(c) Case Analysis

The Gabčíkovo-Nagymaros Case Seen in Particular From the Perspective of the Law of International Watercourses and the Protection of the Environment

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Keywords: environmental protection; *Gabčíkovo-Nagymaros* case; International Court of Justice; law of international watercourses; state of necessity.

Abstract: The subject-matter of this article is the Judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros* case. Following an exposition of the relevant facts, it continues with a critical analysis of the Judgment of the Court. In addition to a brief analysis of the issues involving the law of treaties, the law of state responsibility, the law of state succession, and the *treaty* obligations of Hungary and Slovakia relating to the use of Danube water and the protection of its environment, it focuses on the rules and principles of *general* international law concerning the use of international watercourses and the protection of the environment that were applied by the Court in this case.

1. Introduction

On 25 September 1997 the International Court of Justice rendered its Judgment in the case concerning the *Gabčíkovo-Nagymaros Project*,[1] involving the construction and operation of a number of works in the Bratislava-Budapest section of the Danube river. International judicial or arbitral cases concerning the utilization of international watercourses are rare, so that, apart from other merits of the case, a new judgment on that matter is of particular interest. In fact, the present Court has so far never dealt with such a

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1. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997. At the time of the writing of this article the ICJ Report containing the Judgment had not yet appeared. Use was made of a preliminary publication issued by the Court after the rendering of the Judgment; *see also* 37 ILM 168 (1998), which, however, only contains English-language opinions of the Judges. The full text of the Judgment is available on the Internet:http://www.icj-cij.org/idocket/ihs/ihsjudgement/ihsjudcontent.html.

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case to any extent. Its predecessor, the Permanent Court of International Justice (PCIJ) had been more fortunate. Reference may be made first to the Judgment of the PCIJ of 10 September 1929 in the case concerning the *Territorial Jurisdiction of the International Commission of the River Oder*,[2] involving a dispute between Great Britain, Czechoslovakia, Denmark, France, Germany, and Sweden on the one hand and Poland on the other. In that case the PCIJ was requested to decide on the territorial limits of the jurisdiction of the International Commission of the Oder under the provisions of the 1919 Treaty of Versailles.

A second judgment of the PCIJ involving the utilization of an international watercourse was its Judgment of 28 June 1937 in the case of the *Diversion of Water From the Meuse*.[3] In this case, the Court was merely concerned with the interpretation or observance of certain treaty obligations entered into by the litigating states, i.e. Belgium and The Netherlands. The decision was therefore of little or no interest for the establishment of substantive rules or principles of general international law concerning the use of international watercourses or protection of the environment. The same can be said about the decisions rendered by the Lake Ontario Claims Tribunal in 1968 in the *Gut Dam* case,[4] in which the Tribunal confirmed a treaty obligation of Canada to compensate United States citizens for damage caused to them by the Gut Dam.

More interesting from the point of view of general international watercourse law is the early case concerning the *Helmand River Delta*[5] between Afghanistan and Iran. The sharing of the water of this river between the two countries gave rise to two Arbitral Awards, *viz.* the Award of 19 August 1872, rendered by the British General Goldsmid, and the Award of 10 April 1905, rendered by the British Colonel McMahon.[6] Both Awards appear to have been mainly based on equitable considerations.

Particularly interesting from the point of view of general international watercourse law is also the much more recent Award of 16 November 1957 rendered by the Arbitral Tribunal established by France and Spain in the

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2. Territorial Jurisdiction of the International Commission of the River Oder (Great Britain, Czechoslovakia, Denmark, France, Germany, and Sweden *v.* Poland), Judgment of 10 September 1929, 1929 PCIJ (Ser. A) No. 23. *See* for this and other cases mentioned in the introduction, J.G. Lammers, Pollution of International Watercourses, Chapter VI (1984).
3. Diversion of Water From the River Meuse (Netherlands *v.* Belgium), Judgment of 28 June 1937, 1937 PCIJ (Ser. A/B) No. 70.
4. Gut Dam (Canada *v.* United States); *see* for the excerpts of this case the Report of the Agent of the United States Before the Lake Ontario Claims Tribunal, 8 ILM 118-143 (1969).
5. Helmand River Delta (Afghanistan *v.* Iran); *see* with regard to the Helmand controversy, M.M. Whiteman, Digest of International Law (Vol. 3) 1031-1032 (1964).
6. *Id.*

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well-known *Lake Lanoux* case.[7] In this case, which dealt with a project planned by France to divert water from a lake in the French Eastern Pyrenees which has a natural outlet flowing into the Carol river, which in its turn flows into Spain, the Arbitral Tribunal, *inter alia*, stated that, in principle, the use of the water of an international watercourse was not subject to a prior agreement with the other riparian state. Yet, international practice reflected the conviction that states ought to strive to conclude such agreements. In the opinion of the Tribunal, the upstream state was also under an obligation, according to the rules of good faith, to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it was genuinely concerned to reconcile the interests of the other riparian state with its own.[8]

The Judgment recently rendered by the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project* dealt with a great variety of issues of international law. Among those, problems involving the law of treaties took a most prominent place, including, *inter alia*, the question of the applicability of the 1969 Vienna Convention on the Law of Treaties[9] in the present case or the extent to which that Treaty could be deemed to codify already existing customary international law.

