

## REGIONAL AFFAIRS

## Slovakia / Hungary

## Gabčíkovo-Nagymaros Dispute – Implementation of the ICJ Judgment –

by Marcel Szabó\*

More than 11 years after the decision of the International Court of Justice,<sup>1</sup> in the absence of any clear sign of an agreed settlement between Hungary and Slovakia, it is worth analysing 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 utilisation of the hydro-electrical potential of their border river,<sup>2</sup> 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, citing environmental concerns. Czechoslovakia, realising 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 – realising that Czechoslovakia was working on a unilateral solution – decided to terminate the 1977 Treaty in 1992. Czechoslovakia declared that Hungary's proposed termination was unlawful and, in response, diverted 90% of the water of the Danube from its course along the border 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 proposed termination of the 1977 Treaty. According to the judgment, Czechoslovakia had had the right to build the Variant C installations unilaterally, but it had acted unlawfully when it started to operate the system, diverting the overwhelming majority of the flow of the Danube from its original riverbed and thereby depriving Hungary of its right to an equitable and reasonable share of the border watercourse. The Court proclaimed that the existing structures had to be jointly operated, no further structures were to be built, and a sufficient amount of water had to be discharged to the original riverbed.

### Brief Summary of the Negotiations

Slovakia and Hungary started their negotiations regarding implementation of the Judgment in October 1997. In the first phase of the negotiations, Hungary seemed to abandon entirely the position it had presented and expressed before the ICJ. It probably wanted to end as quickly as possible the long-standing political and legal debate so that it would not be an obstacle to the negotiations on accession to the European Union. The government delegations initialled the draft agreement<sup>3</sup> as early as 28 February 1998. According to this draft, Hungary would have relinquished two of its main claims, namely an increase in the 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 the construction of a new dam on Hungarian territory. However, the Hungarian Government rejected the draft agreement and left the continuation of the negotiations until after the approaching elections. This concluded the first phase of the negotiations. The four subsequent Hungarian governments have returned to the position that Hungary held before the International Court of Justice, and have attempted to conclude an agreement with Slovakia on that basis.

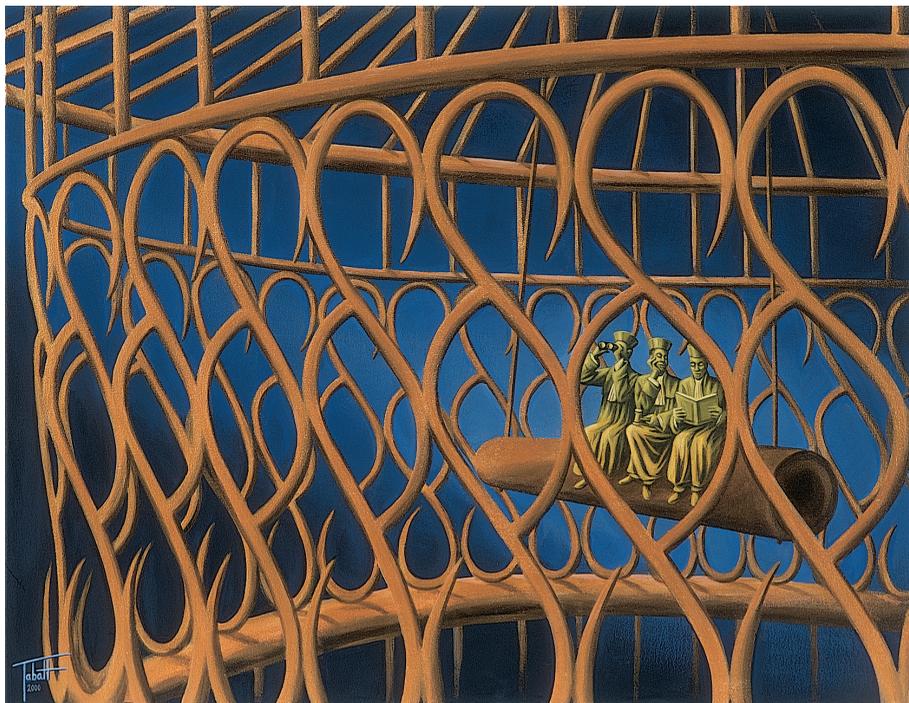
The negotiations were resumed at the end of 1998. In May 1999 the two parties agreed that the Hungarian party would "elaborate its proposal regarding the principal elements and parameters of the system to be established".<sup>4</sup> Slovakia handed in its response in December 2000. On 2 April 2001, Hungary presented a draft Agreement on the implementation of the Judgment.<sup>5</sup> In June 2001, Hungary and Slovakia established a Water Management Working Group in order to evaluate and analyse the two technical documents relating to the system to be established. The parties also established, in June 2001, a Working Group on Legal Matters, with the aim of negotiating on the draft Agreement of Hungary in the context of the ICJ Judgment. After the May 2002 elections in Hungary, negotiations were interrupted and didn't restart until 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 Judgment",<sup>6</sup> in October 2002, but this document was only officially presented to the Hungarian delegation in April 2004. During

