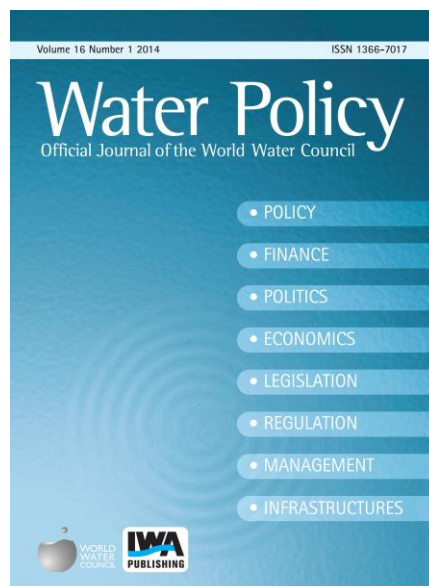


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Anatomy of a deadlock: a systemic analysis of why the Gabčíkovo–Nagymaros dam dispute is still unresolved

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Abstract

The most high profile transboundary water dispute to ever reach the International Court of Justice – the Gabčíkovo–Nagymaros case – remains unresolved 18 years after the delivery of the judgement. This article suggests that there are at least three structural causes that prevent the parties – Hungary and Slovakia – from coming to an agreement. First is the judgement of the Court itself that has created an ambiguous legal situation that actually helped the parties to reinforce their pre-litigation positions. Second, the Gabčíkovo–Nagymaros dam complex gained an unexpectedly powerful symbolic value in both countries whose antagonistic nature still holds a strong grip on the two governments. Finally, these circumstances have given rise to a negotiating dynamic that is characterised by mutual distrust and dominated by the fear of loss. Consequently, while both countries are aware of what the final outcome should and could be, they are unable to get there as the lack of consensus on the starting conditions of the negotiations and the domestic political domain leaves almost no space for rational concessions. The Gabčíkovo–Nagymaros case is therefore likely to remain unresolved, unless the parties manage to find a new positive negotiating paradigm that subsumes the old rivalry of the underlying dam dispute.

Keywords: Gabčíkovo–Nagymaros; Inadequacy of legal solutions; International Court of Justice; International watercourses law; International water disputes; Transboundary water cooperation

1. Introduction

With over 40% of all global available freshwater resources being of transboundary character (UN-Water, 2008) the transnational water problem has been a hot topic of global water policy ever since the first global water jamboree: the Mar del Plata UN Conference on Water in 1977. And it is likely to remain so as the various phenomena of the unfolding global water crises are expected to be manifested in a more pronounced fashion in a cross-border context. One would therefore assume that

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the world is in desperate need of workable dispute settlement mechanisms for transboundary water issues and success stories.

Against this background the fact that the most high profile cross-border freshwater dispute to ever reach the International Court of Justice – the Gabčíkovo–Nagymaros case – remains unresolved after 22 years from the start of the legal proceedings and 18 years following the delivery of the judgement constitutes a real disappointment. This article investigates the structural causes of this failed endeavour and formulates suggestions as to the way forward. We submit that the three most critical sources of the impasse are, first, the judgement of the International Court of Justice itself, second, the antagonistic political framing of the issue in the two countries and, finally, the nature of the negotiations that followed the judgement. Paradoxically, the dispute can only be resolved if the parties set aside the judgement and overcome the antagonistic political narratives surrounding the dam dispute by way of defining a new negotiating paradigm framed around a mutually supported positive political agenda that is broader than the old rivalry around the Gabčíkovo–Nagymaros dam complex.

2. The Gabčíkovo–Nagymaros dispute: an old legacy

The Gabčíkovo–Nagymaros dispute originates in the 1960s, when two, then-communist countries – the Czechoslovak Socialist Republic and the Hungarian People’s Republic – decided to launch a joint development programme with a view to building a series of dams and locks on the joint stretch of the River Danube, the second longest river of the European continent. The political inspiration behind the project was a 1956 resolution of the COMECON – the communist bloc’s economic cooperation body – that implied for large-scale interventions in the Danube from the Black Sea delta all the way through to Bratislava, including the construction of a series of dams for energy production, navigation, economic development, etc. Navigability of the river to Bratislava also held high geopolitical significance as it was the westernmost rail and inland water cargo hub in the Soviet bloc on the most important international waterway of Europe.