Further points of discussion were the possibilities of, conditions for, and consequences of the termination and/or suspension of the operation of a treaty, *in casu* the 1977 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks concluded between Hungary and Czechoslovakia on 16 September 1977[10] (1977 Treaty). This involved an examination by the Court of various grounds, invoked by Hungary, for terminating or suspending the 1977 Treaty, such as supervening impossibility of performance, fundamental change of circumstances, material breach, reciprocal non-compliance, or, invoked by Slovakia, the feasibility of (non-agreed) alternative modes of achieving or approximating the objectives of that Treaty. Furthermore, to what extent could Slovakia be deemed to have succeeded Czechoslovakia (or the Czech and Slovak Republic) in respect of treaties entered into by Czechoslovakia, in particular the 1977 Treaty, and to

7. Lake Lanoux (Spain *v.* France), reproduced (in French) *in* 62 RGDIP 79-119 (1958) and 12 UNRIAA 285-317 (1963). For the English translation, *see* 24 ILR 105-142 (1957).
8. *Id.*, 24 ILR, at 139.
9. 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).
10. 1977 Treaty Between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks, signed in Budapest, 16 September 1977, 1109 UNTS 211 and 236 (English translation).

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what extent could that Treaty be deemed to create rights and obligations 'attaching to the territory'?[11]

Another area of problems dealt with by the Court related to issues of state responsibility, such as the relationship between the law of state responsibility and the law of treaties, "state of necessity" as a ground for precluding the wrongfulness of an act, the obligation to mitigate damages, the feasibility in the present case of so-called countermeasures, and the implications of intersecting wrongs.

It is abundantly clear that the present case dealt with *concrete works* involving the utilization of a particular international watercourse and *their factual implications* for the environment. However, the question remains to what extent the *legal* considerations of the Court did, in addition to the above-mentioned issues involving the law of treaties, the law of state responsibility, and *treaty* obligations of Hungary and Slovakia relating to the use of Danube water and protection of the environment, also expound on rules and principles of *general* international law concerning the use of international watercourses or protection of the environment. In the following analysis of the Judgment of the Court, we will, after an exposition of the relevant facts, concentrate mainly on those parts of the Judgment which may be regarded of particular interest from the perspective of the law of international watercourses and protection of the environment.

2. THE FACTS

The boundary between Hungary and Slovakia is constituted, in the major part of that region, by the main channel of the Danube river. Čunovo and, further downstream, Gabčíkovo are situated on Slovak territory in this section of the river on Slovak territory (Čunovo on the right bank and Gabčíkovo on the left). Further downstream, after the confluence of various branches, the Danube river enters Hungarian territory. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (*see* sketch-map No. 1).

11. *Cf.* Art. 12 of the 1978 Vienna Convention on Succession of States in respect of Treaties, 17 ILM 1488 (1978).

