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(Hungary/Slovakia) (1997)

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I. INTRODUCTION

The Gabčíkovo-Nagymaros Project (Hungary/Slovakia) case (hereinafter, the Gabčíkovo-Nagymaros case or Gabčíkovo-Nagymaros) has, like a prism, refracted the international law on environmental protection as well as on fundamental fields of general international law such as state responsibility, the law of treaties and the law of international watercourses. It is a landmark decision. Its reach in terms of subject matter is very wide indeed. At the time of its handing down by the International Court of Justice (ICJ), the President of the Court said that the case 'proved to be compendious in terms of the range of legal issues it summoned up: the law of treaties, of state responsibility, of international watercourses, of state succession and environmental law'. This is the reason why it may be considered all things to all people.

Gabčíkovo-Nagymaros was the first case before the ICJ to be concerned with international environmental law in such a comprehensive manner, and in many ways the ICJ clarified this field of law. Notwithstanding, while the Court had occasion to consider a broad spectrum of issues in the light of international environmental law, one cannot escape the conclusion that it could have done more, as the ICJ ultimately founded many of its holdings in this case on the basis of more 'traditional' grounds, such as the law of treaties and state responsibility. Moreover, after the

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Court weighed and balanced all aspects of the dispute, neither of the parties can be said to have won or lost the case, as the Court found both parties to be at fault on various grounds.

Much like looking through a kaleidoscope, this chapter will consider the major issues of international law that were at stake in the Gabčíkovo-Nagymaros case, from international environmental law and sustainable development to state responsibility and the law of treaties. Before we turn to those, however, let us reconsider the situation in which the ICJ found itself.

II. ONCE UPON A TIME...

Under the 1977 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks, Hungary and Czechoslovakia (as it was before it was broken up into the Czech Republic and Slovakia in 1993) had agreed to construct and operate a system of locks, a dam, a reservoir, a hydroelectric power plant and flood controls along the Danube River. Subsequent to this treaty, both countries experienced significant changes to their internal political and economic systems, more especially at the end of the 1980s with the fall of the Berlin Wall and circumstances surrounding this event. In Hungary, a significant environmental lobby began to grow and oppose the planned works on the Danube. Following these events, Hungary stopped its part of the works and ultimately sought to terminate the 1977 treaty. In 1992, Czechoslovakia began works to divert the Danube River into a power canal, controlling 80–90 per cent of its flow, under an alternative project (known as Variant C) to that which had been agreed between the two countries. Slovakia and Hungary decided to submit the dispute for resolution by the ICJ.

An important context to this case is the timing of its submission to the ICJ. Indeed, it was submitted shortly after the fall of the Berlin Wall and the demise of communism in Eastern Europe. The EU Commission had attempted to broker an agreement to appease tensions between Slovakia and Hungary that would ultimately become new members of the EU. As a subsequent step, the two countries agreed to bring their case before the ICJ. Moreover, the landscape of international environmental law was beginning to change. The Conference on Environment and Development held in Rio de Janeiro in June 1992 gave significant momentum to the shaping and development of the international legal order. Instruments such as the Rio Declaration on Environment and Development, the Program of Action Agenda 21 and the Conventions on Climate Change and on Biological Diversity entrenched notions and principles, such as ‘sustainable development’ and the ‘precautionary principle’. One ongoing problem, however, was and remains the definition of these notions and principles. Since the 1972 United Nations Conference on the Human Environment held at Stockholm—which marked the birth of international environmental

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4 Reproduced in (1992) 31 ILM 874.
law— the degree of importance to be given to environmental protection has been a source of dissonance between developing and developed states. The pressing need for economic development was in tension with the development of an environmental ethic. Twenty years later at the United Nations Conference on Environment and Development in Rio, the same conflict resurfaced. There was little consensus on the real environmental issues, the significance of the terms ‘environment’ and ‘development’ and indeed the nature of the ‘environment-development’ interaction.

In this context, when the Gabčíkovo-Nagymaros case came before the ICJ, the Court tipped its hat to these emerging concepts and principles. However, it ultimately founded its decision on more traditional bases of international law. Placing an emphasis on *pacta sunt servanda*, it held that a fundamental change of circumstances may justify the termination of a treaty but these must have been unforeseen and the pre-existing circumstances should have been critical to the consent offered by the parties. In this case, the changed political and economic circumstances were not an essential basis of the consent of the parties, and could not be considered to constitute a fundamental change of circumstances. The Court also clarified that a state of necessity which would suspend treaty obligations can only be temporary, although it did not rule out the possibility that a state of ecological necessity could exist. On the other hand, the unilateral action taken by Czechoslovakia to divert 80–90 per cent of the flow of the Danube was an internationally wrongful act. Moreover, while the Court accepted that the 1977 Treaty had not been terminated, it also did not order Hungary to perform its obligations under the 1977 Treaty. Instead, the parties were encouraged to negotiate an agreement that was consistent with both the 1977 Treaty’s object and purpose as well as contemporary international environmental law.

