

THE IMPLEMENTATION OF THE JUDGMENT OF THE ICJ IN THE GABČIKOVO–NAGYMAROS DISPUTE

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More than eleven years after the decision of the International Court of Justice.¹ In the absence of any clear sign for an agreement on the settlement between Hungary and Slovakia, it is worth analyzing the process of the negotiations on the implementation of the Judgment, as well as, the provisions of the Judgment in order to explore the reasons for this dangerous failure.

Hungary and Czechoslovakia concluded a Treaty in 1977 on the joint utilization of the hydro-electrical potential of their frontier river,² the Danube that prescribed the construction of a joint barrage system. The main components of that plant included the construction of a dam at Gabčíkovo on the Czechoslovak side and one at Nagymaros, on Hungarian territory. The legal battle commenced in 1989, when Hungary suspended the works at Nagymaros referring to environmental concerns. Czechoslovakia, realizing Hungary's reluctance to continue the joint project, started to work on a solution (later to be called "Variant C") that enabled it unilaterally to put the barrage system into operation, significantly departing from the original plans. Hungary – realizing that Czechoslovakia was working on a unilateral solution – decided to terminate the 1977 Treaty in 1992. Czechoslovakia declared that Hungary's purported termination was unlawful and, in response, diverted 90% of the water of the Danube from its frontier course into the artificial canal feeding the works built on Czechoslovak territory. On 1 January 1993, Czechoslovakia ceased to exist, and the new Slovak Republic was proclaimed. Slovakia and Hungary agreed to refer their dispute to the International Court of Justice. The International Court of Justice declared unlawful both the suspension of works at Nagymaros, as well as the purported termination of the 1977 Treaty. According to the judgment, Czechoslovakia had had the right to create

¹ The decision of the ICJ was delivered on 25 September 1997.

² Treaty concerning the construction and operation of the Gabčíkovo–Nagymaros system of locks. Signed at Budapest on 16 September 1977, United Nations Treaty Series, 1978, 236–248.

the installations of Variant C unilaterally, but it had been acting unlawfully when it started to operate the system, diverting the overwhelming majority of the flow of the Danube from its original bed, thereby depriving Hungary of its right to equitable and reasonable share of the frontier watercourse. The Court proclaimed that the existing structures had to be jointly operated, but no further objects had to be created, and a sufficient amount of water had to be discharged to the original riverbed.

I. Brief summary of the negotiations

Slovakia and Hungary already started their negotiations regarding the Judgment in October 1997. In the first phase of the negotiations, Hungary seemed to give up entirely its position represented and expressed before the ICJ. Hungary probably wanted to close down very quickly the long-standing political and legal debate so that it would not create an obstacle in relation to negotiations on accession to the European Union. The governmental delegations initialled the draft agreement³ as early as on 28 February 1998. According to this draft, Hungary would have resigned from two of its main claims, from the increased amount of water to be released into the original riverbed as well as the mutual abolition of the plans for the Nagymaros dam. On the contrary, the draft agreement prescribed for the construction of a new dam on Hungarian territory. However, when considering the agreement, the Hungarian Government rejected it and left the continuation of the negotiations until after the approaching elections. This concluded the first phase of the negotiations. The subsequent four Hungarian governments have returned to the position that Hungary represented before the International Court of Justice, and have attempted to conclude an agreement with Slovakia on that basis.

The negotiations were resumed at the end of 1998. In May 1999 the two parties agreed that the Hungarian party would “elaborate its proposal regarding the principal elements and parameters of the system to be established”.⁴ Slovakia handed over its answer in December 2000. On 2 April 2001, Hungary presented a draft Agreement on the implementation of the Judgment.⁵ In June 2001, Hungary and Slovakia established a Water Management Working Group in order to evaluate and analyze the two technical documents that were mutually handed over regarding the system to be established. The parties also established in June 2001 a Working Group on Legal Matters, with the aim to negotiate on the draft Agreement of Hungary in the context of the

³ Currently only the Slovak version of the Agreement is public. <http://www.gabcikovo.gov.sk/doc/fa1998/> last visited 30 December 2008.

⁴ Agreed Minutes of the negotiations held in Budapest on 14 May, 1999, between the delegations of the Government of the Republic of Hungary and of the Government of the Slovak Republic on the execution of the Judgment of the International Court of Justice in the case concerning the Gabčíkovo–Nagymaros Project www.bosnagymaros.hu, last visited 30 December 2008.

