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Implications of the Danube River Dispute on International Environmental Law

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Abstract

International environmental law has emerged recently. Yet, its development is very dynamic. However, there remain controversies surrounding the content and normative value of its principles. The principle of sustainable development is to name only one example. The paper seeks to explore the International Court of Justice's judgment, on the Gabcikovo-Nagymaros case concerning the implementation of a treaty concluded between Czechoslovakia and Hungary with respect to the utilization of the waters of the River Danube, in order to find out what implications the dispute had on the principles, both on substantive and procedural ones, of international environmental law. The author discusses the judgment and concludes, despite the fact that neither the World Court offered a final settlement nor the parties have found a negotiated solution of the dispute so far, the judgment made a considerable contribution to the further understanding of the principles of international law on the environment.

Keywords: *Gabcikovo-Nagymaros case, River Danube, International Court of Justice, International Environmental Law*

INTRODUCTION

International environmental law is one of the fastest developing branches of public international law. It is true that cases brought before the international tribunals play an important role in this. Even the judgments delivered by the courts, apparently not relevant to the environmental law, have contributed to shaping of the basic principles of international environmental law by the

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passage of time and by enhancing the knowledge of environmental matters. On September 25, 1997 the International Court of Justice ("the Court") delivered its judgement in the *Case Concerning the Gabcikovo-Nagymaros Project (Hun. v. Slo.).*[2] Although the environmental issues were in the center of the dispute, the case, which mainly involved issues of the law of treaties, the law of state responsibility and the legal implications of the state succession, is not an environmental one. However, the Court's pronouncements on the legal developments in the field of environmental protection, such as the principle of sustainable development, the precautionary principle and the duties of notification and consultation are extremely important.

The Gabcikovo-Nagymaros Project ("the Project") could easily be described as an integrated international watercourse utilization system which provides for hydro-electric production, flood protection, improved navigation, building of roads, and regional development opportunities on and around the River Danube. Hungary and Czechoslovakia agreed upon the creation of such a water utilization regime in 1977. As a result of drastic political, economic and social changes which took place after the end of the Cold War era, particularly in COMECON countries, the feasibility of benefits which was to be derived from the Project became a matter of dispute between the parties.[3] Environmental issues constituted the essence of the disagreement.

The aim of this paper is to examine the Danube dispute in order for exploring the Court's understanding of the legal principles of international environmental law and finding out the judgment's implications on the development of these principles. To this end this paper will first give some background information on the Project which will be followed by a summary and discussion of the essential aspects of the Court's judgment highlighting points of particular significance. Then, its implications on the development of new norms and principles of international environmental law will be examined.

[2] 'Gabcikovo-Nagymaros (Hun. v. Slo.)', *I.C.J.* 1997 (September, 25). All page references are to the version of the text provided by the ICJ Registry.

[3] For an analysis of the groundwater aspect of dispute before the Court delivered its judgment see G. Eckstein 'Application of International Water Law to Transboundary Graoundwater Resources and the Slovak-Hungarian Dispute over Gabcikovo-Nagymaros' 19 *SUFFOLK TRANSNAT'L L. R.* 67 (1995).

THE BACKGROUND

On July 2, 1993 Hungary and Slovakia instituted proceedings before the Court on the basis of a special agreement signed in Brussels on April 7, 1993 which entered into force on June 28, 1993. The dispute arose out of the signature on September 16, 1977 of the Treaty on the Construction and Operation of the Gabcikovo-Nagymaros System of Locks ("the 1977 Treaty") by Czechoslovakia and Hungary, with effect from June 30, 1978.[4] The 1977 Treaty provided for the construction and operation of a system of locks by the parties as a "joint investment", aiming at the production of hydroelectricity, the improvement of navigation and the protection against flooding. The 1977 Treaty envisaged for the construction of two series of locks, one at Gabcikovo (in Slovak territory) and the other at Nagymaros (in Hungarian territory), to constitute a single and indivisible operational system of works which are financed, constructed, operated, and owned by both states "in equal measure".

Work on the Project started in 1978. On Hungary`s initiative, the parties first agreed to slow down the project and postpone putting into operation the power plants in October 1983, and then to accelerate the Project in February 1989.

