

OTHER INTERNATIONAL DEVELOPMENTS

ICJ

A Step Forward in the Gabčíkovo-Nagymaros Case

by Dinah Shelton*

At the conclusion of the judgment of the International Court of Justice of 25 September 1997 in the dispute between Hungary and Slovakia over the Danube dam project and water diversion, the Court said that "the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular, they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river." The Court emphasized that it would not determine in advance the final results of the negotiations, but rather the Parties themselves must find an agreed solution taking into account the objectives of the original treaty that foresaw the construction of a joint project.

Since the 1997 judgment and pursuant to the Court's instruction, the two sides have met periodically to discuss various proposals to resolve the dispute. In April the Hungarian government prepared a detailed proposal aiming to give effect to the judgment. This proposal contains the first concrete measures for the division of the waters and their management as well as for navigation, flood control and environmental protection.

The measures on environmental protection are of particular interest, being linked of course with other parts of the agreement and with water quantity and quality. Indeed, draft Article 2(1)(d) says that in order to protect the natural environment, in particular biodiversity and water quality, the parties shall share the water discharge between the main riverbed and the bypass canal in a way that ensures "a satisfactory solution" to the supply of water to the main riverbed and the side-arms. Articles 6 and 7 of the proposal detail the water sharing rights and duties.

Article 6 sets forth general principles for sharing of water discharge between the main river bed and the bypass canal. It provides that the Parties agree on the joint obligation to provide for an increased volume of water, which meets the environmental requirements, to be released into the main riverbed forming the state border and the side-arm system of the Danube in accordance with the principles set out in the Judgment. This shall not affect the right of the Parties, according to Article 14(3) of the 1977 Treaty, to transform their hypothetical entitlement to a share in energy into an entitlement to water – in an amount over and above the requirements of the natural environment, and to direct this entitlement to water flow into the main riverbed and the side-arms of the Danube.

Article 7 governs the water supply in the main riverbed and side-arms in the area most directly impacted by the Gabčíkovo dam (*i.e.* between river kilometres 1851 and 1811). In accordance with the principle of sustainable development, water management here should ensure that surface, groundwaters and other subsurface waters maintain or improve their quality for potential use. There is to be continued and long-term preservation and restoration of the flora, fauna and biodiversity and its productive capacity in the area concerned as well as of the recreational, climatic and other values of the natural landscape. The dynamic connection between the main bed and the side-arms of the Danube, including the natural flooding of flood plains, is to be restored and maintained, as are the environmentally sound and sustainable flow rates, directions and dynamics of groundwater. There is to be provision for the safe discharge of floods and formation of a riverbed suitable to the unhindered navigation of recreational and small boats. Summing up this section, the proposal requires that the volume of water to be discharged shall be sufficient to meet all of the above-mentioned objectives. To determine this discharge volume, the Parties will conduct an environmental impact assessment according to the provisions of the 1991 Espoo Convention. The EIA will also determine the water management solution to be agreed upon by the Parties from among alternatives that may be proposed by either side. The proposal acknowledges that there may be variations in the volume of water to be discharged according to seasons, the necessity of flooding and the dormant vegetation period. These variations should be governed by bilateral and multilateral agreements.

Two final paragraphs of Article 7 speak to future joint monitoring of the environment, immediate modification of operation of the system in case of a deterioration or serious risk of environmental deterioration, and to appropriate public participation in accordance with the 1998 Aarhus Convention.

The provisions on the environment are part of the entire proposed package, which also addresses the sharing of energy, benefits and costs, settlement of damages and accounts and future operation of the Gabčíkovo plant. None of the provisions can be taken in isolation, but together may be seen to represent a good faith effort to ensure environmental protection in the context of settling this long-standing dispute in conformity with the I.C.J. judgment. Further meetings will indicate whether the proposal is acceptable to both sides.

* Professor of Law, Notre Dame Law School, Indiana (USA).