⁵ Annex 4 to the Minutes of June 5, 2001. Draft (2 April 2001) Agreement concluded between the Republic of Hungary and the Slovak Republic for the purpose of giving effect to the judgment of the International Court of Justice of 25th September 1997 www.nagymaros.hu, or <http://www.gabcikovo.gov.sk/doc/prop/agreement-draft-02-04-01a.htm> last visited 30 December 2008.

Judgment of the International Court of Justice. After the May 2002 elections in Hungary, the negotiations were interrupted and only continued during the spring of 2004.

Slovakia prepared a document entitled “Complex Statement of the Slovak Republic Governmental Delegation. How to Fulfil the Objectives of the 1977 Treaty on the Basis of the International Court of Justice Judgment⁶”, in October 2002, but this document was only officially handed over to the Hungarian delegation in April 2004. During the same round of negotiations, the two parties established a third Working Group on Economic Matters.

The Government Delegations had already agreed in September 2001 that the Working Groups had to determine the questions to be investigated jointly in relation to the documents that were mutually handed over. It took not less than three and a half years (!) until these working groups were finally able to agree on the questions to be investigated. Consequently, the mandates of the working groups were only approved by the Government Delegations in March 2005. As compared to the three and a half years to agree on the questions to investigate, the Water Management Working Group was able to elaborate a document which summarized the answers for the jointly determined questions within only one year.⁷ Nevertheless, this document may be characterised as an agreement on the disagreement of the parties, the document clearly expresses the diametrically opposing views of the parties in every matter.

The Slovak delegation also presented its version for the agreement⁸ on the implementation of the Judgment in December 2006, five years after Hungary’s proposal was handed over. As it is clear from the proposed preamble, Slovakia was ready to accept temporarily that Hungary was not ready to negotiate on the Nagymaros dam, however in return it wished to take advantage of practically all electricity produced at Gabčíkovo.⁹ Hungary and Slovakia also agreed in 2005 to identify relevant European legal norms that would have to be taken into consideration.¹⁰

The parties also agreed in 2007 that they were going to pursue a Strategic Environmental Assessment (“SEA”) in relation to the entire Bratislava–Budapest section,¹¹ in which process they also decided to involve international experts. The aim of this assessment

⁶ <http://www.gabcikovo.gov.sk/doc/st2002/statementEng.htm>, last visited 30 December 2008.

⁷ Synopsis. Negotiations Conducted on the Issues Identified in the Mandate of the Expert Working Group on River Management, Environmental Protection, Energy and Navigation, Budapest/Bratislava, 27 March 2006.

⁸ http://www.gabcikovo.gov.sk/doc/prop/061219_pr5EN.ht

⁹ The relevant part of the preamble is as follows: “Taking due note of the decision of the Government of the Republic of Hungary not to negotiate with the Slovak Party about the building the Nagymaros step according to the original project... *Considering* that Hungary does not intend to utilize its hydropotential from the Danube River and that Slovakia shall benefit from a substantial part of 2,980 GWh projected annual energy production of the Gabčíkovo power plant”.

¹⁰ Paragraph 6 of the Minutes of the Meeting of the Working Group on Legal Matters of the delegations of the Government of the Slovak Republic and the Government of the Republic of Hungary on the implementation of the Judgment of the International Court of Justice in the Case concerning the Gabčíkovo–Nagymaros Project held in Bratislava on 27 April 2005. <http://www.gabcikovo.gov.sk/doc/prop/050427-zapisnica-a.htm>, last visited 30 December 2008.

¹¹ In accordance with Article 5 of the Minutes of the meeting of the Governmental Delegation on the implementation of the Judgment of the International Court of Justice in the Hague concerning the Gabčíkovo–Nagymaros System of Locks, held on November 6, 2007 in Bratislava.

from a Hungarian prospective is to help find a technical solution that would improve the environmental status of the Hungarian tributaries, as well as, the original riverbed at the upper (Gabčíkovo) section. Hungary could only achieve it by undertaking that the SEA would also cover the Nagymaros section. Obviously, the Slovak intention related to the SEA is to prove that it is not required to discharge more water into the original bed of the Danube, and to underline its position that the construction of Nagymaros is environmentally friendly. In sum, Slovakia's aim is to maintain the *status quo* at the upper section, change at the bottom, while Hungary wishes change at the upper section and wants to keep the *status quo* at the bottom section. Since five votes are required in the established Committee in order to deliver a decision regarding the results of the SEA, and two members of that Committee are each appointed by the Slovak and the Hungarian party, it is not difficult to forecast that the SEA will also be fruitless, especially since the parties were unable jointly to establish strict and proper environmental criteria in the light of which the different alternatives would be compared. As the deadline for the final results of the SEA is December 2009, one can forecast that the bilateral negotiations will be pointless after that date, and the parties will have to return to the International Court of Justice (or another third party) seeking for a more detailed and concrete guidance.