As a result of domestic pressure, Hungary decided to abandon the works at Nagymaros on October 27, 1989. Czechoslovakia found this unacceptable. The negotiations to address the situation failed. In 1991, Czechoslovakia decided to implement an alternative solution (called "Variant C") which entailed a unilateral diversion of the Danube by Czechoslovakia and included the construction of an overflow dam, a levee linking the dam to a bypass canal and ancillary works. Hungary claimed that its use of the river would be adversely affected and terminated the 1977 Treaty with effect from May 25, 1992. Czechoslovakia proceeded Variant C and dammed the Danube on October 23, 1992. On January 1, 1993 Slovakia became an independent state. Following negotiations under the aegis of the European Communities on April 7, 1994 the "Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic Concerning the Gabcikovo-Nagymaros Project" was signed.[5] The special agreement records that the Slovak Republic is in this respect the sole successor state of the Czech and Slovak Federal Republic (Czechoslovakia).

[4] Reproduced in 32 I.L.M. 1247 (1993).

[5] 32 *I.L.M.* 1293(1993).

The parties' requests from the Court expressed in Article 2 of the Special Agreement which reads as follows:

> (1) The Court is requested to decide on the basis of the [1977] Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,
>
> (a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the [1977] Treaty attributed responsibility to the Republic of Hungary;
>
> (b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);
>
> (c) What are the legal effects of the notification, on 19 May 1992, of the termination of the [1977] Treaty by the Republic of Hungary?
>
> (2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the question in paragraph 1 of this Article.[6]

The Court's findings on each of these requests will be explained and discussed below; but it seems necessary to summarize the post-case developments before dealing with the judgment in detail. The Court gave parties six months to negotiate a solution. Yet, no agreement is reached because of the incompatible views of the parties. On the one hand Slovakia proposes to construct the entire system as had been originally agreed in treaty with modification of the provisional solution, Hungary, on the other hand, categorically rejects the construction of a new dam.[7]

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6 *Id.* at 1295.

7 www.mfa.hu and www.slovakia.org (last visited on December 28, 2004) For further details about immediate post case developments till 2001 see B. Fuyane and F. Madai "The Hungary-Slovakia Danube River Dispute: Implications for sustainable Utilization of Natural Resources in International Law" 1 *INT. J. GLOB. ENV. ISSUES,* 339-340 (2001)

THE COURT'S JUDGMENT

The parties concurred in recognizing that the 1977 Treaty and related protocols were validly concluded and were duly in force when the facts recounted above took place. Hungary contented that, although it had suspended or abandoned certain works, on the contrary, it had never suspended the application of the 1977 Treaty itself. To justify its conduct, Hungary relied on a "state of ecological necessity". Hungary also accused Czechoslovakia of having violated the provisions of the 1977 Treaty. Hungary, moreover, contended that its conduct in the present case not be evaluated only in relation to the law of treaties.[8] Both arguments were denied by Slovakia.

The Court pointed out that some of the provisions of the 1969 Vienna Convention on the Law of Treaties concerning the termination and suspension of the operation of treaties might be considered as a codification of existing customary law. [9]

The Court made a distinction between a determination under the law of treaties of whether a treaty is in force and has been properly suspended, and an evaluation under the law of state responsibility of the extent to which the suspension of a treaty in violation of the law of treaties engages state responsibility. The Court rejected Hungary's argument that it never suspended the application of the Treaty. The Court pointed out that the conduct of Hungary by suspending and subsequently abandoning the works for which it was responsible under the 1977 Treaty can be interpreted as an expression of its unwillingness to comply with the 1977 Treaty and the effect of this conduct was to render impossible the accomplishment of the system of works that the 1977 Treaty expressly described as "single and indivisible".[10]

The Court also rejected Hungary's reliance on "a state of ecological necessity" as a justification for failure to comply with its obligations. Hungary and Slovakia were in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States adopted on first reading.[11]

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8 Gabcikovo-Nagymaros Project (Hun. v. Slo.) at 31.
9 *Id.* at 32.
10 *Id.* at 33.
11 Article 33 reads as follows:

Although the Court acknowledged that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcikovo-Nagymaros Project related to an "essential interest", it found that there were no real "grave and imminent" perils.[12] Moreover the Court considered that Hungary could have resorted to other means in order to respond to the dangers that it apprehended, such as continuing of the negotiation process. Having rejected Hungary's reliance on a state of necessity, the Court concluded that, with 14 Votes against 1, that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works for which the 1977 Treaty and related instruments attributed responsibility to it.[13]