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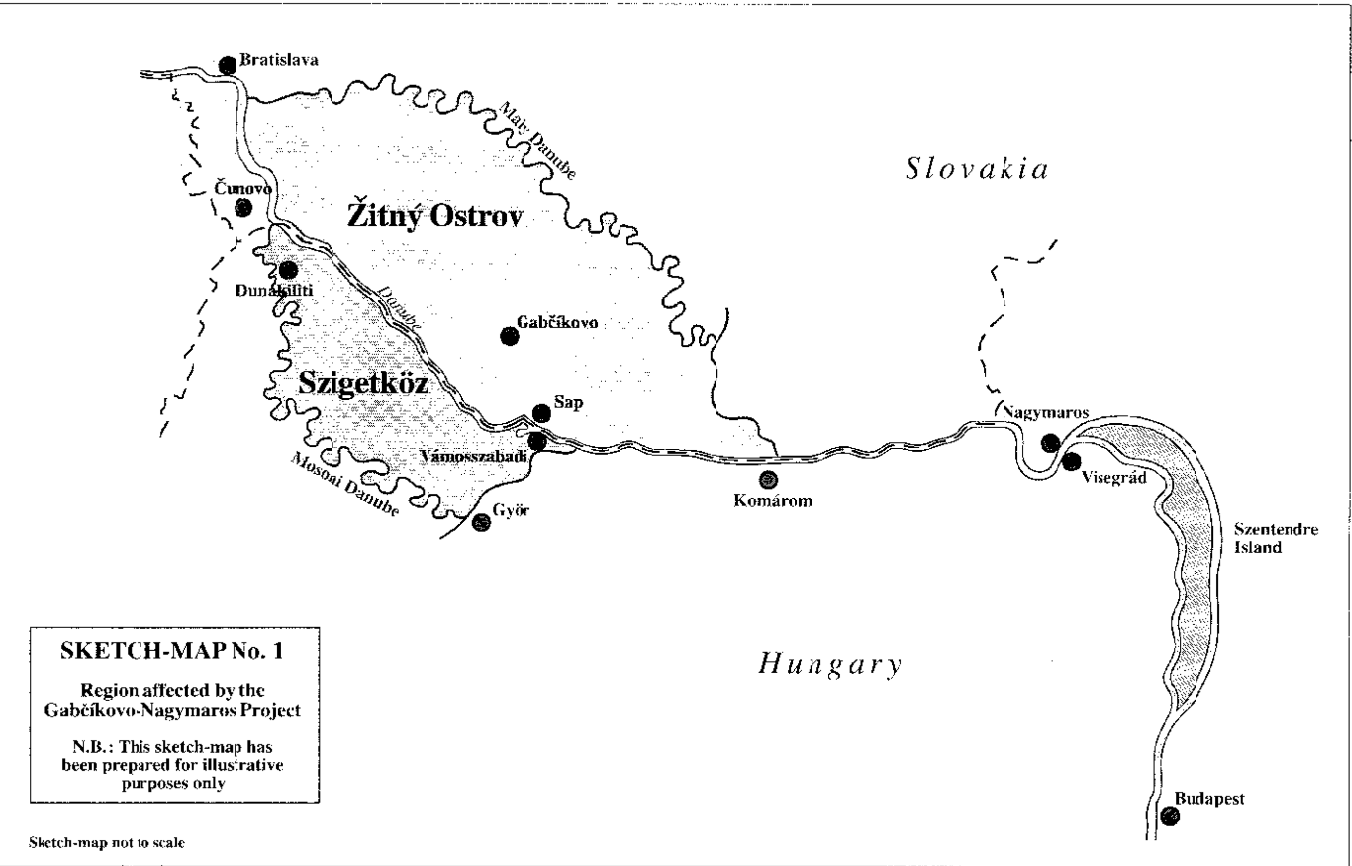

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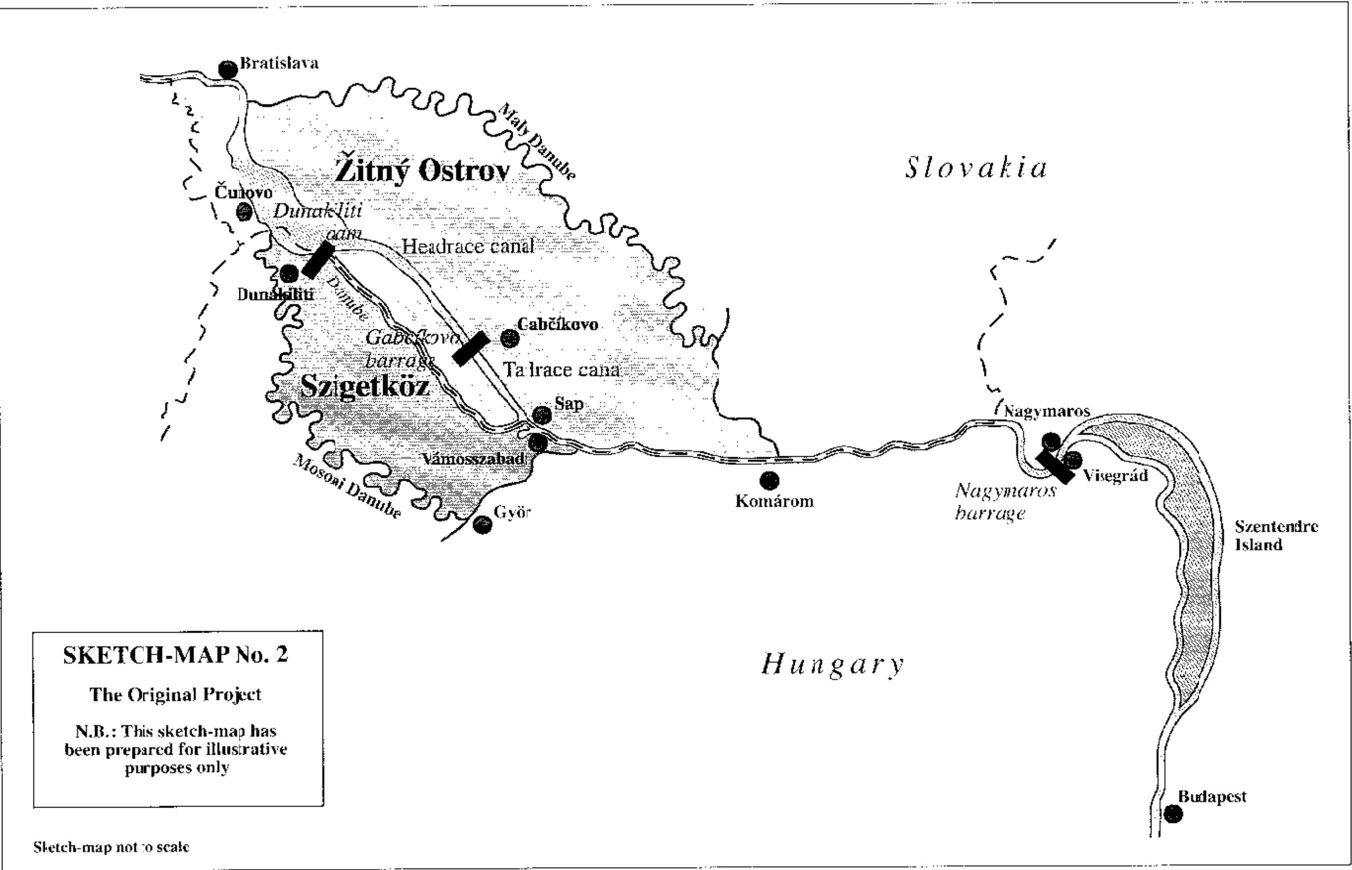