The formal agreement on the actual project was adopted by the two governments in 1977. The agreement envisaged the concerted operation of two separate dam complexes: an upstream one in Czechoslovak territory at Gabčíkovo (by way of diverting the water from the joint river bed through a navigation canal commencing at Dunakiliti on the Hungarian side) and a downstream dam at Nagymaros, in Hungary (Figure 1). The operational concept of the complex was that of ‘peak power mode’ under which the upstream Gabčíkovo barrage would have released water twice per day during peak power demand hours. The downstream Nagymaros plant was designed to equalise the fluctuations of water released at peak-load and to operate mainly in continuous mode.

In addition to energy production, the objectives of the Gabčíkovo–Nagymaros complex comprised the improvement of flood defence and navigation. Interestingly, the 1977 agreement also made reference to the protection of the natural environment in so far as it called for the implementation of measures necessitated by the ‘requirements of nature conservation’.

Right from the outset the project suffered from setbacks and delays. It was only in the mid-1980s that the actual infrastructure started to take shape amidst the gradual political erosion of the communist system (especially in Hungary) and continuous financial difficulties. In Hungary, the project was more and more perceived as the ultimate symbol of the arrogance, incompetence and mismanagement of the country by the ruling communist regime. In the final years of the 1980s, it triggered a mass protest



Fig. 1. Sketch of the original project. *Source:* judgement of the International Court of Justice, p. 17.

movement unseen in the Soviet bloc since the ‘Prague spring’ of 1968 (Deets, 2009). Since the mid-1980s, the environmental and political motifs have become more and more intertwined, with the environment serving as a powerful vehicle in the quest for overall democratic transition (Szirmai, 1993). Owing to the unprecedented popular pressure in May 1989, the Hungarian Parliament decided to suspend the works in Nagymaros and in October to abandon the Hungarian part of the project altogether (Fürst, 2003). (By that time the upstream Dunakiliti barrage was almost complete, but works at the Nagymaros side had just begun.) The Hungarian decision was also motivated by the economic unsustainability of the project. By 1988–1989, Hungarian public finances, which were to a large extent kept in balance in the preceding decade by western loans, were in a state of near-collapse due to rapidly deteriorating exchange rates and the weak performance of the Hungarian economy. Fresh studies carried out in 1989 revealed that, if completed, the project would never make a return and the costs of abandoning the works on the Hungarian side would actually mitigate the (otherwise significant) loss (Kerekes *et al.*, 1994). In view of the fact that the country planned to finance building Nagymaros through convertible western loans, going ahead with such an ideologically motivated investment would have made economic nonsense.

In 1990, for the first time since Soviet occupation after World War II, democratic elections were held in both Czechoslovakia and Hungary.

While in Hungary there was a broad public consensus about the abandonment of Nagymaros, as it was almost exclusively pictured as a monstrous act of destruction of nature, in Czechoslovakia the

project was actually perceived as environmentally beneficial, especially vis-à-vis the lethal pollution of coal-fired power plants spread across the country. Moreover, the Czechoslovak side was more advanced with the completion of its own part of the dam system. As, unlike Hungary, they financed their part of the project by their own resources, the delays in the construction process were less severe. Consequently, abandoning an investment broadly perceived as economically and environmentally beneficial would have made economic nonsense.

Therefore, in view of the diametrically opposed position of the parties, alternative plans were elaborated in Czechoslovakia to put in operation the (then) almost complete Gabčíkovo plant. Among the various alternatives, an arrangement entitled ‘Variant C’ was approved by Czechoslovakia in July 1991 that implied the construction of a completely new dam exclusively in Slovak territory at Čunovo and the unilateral diversion of the Danube from the joint river bed (Figure 2).

