



## Case Note: Gabčíkovo-Nagymaros Project Case 1997 (ICJ)

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**Abstract.** The Gabčíkovo-Nagymaros Project is not just a dispute between Hungary and Slovakia. It had political and historical consequences before, during and after the regime change. Firstly, the complexity of prior events – which led to the escalation of the debate – is outlined. Thus, it is unavoidable to understand the concerns and claims of the parties. Then, the questions submitted to the International Court of Justice and the given answers are analysed while also pointing out the legal consequences of the Judgement. In conclusion, the factors are summarized, answering why it is still an unresolved international dispute.

**Keywords:** Gabčíkovo-Nagymaros Project, International Court of Justice, international law, Budapest Treaty

*“Attitude is a little thing that makes a big difference.”  
Winston Churchill*

### 1. On the Way to Escalation...

The Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks (done at Budapest on 16 September 1977;<sup>2</sup> hereinafter: Budapest Treaty) envisioned a cross-border barrage system accomplished in the framework of a joint Hungarian-Czechoslovak project. There were three main reasons for its construction, as the Budapest Treaty also implied. Firstly, it was envisioned to prevent catastrophic floods with the assistance of the system of locks and reservoirs. Furthermore, it is said that the facility could help the navigability of the Danube, helping the interconnections between inland navigations as part

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1 Source: [http://www.brainyquote.com/quotes/authors/w/winston\\_churchill.html](http://www.brainyquote.com/quotes/authors/w/winston_churchill.html) [accessed: 14.01.2014].

2 Available in Hungarian: <http://www.bosnagymaros.hu/dokumentumok/az-1977-es-szerzodes/15> [accessed: 14.01.2014]. On this case, see also the papers of Boldizsár Nagy: <http://www.nagyboldizsar.hu/b337s-nagymaros-uumlgye.html>

of the Rhine-Main-Danube Canal system. And, last but not least, the hydroelectric power-plants near Gabčíkovo and Nagymaros could produce clean electricity.

We must underline the most important conditions of construction and operation on the basis of the Budapest Treaty.

Hungary undertook the obligation to divert a part of the Danube into an artificial canal. Furthermore, the Hungarian party committed itself to deepen the original riverbed. Moreover, the construction of a smaller dam and a smaller power-plant near Nagymaros would be a task for the People's Republic of Hungary.

The core of the Czechoslovakian obligations was the construction of a peaking power-plant close to Gabčíkovo. It means that most of the constructions would have been realized on the territory of the Czechoslovak Socialist Republic. Therefore, the participation of Hungary was prescribed in the Czechoslovakian construction according to the Budapest Treaty in order to ensure the equal investment of both parties.

According to the Budapest Treaty, the electricity produced was to be shared equally.

In the 1980s, Hungary started to "export internal affairs". In 1981, the Hungarian party asked to slow down the project due to economic problems. As part of the transition's history, the so-called "Danube Circle" was formed in 1984. They organized a movement against the system of locks in Hungary. The Gabčíkovo and Nagymaros Project was regarded as the symbol of the communist regime and the symbol of international "дружба" (friendship). The causes of pillorying the joint project were various. Hence, the most considerable ones are enumerated. Firstly, the government did not provide sufficient information on the project and on its impact. Secondly, the system of locks was seen as a potential danger to the environment, to the unique ecosystem resulting in the ecocide of the middle reaches of the Danube. Thirdly, according to the perceptions of the population, the water supply of Budapest was threatened.

As a result of the chain of events, the Hungarian contracting party decided to suspend the construction on her side in 1989 without informing Czechoslovakia. At that time, most of the facilities were being constructed on the Czechoslovakian side.<sup>3</sup>

As a consequence of the above-mentioned situation, a group of experts elaborated seven proposals for the Czechoslovakian party on what to do with the construction site. The winning project was the so-called proposal "C". It reduced the reservoir, i.e. the Czechoslovakian party intended to build the waterworks solely on her territory. The winning proposal took into consideration the Hungarian approach to the construction, which is postponing the construction

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3 Cf. MTI, "A rendszerváltás szimbólumává vált a Bős-Nagymaros elleni küzdelem," *Múlt-kor*. Available at: [http://mult-kor.hu/20090513\\_a\\_rendszervaltas\\_szimbolumava\\_valt\\_a\\_bosnagymaros\\_elleni\\_kuzdelem](http://mult-kor.hu/20090513_a_rendszervaltas_szimbolumava_valt_a_bosnagymaros_elleni_kuzdelem) [accessed: 26.02.2011].

in Hungary. The proposal suggested splitting the shared reservoir into two with a dam in Czechoslovakia.