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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 should determine the questions to be investigated jointly in relation to the documents that were exchanged. It was three and a half years (!) before these working groups were finally able to agree on the questions to be investigated. Consequently,



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the mandates of the working groups were only approved by the Government Delegations in March 2005. Compared to the three and a half years taken to agree on the questions to investigate, the Water Management Working Group was able to elaborate a document which summarised the answers to these questions in just one year.<sup>7</sup> However, this document can best be described as an agreement on the disagreement of the parties; the document clearly expresses the diametrically opposed views of the parties on every matter.

The Slovak delegation also presented its version of an agreement<sup>8</sup> on the implementation of the Judgment in December 2006, five years after Hungary's proposal was handed over. As is clear from the proposed preamble, Slovakia was prepared 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 the electricity produced at Gabčíkovo.<sup>9</sup> Hungary and Slovakia also agreed in 2005 to identify the relevant European legal norms that would have to be taken into consideration.<sup>10</sup>

In 2007, the parties agreed to carry out a Strategic Environmental Assessment (SEA) of the entire Bratislava-Budapest section,<sup>11</sup> involving international as well as national experts. The aim of this assessment from a

Hungarian perspective was to help find a technical solution that would improve the environmental status of the Hungarian tributaries, as well as the original riverbed in the upper (Gabčíkovo) section. Hungary could only achieve this by undertaking that the SEA would also cover the Nagymaros section. Obviously, the Slovak intention was for the SEA to show that discharging more water into the original Danube riverbed was not needed, and

to underline its position that the Nagymaros construction was environmentally friendly. In sum, Slovakia's aim is to maintain the *status quo* in the upper section, and make changes in the bottom section, whereas Hungary wants the precise opposite. Since five votes are required in the established Committee in order to deliver a decision regarding the results of the SEA, and the Slovak and the Hungarian parties each appoint two members of that Committee, it is not difficult to predict that the SEA will 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 predict that there will be no

point in continuing bilateral negotiations after that date, and the parties will have to return to the International Court of Justice (or another third party) to seek more detailed and concrete guidance.

### What Made the Negotiations so Fruitless?

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

In the course of this evaluation, we will concentrate on the second phase of the negotiations, when Hungary announced that it was not willing to accept the negotiated Draft Agreement on the implementation. The first six-month phase can be described as disturbing but meaningless: in fact, a dead end. The negotiations had to be restarted.

The basic difference in the two negotiation strategies was that Hungary tried to propose that the parties should jointly determine the legal consequences of the Judgment.<sup>12</sup> Hungary emphasised 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 which legal surroundings are relevant.<sup>13</sup> The obligations to build any further installations (especially the Nagymaros dam) had been overtaken by events and the existing structures had to be legalised: “the facilities hitherto not constructed were not required to be built”.<sup>14</sup>

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 measures 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 complained that the International Court of Justice overemphasised the role of the 1977 Treaty as compared to other potential sources.<sup>15</sup> We will take a different standpoint: it is enough to mention that the Court did actually raise the eventuality that certain environmental norms could be regarded as *jus cogens*, even if it was not investigated in the absence of any direct request from the parties. Nevertheless Slovakia was confident enough to base its strategy – 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.<sup>16</sup> All of the aims had to be realised, 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:

*part of the obligations of performance which related to the construction of the System of Locks – insofar 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)*<sup>17</sup>