With 9 votes against 6, the Court held that Slovakia was entitled to proceed, in November 1991, to the provisional solution "in so far as it then confined itself to undertaking work which it did not predetermine the final decision to be taken by it".[14] On the other hand, with 10 votes against 5, it was rejected by the court that Slovakia was entitled to put into operation, from October 1992, this "provisional solution".[15] The Court based this finding on a distinction between the actual commission of a wrongful act and the conduct prior to that act, which is of a preparatory character but does not qualify as a wrongful act.[16]

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1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interests of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding the wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

Yearbook of International Law Commission, 1980, Vol. II, Part 2, p. 34.

[12] Gabcikovo-Nagymaros Project (Hun. v. Slo.) at 35.

[13] *Id.* at 39.

[14] *Id.* at 48.

[15] *Id.* at 70.

[16] *Id.* at 32.

Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works of the project had made it impossible to carry out the works as initially contemplated by the 1977 Treaty. Therefore, Slovakia was entitled to proceed with a solution which was as close to the original project as possible.[17] Slovakia maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary's unlawful actions. It argued that putting into operation of Variant C could be justified as a countermeasure.[18] Hungary for its part contended that Variant C was a material breach of the 1977 Treaty and other treaty obligations as well as general international law.[19]

Without dealing with whether there is a principle of international law or a general principle of law of "approximate application", the Court concluded that Variant C does not meet the cardinal condition of such a principle which is the employment within the limits of the treaty in question, since Variant C by enabling Slovakia to control and divert the Danube unilaterally for its own benefit differed sharply from the original project which constituted a single and joint operational system of works.[20] Thus, Variant C by diverting between %80 and 90 of the waters of the Danube for the benefit of Slovakia breached Hungary's basic right to an equitable and reasonable sharing of the resources of the Danube which is not only a shared international watercourse, but also an international boundary river. The Court, therefore, concluded that Czechoslovakia, in putting Variant C into operation committed an internationally wrongful act.[21]

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[17] With a view to justifying those actions, Slovakia invoked what it described as " the principle of approximate application", expressed by Judge Lauterpacht in the following terms:
"It was a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument- not to change it" ('Admissibility of Hearings of Petitioners by the Committee on South West Africa', separate opinion of Sir Hersch Lauterpacht, *I.C.J. Reports* (1956) at 46)

[18] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 43,44.

[19] *Id.* at 44.

[20] *Id.* at 45.

[21] *Id.* at 45. The ICJ referred to the provisions of the Convention on the Law of the Non-Navigational Uses of International Watercourses. For the text of the Convention *See* 36 I.L.M. 700 (1997). To see what is meant by "equitable" in the context of international water resources in detail see I. Kaya *Equitable Utilization: The Law of the Non-navigational Uses of International Watercourses* (Ashgate: Aldershot, 2003).

Although putting into operation of Variant C met certain conditions in order to be justifiable as a countermeasure,[22] it failed to respect the proportionality, which is required by international law, in unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right.[23] Therefore, the Court considered that the diversion of the Danube by Slovakia was not a lawful countermeasure, because it was not proportionate.[24]

With regard to the effects of notification of the termination of the 1977 Treaty, the Court rejected all of the defenses that Hungary advanced in support of the lawfulness and effectiveness of its termination. The Court found, with 11 votes against 4, that Hungary's notification of termination did not have the legal effect of terminating the 1977 Treaty and related instruments.[25]

The 1977 Treaty does not contain any provision regarding its termination and nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. In this case, the Court found that the Articles 60-62 of the Vienna Convention relating to termination or suspension of the operation of a treaty are applicable, despite both states ratified that Convention only after the 1977 Treaty's conclusion, since they are declaratory of customary law.[26]

Hungary presented mainly five arguments in support of the lawfulness of its notification of termination. They were:

1. The existence of a state of necessity;
2. The impossibility of performance of the 1977 Treaty;
3. The occurrence of a fundamental change of circumstances;
4. The material breach of the 1977 Treaty by Czechoslovakia;

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[22] The conditions met by Slovakia are:

1. A countermeasure must be taken in response to a previous international wrongful act of another state and must be directed against that state. ('Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 42.)
2. The injured state must have called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. ('Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 47.)

[23] *Id.* at 47.