All in all, proposal “C” was seen as “temporary” due to the fact that it was technically possible to build a dam in Hungary and flood the Czechoslovakian one in order to finish the system of locks according to the Budapest Treaty.

The construction of proposal “C” started in 1991 on a smaller scale. But the Czechoslovakian proposals were forwarded to Hungary only in 1992. The diversion of the River Danube started in the same year. The power-plant started its operation in 1996.<sup>4</sup>

As it is mentioned above, Hungary abandoned the site in 1989. Then, in 1992, Hungary tried to terminate the Budapest Treaty based on her Memorandum (hereinafter, also referred to as the 1992 Hungarian Memorandum). And Hungary submitted her claim to the International Court of Justice (hereinafter: ICJ) because of the Czechoslovakian diversion of the Danube.

Two days after that, Czechoslovakia and Hungary started consultations involving the European Commission. The results of the negotiations manifested in the so-called London Protocol. Firstly, the parties decided to submit mutual and joint claims to the ICJ to settle the dispute. The judgement was considered to be obligatory. Furthermore, until the judgement, they applied a temporary division of the Danube. And, thirdly, Czechoslovakia promised that at least 95% of the water shall flow in the original riverbed. Actually, this very last point was to be failed to be performed.<sup>5</sup>

Czechoslovakia split up in 1993, and Slovakia claimed to be its successor concerning the dispute.

## 2. Questions to the ICJ and Its Answers

It must be emphasized that the contracting parties decided to submit their claims to ICJ jointly and mutually according to the London Protocol. In the London Protocol, the parties explicitly mentioned that they would undertake the ICJ judgement as their obligation. Consequently, Hungary and Slovakia concluded the so-called Special Agreement<sup>6</sup> in 1993, which was formally the legal basis of their questions being jointly submitted to the ICJ.

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4 Cf. Chronology of the case. Available in Hungarian at: <http://www.bosnagymaros.hu/dokumentumok/esemenyek-idorendje/269> [accessed: 14.01.2014].

5 *Ibidem*.

6 Special Agreement for Submission to the International Court of Justice of the Differences concerning the Gabčíkovo-Nagymaros Project. (Signed at Brussels on 7 April 1993.) Available in English: [http://untreaty.un.org/unts/120001\\_144071/9/8/00007471.pdf](http://untreaty.un.org/unts/120001_144071/9/8/00007471.pdf) [accessed: 14.01.2014]. Available in Hungarian: <http://www.bosnagymaros.hu/dokumentumok/kulon-megallapodas/19> [accessed: 14.01.2014].

The submitted questions were the following: Did Hungary have the right to suspend the Budapest Treaty and abandon the construction near Nagymaros? Did Czechoslovakia have the right to construct and operate the modified version of proposal “C”? The third question was concerned with the legal consequences of the 1992 Hungarian Memorandum on the termination of the Budapest Treaty.

To be more precise, there was one more question in the Special Agreement on the legal consequences of the judgement, too.<sup>7</sup>

The Republic of Hungary claimed the ICJ to state the lawfulness of the suspension and abandonment, to state the unlawfulness of the construction and operation of the modified version of proposal “C,” and to recognize the validity of the termination of the Budapest Treaty. Furthermore, Hungary claimed the ICJ to state that the Budapest Treaty had never been in force, to define the responsibility of Slovakia concerning the operation of the modified version of proposal “C,” to decide on the responsibility of Slovakia concerning the caused damage and danger, to oblige Slovakia to pay for reparation costs (damage, loss and loss of benefits), to divert the Danube back to the old riverbed, to rehabilitate the Danube and to give guarantees to Hungary.<sup>8</sup>