III. ENVIRONMENTAL PRINCIPLES IN THE WAKE OF THE RIO CONFERENCE ON ENVIRONMENT AND DEVELOPMENT

As alluded to, the timing of the case before the Court was significant in light of the developments in the field of international environmental law leading up to the

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8 See *Arbitration Regarding the Iron Rhine Railway* (Belgium v. Netherlands) ICGJ 373 (PCA 2005), [59] (‘Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment’).

9 The Report of the UN Conference on the Human Environment reads in part as follows: ‘Considerable emphasis was placed by speakers from developing countries upon the fact that for two-thirds of the world’s population the human environment was dominated by poverty, malnutrition, illiteracy and misery. The priority of developing countries was development. Until the gap between the rich and the poor countries was substantially narrowed, little if any progress could be made ... support for environmental action must not be an excuse for reducing development’. UN Doc A/CONF.48/14 and Corr 1 (1972), reproduced in (1972) 11 ILM 1416.

10 A Najam, ‘The South in International Environmental Negotiations’ (1994) 31 *International Studies* 4, 427, 441. While the industrialised countries sought progress on climate change, biodiversity, forest loss and fishery issues, developing states placed more emphasis on market access, trade, technology transfer, development assistance and capacity building.

proceedings. After the Stockholm Conference of 1972, several other milestones facilitated the elaboration of environmental principles, including the Vienna Convention for the Protection of the Ozone Layer in 1985, the Montreal Protocol of 1987 and the Convention on Biodiversity in 1992. The Rio Declaration following the Conference of 1992 was a particularly important conduit through which environmental principles would crystallise. A brief appraisal of the state of environmental principles at the time of the Gabčíkovo-Nagymaryos case, as well as the way in which they were argued by the parties, is helpful to understand better the new tools that the Court had to deal with. Those principles make reference to notions of prevention and of sustainable development, and protection for future generations.

Turning first to prevention, this principle has always played a central role in the life of international environmental law. Indeed, prevention is often better than a cure when it comes to environmental protection. This centrality of prevention was recognised not least in the Espoo Convention of 1991. It is also manifested in Principle 17 of the Rio Declaration, which envisages the evaluation of risks through an environmental impact assessment. As such, it was necessary for states to take into account the impact of activities conducted on their territory, including in respect of the environment.

In the Gabčíkovo-Nagymaryos proceedings, Hungary connected prevention to precaution in its arguments by urging that ‘The previously existing obligation not to cause substantive damage to the territory of another State had ... evolved into an erga omnes obligation of prevention of damage pursuant to the “precautionary principle”’.

As with the principle of prevention, the principle of precaution also constitutes a lynchpin of international environmental law. The latter principle in fact often extends and completes the spirit of the former principle. The principle of precaution found its primary expression in Principle 15 of the Rio Declaration, which provides that ‘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’. Moreover, expressions of the principle can be found in the preamble of the Convention on Biodiversity and its Cartagena Protocol (Articles 9 and 10), the Convention on Climate Change of 1992, as well as the Vienna Convention for the Protection of the Ozone Layer of 1985 and its 1987 Montreal Protocol, which both referred to precautionary measures, and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992.

This principle requires decision-makers to consider the risks of environmental damage and to take measures that will minimise the risks of events harmful to

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13 Case Concerning the Gabčíkovo-Nagymaryos Project (n 1) [97].
14 Boisson de Chazournes and Maljean-Dubois, ‘Principes du Droit International’ (n 12) [64].
15 ibid.
the environment occurring. It imposes both obligations of means and of results. Just as with the principle of prevention, the principle of precaution is concerned with the evaluation of risk. In this way, both principles are closely intertwined with the requirement to conduct an environmental impact assessment, which is now provided for in both conventional and customary international law.

Hungary invoked the precautionary principle to justify the impossibility of respecting a treaty by which it was bound to Czechoslovakia. In this way Hungary claimed ‘that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty’ and that it was ‘forced (to terminate the Treaty) by the other party’s refusal to suspend work on Variant C’.16 Moreover, Hungary pleaded that states were required by international law to ‘take measures to anticipate, prevent or minimise damage to their transboundary resources and mitigate adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures’.17 Overall, the parties had agreed on the need to adopt a precautionary approach, but they disagreed on whether it was necessary to know if the conditions for the implementation of the concept were present in that specific situation.