As the parties failed to come to an agreement over the final fate of the project, Czechoslovakia started to unilaterally implement Variant C in November 1991. In response, in May 1992 the Hungarian government notified Czechoslovakia of the immediate termination of the 1977 agreement. Czechoslovakia completed the works of Variant C the same year’s autumn and commenced to divert the Danube from the joint riverbed (the international border) and the Hungarian side branches (Szigetköz), extracting some 90% of the water. The Gabčíkovo plant was put in operation with the same installed capacity as envisaged under the 1977 agreement, but in continuous flow mode, rather than peak mode as originally foreseen.



Fig. 2. Sketch of ‘Variant C’. Source: Judgement of the International Court of Justice, p. 25.

On 1 January 1993, due to a peaceful separation of the constituent sister republics, Czechoslovakia became two independent states: the Slovak Republic and the Czech Republic, with Slovakia being the sole successor to the Gabčíkovo project.

3. The Court procedure and the 1997 Judgement

With political tensions running high between the two countries, it was through the good offices of the European Commission, the executive arm of the (then) European Communities, that Hungary and Slovakia eventually submitted their plea to the International Court of Justice (the Court) at the Hague in April 1993. To alleviate the most pressing environmental needs resulting from the deviation of the Danube, notably the dramatic disappearance of surface water from the entire Szigetköz nature conservation area and the ensuing depletion of the drinking water reserves on the Hungarian side, in April 1995 Slovakia and Hungary agreed on a temporary water sharing agreement significantly increasing the discharge into the joint riverbed and the side arms in Hungarian territory. While that agreement was meant to be of a temporary nature, it is still in force and remains the only legally binding legal instrument regulating the flow of water between the two countries.

The Court delivered its judgement following an unexpectedly long and complex procedure in September 1997 (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgement, 1997, p. 7*). The judgement considered a wide range of purely legal issues in great depth – state succession in treaties, the state of necessity and state liability, mutual non-performance of treaties, just to name a few – as well as some new progressive legal phenomena, such as the emergence of new environmental norms in international law. As to the actual obligations of the parties, however, it said conspicuously little. It basically held that:

- Hungary was not entitled to unilaterally abrogate the 1977 agreement.
- Slovakia was not entitled to unilaterally implement Variant C.
- Both countries can claim mutual compensation for the damage caused by the respective failures of the other party (although the Court suggested they had better not do so in view of the unquantifiable nature of the damage).
- Hungary is entitled to the joint control of the existing system and to an equal share of the energy, but such claim can only be effected if it first pays its contribution to the original investment (i.e. 50% of the costs).
- While the 1977 agreement is still in force, it does not have to be implemented verbatim, only its broad objectives that can be met by the already existing works.
- The existing system of works should be adjusted to meet new environmental standards (that implies more water discharge to the common river bed).
- The parties should embark on negotiations in good faith with a view to finding mutually acceptable solutions along the above lines.

4. A never-ending story: the follow-up negotiations

Immediately following the delivery of the judgement two dominant lines of interpretation emerged. The Slovak official line focussed on the fact that the 1977 agreement was not only still in force, but also

enforceable, i.e. Hungary is bound to build Nagymaros and implement peak operation mode. The judgement was widely pictured as a token of the international reputation of the new Slovak state as well as a symbolic victory over a historic rival. The mainstream perception of the judgement was completely different in Hungary: Variant C operates illegally, the second dam at Nagymaros need not be built, *en plus* Hungary is entitled to compensation and more water (Szabó, 1999).

Oddly, immediately after the delivery of the judgement, the Hungarian government lined up with the Slovak position and quickly commenced negotiations with Slovakia on a set of alternative dams on the Danube. However, the negotiations rushed through by the two governments were seen as a complete betrayal of the consensual national position in Hungary which led to the ruling parties' defeat in the upcoming 1998 spring general elections. The incoming new Hungarian government immediately rejected the (already initialled) new framework agreement and called for fresh negotiations. In response, the Slovak government filed an additional lawsuit with the Court in early September 1998 requesting an additional judgement against Hungary for its alleged failure to negotiate in good faith. (The case was subsequently suspended by the parties, but as the petitions have not yet been revoked the Gabčíkovo–Nagymaros Project still features in the registry of the Court, being its oldest pending case).