All the same, the Republic of Slovakia claimed turning the Hungarian claims upside down. Their main point was to oblige Hungary to perform in accordance with the Budapest Treaty. Moreover, the Slovakian party intended to oblige Hungary to continue negotiations on (starting and) completing the constructions.<sup>9</sup>

## 2.1. Suspension and Abandonment

First of all, it had to be decided by the ICJ whether the 1969 Vienna Convention can be applicable or not. Hungary and Czechoslovakia ratified the 1969 Vienna Convention after the Budapest Treaty had entered into force. Hungary ratified the Convention in 1987. The Convention is applicable if both/all contracting parties have ratified it. Therefore, it is not applicable in the case of the Budapest Treaty, which derives from the *ex nunc* applicability of the 1969 Vienna Convention.

The Court emphasized that the 1969 Vienna Convention codified several customs. After the 1989 Protocol, the Convention is applicable for all treaties. But the responsibility of the states<sup>10</sup> cannot be examined based on the Convention

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7 International Court of Justice: Reports of Judgements, Advisory Opinions and Orders. Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia). Judgement of 25 September 1997. Available in English and French: <http://www.icj-cij.org/docket/files/92/7375.pdf> [accessed: 14.01.2014]. Hereinafter: the Judgement.

8 The Judgement.

9 *Ibidem*.

10 Cf. Vienna Convention on the Law of Treaties, 1969, Art. 73. Available in English: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) [accessed: 14.01.2014].

since the main legal act, the Budapest Treaty, was concluded well before the parties' ratification of the 1969 Vienna Convention.

Hungary referred to state of emergency in order to justify the lawfulness of suspension of the Budapest Treaty and of the abandonment of the site. The ICJ stated that the state of emergency is recognized by the international customary law. But its scope of application is limited to uncommon use. The Court referred to a proposal of the United Nations International Law Commission on state responsibility. It was stated that the state of emergency cannot be a reference point for excuse. However, there is one expectation if all the four following conditions are approved, i.e. can be justified.

Firstly, a key public interest has to be affected. The ICJ accepted the preservation of ecology as a key public interest.

Secondly, the danger must be serious and direct. The Court stated that the fear of danger is not enough. But the Court recognized that a long-term danger also could be a direct one. However, the case is different here. Concerning Gabčíkovo, water quality, water level, flora and fauna were threatened alike. According to the Court, these are long-term and uncertain threats. Therefore, a long-term examination was needed. There was not enough data for its approval; thus, the effects remained unmeasurable. Concerning Nagymaros, the environment and the drinking water supply were significantly threatened. The ICJ stated that the danger was not direct at the time of the suspension. The Court emphasized that there were other available means besides suspension.

Thirdly, there cannot be other means or possibility to remove the direct danger. The ICJ pointed out Article 14 of the Budapest Treaty<sup>11</sup> stating that there were means, i.e. the modification of the Budapest Treaty, for example, the modification of water division between the parties, which could make parties avoid suspension and abandonment.

Fourthly, the state cannot cause the state of emergency on its own. Hungary handled the Budapest Treaty effectively, which was valid until 1992. The core of the statement is the implicit behaviour of Hungary. For example, she asked for the slowdown of the construction in 1983 and for its speeding up in 1989.

It means that the lawfulness of the suspension of the Budapest Treaty and of the abandonment of the construction near Nagymaros on behalf of Hungary is hardly approvable.

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11 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks (done at Budapest on 16 September 1977), Art. 14. Available in Hungarian at: <http://www.bosnagymaros.hu/dokumentumok/az-1977-es-szerzodes/15> [accessed: 14.01.2014].

## **2.2. Czechoslovakia and the Modified Version of Proposal “C”**

From the Czechoslovakian perspective, the construction and the operation of the modified version of proposal “C” was not unlawful. They referred to the principle of approximate application. Moreover, they referred to the modified version of proposal “C” as a countermeasure to the unlawful behaviour of Hungary, minimizing their damage.

The Court called the attention to the fact that the principle of approximate application could be interpreted only in the frame of a treaty. Therefore, it shall not be examined whether there exists the principle in the practice of public international law or not. The ICJ emphasized that the system of locks was envisioned as a common investment (concerning the construction) and a common property, while its operation should have been common, too. Thus, the operation of the modified version of proposal “C” is unlawful. But its construction as a preparatory event to the realization of the Budapest Treaty is different. These events are not unlawful acts.