[24] *Id.* at 48.

[25] *Id.* at 71.

[26] *Id.* at 53.

5. The development of new norms of international environmental law.

Each of these grounds was contested by Slovakia.

For the first ground, the Court concluded that even if a state of necessity is found to exist, it is not a ground for the termination of a treaty; rather it may only be invoked only to relieve a state of responsibility for failure to implement a treaty.[27] The Court also rejected the argument that it is impossible to perform the 1977 Treaty since "the essential object" indispensable for the execution of the 1977 Treaty- an economic joint investment which was consistent with environmental protection and which was operated by the two countries jointly- had permanently disappeared.

The Court found that the 1977 Treaty provided means for any required readjustments. It is also added by the Court that, even if the joint exploitation of the investment was no longer possible, this was because Hungary did not carry out most of the work for which it was responsible under the 1977 Treaty and Article 61 of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from treaty. Thus, it is concluded by the Court that the argument of the impossibility of performance of the 1977 Treaty is unfounded.[28]

Another argument advanced by Hungary was the occurrence of a fundamental change in circumstances, particularly in political situation, environmental knowledge and environmental law. The Court did not consider them completely unforeseen and noted that they can be accommodated in the Project under the 1977 Treaty. Moreover, in the Court's view, the existence of the circumstances at the time of the 1977 Treaty's conclusion did not constitute an essential basis of the consent of the parties to be bound by the 1977 Treaty.[29]

The material breach of the 1977 Treaty by Czechoslovakia was another ground relied on by Hungary for the termination of the 1977 Treaty. The Court found that Czechoslovakia violated the 1977 Treaty only when it diverted the waters of the Danube in October 1992. However, Hungary gave notice of termination on 19 May 1992. Therefore the notification was premature.[30]

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[27] *Id.* at 54.
[28] *Id.* at 54.
[29] *Id.* at 55.
[30] *Id.* at 56.

Finally, with regard to the development of new norms of international environmental law the Court concluded that these could be incorporated by the parties into their Project.[31]

The second part of the Court's judgment addressees the legal consequences, including the rights and obligations for both parties, arising from its findings on the matters above. The first question was whether Slovakia became a party to the 1977 Treaty as a successor to Czechoslovakia. The Court's answer is affirmative, with 12 votes against 3. The Court found that the content of the 1977 Treaty indicated that it must be regarded as establishing territorial regime within the meaning of Article 12 of the 1978 Vienna Convention, which is considered by the Court as a reflection of customary law.[32] It created rights and obligations attaching to the parties of the Danube; thus the 1977 Treaty cannot be affected by the succession of states. The 1977 Treaty, therefore, became binding upon Slovakia on January 1, 1993 when Czechoslovakia was dissolved.

The Court found, with 13 votes against 3, that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the 1977 Treaty,[33] since the 1977 Treaty is still in force and, consequently, governs the relationship between the parties.[34] On this finding the Court concluded that, with 13 votes against 2, a joint operational regime must be established in accordance with the 1977 Treaty, unless the parties otherwise agree.[35] The Court noted that the 1977 Treaty has not been fully implemented by either party for years, and in fact their acts of commission and omission have contributed to the present factual situation.[36] However, the factual situation as it has developed since 1989 must be placed within the content of the treaty relationship. It is possible, because the 1977 Treaty never laid down a rigid system.[37]

The Court pointed out that the Project's impacts upon, and its implications for, the environment are of necessity a key issue. Therefore, current standards

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[31] *Id.* at 57, 58. this will be dealt with in more detail by the parts V and VI of this paper.

[32] *Id.* at 61.

[33] *Id.* at 71.

[34] *Id.* at 65,69.

[35] *Id.* at 71.

[36] *Id.* at 65.