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The 1977 Treaty, referred to above, provided for the construction and operation of a system of locks by the parties as a "joint investment".[12] According to its Preamble, the system was designed to attain

> the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties.[13]

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube, and the protection of the areas along the banks against flooding. At the same time the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Gabčíkovo-Nagymaros Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the system of locks would be observed.

The 1977 Treaty described the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works"[9] (*see* sketch-map No. 2). The works were to comprise, *inter alia,* a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks (together with a hydro-electric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the Danube;[14] a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydro-electric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.[15] The Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two governments for this purpose on 6 May 1976.[16] It also provided for the construction, financing, and management of the works on a joint basis in which the parties participated in equal measure.[17] Hungary would have had control of the sluices at Dunak-

12. Art. 1(1) of the 1977 Treaty, *supra* note 10.
13. Preamble of the 1977 Treaty, *id.*
14. *Id.*, Art. 1(2).
15. *Id.*, Art. 1(3).
16. *Id.*, Art. 1(4).
17. *Id.*, Arts. 5, 7, 8, 9, and 12.

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iliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčíkovo.

The schedule of work had been fixed in an Agreement on mutual assistance signed by the two Parties on 16 September 1977,[18] at the same time as the Treaty itself. The Agreement made some adjustments to the allocation of the works between the parties as laid down by the Treaty.

Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 to accelerate the Project.[19]

In the spring of 1989, the work on the Gabčíkovo sector was well-advanced: the Dunakiliti dam was 90 percent complete and the Gabčíkovo dam was 85 percent complete; the bypass canal was between 60 percent (downstream of Gabčíkovo) and 95 percent (upstream of Gabčíkovo) complete, and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 percent complete, depending on the location. This was not the case in the Nagymaros sector, where, although dykes had been built, the only structure relating to the dam itself was the Coffer-dam which was to facilitate its construction.

In the wake of the profound political and economic changes which occurred at this time in Central Europe, the Gabčíkovo-Nagymaros Project became, particularly in Hungary, the object of increasing apprehension. Uncertainties not only about the economic viability of the Project, but also its implications for the preservation of the environment led to growing opposition. As a result of the intense criticism which the Project had generated in Hungary, the Hungarian government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which were to be finished before 31 July 1989. On 21 July 1989, the Hungarian government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the *status quo* at Dunakiliti.

During this period, negotiations took place between the parties. Czechoslovakia also started investigating alternative solutions. One of them, an alternative solution subsequently known as "Variant C", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some ten kilometres upstream of Dunakiliti (*see* sketch-map No. 3). In its final stage, Variant C included the construction at Čunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corre-

18. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 21. 1977 Agreement on Mutual Assistance, 32 ILM 1263 (1978).
19. *Id.*

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sponding reservoir was to have a smaller surface area and provided approximately 30 per cent less storage than the reservoir initially contemplated. Provision was made for ancillary works.

On 23 July 1991, the Slovak government decided to begin construction in September 1991 to put the Gabčíkovo Project into operation following the provisional solution. Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian government transmitted to the Czechoslovak government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to dam the river.