The Court evoked the appearance of new norms which must be taken into account in the field of environmental protection, without however resorting to the qualification of the precautionary principle as a legal principle.18 Judge Weeramantry, in his separate opinion, stressed the necessity of taking into account *erga omnes* obligations in international judicial proceedings. The precautionary principle would belong to this category of obligations. As Judge Weeramantry said:

> We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation. When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.19

In the end, the precautionary principle did not play as significant a role as might have been expected in this case. It was not mentioned explicitly by the majority.

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16 *Case Concerning the Gabčíkovo-Nagymaros Project* (n 1) [97].
19 *Case Concerning the Gabčíkovo-Nagymaros Project* (n 1) Judge Weeramantry separate opinion, 118–19.
While the Court did not refer to precaution, it did accept that ‘vigilance and prevention’ were to be exercised in the area of the protection of the environment.\textsuperscript{20} Turning to another environmental principle that was relevant in this case, inter-generational equity purports to extend the universal application of rights to individuals not yet born. Inter-generational equity aims to ensure equity between generations. It is in this sense a principle of distributive justice.\textsuperscript{21} The spirit of the principle was expressed by the Brundtland Commission as follows:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.\textsuperscript{22}

It is evident from this expression that inter-generational equity is integral to sustainable development. Principle 2 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment also provided that ‘The natural resources of the earth ... must be safeguarded for the benefit of present and future generations ...’. Principle 5 of the Stockholm Declaration provided that ‘The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion...’ In its Advisory Opinion in Legality of the Threat or Use of Nuclear Weapons, the ICJ had recognised that ‘the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn’.\textsuperscript{23}

In Gabčíkovo-Nagymaros, the ICJ appeared to lend its support to the principle of inter-generational equity. It did so by restating what it had said in Legality of the Threat or Use of Nuclear Weapons. Also, in that case it had been considered that in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.\textsuperscript{24}

Judge Weeramantry’s dissenting opinion in the Nuclear Weapons advisory opinion recognised that ‘the rights of future generations have passed the stage when they were

\textsuperscript{20} ibid [140]; ‘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’. It should be noted that a year later in the Hormones case, the Appellate Body of the World Trade Organization (WTO), following in the footsteps of the ICJ, refused to take a position on the customary status of the precautionary principle. The Appellate Body noted ‘that the Court did not identify the precautionary principle as one of those recently developed norms. It also declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks’ (see European Communities—Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS48/AB/R, 16 January 1998, [123] and fn 93.


\textsuperscript{22} The World Commission on Environment and Development, Our Common Future (Oxford, OUP, 1987) 43.

\textsuperscript{23} Legality of the Threat or Use of Nuclear Weapons [1996] IC Rep 226, [29]; Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [112].

\textsuperscript{24} Legality of the Threat or Use of Nuclear Weapons (n 23) [36].
merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognised by civilized nations. Moreover, in placing an emphasis in "Gabčíkovo-Nagymaros" on sustainable development as embodying the ‘need to reconcile economic development with protection of the environment’, a place for intergenerational equity was recognised. Indeed, intergenerational equity has been described in the literature as forming a part of sustainable development.

Despite the differences that had arisen on the issues of the environment and development in the period prior to the case, a consensus had nevertheless culminated around the concept of ‘sustainable development’ at the time of this dispute. Defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs, sustainable development has acquired a rhetorical power for bridging gaps, at least at a preliminary level. Subsequent practice has shown the virtue of the concept of sustainable development for reconciling different interests and for establishing links between different areas of international regulation.

Even though the issues of the environment and development were considered as incompatible at the time of the Stockholm Conference in 1972, the concept of eco-development was nevertheless an observable feature of the debate at that time. It was, however, at the Rio Conference of 1992 that the concept of sustainable development emerged in earnest. Principle 4 of the Rio Declaration had recognised the existence of sustainable development (emphasising that ‘environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’), while Principle 3 provides that ‘developmental and environmental needs of present and future generations’ must be met in an equitable manner and Principle 27 calls for cooperation on elaborating sustainable development under international law. Article 3(4) of the Climate Change Convention of 1992 stipulates that ‘the parties have a right to, and should, promote sustainable development’ and the Biodiversity Convention also makes reference to ‘sustainable use’. The principle can of course be observed in a variety of contexts, including the preamble of the Agreement establishing the World Trade Organization (WTO). While its precise content and obligations remain somewhat unclear, the concept envisages that the requirements of the environment are taken into account in policy-making along with other economic and social considerations. The environment cannot be considered in isolation.