II. What made the negotiations so fruitless?

The main aim of this paper is to determine whether the deadlock of the negotiations is attributable to some structural problems in the Judgment or a result of the manifest lack of the required good will from one of the parties.

In the course of this evaluation, we should concentrate on the negotiations from the second phase, when Hungary announced that it was not willing to accept the negotiated Draft Agreement on the implementation. The first half-year period can be qualified as disturbing but meaningless: in fact, a dead-end street. The negotiations had to be restarted *de novo*.

The basic difference of the negotiation strategy was that Hungary tried to propose that the parties should determine jointly the legal consequences of the Judgment.¹² Hungary emphasized that the Judgment had been made within a three pillar legal framework: thus the 1977 Treaty, the international law of watercourses as well as international environmental law were equally important when determining the relevant legal surroundings.¹³ The obligations to construct any further installation (especially the Nagymaros dam) were overtaken by events and the existing structures had to be legalized: "the facilities not constructed were not required to be built".¹⁴

¹² Hungary proposed that the main task of the working group on legal matters should be to analyze what legal obligations are arising from the judgment. This proposal was firmly rejected by Slovakia.

¹³ Hungary based its argument on paragraph 141 of the Judgment which reads as follows: "*It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in an integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses.*"

¹⁴ Point 11 of the Hungarian Position Paper attached as Annex 4 to the Protocol made on 28th January 1999, <http://www.bosnagymaros.hu/uploaded/1999.htm>.

On the contrary, Slovakia underlined that the main goal of the negotiations was that every necessary measure had to be adopted with the view to achieving all the goals of the 1977 Treaty. Since all measures had a technical character, the task of the parties was to select the best technical measure with the involvement of technical experts. The task of the legal experts was to draft the appropriate legal framework for the solution selected by the technical experts.

Some of the writers criticized the International Court of Justice, that it overemphasized the role of the 1977 Treaty as compared to other potential sources.¹⁵ We should take a different standpoint, it is enough to mention that the Court actually raised the eventuality that certain environmental norms could even be regarded as *jus cogens*, even if it was not investigated in the absence of any direct request from the parties. Nevertheless Slovakia felt itself self confident enough to base –especially in the light of the wording of paragraph 155 of the Judgment – entirely on the 1977 Treaty.

The Judgment obliged the parties to fulfil the aims of the 1977 Treaty. The Court held that the objectives of the Treaty were energy production, improvement of navigability, flood control, regulation of ice discharge and environment protection.¹⁶ All of the aims had to be realized – however only to the extent that it was feasible. But do the current installations fulfil the aims of the 1977 Treaty? According to the Judgment, *that part of the obligations of performance which related to the construction of the System of Locks – in so far as they were not yet implemented before 1992 – have been overtaken by events, it is not necessary to implement them, when the objectives of the Treaty can be adequately served by the existing structures. (Emphasis added).*¹⁷

Nevertheless, there was a problem related to the meaning of the word “when”. The word may either mean “in the event that” (“the contestant is disqualified when he disobeys the rules”) or “considering that” (“why use water when you can drown in it?”).¹⁸ The Hungarian delegation believed that the meaning of “when” in this case was clearly “considering that”. The Slovak party however was of the opinion that the meaning of “when” was “in the event that”. The Slovak party, when quoting the relevant part of the Judgment in its Complex Statement, emphasized the “in the event that” meaning by emphasizing it as a remark in bold in the quotation. The Complex Statement of Slovakia drew further conclusions from this interpretation: *When the objectives of the Treaty can serve adequately constructions built before 1992 it is necessary to use them, and not to destroy them and build new ones (mainly Variant C – Čunovo).*¹⁹

¹⁵ As for example Jan Klabbbers put it “the Court guarantees that it will be regarded as being environmentally correct, despite its apparent insistence on the law of treaties rather than on the protection of the environment”. JAN KLABBERS: The Substance of Form: The Case Concerning the G/N Project. *Yearbook of International Environmental Law*, vol 8, 1997 34.

