later, in December 2000. It basically ignored the whole substantive content of the Hungarian proposal and returned to demanding the construction of a second dam. However, it noted that Slovakia could not force Hungary to construct the barrage at Nagymaros. That was read in Hungary as a timid acquiescence into negotiating further a solution without Nagymaros. So a revised draft of the framework agreement was handed over to the Slovak side on 2 April 2001. However, instead of starting the discussion on the new text of the draft Framework Agreement Slovakia reverted to suggesting the construction of the second dam. No negotiations were conducted on the revised text. Instead of that in the summer of 2001, the plenary meeting of the two delegations suggested to set up working groups that would work on harmonising the parties' vision of possible futures, as contained in their respective proposals of 1999 and 2000. The task was not promising as the two positions were based on different expectations, philosophy and methodology.

Hungary's goals were the following

- no peak operation,
- therefore no second dam,
- preference to the environment over energy production,
- adjusting the ships to the river's capacity, and
- precaution, rather than a posteriori fix.

In contrast, Slovakia's goals were

- peak operation enabled by a second dam,
- the return as much as possible to the original project,
- subordination of environmental concerns to the primacy of energy production and navigation,
- adjustment of the river to the size of the ships and barges, and
- ecological hazards to be controlled by technical interventions.

That was the moment when the hope waned. Two options were available: engaging in a less than inspiring round of expert level negotiations or turning to a third party. The first was chosen at the political level, contrary to expert advice. As at the plenary meeting the two delegations were unable even to describe

the tasks of the technical and the legal working group,[94] the formulation of the mandate of the newly established working groups became their first task. Four rounds of negotiations before the elections in Hungary in May 2002 were insufficient to produce that mandate (the list of issues to be discussed) in the legal working group. The technical working group managed to formulate its own questions after six meetings.

4.2.3 Growing Hopelessness 2002–2010

The elections in Hungary in May 2002 interrupted the process. The new socialist-liberal coalition was slow in appointing the recomposed negotiating delegation. In the meantime Slovakia handed over a document summarising its position ("Complex statement") in October 2002.[95] The Slovak strategy in the statement was transparent: wherever the Court referred to the status quo and suggested that the goals of the 1977 treaty could be achieved with the existing structures, Slovakia read that as a reference to the Čunovo structures but not as a reference to the absence of the Nagymaros installations. Whenever the validity of the 1977 treaty was mentioned in the Judgment or the implementation of the goals of the 1977 treaty, Slovakia read that as legal ground for demanding the construction of the second dam, *i.e.* abandoning the status quo and the abstract goals of the treaty in favour of the letter of the 1977 Treaty.

When negotiations resumed on 13 April 2004, not much hope was left.[96] Another working group was established to handle the economic issues.

Nevertheless there was one last source of optimism: both countries' accession to the EU. Hungary firmly hoped that the EU water law and environmental law, as the binding legal environment, could re-frame the whole dispute. That

94 I am using simplified designations. The first formally was called 'Joint working group for water management, ecology, navigation and energy', the second 'Joint legal working group'.

95 Complex statement of the Slovak Republic governmental delegation how to fulfill the objectives of the 1977 Treaty on base /sic – BN/ of the International Court of Justice judgement and statement of the Slovak part of the working group for water management, ecology, navigation and energy, October 2002 <http://www.gabcikovo.gov.sk/old.gabcikovo.gov.sk/doc/st2002/statementEng.htm> (Accessed 27 June 2018).

96 One sentence from the Complex statement reflects the tone of the whole: 'About the fact, what obligations have been overcome by the development shall decide first and foremost the Parties by mutual negotiation. The Parties are under a legal obligation, during the negotiations to be held, to consider, within the context of the 1977 Čunovo, in what way the multiple objectives of the Čunovo can best be served, keeping in mind that all of them should be fulfilled. (The legal obligation to construct the Nagymaros dam, or similar construction fulfilling the objectives of the Čunovo, is not cancelled)' Complex Statement (n 96).

could have diminished the importance of the Judgment and ground the resolution of the dispute on norms and principles assumed to be shared by both new members of the EU. In the course of 2005, the Hungarian side devised three documents dealing with the applicable EU law, one on water management, one related to the environmental and ecological obligations, and the third on energetics and transport. The disappointment came soon: instead of engaging EU law on its substance, the Slovak formal response[97] essentially refused to deal with EU law proper. According to it, EU law, and in particular environmental law, was not applicable to the Gabčíkovo-Nagymaros dispute for several reasons. First, EU law could not retroactively be applied to a project predating either the norms or the accession, second, directives have to be implemented domestically and therefore only national law was relevant, and third, directives are only binding as to their purpose and states may deviate from their literal application.