[37] *Id.* at 66.

must be taken into consideration in order to evaluate the environmental risks and to maintain the quality of the water of the Danube with the aim of protecting nature and ensuring sustainable development.[38]

Noting that it is not for the Court to determine what should be the find result of negotiations to be conducted by the parties, the Court advised on some issues. It is also concluded by the Court that Variant C should be made to conform to the 1977 Treaty by associating Hungary equally in its operation, management and benefits. [39]

With regard to the legal effects of the internationally wrongful acts committed by both parties the Court concluded, with 12 votes against 3, that:

> *... unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damages sustained by Czechoslovakia and Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damages it has sustained on account of putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia.*[40]

In concluding so, the court quoted from the *Chorzow Factory Case*, where PCIJ stated reparation must "as far as possible" wipe out all the consequences of the illegal act.[41] To this end, according to the Court, parties must resume their cooperation in the utilization of the Danube and implement the water utilization project in an equitable and reasonable manner.[42]

THE SEPARATE OPINION AND DECLARATIONS

In his separate opinion, Vice-President Weeramantry made some observations on a few aspects of environmental law which is one of the most rapidly developing areas of international law. The issues, which have presented themselves for consideration in this case, discussed are: The role played by the principle of sustainable development, the principle of continuing environmental impact assessment and of contemporaneity in the application of environmental norms, and, finally, the appropriateness of the use of *inter partes* legal principles for the resolution of problems with an *erga omnes* connotation. The

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[38] *Id.* at 66.

[39] *Id.* at 68.

[40] *Id.* at 71.

[41] *P.C.I.J.*, Series A, No. 17, p. 47.

[42] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 69.

Vice-President concluded that international law "will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual self-interest, unrelated to the global concerns of humanity as a whole" and in "the arena of obligations which operate *erga omnes* rather than *inter partes,* rules based on individual fairness and procedural compliance may be inadequate".[43]

Major dissenting opinions have been raised regarding the questions whether Czechoslovakia was entitled to proceed to the provisional solution and whether it was entitled to put it into operation.

Judge Fleischhaurer expressed his dissenting opinion on the finding of the Court that Czechoslovakia was entitled to proceed "provisional solution" and it violated the 1977 Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. The Judge based his views on the argument that putting into operation of Variant C constituted a *continuing* wrongful act which extended from the passing from mere studies and planning to construction in November 1991 and lasted to the actual damming of the Danube in October 1992.[44]

President Schwebel, too, considered the construction of Variant C as inseparable from its being put into operation and voted against the finding of the Court that Czechoslovakia was entitled to proceed in November 1991 to the "provisional solution".[45]

On the other hand, by departing from the same point, i.e. inseparability of proceeding to the provisional solution and putting it into operation, some other judges arrived at different conclusions.

Judge Koroma pointed out that Variant C constituted the minimum modification of the original project, and, therefore, its realization was a genuine application of the 1977 Treaty; since the unilateral suspension and termination of the 1977 Treaty and works for which Hungary was responsible under it had amounted to depriving the 1977 Treaty of its objective. [46]

Noting that Variant C was designed by Czechoslovakia because it had no other option, as a result of Hungary's suspension of works, in order to give life

[43] *Id.* Separate Opinion of Vice-President Weeramantry.
[44] *Id.* Dissenting Opinion of Judge Fleischhaurer.
[45] *Id.* Declaration of President Schwebel.
[46] *Id.* Separate Opinion of Judge Koroma.

to the Project, Judge Oda concluded that he does not agree with the Judgment when it states "Czechoslovakia was entitled to proceed to the 'provisional solution'" but it "was not entitled to put into operation...this 'provisional solution'".[47]

Judge Parra-Aranguren, too, recognized Czechoslovakia's right to put into operation Variant C, not only to realize the 1977 Treaty's objective and purpose, but also to solve the ecological and economic problems caused by the unfinished constructions.[48]

Having said that the withdrawal of Hungary from the project left Czechoslovakia with the possibility of doing on its own territory what it was allowed to do by general law, Judge *ad hoc* Skubiszewski based his dissenting opinion on the evidences of general international law. According to the Judge, under international law, Czechoslovakia had the right to put into operation the provisional solution, since there is nothing in general international law to prevent it from acting alone, without any prior consent by Hungary, as long as it respects Hungary's right to an equitable and reasonable share on the Danube's waters.[49]

SUBSTANTIVE PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

State Sovereignty and Responsibility

State sovereignty is one of the oldest principles of international law. It means that a state has exclusive jurisdiction in its territory and is free to do what it deems necessary. Also a sovereign is immune from the limitations imposed by others. States are also equal before the law due to their sovereignty, since no state has the right to intervene in another state's territory. Respect for the territory of other states is another well established principle of international law from which state responsibility stems. States have right to have their territories respected. Here, two principles need to be reconciled. In other words, states are under an obligation to respect the territories beyond their national jurisdiction, although they are free to do as they wish in their own territories. In cases of damage to other states territories the issue of state responsibility

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[47] *Id.* Dissenting Opinion of Judge Oda.