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?”).<sup>18</sup> 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, emphasised the “in the event that” meaning by highlighting it in bold in the quotation. The Complex Statement of Slovakia drew further conclusions from this interpretation:

*When the objectives of the Treaty can be served adequately by constructions built before 1992 it is necessary to use them, and not to destroy them and build new ones (mainly Variant C – Čunovo).*<sup>19</sup>

A further statement in 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.*<sup>20</sup>

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.<sup>21</sup> Could Hungary reject any talks on the eventual creation of a second dam in the light of the Judgment? Would Hungary appear to be failing to negotiate in good faith if it rejected any (even hypothetical) discussion 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 remained open, if the parties did not care 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 disregarded any other aspects highlighted in the Judgment.

Between 1998 and 2005, Hungary refused even to discuss Nagymaros or any second dam as an alternative. However, as the negotiations approached total deadlock, it was ready to accept placing this option on the negotiating table (as with the SEA), whilst highlighting that it was not 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 emphasised that it could lawfully require Hungary to consider any alternatives that would serve as a solution to this problem. In order to underline this obligation, it also expressly referred to paragraph 137 of the Judgment, “(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 legalised 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, that with the effective discarding of the peak-mode operation by both parties, “there is no longer any point” in building it. Slovakia did not accept the legality of this statement. On the contrary, according to the Slovak position, Hungary was not released from its obligation to build Nagymaros, as the proposed termination of the 1977 Treaty was unlawful, and *ex injuria jus non oritur*.<sup>22</sup>

For Slovakia, the Court’s statement meant: *(the decision had) 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 for the Nagymaros Project should not be constructed to fulfil 1977 Treaty objectives.*<sup>23</sup>

In the same document, Slovakia declared peak-mode operation as one of the objectives:

*“Treaty objectives and fulfilment of the International Court of Justice Judgement on this part of the Danube are ... (t)o create conditions for peak power production in Gabčíkovo hydropower plant according to the 1977 Treaty”.*<sup>24</sup>

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.<sup>25</sup>

Hungary repeatedly emphasised its position that in the light of the statement of the Court, the obligations of performance were overtaken by events. This view enjoys widespread support amongst international scholars. According to Bostian. “Hungary is not required to build any dams”.<sup>26</sup> Koe underlines: “Nagymaros had not been built, and there was no longer any necessity for its construction”.<sup>27</sup> Sohnle states: “La nappe souterraine d’eau de Budapest ne sera pas menacée par la construction du barrage de Nagymaros, la Hongrie est dispensée”.<sup>28</sup>

The Hungarian delegation expressed its view that “the Court linked the issues of Čunovo and Nagymaros”.<sup>29</sup> According to this position, Hungary had to give its consent that Čunovo could operate as part of the 1977 Treaty structure (thereby refraining from 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 in response to that gesture, Slovakia had to withdraw its demands regarding the Nagymaros dam.

According to the rules of state responsibility,<sup>30</sup> the immediate obligation of the wrongful state is to stop the breach (cessation) and then to provide reparation. As the PCIJ clarified 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.*<sup>31</sup>

These rules would require Slovakia to demolish the dam at Čunovo (as 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 that this administration of law would be 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”.<sup>32</sup>

International law lacks the proper legal prescription for a very significant change of circumstances in relation to

an international agreement, if those do not fall 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 an 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 referred 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.<sup>33</sup> 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 only very briefly touched upon by the government delegations, or not discussed at all during the last 11 years. One issue is the amount of water to be released into the riverbed. The Court emphasised that a satisfactory solution had to be found regarding the amount of water to be discharged into the original riverbed and the tributaries, so that it would satisfy the requirement of an equitable share of the border river. Slovakia expressed its view that the current amount of water (around 20%) was sufficient or even too much to satisfy the needs of the



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environment. Hungary requested 65% to be released into the original riverbed as a starting point,<sup>34</sup> but also indicated that probably only a third party could help settle this matter. In other important matters – such as the issue of the joint operation of the system or compensation – a meaningful dialogue did not even begin during the 11 years.