In the meantime it became clear that the exchanges in the working groups produced no material results.[98] As neither party was ready to submit the dispute to third party settlement (either returning to the ICJ or invoking the CJEU or other available fora), they returned to direct negotiations at plenary level. The Slovak side tabled a new draft treaty[99] which had a dual aim:

- regularisation of the Čunovo dam, thereby terminating the continuous internationally wrongful act, and
- starting a scrutiny of different technical proposals, covering the whole area of the original project, including the lower section.[100]

It would have been a temporary agreement, leading to a "Supplementary Treaty" codifying the results of the scrutiny of the technical alternatives.

97 Annex 4 of Agreed Minutes from the meeting of governmental delegation of 19 December 2006.

98 The Protocol of the plenary meeting on 5 October 2006 took note of the reports of the working groups and indicated – in a face saving mode – 'in the future the working groups may provide concrete assistance according to the needs of the governmental delegations' (Point 3 of the protocol, on file with the author.)

99 Annex 5 to the Protocol on the plenary meeting of the parties, 19 December 2006.

100 The key clause may be seen as this: 'Parties shall jointly conduct Strategic Environmental Assessment of various plans and solution proposals in accordance with the Strategic Environmental Assessment Directive of the European Parliament and the Council (2001/42/EC) at both Bratislava – Sap and Sap – Budapest sections to identify the most suitable single solution to achieve the objectives of the 1977 Čunovo. The process conducted under the previous paragraph shall be followed by a joint Environmental Impact Assessments in accordance with the Environmental Impact Assessment Directive of the Council (85/337/EEC)'. (art II, paras 4 and 5).

This was like walking in the desert without a compass. After eight years of negotiations, having had rounds of plenary meetings, even more rounds of working group meetings, now again came the plenary level, which had to agree on versions of large scale interventions to be subjected to the evaluations, on methods of evaluation, etc. Moreover, now the fourth draft treaty appeared on the negotiating table, with none of the predecessors ever being discussed according to traditional treaty formation. Hungary duly sent its response in February 2007, essentially rejecting the idea of legalising Variant C and the unilateral appropriation of the energy produced while bearing most of the costs of the riverbed-maintenance as suggested by the Slovak draft. The futile discussions on the draft were formally suspended in 2009.[101]

The total standstill was avoided by initiating yet another process. The Joint Statement submitted by the two parties to the ICJ on the state of affairs in 2010 offers a precise description of this new process:[102]

"The joint Strategic Environmental Assessment is a sui generis project, the implementation of which was decided at the meeting of the Governmental Delegations on 19 December 2006. ... The SEA working group has elaborated the Statute of the Steering Group (and thereby the task of itself), which was formally adopted at the meeting of the Governmental Delegations on 12 August 2008. Its article on goals, tasks and methods describes the Parties' activity in 2009. Parties have agreed that 'If no final and conclusive approval of the common Environmental Report is reached by the Steering Committee by 22 December 2009 this procedure of the joint Strategic Environmental Assessment shall be discontinued'. On 15 December 2009, at the request of the Slovak party the deadline was extended to 30 April 2010."

The pendulum thus swung back from finding a solution by interpreting the Judgment to trying to find a mutually acceptable technical solution. The novelty of the Joint Statement was that in order to break the deadlock third party involvement was envisaged. The Steering Committee of this sui generis environmental assessment was to be composed of six experts, each party nominating two national and one international expert. Decisions would have required five votes of the six. The task was "to formulate common proposals of technical measures" concerning "the separate but interconnected sections of the Danube between Bratislava and Budapest, affected by the 1977 Treaty on the Construction and Operation of the Gabčíkovo – Nagymaros System of Locks." These proposals had to be "in accordance with the provisions of

101 Point 2 of the Protocol of the plenary meeting, 19 March 2009.

102 http://www.gabcikovo.gov.sk/old.gabcikovo.gov.sk/arch/Z100128-VD-SK_HU-priloha2.pdf (Accessed 27 June 2017).

Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment, Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, and other relevant European and international legal regulations."

The core idea was that common investigations would be carried out. The naming of the two sections enabled a politically viable compromise: the Slovak Party could stress that the Nagymaros section is involved and the best solution to be found may entail a second dam. Hungary's selling point was that the work started with the upper section, the mitigation of the damage caused by Gabčíkovo, and may never get to the second section.

Nice on paper. Reality became gloomy fast. Whereas the idea was to have one joint team of experts, engineers, and scholars for each task who would produce agreed statements (on ecological goals, size and frequency of floods, desirability or not of navigation with large vessels in the main riverbed, on the method of connecting the side arms with the main channel, etc.), in reality these groups never formed as the Slovak party instead suggested that each side ought to produce national reports which thereafter would be merged. The whole strategic environmental assessment was to be integrated into the work required by the EU Water Framework Directive,[103] which called on EU Member States[104] to finalise river basin management plans including programme of measures by 22 December 2009.[105] The possible synergy thus remained unexploited. Slovakia informed Hungary in a letter dated 10 February 2009 that due to the lack of financial resources Slovakia would not even start the agreed tasks in producing the so-called SEA.[106] Hungary in the meantime produced three documents as inputs to the planned SEA. The first was a "Feasibility Study" reviewing the conceivable technical interventions in the upper section and

103 Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy [2000] OJ L 327/1.

104 In cooperation with other river basin states, non-members of the EU (art 3 para 5).

105 This follows from arts 11 and 13 of the directive.

106 György Kovács (with the contribution of Gábor Bartus and Boldizsár Nagy), *Feljegyzés Dr. Illés Zoltán környezetvédelmi, természetvédelmi és vízügyi államtitkár úr részére a bős-nagymarosi jogvita 2004–2010 közötti történéseiről, az azonnali intézkedést igénylő ügyekről és a jövőbeni lehetőségekről 2010. június 23*. [Memo for Dr Zoltán Illés, state secretary for the environment, nature protection and water issues on the events between 2004 and 2010 in the Bős-Nagymaros legal dispute, on matters requiring urgent action and on future possibilities] Manuscript on file with the author, 5.

preliminarily assessing their impacts.[107] The second concerned river regulation to improve navigation and guarantee flood protection on the joint section of the Danube, not affected by the Gabčíkovo dam (Sap – Szob.)[108] The third document submitted in 2010 was the preliminary SEA of possible interventions in the upper section, between Čunovo and Sap.[109] It investigated six different technical proposals (with varying levels of detail) according the an elaborate set of criteria and identified their impact on surface and subsurface waters, flood protection, flora and fauna, habitats and wetlands, air, climate, landscape, and regional development, just to name a few. The assessment did not formally rank the different interventions, especially since their performance and impact depended on the medium assessed. Some fared better in connecting the riverbed with the side arms, others involved less construction and disturbance to the area. Slovakia produced no substantive contribution of its own assessment of the already available (or of brand new) propositions.

The decade that started with a shimmer of hope therefore ended without a promise of solution.

4.3 *The Period of Stagnation, Secrecy and an Effort to Rekindle (2010–Present (2018))*

Whereas the negotiations between 1998 and 2010, under both the conservative and the socialist-liberal governments, were conducted with considerable

107 *Feasibility Study: The Rehabilitation of the Szigetköz Reach of the Danube. Prepared by the Hungarian Section of the Working Group for the Preparation of the Joint Hungarian-Slovak Strategic Environmental Assessment Established by the Governmental Delegations of the Gabčíkovo-Nagymaros Project.* (Budapest February 2010) <http://www.gabcikovo.gov.sk/old.gabcikovo.gov.sk/sea/FeasibilityStudySzigetkoz_HU-english.pdf> (Accessed on 27 June 2018).

108 *Background paper for the strategic environmental assessment of the variants of the structural measures for the improvement of the navigability and the rehabilitation of the side arms of the Danube section between Sap and Szob Draft Environmental Report for discussion with the Slovak Party*, (Budapest December 2009) <http://mta.hu/data/dokumentumok/hatteranyagok/konferenciak/szigetkozi_konferencia/2009%20Danube_SEA_Szap-Szob_Hu.doc> (Accessed on 27 June 2018).