On 1 January 1993 Slovakia became an independent state. On 7 April 1993 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 Gabčíkovo-Nagymaros Project[20] was signed in Brussels. According to Article 2 of that Agreement, the parties submitted the following questions to the Court:

> Article 2
> (1) Court is requested to decide on the basis of the 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 Gabčíkovo Project for which the 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 October 1992 this system [...] (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 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 questions in paragraph 1 of this Article.[21]

20. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 2; and 1993 Special Agreement Between the Republic of Hungary and the Slovak Republic for Submission to the International Court of Justice of the Differences Between Them Concerning the Gabčíkovo-Nagymaros Project, reproduced *in* 32 ILM 1291 (1993).
21. *See* 1993 Special Agreement, *id.*, Art. 2.

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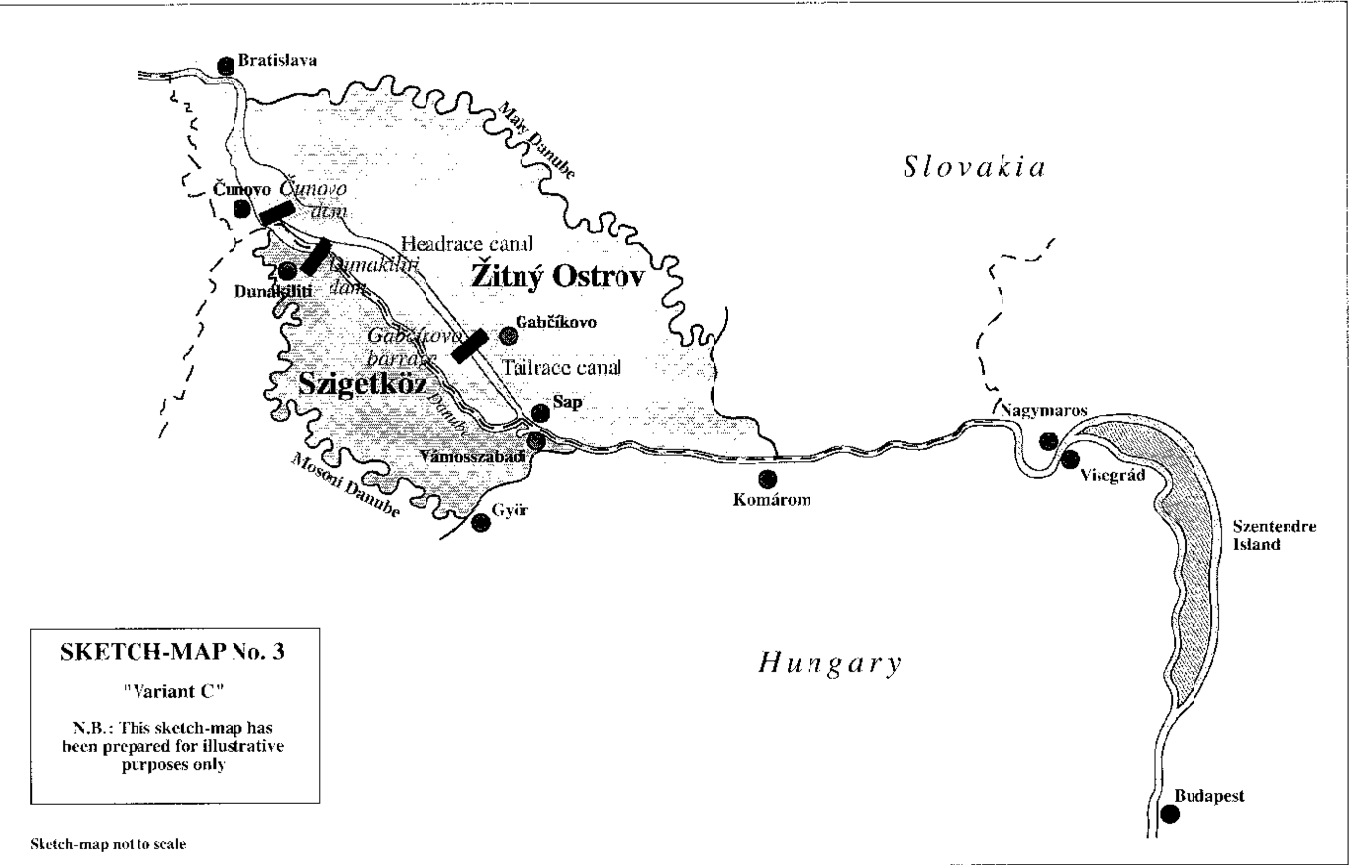

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According to Article 4 of the Special Agreement, the parties agreed that pending the final Judgment of the Court they would establish and implement a temporary water management régime for the Danube, which would come to an end 14 days after the Judgment of the Court.