### The Consistency of the Position of the Parties

It is well known that Hungary changed its position a few times in relation to the barrage before the international litigation started, especially in the 1980s. However, since its legal position seemed to be rather secure at the beginning 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. Of the different alternatives, Variant B was "the completion of the original project without the Nagymaros phase".<sup>35</sup> The Slovak Memorial described that all the alternatives were subject to "careful study and feasibility assessments".<sup>36</sup> After careful assessment, the Czechoslovak government selected three alternatives, one of which was Variant B. The Slovak Memorial refers to the acceptable alternatives as being capable of "fulfilling the broad aims of the treaty".<sup>37</sup> It is difficult to understand, if Slovakia was content to accept an alternative without the Nagymaros dam during the written stage of the procedure before the ICJ, why it rejected 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, during the negotiations, that it could not, by any legal means, force Hungary to construct a second dam.<sup>38</sup> 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 to the Court that they do not intend to follow.

### Potential Future Developments

It seems that the parties are very close to realising that they have exhausted all possibilities and that they will inevitably have to ask for assistance from a third party. The obvious solution would be to return to the ICJ to ask for an additional judgment: it is already specified in the Special Agreement that – in case the parties are unable to reach an agreement on the implementation of the Judgment within six months after its delivery – each of the parties has the right to turn to the Court to ask it 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 find 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."<sup>39</sup> As 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".<sup>40</sup>

Another interesting aspect of the case is that both parties have 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.<sup>41</sup> A very important lesson from the judgment of the European Court of Justice in the Mox plant case is that European Union Member States are not allowed to bring their disputes related to European law before any judicial forum other than the European Court of Justice.<sup>42</sup> 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, ranking 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.<sup>43</sup> Since the decision of the European Court of Justice in the Kadi case,<sup>44</sup> the European Court of Justice seems to favour the concept of the primordial role of 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 the third-party role of the European Union, especially as the ICJ Judgment specifically highlighted this possibility.<sup>45</sup>

No matter how the case will be settled finally, Slovakia and Hungary will have to find a way to work together in the sustainable use of the Danube. As Weckel put it, "ils n'échapperont pas dans l'avenir d'agir en commun".<sup>46</sup>

### Notes

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, pp.236–248. ➤

- 3 Currently only the Slovak version of the Agreement is public. See: <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 Government of the Republic of Hungary and 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. See: [www.bosnagymaros.hu](http://www.bosnagymaros.hu), last visited 30 December, 2008.
- 5 Annex 4 to the Minutes of 5 June, 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 25 September 1997. See: [www.bosnagymaros.hu](http://www.bosnagymaros.hu) or <http://www.gabcikovo.gov.sk/doc/prop/agreement-draft-02-04-01a.htm>, last visited 30 December 2008.
- 6 See <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 See: [http://www.gabcikovo.gov.sk/doc/prop/061219\\_pr5EN.htm](http://www.gabcikovo.gov.sk/doc/prop/061219_pr5EN.htm).
- 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 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. See: <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 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.
- 12 Hungary proposed that the main task of the working group on legal matters should be to analyse what legal obligations arise 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 of 28<sup>th</sup> January 1999. See: <http://www.bosnagymaros.hu/uploaded/1999.htm>.
- 15 As, for example, Jan Klabbers 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". Klabbers, J. (1997). "The Substance of Form: The Case Concerning the Gabčíkovo-Nagymaros Project, Environmental Law, and the Law of Treaties". *Yearbook of International Environmental Law* 8: 32–40, at 34.
- 16 Paragraph 135 of the Judgement.
- 17 Paragraph 136 of the Judgement.
- 18 Examples provided by the Merriam-Webster Dictionary. See: <http://www.merriam-webster.com>.
- 19 Complex Statement of the Slovak Republic, *supra*, note 6, at 12.
- 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 in the Conclusion of the Complex Statement (*supra*, note 6): "we must negotiate in good faith about every proposal of one or the other Party. Fulfilling treaty objectives 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 at the 28 January, 1999 negotiations. See: <http://www.bosnagymaros.hu/uploaded/1999.htm>.
- 23 Complex Statement of the Slovak Republic, *supra*, note 6, at 19.
- 24 *Ibid.*, 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