109 *A Szigetköz vízpótlását, a szigetközi víztest állapotának javítását, valamint a kapcsolódó hullámtér helyreállítását (rehabilitációját) szolgáló beavatkozási változatok stratégiai környezeti vizsgálata a Duna Dunacsún és Szap közötti szakaszán. Előzetes környezeti jelentés* [Strategic Environmental Assessment of the intervention alternatives serving the water supply to Szigetköz, the improvement of the water body of the Szigetköz and the restoration (rehabilitation) of the adjacent floodplain Preliminary environmental report] (Budapest, April 2010) <http://mta.hu/data/dokumentumok/hatteranyagok/konferenciak/szigetkozi_konferencia/2010%20DunaSEA_Szigetkoz_vegso_100615.doc> (Accessed on 28 June 2018).

publicity, the period starting with the return to power of the Fidesz and Viktor Orbán is characterised by almost total secrecy. The Hungarian website that contained all the protocols of the negotiations and the documents exchanged disappeared.[110] The Slovak website is still in place, but has no English version and only contains the most basic documents, such as the Judgment and the 1977 Treaty.[111] The mosaic is to be assembled from fragments, collected from news reports, personal interviews, and records of scientific events.

The Gabčíkovo-Nagymaros issue was a hot potato in the 1998 campaign leading to the victory of Fidesz in the general election. Times have changed: in 2010 Fidesz remained silent on the pending dispute. It was only in 2012 that a resolution of the Prime Minister designated Mr. Marcel Szabó as the head of the negotiating delegation, who after a few months was replaced by Mr. László Székely due to the former's election to the office of deputy ombudsman responsible for future generations.[112]

Both representatives conducted talks with their Slovak counterparts, but the content of those talks were never officially made public. Progress was not and could not be made, especially as the Slovak party still had not responded to the Hungarian preliminary SEA. The Slovak response only arrived with a three years delay in 2013. As Székely was elected to become the ombudsman of Hungary, yet another person took over the helm, Mr. Gábor Baranyai.[113]

After almost five years of stagnation, substantive negotiations resumed at expert level, behind closed doors. The Government delegates met on 22 July 2015 and probably also earlier,[114] and the so-called Joint Working Group on Strategic

110 It used to be at www.bosnagymaros.hu.

111 <www.gabcikovo.gov.sk> (Accessed on 28 June 2018). Other documents presumably are online but only accessible with a password. Hidden in the internet the old Slovak website containing most of the protocols and exhchanged documents until 2010 is available but difficult to find and manage, <http://www.gabcikovo.gov.sk/old.gabcikovo.gov.sk/arch/index.htm> (Accessed on 28 June 2018).

112 41/2012. (IV. 16.) ME határozat [Prime Minister's resolution 41/2012 of 16 April 2012] designating Marcel Szabó as plenipotentiary under the 1977 Treaty and agent in front of the ICJ to head the government delegation negotiating a new Čunovo 'replacing or complementing' the 1977 Čunovo. 143/2012. (XII. 12.) ME határozat [Prime Minister's resolution 143/2012 of 12 December 2012] appointing László Székely to the same task and discharging Marcel Szabó. His role as agent in front of the ICJ was taken over by Pál Sonnevend.

113 A miniszterelnök 95/2014. (VII.25.) ME határozata [Prime Minister's resolution 95/2014 of 25 July 2014] appointing Gábor Baranyai and discharging László Székely entrusting him again with negotiating a Čunovo replacing or complementing the 1977 Čunovo.

114 The fact of the meeting on 22 July 2015 became known after a letter from the head of the delegation to the Minister of justice was leaked to the press. Accessible (in Hungarian) at <http://vedegylet.hu/doc/duna_f723_bg_t_im.pdf> (Accessed on 28 June 2018). A possible meeting on 10 February 2015 is deductible from the table of travels of high ranking

Environmental Assessment met five times between 20 May and 25 September 2015 and produced "Joint Conclusions on the Strategic Environmental Assessment."[115] This fairly rudimentary text does not resemble the complexity of the Hungarian studies produced in 2009–2010. After briefly evaluating several options for the upper section it comes down with the proposal to build four weirs in the main riverbed and thereby establish connection between the side arms and the main canal.[116] With regard to "the Danube section Sap-Budapest the joint working group agreed that one variant with traditional river training methods (HU) and one variant with water level impoundment (SK) will be elaborated and assessed. The assessment will be performed according to the jointly agreed criteria."[117] That conclusion opens the road to the reconstruction of the original project with a second dam at Nagymaros and renders the efforts of the earlier Hungarian negotiating teams wasted.