The modified version of proposal “C” could be a lawful countermeasure exclusively if it had been carried out against a state violating international law. It was proved according to the Court, since it was against Hungary. Prior to the countermeasure, the affected party has to be warned to discontinue the unlawful action and to compensate for the damage. For several times, Slovakia has called upon Hungary to act in accordance with the Budapest Treaty. The damage and the effect of the applied countermeasure have to be proportionate. The Court cited a precedent from 1921 regarding the legal equality of downstream states. Czechoslovakia (Slovakia) unlawfully expropriated the natural resources of the River Danube. Therefore, she violated the principle of proportionality. Thus, there is no need for further examination. The lawfulness of the countermeasure shall be excluded.

To sum up, Czechoslovakia had the right to construct the modified version of proposal “C,” but – according to the Budapest Treaty – she did not have the right to operate it on her own. Furthermore, the diversion of the Danube cannot be accepted as a countermeasure since it is not in line with proportionality. Thus, it is not considered as a lawful act.

## **2.3. Legal Consequences of the 1992 Hungarian Memorandum on the Termination of the Budapest Treaty**

The Republic of Hungary terminated the Budapest Treaty on 25 March 1992. To prove its lawfulness, Hungary referred to the following five reasons.

Firstly, it was a state of emergency as I mentioned above in another context. The Court reminded that there was not any serious and direct danger, which is

one of the prescriptions to a state of emergency. Hence, the ICJ pointed it out that the state of emergency cannot be the ground for termination. It solely excludes state responsibility. Furthermore, the Court stated that in case of state emergency the treaty is not applicable. But it is still in force.

The second Hungarian argument was the subsequent impossibility of performance. The aim/goal of the Budapest Treaty (i.e. the common investment) disappeared according to Hungary. The ICJ stated that it shall not be examined whether the “aim/goal” is equal to the abstract notion of legal order since the legal order had continuously existed. The Court decided that Hungary could not refer to the subsequent impossibility of performance since it derived from her own conduct breaching the Treaty.

The third Hungarian reason was the fundamental change of circumstances. As a main rule, it cannot be cited unless the circumstances were fundamental at the time of the conclusion and these circumstances have been changed; or the obligations have changed radically. The fundamental change of circumstances can never be a reference point if a treaty demarcates boarder or if the change is the result of not carrying out other international obligation(s). Hungary referred to four circumstances which were supposed to change fundamentally the circumstances. The ICJ stated that political change and the questionable economic viability of the joint project are not strongly related to the aim/goal of the Budapest Treaty. According to the Court, the Hungarian references to the deepened knowledge concerning the environment and to the new international legal norms were not unforeseeable. Furthermore, the parties could comply with the latter two based on the Budapest Treaty, too.<sup>12</sup>

Fourthly, Hungary claimed the ICJ to state fundamental breach of law by Czechoslovakia. The core of the problem was that the Court had to decide on whether Czechoslovakia breached Article 15, 19 and 20 of the Budapest Treaty and other conventions and the general principles of public international law or not. The ICJ stated that one party could terminate the Treaty if the other party had seriously breached it. Other treaties, conventions and the general principles of public international law cannot serve as a legal ground for the termination. But the application of certain measures is possible. Hungary stated that Czechoslovakia breached the above-cited articles since she was not ready to start negotiations. The Court said that there was hardly any evidence to prove. Furthermore, it was not the responsibility of one sole party. Moreover, Hungary contributed to the development of such a situation which did not support the effective and successful negotiations. Hungary also referred to the construction and operation of the

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12 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks (done at Budapest on 16 September 16 1977), Art. 15, Art. 19 and Art. 20. Available in Hungarian at: <http://www.bosnagymaros.hu/dokumentumok/az-1977-es-szerzodes/15> [accessed: 14.01.2014].

modified version of proposal “C” as a fundamental breach of the Budapest Treaty. The Court reminded that Czechoslovakia until the 1992 Hungarian Memorandum (sent to the Czechoslovakian party on 19 May 1992) did not breach the Budapest Treaty. The termination of the Budapest Treaty would have entered into force on 25 May 1992. The ICJ stated that 6 days are simply not enough for well-meaning consultations and negotiations. Furthermore, there was not any violation of the Budapest Treaty on behalf of Czechoslovakia during the 6 days.