Hungary had argued that new environmental norms should be taken into consideration in the interpretation of the 1977 Treaty and also noted that, as regards

25 ibid, Judge Weeramantry dissenting, 455.
26 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [140].
27 See, for example, P Sands and J Peel, Principles of International Environmental Law (Cambridge, CUP, 2012); S Bell and D McGillivray, Environmental Law, 7th edn (Oxford, OUP, 2008).
28 See Principles 3 and 4 of the Rio Declaration on Environment and Development.
30 Boisson de Chazournes and Maljean-Dubois (n 12) [29].
31 ibid [34].
future relations between the Parties ... “a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region” should be carried out. The Court referred to sustainable development in recognising the ‘need to reconcile economic development with protection of the environment’. Moreover, ‘The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the treaty’s conclusion’. This is evidence that environmental considerations should be part and parcel of decisions taken by parties on development projects.

The Court simply referred to sustainable development as a concept and did not seem to attach any legal value to it. It was only Judge Weeramantry who recognised this principle as having an *erga omnes* character. In this respect, questions as to how such an obligation may be actionable can rightly be asked. Judge Weeramantry also described the principle of sustainable development as taking into account ‘the needs of development and the necessity to protect the environment’. Moreover, consistent with *Legality of the Threat or Use of Nuclear Weapons*, it was affirmed that whatever agreement the parties came to under the Treaty to pursue development works, the latter had to be consistent with the obligation of continuing environmental assessment.

Overall, it would seem that the ICJ considers it had a role to play in adjudicating not only the immediate dispute before it but the wider issues of interest to the international community, such as the development and application of emerging principles of environmental protection, even if this was done in a relatively nuanced way in the present case. Nevertheless, in this context, it should also be noted that this was in fact the first contentious case before the ICJ in which non-governmental organisations requested the filing of an *amicus* brief, an indication of the broader interests that the ICJ was willing to consider.

IV. THE GREENING EFFECT OF INTERPRETATION

It should not be forgotten that the progressive inroads on environmental principles were made through more conservative means in this case. While the Court never abandoned the treaty that had been agreed by the parties in place of newly developed principles of environmental protection, it nevertheless sought to interpret the 1977 treaty in light of those new principles. Indeed, the Court clarified that individual treaties are not to be interpreted in isolation but rather in the context of an evolving international law. The development of the international legal regime over

32 *Case Concerning the Gabčíkovo-Nagymaros Project* (n 1) [125].
33 ibid [140].
34 ibid [112].
time can have a bearing on the interpretation and application of existing treaties and thus the parties are called upon to take these developments into account:

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.36

Moreover, it was underlined that ‘the Treaty is not static, and is open to adapt to emerging norms of international law’.37 This evolutive interpretation found favour with the tribunal in the Iron Rhine Arbitration. There, drawing support from the ICJ’s approach in Gabčíkovo-Nagymaros, it was affirmed that ‘an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule’.38 The Tribunal cited Article 31(3)(c) of the Vienna Convention on the Law of Treaties as a legal base for a contemporaneous interpretation of the treaties at issue. According to this provision ‘any relevant rules of international law applicable in the relations between the Parties’ shall be taken into account in interpreting international agreements. The Tribunal therefore considered principles of international environmental law in their current form as relevant to its decision.39

The Arbitration Court in the Indus Waters Kishenganga Arbitration followed the same pattern of reasoning as the ICJ and the Iron Rhine Tribunal (which was in its majority composed of ICJ judges). It said:

It is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law. The Iron Rhine Tribunal applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century, when principles of environmental protection were rarely if ever considered in international agreements and did not form any part of customary international law. Similarly, the International Court of Justice in Gabčíkovo-Nagymaros ruled that, whenever necessary for the application of a treaty, “new norms have to be taken into consideration, and ... new standards given proper weight.” It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today.40

Similarly, the ICJ had suggested that no explicit treaty provision was required to apply new environmental norms in the Gabčíkovo-Nagymaros case.41 This has been commended as a sensible approach given that where treaties do not provide for obligations under customary international law—such as environmental impact

36 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [104].
37 ibid [112].
38 Arbitration Regarding the Iron Rhine Railway (Belgium v Netherlands) ICGJ 373 (PCA 2005), [80].
39 ibid [58].
40 Indus Waters Kishenganga Arbitration (Pakistan v India), Partial Award (PCA 2013), [452] (original footnotes omitted).
41 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [140].
assessments—the latter should in any event apply. This interpretative approach has been followed in subsequent cases, such as Pulp Mills, in which the Court interpreted the 1975 Statute of the River Uruguay at issue in that case as follows:

Article 41(a) distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ('con adecuación') with those guidelines and recommendations.43

One of the most important aspects of this judgment was the recognition of the concept of sustainable development, which has been described as something of an interstitial norm.44 Some international tribunals have since relied on the Court's decision in this respect. For instance, in the Iron Rhine Arbitration, the tribunal noted that sustainable development was an acknowledgment that environment and development were 'mutually reinforcing, integral concepts'.45

A significant contribution to international environmental law was also made through the recognition of 'ecological necessity', even though this did not arise on the facts in this case. Moreover, environmental impact assessment, to be conducted on an ongoing basis throughout the project, is another important take-away from this judgment.