[48] *Id.* Dissenting Opinion of Judge Parra-Aranguren.

[49] *Id.* Dissenting Opinion of Judge *Ad Hoc* Skubiszewski.

arises. In this connection the Principle 21 of the Stockholm Declaration provides

> *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*

Although the same wording was used by Rio Declaration, its scope is enlarged by referring to "environmental and *developmental policies*". This principle is accepted as the cornerstone of international environmental law which reflects customary international law.[50]

In the case concerning Gabcikovo-Nagymaros Project, the Court "recall[ed] that it has recently had occasion to stress...the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind".[51] Then, the Court went on quoting from its advisory opinion in the Nuclear Weapons case stating that "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect to the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[52] emphasizing the rule's declaratory nature of customary law.

The Court acknowledged Hungary's "basic right to an equitable and reasonable sharing of the resources of an international watercourse"[53] and found that Slovakia by diverting ninety percent of the Danube and "by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube...failed to respect the proportionality which is required by international law".[54]

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[50] P. Sands, *Principles of International Environmental Law*, (Manchester: Manchester University Press, 1995) p. 186.

[51] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 35.

[52] 'Legality of the Threat or Use of Nuclear Weapons', Advisory Opinion, *ICJ Reports,* 1996 at 242.

[53] Gabcikovo-Nagymaros Project (Hun. v. Slo.) at 45.

[54] *Id.* at 47.

Prevention and Precautionary Principle

It is almost impossible to remedy environmental damage. Therefore, both for ecological and economical reasons, preventive approach is the golden rule before the emergence of irreversible situations.[55] Although an absolute duty to prevent all harm is not required, "due diligence" must be exercised. Due diligence requires each state to act reasonably and in good faith to prevent any activity possibly harmful to the environment. This duty is expressed in Principle 17 of the Rio declaration. Precautionary Principle is a step towards prevention of harm. Rio Declaration proclaims:

> *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.*

In the Gabcikovo-Nagymaros case Hungary claimed that it was entitled to terminate the 1977 Treaty because the new requirements of international law for the protection of the environment, one of them is obviously the precautionary principle, precluded performance of the treaty regime. This was rejected by the Court which pointed out that the newly developed norms of environmental law could be incorporated by the parties into the treaty regime. The Court welcomed that "both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures".[56] The significance of the precautionary principle pointed out by the Court in the following terms

> *The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.*[57]

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[55] A. Kiss and D. Shelton, *International Environmental Law* (Transnational Publishers: New York, 2000), p. 263.

[56] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 58.

[57] Para 140.

It must also be noted that although the parties agreed on the importance of precautionary measures, they fundamentally disagreed on the consequences this had for the project.

Sustainable Development

The principle of environmental protection is another foundation of international environmental law. Sustainable development is closely connected with this as well as with the right to development. Sustainable development assures the on-going productivity of exploitable natural resources and conserving all species of fauna and flora.[58] The Rio Declaration and the Agenda 21 call for further development of international law "in the field of sustainable development".[59] Sustainable development contains both substantive and procedural elements. According to some leading authors on the field, integration of environmental protection and economic development, the right to development, sustainable utilization, conservation of natural resources, inter-generational equity, intra-generational equity, the "polluter pays" principle are the substantive elements of sustainable development and procedural elements include environmental impact assessment, access to information and public participation.[60]

It must be noted that some of its elements are accepted as legal rules on their own merit. Therefore, it could not be wrong to claim that sustainable development is an umbrella principle bringing together various legal norms as well as policy elements. As a result, elements of sustainable development are related to environmental law, economic law and human rights.[61] Although there remain fundamental uncertainties about the "legal" nature of sustainable development, the parameters of sustainability and the criteria for measuring it, it is interesting to note that the Court in the Gabcikovo-Nagymaros case referred for the fist time to the "need to reconcile economic development with protection of the environment [which] is aptly expressed in the concept of sustainable development."[62] Thereby, it emphasized the need to integrate environmental protection and economic development.

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[58] A. Kiss and D. Shelton, *International Environmental Law* (Transnational Publishers: New York, 2000), p. 262.

[59] Article 27 and Chapter 39, respectively.