¹⁶ Paragraph 135 of the Judgement.

¹⁷ Paragraph 136 of the Judgement.

¹⁸ Examples provided by the Merriam-Webster Dictionary. <http://www.merriam-webster.com>.

¹⁹ Complex Statement of the Slovak Republic, above n. 6, at page 12.

A further statement of the Slovak document obviously refers to Nagymaros: *In the case there are no constructions, which may serve the objectives of the Treaty, it is necessary to negotiate and do everything to fulfil objectives of the Treaty.*²⁰

A central issue of the negotiations was whether it was a good faith requirement from the Hungarian side to be ready to investigate the possibility of the creation of a dam at Nagymaros or not.²¹ Could Hungary reject any talks on the eventual creation of a second dam in the light of the Judgment? Would Hungary look as failing to negotiate in good faith if it rejected any (even a hypothetical) talk on a second dam if it were proposed at any stage “just for the sake of comparison”? At the end of the day, the Judgment did not say that the parties must not build a dam. But what would be the value of the Judgment if all disputed questions would remain open, if one could presume that the parties should not bother how the Court directed them to settle the case? The whole Judgment would be meaningless if the parties were to concentrate on one single sentence in the operative part of the Judgment regarding the binding force of the 1977 Treaty, and disregarding any other aspects highlighted in the Judgement.

Hungary between 1998 and 2005 rejected even discussing Nagymaros or any second dam as an alternative. When the negotiations were approaching a total deadlock, it was ready to accept having this option on the negotiation table (such as in the case of the SEA), always highlighting that it was not going to be an acceptable alternative for Hungary.

Referring to its own interpretation of the meaning of “when” in the Judgment – according to which it was doubtful whether the barrage system, as it then stood, could fulfil the objectives of the 1977 Treaty – Slovakia emphasized that it could lawfully require Hungary to consider any alternatives that could serve as a solution for this problem. In order to underline this obligation of Hungary, it also expressly referred to paragraph 137 of the Judgement, “(w)hether this is indeed the case, it is first and foremost for the parties to decide”.

One should also add that, on the one hand, the Court legalized the existence – but not the operation – of Variant C. On the other hand, in the case of Nagymaros, the Court declared that although the termination of the 1977 Treaty was unlawful, with the effective discarding of the peak-mode operation by both parties “there is no longer any point” in building it. This latter statement did not seem to have a legal character for Slovakia. On the contrary, according to the Slovak position, Hungary was not released from its obligation to build Nagymaros, as the purported termination of the 1977 Treaty was unlawful, and *ex injuria jus non oritur*.²²

²⁰ *Ibid.*

²¹ Slovakia obviously believes that it is a good faith requirement on the side of Hungary to investigate the possibility of the creation of a second dam. As they highlight it in the Conclusion of the Complex Statement (above, note 6): “we must negotiate in good faith about every proposal of one or the other Party. Treaty objectives fulfillment is a highly expert problem. Without expert evaluation of individual proposals concerning whose part of the Danube... we cannot come to... changes... in the framework of the 1977 Treaty.”

²² Address of the Head of the Slovak Delegation, attached to the Protocol signed on the 28 January 1999 negotiations, <http://www.bosnagymaros.hu/uploaded/1999.htm>.

For Slovakia, the Court's statement meant *(t)his were not ceased other 1977 Treaty objectives, power production at Nagymaros... This does not mean that the Nagymaros part of the Project or any other project substituting Nagymaros Project should not be constructed to fulfil 1977 Treaty objectives.*²³

In the same document, Slovakia was even declaring peak-mode operation as one of the objectives: "*Treaty objectives and fulfilment of the International Court of Justice Judgement at this part of the Danube are [...] to create conditions for peak power production in Gabčíkovo hydropower plant according to the 1977 Treaty*".²⁴

At one point, Slovakia even claimed that as the 1977 Treaty was still in force, the only open question between the parties was the level of peak-mode operation at Nagymaros.²⁵