Since 1999 until today endless rounds of negotiations in various formats have been conducted by the parties to identify the modalities of the implementation of the Judgement that the general public of both countries can accept (Szabó, 2009). Such modalities, however, have never been found. Still today the official negotiating positions of the two countries are based on the mutually exclusive interpretation of the judgement, with the critical question whether Nagymaros has or has not to be built according to the Court.

5. Why the deadlock?

The failure of the parties to handle such a complex political, legal and technical phenomenon as the Gabčíkovo–Nagymaros affair can be traced back to a series of overlapping causes. We submit that the three most critical sources of the present deadlock are, first, the judgement of the International Court of Justice itself, second, the antagonistic political framing of the case in the two countries and, finally, the nature of the negotiations that followed the judgement.

5.1. *The judgement*

The Gabčíkovo–Nagymaros case generated exceptional international attention even before the judgement was adopted (Fitzmaurice, 1995; Nagy, 1996; Schwabach, 1996). Once it came out, the judgement quickly became one of the most studied and referenced rulings of the Court ever. For years it was at the centre of academic interest of scholars of international law, political science (Deets, 2009) and environmental policy. International lawyers hailed the seminal conclusions of the judgement on the law of the treaties (Reichert-Facilides, 1998), state succession (Klabbers, 1998), state liability (Lefeber, 1998), the law of international watercourses (Lammers, 1998; Thompson, 1999), the legal recognition of the principle of sustainable development (Fuyane & Madai, 2001), etc. This is not surprising in view of the fact that the Court had hardly ever faced such a diverse complex of legal and scientific issues before (Okowa & Evans, 1998).

As to, however, the merit of the actual case, the judgment has received much criticism for its failure to clarify the obligations of the parties (Sands, 1999; Fitzmaurice, 2000). As one commentator sarcastically put ‘at first the court’s entire approach to the case is more notable for what it did not decide than what it did’ (Deets, 2009). These critical observations are not surprising as the Court not only maintained the legal force of the 1977 agreement, but it also legitimised the status quo that emerged as a result of the mutual non-performance of that agreement. In general legal terms, the Court shied away from a vigorous application of the fundamental principles of the international watercourses law, such as the no-harm rule and the reasonable and equitable utilisation principle, to the actual situation. Therefore, by way of recognising the divergent claims of the parties, the Court has contributed considerably to the complete ossification of the diametrically opposed positions of the two countries (Deets, 2009). This, coupled with the somewhat naïve call of the Court to ‘go back and negotiate in good faith’ in a way exacerbated rather than helped to solve the underlying conflict.

Take for example one of the most critical issues: the future of the unbuilt downstream dam of Nagymaros. First of all, the operative part of the judgement makes no mention of Nagymaros (or any other unfinished installation) at all, it merely stipulates that the parties must negotiate ‘in the light of the prevailing situation’ (para 155). What is then the prevailing situation? First, Nagymaros has not been built, Variant C does not operate in peak-mode, the treaty obligations of the parties can be fulfilled based on the already existing infrastructure. Consequently, goes the Court, ‘with the effective discarding [of peak operation mode], there is no longer any point in building [Nagymaros]’ (para 134). In the Hungarian view, it categorically means that *Nagymaros does not have to be built* under any condition. Confusingly, the judgement can support another line of interpretation too. When summarising the Slovak position the judgement itself acknowledges that Slovakia did not discard the peak-operation mode, it merely signalled its openness to consider the issue, subject to the condition that ‘the environmental damage [is] clear and accepted by both parties’ (para 128) (for the description of peak operation and its link to the planned Nagymaros dam see Section 2 above). To add to the muddle, other sections of the judgement mention merely the *possibility* of abandoning Nagymaros (para 138, 150), which clearly falls short of a normative instruction as to the real fate of the controversial, multi-billion dollar project element. As a result, throughout the entire follow-up negotiations Slovakia consistently maintained that it had never given up peak operation and, as a result, the judgement cannot be seen as a definitive rejection of Nagymaros. On the contrary, goes the Slovak position: as the validity of the 1977 agreement has been unequivocally reinstated by the Court, any discussion on the implementation of the judgement must start from the original two-dam arrangement (Complex Statement, 2002). Visibly, the judgement has created a situation where both parties could find sufficient legal ammunition to preserve their respective pre-litigation positions.