Courtesy: SZ

- 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 Bostian, I.L. (1998). "Flushing the Danube: The World Court's Decision Concerning the Gabčíkovo Dam", *Colorado Journal of International Environmental Law and Policy* 9(2): 401–427, at 423.
- 27 Koe, A. (1998). "Damming the Danube: the International Court of Justice and the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)". *The Sydney Law Review* 20: 612–629, at 621.
- 28 Sohnle, J. (1998). « Iruption du droit de l'environnement dans la jurisprudence de la CIJ : l'affaire Gabčíkovo-Nagymaros ». *Revue générale de droit international public* 102 : 85–119, at 102.
- 29 Opening Speech of Laszlo Székely, head of the Hungarian Government Delegation, 10 March, 1999. See: <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, at 47.
- 32 Paragraph 145 of the Judgment.
- 33 Fritzmaurice, M. (1998). "Case Analysis: The Gabčíkovo-Nagymaros Case: The Law of Treaties". *Leiden Journal of International Law* 11(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. See: <http://www.bosnagymaros.hu/feltoltott/2001.htm>.
- 35 Slovak Memorial. See: <http://www.icj-cij.org/docket/files/92/10939.pdf> at 5.16.
- 36 *Ibid.*, 5.14.
- 37 *Ibid.*
- 38 Currently only the original version of the referred Slovak standpoint is public. "STANOVIŠKO delegácie vlády SR k návrhu maďarskej strany na vykonanie Rozsudku MSD v Haagu z 25.septembra, 1997 vo veci Sústavy vodných diel Gabčíkovo-Nagymaros". See: <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 Budapest round of the Hungarian-Slovak intergovernmental negotiations on the implementation of the 25 September 1997 Judgment of the International Court of Justice at the Hague. See: <http://www.bosnagymaros.hu/uploaded/2001.htm>.
- 39 Boyle, A.E. (1997). "The G/N Case: New Law in Old Bottles, Symposium: The Case Concerning the G/N Project". *Yearbook of International Environmental Law* 8: 13–20, at 14.
- 40 Bostian, *supra*, note 26, at 425.
- 41 Directive 98/83/EC on the quality of water 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 wastewater deflection and treatment; Directive 71/60/EEC on the quality of bathing water. For the further potential role of 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, Page 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 95/306/EC of 24 July 1995, Slovakia ratified it on 13 April, 1999, Hungary ratified it on 2 September, 1994. See: [http://www.unece.org/env/water/status/lega\\_wc.htm](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 Barakat International Foundation v. Council and Commission*.
- 45 Okowa expresses a very surprising view: "Yet by asking parties to negotiate a solution, possibly with the help of a third party, it is arguable that the Court was abdicating the very responsibility that the parties had assigned to it". Okowa, P.N. (1998). "Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)". *International Comparative Law Quarterly* 47: 688–697, at 696.
- 46 Weckel, P. (1998). „Convergence du Droit Des Traités et du Droit de la Responsabilité Internationale”. *Revue Générale de Droit International Public* 102(3): 647–684, at 672.

## Alpine Convention / 10<sup>th</sup> Conference

### Presidency Transferred to Slovenia

Following detailed preparation in the Standing Committee,<sup>1</sup> the 10<sup>th</sup> Alpine Conference took place in Evian (France) on 11–12 March, bringing together Ministers from the six States Parties and the European Commission.<sup>2</sup> In addition to consideration of the headway made on decisions reached at the 9<sup>th</sup> Conference in Alpbach,<sup>3</sup> the main agenda items related to adoption of an Action Plan for climate change in the Alps, approving the second report on the State of the Alps, and selecting a new topic to be addressed in the next such report.

Delegates to the Conference began by welcoming the European Union's ratification of the Transport Protocol and approving a revision of the Convention's Mid-term Work Programme, which runs until 2010. A Task Force, to be chaired by Switzerland, was charged with the task of preparing proposals in line with these revisions. The Conference also approved the 2009–2010 budget and changes to its personnel and financial rules.

Thereafter, the Conference discussed and authorised a Task Force for Protected Areas and agreed to create a new Large Carnivore Platform to be chaired by Liechtenstein. It acknowledged the report of the System for the Observation and Information on the Alps (SOIA) and the multi-year research programme of the International Scientific Committee for the Alpine Region (ISCAR). Confirming the need for subregional conferences under the Alpine Convention in addition to the biannual Alpine Conferences, it again welcomed the contribution of the "International Mountain Partnership".