Hungary repeatedly emphasized its position that in the light of the statement of the Court, notably that the obligations of performance were overtaken by events. This view enjoys a widespread support amongst the international scholars. According to Ida L. Bostian "Hungary is not required to build any dams".²⁶ Adriana Koe underlined: "Nagymaros had not been built, and there was no longer any necessity for their construction".²⁷ Joched Solne stated: "La nappesouterrainée eau de Budapest ne sera pas menacée par la construction du barrage de Nagymaros, la Hongrie est dispensée."²⁸

The Hungarian Delegation expressed its view that "the Court linked the issues of Čunovo and Nagymaros".²⁹ According to this position, Hungary has to give its consent that Čunovo could operate as part of the 1977 Treaty structure (resigning thereby from the putting into operation the nearly finished installations at Dunakiliti, built on Hungarian territory on the basis of the 1977 plans of the barrage system) and to response to that gesture, Slovakia has to resign from the Nagymaros dam.

According to the rules of state responsibility,³⁰ the immediate obligation of the wrongful state is to stop the breach (cessation) and then to provide reparation. As the PCIJ clarified already in the Chorzow case: *reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*³¹

²³ Complex Statement of the Slovak Republic, above n. 6, at 19.

²⁴ Complex Statement, of the Slovak Republic, above n. 6, at 16.

²⁵ Referred to in the position paper of the Hungarian Government Delegation, which is attached to the protocol of the negotiations of 29 June, 2001. The Slovak document containing that statement was dated 5 June, 2001, and was issued as background material in relation to the establishment and negotiations of the joint working groups. <http://www.bosnagymaros.hu/feltoltott/2001.htm>, last visited 30 December, 2008. The statement was re-confirmed by Slovakia in the Complex Statement at 22.

²⁶ IDA L. BOSTIAN: Flashing the Danube: The World Court's Decision Concerning the G/M Dam. *Colorado Journal of International Environmental Law and Policy* 9 (98) 2, 423.

²⁷ ADRIANA KOE: Damming the Danube: the International Court of Justice and the Gabčíkovo–Nagymaros Project (Hungary v. Slovakia). 20 *The Sydney Law Review* 612–629 (1998) at 621.

²⁸ JOCHEN SOHNLE: Irruption du droit de l'environnement dans la jurisprudence de la CIJ: l'affaire Gabčíkovo–Nagymaros. *Revue générale de droit international public*, Tome 102, 1998, 85–119 at 102.

²⁹ Opening Speech of Laszlo Székely, head of the Hungarian Government Delegation, 10 March, 1999. <http://www.bosnagymaros.hu/uploaded/1999.htm> at 17.

³⁰ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II, Part Two.

³¹ Factory at Chorzow, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 47.

It means that the normal legal consequences would require Slovakia to demolish the dam at Čunovo (not being part of the 1977 Treaty) and would require Hungary to put the installations at Dunakiliti into operation and to build the Nagymaros dam. However the Court highlighted clearly that this would be an administration of law entirely out of touch with reality. What it required the parties to do was to agree on the joint operation “of what remains from the Project”.³²

International law is lacking the proper legal prescription for the very significant change of circumstances in relation to an international agreement, if those cannot qualify as falling within the legal rubric of *clausula rebus sic stantibus*. There is a significant difference between the practice of common law and civil law courts. Most continental legal systems allow the judge to adjust the provisions of a contract between two private parties, while the English judge is not allowed to do so, he merely prescribes in the judgment the lines along which the parties are required to modify their agreement. It seems that the ICJ followed the English approach. It is worth noting that it was Slovakia that was referring to a private law analogy, notably the doctrine of approximate application. According to Fritzmaurice, the Court neither approved nor rejected the concept of approximate application, and this could serve as the legal basis of the modification of the international treaty.³³ In that light it is unfortunate that Slovakia was not more receptive to the language of the Court.

For the sake of providing a full picture, we also have to mention the aspects of the settlement that were very briefly touched upon by the government delegations, or not even discussed during the last eleven years. One such issue is the amount of water to be released into the original riverbed. The Court emphasized that satisfactory solution had to be found for the amount of water to be discharged to the original river-bed and the tributaries, so that it would satisfy the requirement of the equitable share of the frontier river. Slovakia expressed its view that the current amount of water (around 20%) is sufficient or even too much in order to satisfy the needs of the environment. Hungary was requesting 65% to be released into the original riverbed as the starting point,³⁴ but also indicated that probably only a third party involvement could help settle this matter. In other important matters – such as the issue of the joint operation of the system or compensation – the meaningful dialogue did not even begin during these eleven years.