5.2. Identity, symbolism and competing development paradigms: the political frame

As one commentator put it, the powerful political framing of the Gabčíkovo–Nagymaros project on either side of the Danube holds the key to the entire puzzle (Deets, 2009). At the outset, the public perception of the project was dominated by the hegemonic socialist development paradigm of heavy industrialisation in both countries, with very little attention paid to the environmental consequences of the construction and operation of large dams (Fürst, 2003). This hegemonic view started to erode in Hungary in the early 1980s and gave rise to an influential environmental protest movement that, in 1988–1989, turned out to be a key trigger in the peaceful dismantlement of communist rule. In

other words, the underlying environmental quest gradually expanded into a broader political aspiration and the original single-issue movement soon became a major political vehicle for democratic transition (Szirmai, 1993). In that context, the Gabčíkovo–Nagymaros complex has become the symbol of economically and ecologically irrational industrialisation and, ultimately, the rejection of the communist governments' mismanagement of the country (Deets, 2009). This change in public opinion was also supported by fresh economic studies, conducted in 1989, that showed that, if completed, the project would be a complete financial failure (Kerekes *et al.*, 1994). As a result, by 1990 the political narrative in Hungary completely froze around the unconditional rejection of Gabčíkovo–Nagymaros. This political frame was so powerful that it prevented any public discussion of the subject, including Hungary's potential benefits of the already existing works (e.g. in 1992 a parliamentary resolution banned making any economic use of the already completed Dunakiliti barrage rendering the brand new works a derelict industrial torso). The situation was made even worse by the unilateral diversion of the Danube by Slovakia in October 1992, reifying earlier fears of an environmental apocalypse. Gabčíkovo was also picked up by the emerging radical right calling for self-defence and revenge against the political intervention of the historic rivals, the Slovaks. Against such background, no Hungarian politician could advocate a compromise without risking political suicide.

The political narrative in Slovakia has evolved in a radically different way. This was partly due to the fact that the more oppressive communist regime in Czechoslovakia prevented the early emergence of a prominent environmental movement in the 1980s. But also, the Slovak public viewed Gabčíkovo–Nagymaros as a vital and (relatively) environmentally friendly source of energy for the country's oversized heavy industry. Moreover, while Nagymaros was still at an early phase of construction in 1989, Gabčíkovo was already 90% completed by the time the dispute erupted. Complete backtracking would have thus been an enormous financial loss. Thus, gradually, Gabčíkovo has become a modernisation symbol, a token of national achievement and energy independence. Putting into operation Variant C in late 1992 also coincided with the fulfilment of an old national dream: the creation of the independent Slovak state. Hungary's efforts to undo the entire project were widely perceived in Slovakia as an overt attack on the new country's identity and a pretext to revise post World War II borders (Fürst, 2003).

With emotions running this high, there has been very little room for proper scientific and economic analysis and discussion on either side. The underlying political narratives were so monolithic and powerful in both countries that even 20 years later any mention of the comprehensive compromise package can trigger hawkish statements from influential political players in both capitals (immediately condemning the negotiators as traitors, irrespective of the actual content of the negotiations). Moreover, as a result of the inconclusive adventure before the International Court of Justice, neither party has made a genuine effort to involve a neutral third party to help reconcile the situation.