The fifth Hungarian reason was the new prescriptions of the public international law on the environment. The Court pointed it out that parties could integrate these new developments into the contractual framework.<sup>13</sup> The ICJ stated that parties were of the same opinion about the importance of environmental concerns. Only their opinion was different concerning the consequences on the joint project. The Court suggested that the involvement of a third-party could be useful.<sup>14</sup>

Highlighting the most important points about the legal consequences of the 1992 Hungarian Memorandum on the termination of the Budapest Treaty, Hungary argued that the Budapest Treaty was mutually refused by the conduct of both parties. The Court found that mutual unlawfulness could not terminate the Treaty and could not be the ground of termination either.

### **3. Legal Consequences of the Judgment**

As I have indicated above, the legal consequences of the Judgement were also a question of the parties submitted to the ICJ on the basis of the Special Agreement. Hence, the most important ones are underlined.

There are three main groups of issues which have to be explained in the following: the issue of legal succession, other legal consequences of the Judgement and the legal consequences of the unlawful acts committed by the parties (reparations).

#### **3.1. The Issue of Legal Succession**

After the split-up of former Czechoslovakia, several questions remained concerning legal succession. In the observed dispute, the core issue was whether Slovakia is a successor of Czechoslovakia in connection with the Budapest Treaty. The problem was more complex than it sounds at first glance.

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13 Cf. Treaty concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks (done at Budapest on 16 September 1977), Art. 15, Art. 19 and Art. 20. Available in Hungarian at: <http://www.bosnagymaros.hu/dokumentumok/az-1977-es-szerzodes/15> [accessed: 14.01.2014].

14 The Judgement, Par. 113.



Hungary argued that there is not any rule in international public law which ensures the automatic legal succession. Hungary had never recognized Slovakia as legal successor of the Budapest Treaty. So the Hungarian consent was missing.

Refining the first argument, Hungary implied that there could be certain rules<sup>15</sup> of automatic succession in case of separation. But she did not sign and ratify them (certainly not until the Judgement).

Furthermore, Hungary denied that the Budapest Treaty established rights and obligations to water management on the border of the two countries. She stated that the Budapest Treaty did not affect the border line. And she denied the territorial feature of the Budapest Treaty.

Slovakia argued for the Budapest Treaty which was claimed to be still in force between the parties. She considered herself the legal successor of Czechoslovakia in relation to the Budapest Treaty referring to the 1978 Vienna Convention<sup>16</sup> as the codification of customary law, i.e. the consent of Hungary, was not needed.

On the same basis, she claims that the Budapest Treaty affects territory, and she referred to the border-line.<sup>17</sup>

The ICJ considered the nature of the Budapest Treaty more important. Therefore, it did not examine the parties' arguments for and against the applicability of the 1978 Vienna Convention and the referred customs. The Danube is an international navigation route, since the Budapest Treaty affected the interest of other states, too. The Court referred to the comment of the United Nations International Law Commission stating that succession does not have any effect on territorial treaties. Treaties dealing with water and inland navigation are generally considered to be territorial treaties.

Therefore, the Budapest Treaty established a territorial regime by establishing rights and obligations on a certain part of the Danube. The ICJ decided that the succession did not have any effect on the validity and applicability of the Budapest Treaty.

### 3.2. Other Legal Consequences of the Judgement

These orders of the Court, being observed below, are prescriptive; hence, they establish rights and obligations between the parties. The first relevant statement is that the Budapest Treaty is still in force and valid, as highlighted previously. It means that the Budapest Treaty governs all relevant treaties between the parties. It derives from the principle of *lex specialis derogat legi generali*.

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15 Cf. Vienna Convention on Succession of States in respect of Treaties, 1978, Art. 34. Available in English at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/3\\_2\\_1978.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf) [accessed: 14.01.2014].

16 *Ibidem*.