According to Article 5, the parties would accept the Judgment of the Court as final and binding upon them and execute it in its entirety and in good faith. Immediately after the transmission of the Judgment the parties would enter into negotiations on the modalities for its execution. If they would be unable to reach agreement within six months, either party would be entitled to request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

3. Suspension and Abandonment by Hungary, in 1989, of Works on the Project – Invocation of a "State of Ecological Necessity"

In 1989, Hungary's main justification for its decision to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to Hungary was the existence of what it called "a state of ecological necessity".[22] Hungary contended that the various installations in the Gabčíkovo-Nagymaros System of Locks had been designed to enable the Gabčíkovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 km^2) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčíkovo. Such a system, though considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.[23]

According to Hungary, the principal ecological dangers caused by this system were as follows. The groundwater level would fall in most of the Szigetköz. Furthermore, the groundwater would then no longer be supplied by the Danube – which, on the contrary, would act as a drain – but by the reservoir of stagnant water at Dunakiliti and the side-arms, which would become silted up. In the long term, the quality of water would deteriorate seriously. As for the surface water, risks of eutrophication would arise, particularly in the reservoir; instead of the old Danube there would be a river choked with sand, where only a relative trickle of water would flow. The network of arms would for the most part be cut off from the principal bed.

22. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 40.
23. *Id.*

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The fluvial fauna and flora, like those in the alluvial plains, would be condemned to extinction.[24]

As for Nagymaros, Hungary argued that, if that dam were built, the bed of the Danube upstream would silt up and, consequently, the quality of the water collected in the bank-filtered wells would deteriorate in this sector. What is more, the operation of the Gabčíkovo power plant in peak mode would occasion significant daily variations in the water level in the reservoir upstream, which would constitute a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would cause the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore fall in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would be appreciably diminished. The filter layer would also shrink or perhaps even disappear, and fine sediments would be deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would be severely jeopardized.[25]

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a "state of ecological necessity" did indeed exist in 1989.

The first reaction of the Court in respect of this argument was that by placing itself within the ambit of the law of state responsibility from the outset, Hungary by necessity implied that in the absence of a state of ecological necessity its conduct would have been unlawful, i.e. that it had, in 1989, not acted in accordance with its obligations under the 1977 Treaty or that those obligations had not ceased to be binding upon it.[26]

Several questions could be raised here and were in fact, in part, raised by the Court.

(a) What is to be understood by a state of necessity, under what conditions may it be invoked, and what are the legal consequences of such a state of necessity?
(b) To what extent can a state of necessity be regarded as part and parcel of existing general international law?
(c) To what extent can (transboundary) detrimental interference with the environment or the utilization of a natural resource give rise to a state of necessity?
(d) To what extent could Hungary *in the present case* validly invoke a state of necessity in order to justify an otherwise unlawful suspension

24. *Id.*
25. *Id.*
26. *Id.*, para. 48.

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and abandonment of works that it was committed to perform under the 1977 Treaty? and

(e) To what extent would a state of necessity free a state invoking such a state from a duty to pay compensation for damage cause to another state?

3.1. Ad (a) and (b)

A state of necessity is a circumstance or ground precluding the wrongfulness of an otherwise internationally wrongful act. Its existence entails that certain consequences which general international law, in particular the law of state responsibility, normally attaches to the occurrence of internationally wrongful acts, will not take place. Hence, there is no obligation to cease the conduct concerned as long as it is justified by a state of necessity. There will be no obligation to provide satisfaction to the injured state or to give it assurances and guarantees of non-repetition. Moreover, there will be no justification for the injured state to resort to countermeasures.

Certain consequences normally attached by the law of state responsibility to internationally wrongful acts, such as the duty to provide for restitution in kind and/or to pay compensation, if and to the extent that the damage is not made good by restitution in kind, may, however, exist as well in the case of conduct justified by a state of necessity. This is a matter to which we will come back below. (*See* Section 3(e), *infra*.)

In the present case both parties were, as noted by the Court, in agreement that the existence of a state of necessity had to be evaluated in the light of the criteria laid down by the International Law Commission (ILC) in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading.[27] After having quoted Article 33 in full the Court was quick to note "that the state of necessity is a ground *recognized by customary international law* for precluding the wrongfulness of an act not in conformity with an international obligation",[28] thereby not only stating that the concept as such, but *also the description of its criteria* by the International Law Commission were to be regarded as part and parcel of existing customary international law.

27. ILC Draft Articles on State Responsibility, reproduced *in* 37 ILM 440-467 (1998) and Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, UN Doc. A/51/10, at 125-151.

28. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 51 (emphasis added).

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3.2. Ad (c)

Certain statements made by the ILC in its Commentary to the Draft Articles[29] are here of particular relevance. It stated that a state of necessity could not only arise in the case of a grave danger to, for example, the existence of the state itself, its political or economic survival, the maintenance of conditions in which its essential sources can function, the keeping of its internal peace, but also in the case of a grave danger to "the ecological preservation of all or some of its territory" and, moreover, that "[i]t is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States".[30] These statements indicate that in the view of the ILC the protection and preservation of the régime, both in its quantitative and qualitative aspects, of an international watercourse ("some of its territory") and its ecosystem may well involve an "essential interest" of each of the watercourse states concerned, the safeguarding of which may under circumstances lead to acts in principle unlawful under international law, but justified by a state of necessity.