5.3. Perception of gains and losses: the nature of the negotiations

A striking fact about the negotiations the two governments have conducted since 1998 is that instead of finding common win-sets, the fundamental motive of the bilateral talks has been the fear of loss. Parties in the negotiations weighed losses more than gains, suspecting the other to hold back on easy concessions while both feeling that they are asked to make disproportionate sacrifices (Deets, 2009). To a certain degree this mutual distrust can be attributed to the frosty political climate surrounding the project. To a large extent however, the situation is due to the judgement itself that failed to define the rights and obligations of the parties with sufficient precision. The parties' ensuing incapacity

to carry out joint impartial assessments on the environmental and economic consequences of the status quo and possible future options must also be blamed. Thus, short of a common evaluation of the situation and the norms to follow, the parties remained hesitant to make any positive moves.

So 18 years after the judgement, the parties are not any nearer to a solution than in 1998. This is all the more paradoxical as both parties are aware of what the final outcome could and should be: Nagymaros will not be built, the operation of Gabčíkovo should be made more environmentally friendly (but not suspended), Slovakia should divert more water to the common river section (but without compromising the operation of the existing plants) and the parties should mutually resign of their respective claims for compensation.

However, if we look deep into the evolution of the negotiations, the current deadlock is not all that surprising. A useful approach to explain the above situation can be the application of the Coase Theorem, a model of political economy, to the Gabčíkovo–Nagymaros dispute. The Coase Theorem (Coase, 1960; Marciano, 2012; Medema, 2014) is concerned with modelling the bargaining over the use of natural resources. It suggests that where the transaction costs are negligible, the rights over the natural assets concerned are well defined and the agents can commit to their agreements, the negotiating parties should arrive at an optimum solution within a reasonable timeframe. In view of the broad recognition of the validity of the Coase Theorem (Galiani *et al.*, 2014) the lack of an agreement in the Gabčíkovo–Nagymaros case seems to amount to an anomaly. Which assumptions of the Theorem failed?

The intensity of the Gabčíkovo–Nagymaros negotiations appears to confirm that the transaction costs of the talks are marginal. Plenty of bilateral plenary negotiations have been held, a vast number of joint working group meetings conducted, tonnes of position papers produced and even a strategic impact assessment carried out. So why can Hungary and Slovakia not come to an agreement? The answer again – at least partly – lies in the judgement and politics. As the Court has failed to provide unequivocal instructions as to some of the most critical *starting points* of the negotiations, the parties cannot agree not because of the uncertainty of the final outcome, but because of the uncertainty of starting conditions (Bartus, 2009). Coupled with superimposing political sensitivity (a severe ‘wealth effect’ in economic terms), this lack of clarity creates a situation where the negotiations will *not be judged by their outcome*, but the perception of losses and sacrifices that emerge during the *negotiating process*.

6. Conclusions

The unfinished Gabčíkovo–Nagymaros saga holds some important lessons for the international community as a whole. The first may be the resilience of transboundary water disputes. The Gabčíkovo story has survived the collapse of the Berlin wall, state succession, the parallel transition to democracy and market economy in both countries, their accession to NATO and the European Union, etc., basically without a scar. Second is the inability of international community and EU law to handle such situations. Despite the fact that nearly half of the world’s population feeds on transboundary waters, the evolution of the relevant international legal framework is inherently slow as some powerful international players simply do not recognise the existence of the problem! No wonder that the UN Convention on the Law of Non-navigable Use of International Watercourses took 17 years to enter into force. Surprisingly, to a different measure though, such complacency is also characteristic to the European Union that otherwise prides itself to boast the world’s most sophisticated transnational water regime. Finally, as in the case of many other deeply entrenched bilateral conflicts, the solution should be sought outside the original conflict-box by way of

building a new positive political frame that hides the old problem. This requires careful manoeuvring by both parties not necessarily vis-à-vis each other, but against their home-grown radicals.

As for the Gabčíkovo–Nagymaros dispute itself, one may conclude that in light of the above powerful drivers it is unlikely that the parties can conclude the negotiations any time soon, unless they are able to detach the case from its original symbolic context and the confusing conclusions of the judgement of the International Court of Justice. As the old sectarian rhetoric starts fading in both countries, the time may indeed be opportune to place the Gabčíkovo–Nagymaros story into a new negotiating paradigm that is framed around a mutually supported positive political agenda rather than old national fears, rivalries and perceptions.

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