17 See also: the Judgement, Par. 122.

The Budapest Treaty is still in force, i.e. the unlawful behaviours do not result in its invalidity based on the principle of *ex iniuria ius non oritur*.

The Court took seriously into consideration that the Gabčíkovo power-plant had been operated for five years (in 1997); there was a smaller reservoir, and it was not a peak-power. Furthermore, Nagymaros had not been constructed. Moreover, the parties rejected the peak-power operation. So, its construction did not make any sense. Therefore, it ruled that the developments had to be taken into consideration.<sup>18</sup>

The Court stated that the parties are obligated to continue the negotiations<sup>19</sup> to achieve real results, modifying their positions. Rapprochement is needed concerning the environmental effects and the division of water.

The ICJ remembered the parties of the *pacta sunt servanda*, i.e. of the obligatory force of the treaties and of their well-meaning performance. The Court implied that a third party may be involved in the negotiations.

Therefore, the system of the Budapest Treaty was ordered to be restored unless there was another agreement between the parties. It means that the operating facility shall be operated mutually. And the modified version of proposal “C” shall be integrated into the treaty system, since a unified and undividable operational system is needed, which would derive from the Budapest Treaty.

### 3.3. The Legal Consequences of the Unlawful Acts Committed by the Parties (Reparations)

The aim of the reparations is to hide and/or restore the consequences of the unlawful acts, as the ICJ cited the classical definition from the judgement of Permanent Court of International Justice – cf. the case of the Chorzow factory.

According to the ICJ, there has been a possibility to restore co-operative management. Therefore, the mutual maintenance of the facility ruled that it was necessary. Moreover, the parties shall rethink the water and electricity division, and they can decide not to build up the Nagymaros system of locks. Both parties have the right to reparation as a result of the other party’s breached international obligations.

The basis of reparation for Slovakia is the fact that Hungary suspended the construction and unlawfully abandoned the site. For Hungary, the basis is the Czechoslovakian (Slovakian) diversion of the Danube and the operation of the modified version of proposal “C”. The ICJ proposed mutual renunciation.

<sup>18</sup> Cf. the principle of *in integrum restitutio*.

<sup>19</sup> Cf. Special Agreement for Submission to the International Court of Justice of the Differences concerning the Gabčíkovo-Nagymaros Project, Art. 5. (Signed in Brussels on 7 April 1993.) Available in English at: [http://untreaty.un.org/unts/120001\\_144071/9/8/00007471.pdf](http://untreaty.un.org/unts/120001_144071/9/8/00007471.pdf) [accessed: 14.01.2014]. Available in Hungarian at: <http://www.bosnagymaros.hu/dokumentumok/kulonmegallapodas/19> [accessed: 14.01.2014].

But if Hungary wants to operate and use the facility, the proportional part of construction and operation costs have to be paid. These costs are separated from the reparation since they have to be solved (i.e. paid) on the basis of the Budapest Treaty.

## **Conclusions**

By reason of the ICJ judgement, the factors why it is still an unresolved international dispute are the following.

Hungary unlawfully suspended and abandoned the constructions near Nagymaros and her proportional part near Gabčíkovo. Czechoslovakia (Slovakia) did not have right to continue the realization of the modified version of proposal "C". Slovakia unlawfully set up the modified version of proposal "C", i.e. she operated it unlawfully. The termination of the 1992 Budapest Memorandum of Hungary was of no effect. Concerning the Budapest Treaty, Slovakia is the successor of Czechoslovakia. Hungary and Slovakia shall conduct a well-meaning negotiation in order to realize the aim of the Budapest Treaty. The Court considered it possible to create a mutual operational system and/or to pay reparations for the damage defined in the Judgment. The costs of construction and operation have to be paid based on the Budapest Treaty. Since 1997, there have been several consultations and negotiations between Hungary and Slovakia. But all the efforts seem to be ineffective. The main point is that there is a lack of political will to resolve this politically highly sensitive case since the intention to avoid losing face is part of human nature. We may ask whether what we could observe in these rounds raising again the issue of enforceability of public international law is in line with the well-meaning negotiations. I think that the power of shame between the parties is hardly enough to handle and to resolve this mutually inconvenient situation.

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