[60] P. Birnie and A. Boyle, *International Law and the Environment*, (Oxford: Oxford Uni. Press, 2002) pp. 84-95.

[61] See D. McGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception', 45 *INT'L & COMP L. QUART'Y* 796-801 (1996).

[62] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at *67.*

The Brundtland Commission defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs",[63] emphasizing the centrality of inter-generational equity. Similarly, ICJ in the case concerning the Gabcikovo-Nagymaros Project made a reference to future generations. The Court pointed out that "owing to new scientific insights to a growing awareness of the risks for mankind – for present and future generations – of pursuit of...interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades".[64] The Court also made a reference to its previous advisory opinion stating "the environment is not an abstraction but represents the living space, the quality of life and very health of human beings, including generations unborn."[65]

Although the concept of sustainable development has been referred by the Court in its judgment, the Vice-President Weeramantry considered it in more detail as a principle with normative value. According to the Vice-President the principle of sustainable development which is an integral part of modern international law represents reconciliation between Slovakia's right to development and Hungary's right to environmental protection. A dual approach is used for the establishment of sustainable development as a part of international law. First, the Vice-President Weeramantry referred to international instruments such as UNGA Resolution 2849 (XXVI), the Stockholm and Rio Declarations, and the Brundtland Report in order to establish that it is "a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community". Then he turned to some historical conduct of various peoples of the world with the aim of supporting his view that traditional principles can assist in the development of modern environmental law in the meaning of the Article 38 of the Statue of the International Court of Justice.[66]

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[63] WCED, *Our Common Future*, (Oxford Uni. Press: Oxford, 1987), p. 43.

[64] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at *67.*

[65] 'Legality of the Threat or Use of Nuclear Weapons', Advisory Opinion, *ICJ Reports* 1996 at 241.

[66] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' Separate Opinion of Vice-President Weeramantry.

PROCEDURAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

The main procedural principles of international environmental law can be summarized as cooperation, negotiation and environmental impact assessment (EIA). An obligation to cooperate with other states derives from the very essence of general international law.[67] Cooperation is required to protect the environment and prevent transboundary damage as well as to develop an international resource. In this regard it is provided by the Principle 24 of the Stockholm Declaration that;

> *International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effective control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducting in all spheres, in such a way that due account is taken of the sovereignty and interests of all states.*

The need to cooperate in achievement of environmental protection and development is also expressed by the Rio Declaration stating "States and peoples shall co-operate in good faiths and in good spirit of partnership in the fulfillment of the principles embodied in [the Rio Declaration]."[68]

The duty to negotiate is derived from cooperation and from the duty to settle international disputes peacefully. Of all the mechanisms used to settle differences, the simplest and, of course cheapest, form is negotiation. Apart from being an extremely active method of settlement itself, negotiation is the precursor to other dispute settlement means, since the parties decide among themselves how best to reconcile their claims.[69] In international law states are under a duty to negotiate in good faith with the aim of finding a solution and, despite it is not required to reach an agreement, they need to negotiate "meaningfully".[70] Although the ICJ found that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation,[71] it was

[67] A. Kiss and D. Shelton, *International Environmental Law* (New York: Transnational Publishers, 2000), p. 259.

[68] Principle 27.

[69] Shaw p. 633.

[70] "Sea North Sea Continental Shelf cases", *ICJ Reports,* 1969 p. 47, 'The Fisheries Jurisdiction cases' *ICJ Reports,* 1974, p. 32. 'Lake Lanoux Arbitration' *ILR* 24, 1957 pp. 129-130.

[71] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 71.

announced by the Court that it is not for the Court to determine what should be the final result of these negotiations.[72] The implementation of the Treaty, as pointed out by the Court, requires a mutual willingness to discuss in good faith actual and potential environmental risks.[73] The then EU candidate states, now full members, called upon the assistance of the Commission of the European Communities. This was welcomed by the Court as an evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the ICJ's judgment.[74]

EIA is a procedural element of sustainable development. For EIA the Court pointed out that;

> *It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. Numerous scientific reports which have been presented to the Court by the Parties -even if their conclusions are often contradictory- provide abundant evidence that this impact and these implications are considerable. In order to evaluate environmental risks, current standards must be taken into consideration.*[75]