The Conference went on to adopt a detailed procedural recommendation of the Compliance Committee, which requested that instead of writing a second national report, Member States should submit an update to their first by 1 September, 2009. It reminded Member States to invite expert opinion when necessary, and to give priority to the gaps and weaknesses of implementation identified in the Compliance Committee's first report. Several delegates emphasised the need for increased concentration on the Declaration on Population and Culture. Before closing the agenda point, the German delegation reiterated the importance of the compliance procedure and promised to remain strongly engaged in that process.

The report of the Transport Working Group was recognised, underscoring the continuing success of the Transport Protocol. The Working Group's mandate was extended for another biennium.

Concerning nominations to the UNESCO World Heritage Convention, the Working Group's efforts were discussed in detail. The conference considered the tentative lists that the group had prepared during the last intersessional period, and noted that several areas have now been selected for nomination. During the next

biennium the Convention will increase its consultation with UNESCO regarding these areas.

The convention's Ecological Network Platform (ENP) was examined, and a new decision adopted, as well as a detailed list of the ENP's objectives. A report on the Natural Hazards Platform excited special interest. This work will continue, with a focus on developing strategic concepts for adaptation to climatic change.

In addition, a new Water Economy Platform was created and will be chaired by Austria and Switzerland. It got off to a running start, as it was subsequently asked to support Italy in organising a conference in 2010.

A resolution "Climate change and the Alps" ensued. However, in the end, Member States could not agree on an action plan for implementing the "Declaration on climate change" from Alpbach, but instead passed a decision containing mostly general language and only a few concrete measures.

Finally, after releasing the first report on the State of the Alps, which focused on transport and mobility, and addressing the current preparation and approval of the second such report, which will address water issues, the Conference decided on the topic of the third report, which will highlight rural development and innovations, in addition to its general approach of informing the public about developments and serving as a basis for policy development.



The 10<sup>th</sup> Alpine Ministerial Conference closed with the transfer of the Presidency from France to Slovenia and adoption of the provisional report of the Conference's proceedings. (WEB/ATL)

#### Notes

<sup>1</sup> The Permanent Committee of the Convention on the Protection of the Alps (Alpine Convention) met on 29–30 January 2009 in Paris.

<sup>2</sup> For an overview of the functions of the Alpine Conference and previous decisions go to: [http://www.alpconv.org/theconvention/conv06\\_AC\\_en.htm](http://www.alpconv.org/theconvention/conv06_AC_en.htm).

<sup>3</sup> A report of the 9<sup>th</sup> Alpine Ministerial Conference appeared in EPL 36/6: 280–281. A short press release in English, as well as links to further information in the official languages of the Convention is online at: [http://www.alpconv.org/theconvention/conv09\\_c\\_en.htm](http://www.alpconv.org/theconvention/conv09_c_en.htm).



## Arctic

# Defining a Balance of Responsibility

Given the urgent need for increased international discourse concerning the Arctic, the German Federal Foreign Office in cooperation with the Ministries of Foreign Affairs of Denmark and Norway welcomed over 150 guests to an international conference in Berlin, 11–13 March. Entitled *New Chances and New Responsibilities in the Arctic Region*,<sup>1</sup> the aim of the meeting was, above all, “to work out what form cooperation between Arctic and non-Arctic states can take, to discuss the involvement of multilateral organisations such as the UN or the EU, and to identify possible ways of balancing the opposing interests of Arctic littoral and other states”.

With international participants from the fields of politics, diplomacy, business, science and civil society, and especially well attended by the eight Member States of the Arctic Council, as well as many of its observers, the conference focused on how and to what extent cooperation amongst the five Arctic coastal States and other parties interested in the Arctic will be, following the May 2008 Ilulissat Declaration.

Conference participants were welcomed by Georg Witschel, Director General for Legal Affairs of the German Federal Foreign Office and Chair of the Conference. Initial speeches included (i) a welcoming address by Günter Gloser, Minister of State for Europe; (ii) a keynote address delivered by Joe Borg, European Union Commissioner for Maritime Affairs and Fisheries (see excerpts, below); (iii) a presentation highlighting the Inuit’s perspective given by Aqqaluk Lynge, Vice Chair of the Inuit Circumpolar Conference; and

(iv) a speech by Arved Fuchs, providing his insight as a noted German polar explorer.