Moreover, even an action within the territory of another state in order to protect vital ecological interests does not seem to be ruled out by the ILC.[31]

3.3. Ad (d)

The Court had no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region of the Gabčíkovo-Nagymaros Project related to an "essential interest" of Hungary within the meaning given to that expression in Article 33 of the ILC Draft Articles on the International Responsibility of States.

In this connection the Court recalled the statement which it had recently made in its Advisory Opinion in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*.[32] Stressing the great importance which it attached to respect for the environment, not only for states but also for the whole of mankind, it had noted on that occasion:

> [t]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond na-

29. Commentary to the Draft Articles, 1980 YILC, Vol. II (Part Two), at 49, para. 32.
30. 1980 YILC, Vol. II (Part Two), at 34 *et seq.*
31. *Id.*, at 39-40.
32. Legality of the Threat of Use of Nuclear Weapons (Request for Opinion by the General Assembly of the United Nations), Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 3.

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> tional control is now part of the corpus of international law relating to the environment.[33]

In the present case it remained, however, to be seen whether Hungary's recognized essential interest could be deemed, in 1989, to have been threatened by "a grave and imminent peril" and whether the measures taken by Hungary to suspend and abandon the works could be regarded as "the only means of safeguarding [its] essential interest against [that] grave and imminent peril".[34]

Here the Court recalled that Hungary on several occasions expressed, in 1989, its "uncertainties" as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, but went on to state:

> [t]he Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a 'peril' in the sense of a component element of a state of necessity. The word 'peril' certainly evokes the idea of 'risk'; that is precisely what distinguishes 'peril' from material damage. But a state of necessity could not exist without a 'peril' duly established at the relevant point in time; the mere apprehension of a possible 'peril' could not suffice in that respect. It could moreover hardly be otherwise, when the 'peril' constituting the state of necessity has at the same time to be 'grave' and 'imminent'. 'Imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'. As the International Law Commission emphasized in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time' (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[35]

Thus the apprehension of merely a *possible* "peril" does not suffice. Moreover, the "peril" when established must be "grave" and "imminent". The Court's observations with regard to the notion of "imminence" are particularly interesting. In the view of the Court "imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". That does not, however, exclude in the view of the Court that a "peril" *appearing in the long term* might be held to be "imminent" as soon as it is established, at the relevant point of time, that the *realization* of that peril, *however far off it might be*, is not thereby any less certain and inevitable.

The Court then first considered the situation at Nagymaros and in particular the problems for the environment possibly resulting from the upstream reservoir, if the works at Nagymaros had been carried out as planned,

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33. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para 53.
34. Art. 33(1)a of the ILC Draft Articles on State Responsibility, *supra* note 27.
35. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para 54.

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and concluded that the dangers ascribed to the upstream reservoir remained uncertain and that there was no question of a grave and imminent peril at the time at which Hungary suspended and abandoned the works relating to the dam. This was mainly because no final decision had been taken with regard to the modalities of the operation of the dam (in peak-load time and continuously during high water or not).[36] With regard to the alleged danger arising from the lowering of the riverbed downstream of Nagymaros and the possible harmful consequences for the supply of drinking water to the city of Budapest, the Court pointed out that the bed of the Danube in the vicinity of Szentendre Island had already been deepened *prior to 1980* in order to extract building materials and that the peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the works at Nagymaros. Moreover, the Court stressed that even supposing, as Hungary maintained, that the construction and operation of the Nagymaros dam would have created serious risks, Hungary had means available, other than the suspension and abandonment of the works, of responding to the situation. It could, for example, have proceeded regularly to discharge gravel into the river downstream of the dam or, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The fact that the purification of the river water, like the other measures envisaged, would have been a more costly technique was, according to the Court, "not determinative of the state of necessity".[37]

With regard to Hungary's concerns in the Gabčíkovo sector relating, on the one hand, to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement, and quality of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube, the Court could only find that, here again, the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. Hungary could, in this context also, in the view of the Court, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to have been in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms.[38]

The Court concluded from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without pre-

36. *Id.*, para. 55.
37. *Id.*, para. 55.
38. *Id.*, para. 56.

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judging their *possible* gravity, were not sufficiently established in 1989, nor were they "imminent", and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of the works with which it had been entrusted. Finally the Court observed that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity, as it had helped by act or omission to bring that state of necessity about. Accordingly, the Court saw no need to consider whether Hungary, by proceeding as it did in 1989, seriously impaired an essential interest of Czechoslovakia within the meaning of the above-mentioned Article 33 of the ILC Draft articles on State Responsibility a finding which, however, did not in any way prejudge the damage Slovakia may claim to have suffered on account of Hungary's conduct.[39]

3.4. Ad (e)

The question could be raised whether, if the Court had found that there existed a state of necessity justifying Hungary's otherwise unlawful suspension and subsequent abandonment, in 1989, of the works on the Nagymaros Project and on its part of the Gabčíkovo Project, this would have freed Hungary from a duty to pay compensation for damage caused to Czechoslovakia.