It is interesting to note that the Court spoke of "current standards" not those of prior to the commencement of the project. As pointed out by the Vice President of the Court, Weeramantry, "this follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences".[76] Therefore, current standards must be taken into consideration in order to evaluate the environmental risks and to maintain the quality of the water of the Danube with the aim of protecting nature and ensuring sustainable development.[77] According to the Court "... such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."[78] In the Vice-President Weeramentry`s view environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This view has

[72] *Id.* at 67.
[73] *Id.* at 58.
[74] *Id.* at 67.
[75] *Id.* at 67.
[76] Separate Opinion pp. 20-21.
[77] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 66.
[78] *Id.* at 67.

been found recognition by the 1977 Treaty as well. The Vice-President pointed out that the principle of contemporaneity in the application of environmental norms according to which environmental norms of the prevailing time, not those of the time treaty was concluded, must be applied to any dispute. Application of this principle will be an additional safeguard for protecting the environmental interests of Hungary.[79]

EIA assumes that scientific studies can tell whether a project is environmentally friendly or not. However, as noted above even scientific reports presented by the parties may be contrary to each other. This depends on the complexity of the scientific research techniques and variables chosen. Moreover international law does not prohibit any activity which cause harm to the environment. Environmental impact is only a factor, among others such as economic and social gains, in considering whether a project is feasible. Therefore, it seems that EIA is not capable of protecting environment in absolute terms.

CONCLUSION

Environmental implications of the project constituted the essence of the disagreement. Although the case stemmed from a disagreement on the utilization of an international watercourse, it is not easy to conclude that the case is an environmental law case, rather the law of treaties and state succession. However, since the subject-matter of the 1977 Treaty is an international watercourse, the Danube, it was inevitable for the ICJ to make some observations on the law of international watercourses. The judgment is also significant in making reference first time to the 1997 Watercourses Convention's some provisions, which became customary law, although the Convention is not yet in force.

The Court did not issue any specific orders. It asked the parties to commence negotiations in the light of the prevailing situation.[80] However, the Court advised on some issues. It seems evident from the findings of the Court that the decision is a pragmatic one as a balance is made between the interests and claims of the parties. On the one hand, the original project was not acceptable to Hungary due to environmental risks involved. On the other hand, Slovakia did not accept the abandonment of the Project. The Court concluded that the existing factual situation must be placed within the 1977 Treaty' framework. Hungary is given a role as a joint operator of the new system. Hungary's participation in the system gave her a tool to ensure that the

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[79] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' Separate Opinion of Vice-President Weeramantry.

[80] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 71.

operation of the works does not cause any serious environmental harm. The Court also recognized that not using the system would not only have led to considerable financial losses of some $ 2,5 billion, but also would have resulted in serious consequences for environment.[81]

The Court's pronouncement on the negotiation requires parties to reach an acceptable settlement in a manner that protected their respective rights under the 1977 Treaty. In this regard, it can be suggested that the judgment is not the end of the dispute. Parties are also, under the special agreement, required to enter into negotiations on the modalities for the judgment's execution and if they are not able to reach agreement within six months, the Court may be requested, from either party, to render an additional judgment to determine the modalities for executing its judgment.[82]

It must also be borne in mind that, as far as the utilization of the waters of the Danube concerned, the findings of the case are mainly based on the framework of the 1977 Treaty, since the Court concludes that the 1977 Treaty is still in force and parties must take all necessary steps to ensure the achievement of its objectives,[83] rather than the law of the non-navigational uses of international watercourses in general. It is certain that the general law of international watercourses allows a state to develop the portion of the river in its territory.[84] In doing so, a state is not required to seek prior consent of other watercourse states.[85] Nor must any negotiation necessarily lead to agreement.[86]

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[81] For example *Id,* at 66.

[82] Art. 5, 32 *I.L.M.* 1296(1993).

[83] 'Gabcikovo-Nagymaros Project (Hun. v. Slo.)' at 71.

[84] See C. B. Bourne, 'The Right to Utilize the Waters of International Rivers', 3 CAN. *Y.B. INT'L L*, 187-264 (1965).

[85] 'Lake Lanoux Arbitration (France v. Spain)' 24 *ILR* (1957) at 128, 130.

[86] *Id,* at 128. See also C.B. Bourne, 'Procedure in the Development of International Drainage Basins: the Duty to Consult and to Negotiate', 10 CAN. *Y.B. INT'L L.* 212-234 (1972).