V. INTERNATIONAL WATERCOURSES: ON EQUITY AND SUSTAINABILITY

As for the Court's indication that the international community has an interest in sustainable development, it also clarified that this is a further aspect to be considered when balancing the interests of the parties to a dispute over a particular watercourse. In this way, the decision in Gabčíkovo-Nagymaros had an important impact on the law of international watercourses. The Court connected the two concepts of equitable and sustainable utilisation of an international watercourse, emphasising that the former had to be interpreted in light of the latter. While Hungary had violated its obligations under the Treaty, the ICJ noted 'that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse'.46

45 Arbitration Regarding the Iron Rhine Railway (Belgium v Netherlands) ICGJ 373 (PCA 2005), [59]. The Tribunal also referred to the decision of the ICJ case in Gabčíkovo-Nagymaros: The Tribunal would recall the observation of the International Court of Justice in the Gabčíkovo-Nagymaros case that 'This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development' [59].
46 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [190].
The Court, in applying the principle of equitable utilisation, found that the alternative works that Slovakia sought to implement were a violation of Hungary’s right to a share of the Danube that was equitable and reasonable. In making reference to the principle of equitable and reasonable utilisation enshrined in the 1997 UN Watercourses Convention, Hungary’s ‘basic right’ to ‘an equitable and reasonable sharing of the resources of an international watercourse’ was affirmed.\(^\text{47}\) Hungary had a right to equitable and reasonable use of the watercourse, and Slovakia had violated this right.

As regards the interaction between the principle of equitable utilisation (Article 5, UN Watercourses Convention) and the obligation not to cause significant harm (Article 7, UN Watercourses Convention), Stephen McCaffrey has argued that the decision showed that the former has precedence over the latter under the UN Watercourses Convention.\(^\text{48}\) While the Court referred to the equitable utilisation principle on a number of occasions in the Gabčíkovo case, McCaffrey has noted the absence of a reference to the ‘no-harm’ principle in the Court’s judgment, despite Hungary’s reliance on it during the pleadings.\(^\text{49}\) McCaffrey goes on to suggest: ‘I do not believe that means the “no-harm” rule has been weakened; but it suggests that the Court views the principle of equitable utilisation to be the more important of the two’.\(^\text{50}\) However, is it not the case that the UN Watercourses Convention provides for an integrated approach to water management at the international level? Article 6 of the UN Watercourses Convention in fact favours a mutual and supportive application of the principles laid down in Articles 5 and 7, as they include taking into consideration ‘the effects of the use or uses of the watercourse in one watercourse State on other watercourse States’.\(^\text{51}\)

In its discussion of countermeasures, and particularly whether the internationally wrongful act committed by Czechoslovakia in implementing Variant C could be characterised as a countermeasure, the Court noted that an important consideration in this context was the effect of the countermeasure and that the latter was proportionate to the harm originally suffered. The judgment of the Permanent Court of International Justice in the River Oder Case was recited as follows: ‘(the) community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to others’.\(^\text{52}\) The majority then went on to note

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\(^{47}\) ibid [47].


\(^{49}\) ibid, 27.

\(^{50}\) ibid.


\(^{52}\) Territorial Jurisdiction of the International Commission of the River Oder (1929) PCIJ Series A No 23, 27.
that ‘Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly’. This is one of the many illustrations of the dialogue and mutual crystallisation that takes place between the International Law Commission and the ICJ in the law-making process.

Interestingly, while Article 50 of the Articles on the Responsibility of States for Internationally Wrongful Acts makes no mention of the possible illegality of countermeasures by reason of potential damage to the environment, the Gabčíkovo-Nagymaros case has shed light on some aspects of the question. During the course of proceedings before the Court, Slovakia argued that Hungary’s decision to suspend, then to abandon, the construction of the works had made it impossible for Czechoslovakia to carry out the construction work as originally envisaged by the 1977 Treaty, and that the latter thus was entitled to resort to a solution as close as possible to the original design. Slovakia equally maintained that Czechoslovakia had been under an obligation to mitigate the damage resulting from Hungary’s illegal acts. It argued that a state which is confronted by the illegal act of another state is bound to minimise its losses, and thus reduce the damages claimable from the responsible state. The damages claimed by Slovakia were nonetheless considerable, taking into account the investments made and the extra damage, economic as much as ecological, which would have resulted from leaving the works at Dunakiliti/Gabčíkovo unfinished and from the non-operation of the system; on this basis it was argued that Czechoslovakia had not only a right, but was even under an obligation, to put Variant C into action. Although Slovakia had asserted that Czechoslovakia’s conduct had been lawful, it maintained, as a secondary argument, that, even were the Court to find otherwise, the putting into action of Variant C could be justified as a countermeasure.