According to the author's personal interview with Gábor Baranyai,[118] an assessment of the chosen variant in the upper section is expected by September 2018. He recalled that in the early negotiations with his counterpart Ladislav Lazar they agreed not to engage yet another round of interpretation of the Judgment, but to search for points of agreements and start working on those sections of the Danube where substantive intervention had already taken place, that is in the upper section (Szigetköz/Zitny Ostrov). No talks on costs, compensation or navigation have been pursued so far. The aim is to produce good ecological potential (or, if possible, a good ecological state) of the Danube in the terminology of the Water Framework Directive. Flood protection is also a priority. Hungary is demanding a larger discharge into the main riverbed, but is content with the idea of constructing four weirs between Dunakiliti and Sap, thereby creating a cascade of slowly moving water bodies, which connect with the side arms. Mr. Baranyai realises the trade-off between the increased water volume in the main riverbed and the decreased electric energy production, which may generate tensions between the company operating the Gabčíkovo plant aiming at profit maximisation and the negotiating government seeking political dividends.

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officials of the Ministry of Justice that shows a one day trip to Slovakia of Mr Baranyai, <http://www.kormany.hu/download/3/2f/50000/IM_2014%2006%2006–2015%20 05%2020_%C3%A1llami%20vezet%C5%91k%20hivatalos%20utaz%C3%A1sai.pdf> (Accessed 28 June 2018).

115 <http://mta.hu/data/dokumentumok/hatteranyagok/konferenciak/szigetkozi_konferencia/JOINT_CONCLUSIONS_SEA_25092015-fin_GYOR.doc> (Accessed 28 June 2018).

116 ibid 37.

117 ibid 24.

118 25 June 2018, handwritten notes with the author.

5 Enigma or Just the New Normal? An Attempt to Interpret

At this point, after the long journey through a Hungarian reading of the Judgment and the detailed account of the history of the bilateral negotiations, the fundamental question is revisited: why has the Judgment not led to a mutually accepted resolution of the dispute? Is it an enigma or just yet another instance in which parties disregard a substantive judgment of the Court?[119]

There is hardly any literature produced outside of Hungary addressing the lack of success in settling the dispute decided by the Court 21 years ago. Interestingly, all publications in Hungary come from insiders: a former Judge of the ICJ (Géza Herczegh), and a former and present chief negotiator, the latter having served together with a core member of the negotiating team for decades (Marcel Szabó, Gábor Baranyai, and Gábor Bartus).[120]

Judge Herczegh's article only follows the history until 1998. He claims that the judgment was Salamonic, allowing a face-saving outcome for both parties and there is no need for another judgment.[121] He extensively and very critically discusses the period of negotiations in 1997–1998 leading to the betrayal of the Judgment in the form of the initialled Framework Agreement.[122] According to him the explanation for leaving the Judgment behind for the sake of planning a second dam lies in the personal benefits accompanying an investment of such an enormous scale. He also recalls that during the litigation secret negotiations with Slovakia were conducted, in order to achieve an out-of-court settlement, also envisaging a second dam.[123] The author is convinced that the then Prime Minister, Gyula Horn, would have favoured an outcome making room for building the second dam.[124]

Szabó in 2009 explicitly asks what made the negotiations so fruitless. He blames certain ambiguities in the Judgment[125] and the inconsistent behaviour of the Slovak side, for example recalling that Slovakia acknowledged in 2000 that it could not "even by legal means force Hungary to construct a second

119 Aloysius P Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) EJIL 815. For a recent case of probable non-compliance see Japans whaling practices contrary to the judgment in the *Case of Whaling in the Antarctic* (*Australia v Japan: New Zealand intervening*) (Judgment) [2014] ICJ Reports 226.