III. The consistency of the position of the parties

It is a rather well-known fact that Hungary had modified its position a few times in relation to the barrage system, before the international litigation started, especially in the 1980s. However, since its legal position seemed to be rather firm at the beginning

³² Paragraph 145 of the Judgment.

³³ MALGOSIA FRITZMAURICE: Case Analysis: The *Gabčíkovo-Nagymaros* Case: The Law of Treaties. *Leiden Journal of International Law* 11 (1998) 2, 321–344 at 343.

³⁴ Point C of the Position of the Hungarian Government Delegation attached to the Protocol of the negotiations of 29 June 2001, <http://www.bosnagymaros.hu/feltoltott/2001.htm>.

of the litigation, Hungary naturally expressed the desire to accept the Court's legal pronouncements as binding. On the contrary, it is interesting to note that Slovakia represented a somewhat different view in crucial matters during the negotiations as compared to the litigation. In its Memorial, Slovakia highlighted that Czechoslovakia had been elaborating different alternatives to modify with common consent the original plans in 1991. From the different alternatives, Variant B was "the completion of the original project without the Nagymaros step".³⁵ The Slovak Memorial described that all of the alternatives were subjects of "careful studies and assessment of feasibility".³⁶ After the careful assessment, the Czechoslovak government selected three alternatives and Variant B was among the selected ones. The Slovak Memorial refers to the acceptable alternatives as being capable to "fulfil the broad aims of the treaty".³⁷ It is difficult to understand that if Slovakia was accepting an alternative without the Nagymaros dam, already during the written stage of the procedure before the ICJ, why did it reject the same thing after the Judgment?

It is also difficult to understand why Slovakia was insisting on the second dam in 2004, if it had already acknowledged in 2000, in the context of the negotiations, that it could not, even by legal means, force Hungary to construct a second dam.³⁸ Slovakia also expressed different views in relation to the issue of water diversion during the Court proceedings. While it had shown readiness during the pleadings before the Court for reconsideration of the existing situation, it firmly opposed it during the bilateral negotiations. One could ask to what extent are the parties allowed to influence the work of the Court by manifestly indicating will and intention towards the Court that they do not intend to follow.

IV. Potential future developments

It seems that the parties are very near to realizing that they have exhausted their possibilities and it will be inevitable to ask the assistance from a third party. The self-evident solution would be to return to the ICJ asking an additional judgment: they have already specified in the Special Agreement that – in case the parties would be unable to reach an agreement on the implementation of the Judgment within six

³⁵ Slovak Memorial, <http://www.icj-cij.org/docket/files/92/10939.pdf> at 5.16.

³⁶ Slovak Memorial at 5.14.

³⁷ Ibid.

³⁸ Currently only the original version of the referred Slovak standpoint is public. "STANOVISKO delegácie vlády SR k návrhu maďarskej strany na vykonanie Rozsudku MSD v Haagu z 25.septembra.1997 vo veci Sústavy vodných diel Gabčíkovo–Nagymaros" <http://www.gabcikovo.gov.sk/doc/SR2000/Uvod.doc>. However the relevant part of the Slovak standpoint is quoted in the Opening Address of the Head of the Hungarian Delegation: "Let me quote the relevant passages of the Slovak position. In Chapter I on the legal circumstances the Slovak Party declares: 'The Slovak Republic is aware of the fact that it cannot, even by means of judicial processes, oblige the Republic of Hungary to build such a project [i.e. the Nagymaros dam] on its own territory'." Annex 2 to the Minutes of June 29, 2001 Opening Address by the Head of the Hungarian Delegation at the 29th June 2001, Budapest round of the Hungarian–Slovak intergovernmental negotiations on the implementation of the 25th September 1997 Judgment of the International Court of Justice at the Hague. <http://www.bosnagymaros.hu/uploaded/2001.htm>.