Was such a ‘countermeasure’ lawful? In answering that question, the Court enumerated the conditions to be satisfied in relation to the recourse to countermeasures, including the condition according to which the ‘effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question’. It concluded that the countermeasure was unlawful by reason of the fact that it deprived Hungary of its right to a fair and reasonable share of the natural resources of the Danube. An economic approach was thereby favoured, without attaching much importance to an ecological approach to proportionality. It was

53 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [85].
55 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [67].
56 ibid [68]–[69].
57 ibid [85].
58 See also the Separate Opinion of Judge Bedjaoui: ‘In any event ... Variant C is not a countermeasure capable of excusing its unlawfulness. Nor indeed is it proportionate, since from the outset it deprives Hungary of the waters of the Danube as a shared resource and also of any control over a joint investment laid down in the 1977 Treaty’. Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [52].
only in an incidental and rather timid manner that the unilateral diversion of the Danube was considered to have continuing effects on the ecology of the riparian region of Szigetköz.\textsuperscript{59} The judicial body adopted a classic approach to the assessment of the impact of countermeasures, one which is certainly important, but nevertheless is somewhat limited, given the way in which international environmental law is currently developing and taking root in the international legal system.

Could it nevertheless be argued that countermeasures disturbing the ecological and eco-systemic balance of a given area are prohibited? Can countermeasures be permitted to have negative repercussions on the environment? In other words, above and beyond the issue of proportionality or potential reversibility, could it not be envisaged that there are measures prone to damage the environment which cannot be taken in any circumstances?

Having found Slovakia’s countermeasure to be illegal by reason of its disproportionate character, the Court saw it as unnecessary to rule on further conditions on which the legality of countermeasures depends, namely that the latter must have the aim of encouraging the responsible state to carry out its obligations under international law, and that the measure must consequently be ‘reversible’.\textsuperscript{60} However, the issue of ‘reversibility’ could have provided an opportunity to hold that countermeasures having an impact on the environment are unlawful. After all, the particular and substantial characteristic of much environmental damage is its irreversibility as the Court noted itself in its judgment.\textsuperscript{61}

In its guidance to the parties, the Court stressed once more the importance of the principle of equitable and reasonable utilisation of an international watercourse and asserted that the re-implementation of the joint regime would ‘reflect in an optional way the concept of common utilization of shared water resources for the achievement of several objectives in the Treaty’\textsuperscript{62} and noted that this was in accordance with Article 5(2) of the Convention on the Law of the Non-Navigational Uses of International Watercourses, which provides ‘Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilise the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention’.\textsuperscript{63}

\section*{VI. THE LAW OF STATE RESPONSIBILITY AS A PROTECTED FORTRESS}

Another major area of law to be considered in the \textit{Gabčíkovo-Nagymaros} case was the law of state responsibility, under which umbrella a variety of issues arose. While different circumstances precluding wrongfulness had been pleaded by both
Hungary and Slovakia, the ICJ ultimately held that there were intersecting wrongs. In terminating the project, Hungary had committed an internationally wrongful act and Slovakia had similarly done so by its unilateral implementation of a modified version of the 1977 agreement. Moreover, this implementation of the so-called Variant C, an alternative to the works proposed under the 1977 Treaty, violated Hungary’s territorial integrity and sovereign independence.

The most prominent aspect of state responsibility that was discussed in the case was that of necessity. In fact, one commentator has observed that ‘It is an incontrovertible fact that the Gabčíkovo-Nagymaros case has proven to be the most prominent in contributing to the clarification [of] issues raised regarding the plea of necessity in international environmental law’. In response to Hungary’s plea that a state of ecological necessity existed, the Court noted that the state of necessity must be concerned with an essential interest of a state, that this interest must be under grave and imminent peril and there would have been no other measure to prevent this threat to the interest. While it was recognised that a state of ecological necessity could indeed exist, in this case the peril was not sufficiently imminent and there were other means available for Hungary to protect the essential interest of its natural environment. Notwithstanding, the International Law Commission noted in the Draft Articles on State Responsibility that ‘safeguarding the ecological balance has come to be considered an “essential interest” of all States’.

The ICJ left the door open for a plea of ecological necessity to be accepted under Article 33 of the Draft Articles on State Responsibility, but noted that in this case such a situation did not arise. However, it should be noted that the Court has been criticised for this finding on the facts since it did not actually evaluate in any detail the scientific data and research findings suggesting the environmental risk. It has been stated that the failure to engage in this analysis ‘failed to respect the precautionary principle in international environmental law and neglected consideration of ramifications that present uncertainties may have upon the future’. Notwithstanding, the Court did not rule out the potential for ecological necessity to justify an otherwise wrongful act was significant. In addition, the Court was also conscious of the ecological effects caused by Slovakia’s actions.