120 Herczegh (2004) Szabo (2009), Baranyai and Bartus (2016) all in n 10.

121 Herczegh (n 10) 14 and 20.

122 See above, section 4.1.

123 Herczegh (n 10) 8–10.

124 Herczegh (n 10) 12.

125 See above n 25.

dam", but later returning to demand it.[126] Baranyai and Bartus in their study of 2016 identify three grounds for the "deadlock", as they call it:[127] the ambiguity of the Judgment, the incompatible political framing in the two countries, and the fear from losses during negotiations. The first is evident. The second refers to the situation in which the project in Hungary became the symbol of the political mismanagement of the country before 1989 whereas in Slovakia it has become a symbol of modernisation, "a token of national achievement and energy independence."[128] Finally the fear of loss, of giving in on any disputed point, was so large that the parties were incapable on weighing gains more than losses.

In my analysis of the fruitlessness of the negotiations the inconsistency of both parties and the fear of giving up ground certainly played a role. As suggested in the introduction, Hungary is internally divided with strong political and social forces preferring the original project or at least the preservation of the status quo at Gabčíkovo. Hungary has entered three rounds of negotiation aimed at a fundamentally different outcome than the one sought in The Hague: in 1994–1997, in 1997–1998, and since 2010. The first two produced texts envisaging a second dam, the third has not ended yet, but the proposal on the table suggesting four dams in the main riverbed in the upper section and the reopening of the possibility of building another barrage around the originally planned site is not promising.

The Slovak side obviously notes this duality in the Hungarian attitude. It also perceives the difference between the firm stance of the first Orbán government in 1998, treating the dispute as a central issue and maintaining the "anticommunist" political framing Baranyai and Bartus described, and the soft attitude bordering ignorance of the three more recent Orbán governments since 2010.

A further factor in the failure of the negotiations may have been that the Slovak delegation -for most of the time – has been headed by persons directing the company operating the Gabčíkovo complex or closely related to it. For decades, the delegation included persons who even had been part of planning and constructing the original project. Their bias for restoring the original project and their distance from modern environmental approaches was palpable.

This, combined with the recurrent openness on the Hungarian side toward options that ignore the Court process and the Judgment and include a possible second barrage at Nagymaros, created an attitude in Slovakia which presumed

126 ibid 23.

127 Baranyai and Bartus (n 10) 44 – 47.

128 ibid 46.

that endurance and waiting may bring the moment when Hungary will completely and irrevocably give up the position it represented to the Court.

A further Slovak motivation for not entering a compromise solution may be the unilateral control over the Gabčíkovo sector: navigation, energy production, and all the income they produce accrue to the Slovak budget. Any compromise, leading to a different discharge regime and therefore reduction of the produced electric energy, any costly intervention to improve the ecological state of the main riverbed and its floodplains, are losses for Slovakia which it hopes to avoid by its immutable position and continuous procrastination.

One could assume that once the two countries acceded to the EU and had to implement the relevant acquis, a contradiction between the EU duties and the actual situation would be noted by the Commission and as a third party it could induce both Slovakia and Hungary to find an EU-suitable solution. Political pressure and infringement procedure were to come. But they did not.

I tried to show in the analysis of the Judgment that it was not as ambiguous as claimed. True, the Court could have spoken more clearly, it could have engaged the evidence, especially the evidence related to the environmental impacts, in a more thorough way as it started to do in the *Pulp Mills* and the *Whaling* cases. But for two European countries genuinely willing to implement the decision it could have served as a roadmap and principal guide.

Environmentalism is on retreat. Nationalism is rising. The Court and the wider world favouring environmental protection might fear that the Court's good-willing dicta[129] about the value of the environment and the necessary vigilance will be foregone and the common denominator found at the end of the negotiations will resemble more the modernising and nationalist 19th century than the vision of a 21st century. The parties may put aside the warning, according to which "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn". Ignoring the Judgment in favour of short term economic benefits would not only be a bitter disappointment for those who saw the Judgment as a possible ground for a viable compromise, but also for the invisible college of international lawyers, who prefer impartial third party settlement over behind the scene bilateral deals, concluded at the cost of future generations.

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129 Not to speak about Judge Weeramantry's grandiose vision exposed in his Separate Opinion.

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