months after its delivery – each of the parties has the right to turn to the Court asking to determine the modalities of the Judgment. This process is complicated by the fact that Slovakia had already requested an additional judgment from the ICJ in September 1998. Slovakia requested the Court to establish that Hungary bore responsibility for the failure of the negotiations on the implementation of the Judgment as well as to fix a date by which the parties were obliged to reach an agreement. Should they be unable to reach an agreement, the Court should declare that the parties would be required to follow the spirit and terms of the 1977 Treaty. The procedure was suspended at the end of 1998. It is worth noting that some of the scholars were already predicting in 1998 that the two parties would have to return to the Court. According to Boyle: “The Court [...] merely set the parameters within which the agreement should be negotiated and provided the option to bring the matter back to Court if necessary. The case may yet return to the ICJ.”³⁹ As Ida Bostian highlighted: “It is very probable that the Court will be required to enter further judgment in the issue. Perhaps the next decision will give more specific direction to the parties.”⁴⁰

Another interesting aspect of the case that both parties acknowledged that European law is relevant in relation to the dispute. This is basically, but not exclusively referring to the Directive 2000/60/EC establishing a framework for Community action in the field of water policy.⁴¹ A very important lesson from the judgment of the European Court of Justice in the *Mox plant case* that European Union Member States are not allowed to bring their disputes related to European law before any other judicial forum other than the European Court of Justice.⁴² It is also noteworthy that from the perspective of the European Court of Justice, all mixed agreements (agreements in which both the Member States and the European Community are members) are also regarded as part of European law, having a rank between the primary norms (the founding treaties and their modifications) and the secondary norms (regulations, directives, etc.) And there are agreements that delineate the European law of internationally-shared watercourses, such as the Convention on the protection and use of transboundary watercourses and international lakes.⁴³ Since the decision of the European Court of

³⁹ A. E. BOYLE: The G/N Case: New Law in Old Bottles, Symposium: The Case Concerning the G/N Project. *Yearbook of International Environmental Law*, vol 8. 1997, 13–20, at 14.

⁴⁰ IDA L. BOSTIAN: Flashing the Danube: The World Court’s Decision Concerning the G/M Dam. *Colorado Journal of International Environmental Law and Policy* 9 (98) 2, 425.

⁴¹ Directive 98/83/EC on the quality of water intended for human consumption, Directive 91/676/EEC on the protection of waters against pollution caused by nitrates from agricultural sources, Directive 91/271/EEC concerning urban waste water deflecting and treatment, Directive 7/160/EEC on the quality of bathing water. For further potential role of the European law, please see Standpoint of the Hungarian Party on the identification of European legislative rules applicable in the course of developing the modalities for the implementation of the Judgment of the International Court of Justice at the Hague concerning the Gabčíkovo-Nagymaros Project, inter alia on the coordination of tasks relating to the application of the planned technical measures and the Water Framework Directive.

⁴² Judgment of the Court (Grand Chamber) of 30 May 2006 Commission of the European Communities v. Ireland *European Court Reports* 2006. I–04635.

⁴³ Concluded on 17 March 1992, elaborated in the framework of the United Nations Economic Commission for Europe, also known as the Helsinki Convention. The EC is member by virtue of the Council Decision

Justice in the *Kadi case*,⁴⁴ the European Court of Justice seems to favour the concept of the primordial role of the European law even in the case of disputes closely related to international law. It is questionable how the parties will react to these developments – it cannot be entirely excluded that they will take advantage of a third party role of the European Union, especially that the Judgment of the ICJ especially highlighted this possibility.⁴⁵

No matter how the case will be settled finally, the Slovakia and Hungary will have to find the way to work together in the sustainable use of the Danube. As Philippe Weckel put it “ils n’échapperont pas dans l’avenir d’agir en commun.”⁴⁶

⁴⁴ 95/306/EC of 24 July 1995, Slovakia ratified it on 13 April 1999, Hungary ratified it on 2 September 1994 http://www.unece.org/env/water/status/lega_wc.htm

⁴⁴ Judgment of the Court of Justice in Joined Cases C-402/05 P and C-415/05 P : Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission

⁴⁵ In this regard Phoebe N. Okowa expressed a very surprising view: “Yet by asking parties to negotiate a solution, possibly with the help of third party, it is arguable that the Court was abdicating the very responsibility that the parties had assigned to it”. P. N. OKOWA: ICJ Recent Cases – The Case Concerning G/N Project. *International Comparative Law Quarterly* Vol 47, 1998 July, p. 696.

⁴⁶ PHILIPPE WECKEL: Convergence du Droit Des Traités et du Droit de la Responsabilité International. *Revue Generale de Droit International Public*, 1998, vol. 102, no3, 647–684 at p 672.