The invocation of the protection of essential interests and the ‘urgent need to safeguard essential interests’ is often used as a reason for justifying the resort to unilateral measures. This is especially the case today, a time of increased awareness of the scarcity of natural resources as well as a perceived increase in vulnerability due to developments in science and technology. This raises the question of the

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65 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [88].


68 Koe, ‘Damming the Danube’ (n 35) 612.
legality of measures taken for such reasons. 'State of necessity' as envisaged by the International Law Commission in its Draft Articles on State Responsibility for wrongful acts has been referred to in this context. International practice in this area is long-standing and the ICJ has pronounced on the matter. However, one may question the potential of this legal concept to meet new environmental challenges adequately. If there is, as the arbitral tribunal stated in the Lake Lanoux case, no rule of general international law 'that forbids one state, acting to safeguard its legitimate interests, to put itself in a situation which would in fact permit it, in violation of international pledges, seriously to injure a neighbouring state', it remains to be seen whether a state can be excused for actually going beyond the threshold of legality in unilaterally safeguarding environmental interests.

In the Gabčíkovo-Nagymaros Project case, a state of necessity as embodied in draft Article 33 of the ILC Draft Articles on State Responsibility was held to be a norm of customary international law. In approving verbatim the ILC's formulation of the state of necessity, and in considering the conditions attaching to the draft Article, the Court commented that the safeguarding of the environment was indeed an 'essential interest' for the purposes of that provision, even if on the facts of the case, Hungary could not avail itself of the defence.

If a 'state of necessity' was to be available to safeguard environmental interests, the ILC had in its commentary in 1980 nonetheless stressed the need to distance the possibility of the plea being raised in circumstances which could be associated with historical notions of necessity that did not form a part of positive international law; such as the natural law inspired 'doctrine of fundamental rights', from which stemmed a purported inherent right of self-preservation. In the past, it had been claimed that self-preservation was a right before which all other things had to yield in the event of conflict. In the nineteenth century in particular, this doctrine had provided one allegedly theoretical underpinning for action taken ostensibly under the cover of necessity, but in reality in contravention of international law. To emphasise that the necessity referred to in draft Article 33 is not a right, fundamental or otherwise, on the basis of which a state may make a claim on others, draft Article 33 is entitled 'state of necessity'. Thus, necessity is merely a situation which may temporarily exempt a state from complying with an otherwise binding obligation.

To avoid the possibility of abuse, draft Article 33 was cast in particularly strict terms. In the Gabčíkovo-Nagymaros case, the ICJ was also particularly strict in that it applied the notion of the state of necessity in a rather literal manner. The ICJ appeared to say that for the purposes of draft Article 33, the uncertainties surrounding the peril in that case, meant that the risk was insufficiently imminent to satisfy the requirements of the draft Article.

69 Lake Lanoux Arbitration (France v Spain) (1957) 24 ILR 101, 126 (emphasis added).
70 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [50].
72 ibid, 17–18, [7]–[8] and [35], [4]. See also to the same effect in Roberto Ago's report, ILC Ybk vol I (1980), 154, [41]–[45].
73 Emphasis added.
74 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [54].
The peril, according to the Court, must be ‘duly established at the relevant point in time’. It seems that the Court in fact came close to saying that for a peril to be ‘imminent’ it has to be ‘certain’. In his Second Report on State Responsibility, Special Rapporteur James Crawford considered that the Court recognised ‘the existence of scientific uncertainty was not enough, of itself, to establish the existence of an imminent peril’.75 Yet, in the environmental field, risks may not be certain and states may, in order to act in conformity with the precautionary principle, need to take action before the risk is as ‘imminent’ as the International Court would seem to require. In his report to the Commission in 1999, the Special Rapporteur considered the possibility that the current provision in Article 33, be relaxed to accommodate the precautionary principle. He stated: ‘in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be substantial areas of scientific uncertainty, and different views may be taken by different experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances’.76 Were the precautionary principle accommodated within Article 33, there would be greater scope for unilateral action to safeguard the environment. However, the Special Rapporteur decided against such an amendment, on the basis of the possibility of abuse of the Article.77

In Gabčíkovo-Nagyamaros, it was accepted that a state of necessity was an exceptional circumstance precluding wrongfulness, as provided for in customary international law and under Article 33 of the 1980 ILC Draft Articles on the Responsibility of States, and this approach was followed in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.78

Hungary had also argued that Slovakia’s insistence on the implementation of Variant C meant that a temporary state of necessity was converted into a permanent state of necessity, which in turn should terminate the treaty. On this point, the Court clarified that a permanent state of necessity cannot exist to terminate a treaty since a state of necessity must always be temporary in nature and this can only suspend a treaty until the state of necessity disappears. This, the ICJ observed, was the intention of the drafters of Article 61 of the Vienna Convention on the Law of Treaties.79