After setting the scene, the meeting divided into three sections. The first examined *Sustainable Development in the Arctic: Challenges for Environment, Societies and Research*; the second considered *Arctic in Change: New Prospects for Resource Exploitation and Maritime Traffic*; and the third offered *An International Governance Framework for the Arctic: Challenges for International Public Law* under the guidance of Rüdiger Wolfrum.

Of special interest during the forum on international governance were the presentations by Peter Taksøe-Jensen, Assistant Secretary-General to the United Nations Legal Counsel; Tomas Heidar, Legal Adviser of the Ministry of Foreign Affairs of Iceland; and Thomas Winkler, Head of the Legal Service of the Ministry of Foreign Affairs of Denmark; and well received interventions by the legal advisers of Canada and the Russian Federation.

In closing, all the participants and guests recognised the high standard of the contributions over the two days and there was nearly a consensus amongst the concerned States that a new legal regime for the Arctic Region was not necessary, but instead States should focus on the implementation of existing legal instruments. (WEB/ATL)

### Note

1 For further information go to the official website of the conference at: <http://www.arctic-governance.org/>.

### “Opportunities and responsibilities in the Arctic Region: the European Union’s perspective (Excerpts from Keynote Address by Commissioner Joe Borg)

Minister, Mr Lynge, Mr Fuchs, Distinguished Guests, Ladies and Gentleman,

...What we have seen over the last few months is a build-up of momentum on Arctic issues. It is my conviction that we must build on this momentum and use the window of opportunity we have to bring Arctic concerns fully to the fore.

Attending the Nordic Council of Ministers conference in Ilulissat, Greenland, last September and the Arctic Frontiers Conference in Tromsø this January convinced me, as well as many others, of the pressing need for decisive action in the Arctic at an international level. Shortly after the Ilulissat conference, for example, the European Parliament adopted a resolution on the Arctic which provided important input for the EU’s Communication on *The European Union and the Arctic Region* adopted in November last year.

We are clearly seeing that the discussion on Arctic issues is spreading both in Europe and beyond. In some ways this started with the *High North Strategy* of the Norwegian Government adopted in December 2006. It was followed up with our November Communication and with the publication of the US Government’s Presidential Directive on Arctic Regional Policy in January; there is now another key document on the table. It is encouraging to see the degree of overlap between these three documents in identifying the most pressing issues.... [and] ...of course there is another important contribution to the debate expected shortly which is a strategy paper addressing the Arctic from the Russian Federation.

These examples, together with the strategies that have been drawn up by the Arctic States themselves, underline the growing interest in the Arctic and the “new chances and new responsibilities” that exist. I am convinced that the opportunities being presented by the opening of the Arctic also entail new and shared responsibilities. They also pose new challenges – challenges that require international cooperation if they are to be addressed effectively...

...The EU is firmly committed to the welfare of the Arctic and intends to be an active contributor towards its sustainable management and the preservation of its common heritage in close partnership with the Arctic States and peoples... Our Arctic strategy focuses on three main policy objectives: protecting and preserving the Arctic together with its population; promoting sustainable use of resources; and enhancing multilateral governance in the region...

...the European Union is ready to intensify work with the Arctic States, territories, NGOs and other stakeholders to promote high environmental standards and develop an ecosystem-based approach to managing human activity in the Arctic....

...[Regarding] our third objective: that of enhanced governance, many of the challenges and opportunities facing the Arctic are truly global in nature. This means that they can only be tackled through concerted international action. So the keywords of the 21<sup>st</sup> century international policy for the Arctic must be unity and cooperation...

I believe that an UNCLOS-based governance system can deliver security and stability, strict environmental management and the sustainable use of resources. The European Commission is willing to take on its responsibility for Arctic issues and to contribute to an enhanced system of governance in the Arctic in cooperation with all Arctic States, territories and stakeholders. It is in this context that the European Union has made a request to become a permanent observer at the Arctic Council...

[In closing,] my message to you is clear. All of us who are in a position to influence policy must recognise the need for decisive international action in the Arctic given that it is our common heritage. We have to do this both in the interests of man and his fate, and that of our planet as a whole.