VII. THE SANCTITY OF TREATIES

In another major area of international law that arose in this case, the ICJ turned its attention to the law of treaties. In fact, while certain doors were opened, the

76 ibid.
77 ibid; Boisson de Chazournes, ‘Unilateralism’ (n 11).
79 Case Concerning the Gabčíkovo-Nagyamaros Project (n 1) [102].
sanctity of the treaty was also very carefully preserved. Hungary had argued that a fundamental change of circumstances justified the termination of the treaty. This argument was, however, rejected on the facts of this case. The political situation was not closely connected to the object and purpose of the 1977 Treaty and could not be considered an essential basis of the consent underlying the treaty, which had fundamentally changed since the conclusion of the 1977 Treaty. The same reasoning was applied to the economic conditions as well as to environmental considerations.  

According to the Court, a fundamental change of circumstances must 'have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty'. In this way—and following a similar line of reasoning to that made in respect of the state of ecological necessity—the door was left open for environmental considerations to constitute the basis for a fundamental change in circumstances.

As for the claim that there had been a material breach of the treaty by Slovakia, as had been alleged by Hungary, while the violation of a treaty provision or treaty provisions may justify resort to certain countermeasures by an injured state, termination of the treaty was held not to be justified by such a violation. Countermeasures should in fact be distinguished from the concept of material breach under Article 60 of the Vienna Convention on the Law of Treaties. In this respect, the Court took the opportunity to clarify that the law of state responsibility and the law of treaties are separate branches of international law whose scope is also distinct. As such,

[a] determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

Consequently, 'when it invoked the state of necessity in an effort to justify [its] conduct, Hungary chose to place itself from the outset within the ambit of the law of state responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful'.

Overall, the Court underlined that it was only 'a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty', as is provided for under Article 60 of the Vienna Convention. There was also an incongruence in the timing given that the breach of the 1977 Treaty by Slovakia, namely the operation of the Variant C works, was

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80 Fitzmaurice, 'The Gabčíkovo-Nagymaros Case' (n 2) 333–34.
81 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [104].
82 Klabbers, 'The Substance of Form' (n 3).
83 Case Concerning the Gabčíkovo-Nagymaros Project (n 1) [47].
84 ibid [48].
85 ibid [106].
not until October 1992, which was after Hungary’s notification of its intention to terminate the treaty in May 1992. Hungary was therefore unable to avail of material breach as a ground on which to terminate the 1977 Treaty.

The principle of *pacta sunt servanda* was ensured and preserved, even though both parties to the treaty had not complied with the treaty. Almost alarmingly, the Court noted that it would set a dangerous precedent for the principle of *pacta sunt servanda* ‘if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at a great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance’.\(^{86}\) The Court also noted that, even if there was a state of necessity, this was not a ground for the permanent termination of a treaty. Once the state of necessity has passed, regular treaty obligations are restored.

The treaty had been concluded and all efforts should be made to keep it alive. This was emphasised with the Court ultimately asking the parties to negotiate in the context of the treaty. The ICJ clarified that Hungary and Slovakia were free to agree upon and incorporate into the 1977 Treaty ‘newly developed norms of environmental law’, albeit that a situation under Article 64 of the Vienna Convention on the Law of Treaties arose.\(^{87}\)

Ultimately relying on the parties’ judgment, the ICJ (as the Permanent Court of International Justice did in the *Diversion of the River Meuse*\(^ {88}\) dispute) left the parties to negotiate an agreement that would put an end to their dispute on the basis of the Court’s decision:

It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses ... What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty.\(^ {89}\)

VIII. CONCLUSION

The *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) case is undoubtedly a landmark case. Not only does it deal with an impressive array of legal disciplines, it also breaks new ground in many respects. This is particularly with regard to the principle of sustainable development and ecological necessity. However, while the Court opened the doors to these newly emerging principles and concepts in

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\(^{86}\) ibid [114].  
\(^{87}\) ibid [112].  
\(^{88}\) *Diversion of Water from the River Meuse (Netherlands v Belgium)* (1937) PCJ Series A/B No 4.  
\(^{89}\) *Case Concerning the Gabčíkovo-Nagymaros Project* (n 1) [141]–[142].
international law, we must remember that it ultimately held on the basis of more traditional precepts. With the benefit of hindsight, we now know that the opening of those doors was in and of itself significant. Although one swallow does not make a summer, this case has become a foundation stone for the ongoing emergence and consolidation of international environmental law. Indeed, developments since its rendering, such as the evolution of evidence in environmental cases, the *Pulp Mills* case,\(^90\) the *Whaling* case,\(^91\) and the role of experts, all represent further swallows.