The ILC Draft Articles on State Responsibility do not take a definitive stand on this issue. Article 35 entitled "Reservation as to compensation for damage" merely provides:

> [p]reclusion of the wrongfulness of an act of a state by virtue of the provisions of article 29, 31, 32 or 33 [state of necessity] does not prejudge any question that may arise in regard to compensation for damage caused by that act.[40]

It may be wondered whether this reservation should relate not only to the question of compensation for damage caused, but also to the question of restitution in kind, that is, the re-establishment of the situation which existed before the act justified by a state of necessity was committed, where this would be materially possible and not involve unreasonable burdens for the state which had acted in a state of necessity. However this may be, this question was hardly touched by the Court in the present case. The Court merely pointed out rather *en passant* "that Hungary expressly acknowledged

39. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 57.
40. Art. 35 of the ILC Draft Articles on State Responsibility, *supra* note 27.

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that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner".[41]

In the light of the conclusions reached above, the Court found in answer to the question put to it in Article 2, paragraph 1(a), of the Special Agreement that in 1989 Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty attributed responsibility to it.[42]

4. Czechoslovakia's Proceeding to, and Putting Into Operation of, Variant C

Hungary's decision to suspend and abandon most of the construction works which it was obliged to undertake under the 1977 Treaty, led, as we have seen, Czechoslovakia to proceed unilaterally in November 1991 with what it called a "provisional" alternative solution, known as Variant C.

Variant C was put into operation by Czechoslovakia unilaterally and exclusively under its own control and for its own benefit in October 1992. According to Slovakia, Hungary's decision to suspend and abandon the works which it was obliged to construct under the 1977 Treaty had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and it was therefore entitled to proceed with a solution which was as close to the original Project as possible. In order to justify the construction and operation of Variant C, Slovakia invoked "the principle of approximate application" which it claimed to be a principle of international law and a general principle of law.[43]

Slovakia further maintained that Czechoslovakia was also under a duty to mitigate the damage resulting from Hungary's unlawful actions, so that Czechoslovakia was not only entitled but even obliged to implement Variant C. Slovakia argued that even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a lawful countermeasure.

The Court's reaction with regard to "the principle of approximate application" invoked by Slovakia was quick and brief:

> [i]t is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of 'approximate application' because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

41. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 48.
42. *Id.*, para. 59.
43. *Id.*, para. 67.

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> As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.
>
> Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.
>
> Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.[44]

Accordingly the Court concluded that Czechoslovakia in *putting* Variant C *into operation*, was not applying the 1977 Treaty, but on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act. Moreover, the final part of the quoted statement of the Court seemed to imply that Variant C was also not to be considered compatible with Hungary's "basic right to an equitable sharing of the resources of an international watercourse" under *general international law*.

Slovakia's argument that it was acting under a duty to mitigate damages when it carried out Variant C as "it is a principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained",[45] was also quickly disposed of by the Court in the following terms:

> [i]t would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle

44. *Id.*, paras. 76-78.
45. *Id.*, para. 80.

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> might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[46]

Slovakia's alternative line of argument that Variant C, if it were to be considered unlawful, could in any event be regarded as a lawful countermeasure to Hungary's illegal acts was also rejected by the Court. The Court considered that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure *because it was not proportionate*.

> [i]n the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.
>
> In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated 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 the others' (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27).*
>
> 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.
>
> The Court considers that Czechoslovakia, 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 – with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz – failed to respect the proportionality which is required by international law.[47]

The Court's statement is remarkable in various respects. First, because the Court's statement assumed – rightly in my view – the existence under general international law of the right of a riparian state of an international watercourse to an equitable and reasonable share of the natural resources of such a watercourse. Somewhat strange though is that while the Court expressly noted in this connection the recently (21 May 1997) adopted UN Convention on the Law of the Non-Navigational Uses of International Watercourses[48] – which clearly reflects each watercourse state's right to an equitable and reasonable share of the natural resources of such a watercourse – as a further strengthening of the much more abstract and general principle

46. *Id.*
47. *Id.*, para. 85.
48. UN Convention on the Law of the Non-Navigational Uses of International Watercourses, UN Doc. A/51/869 of 11 April 1997, reproduced *in* 36 ILM 703-718 (1997).

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quoted by the PCIJ in the *River Oder* case regarding "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 the others".[49] It is further clear from the statement that the Court considered Czechoslovakia's Variant C not only as a breach of the 1977 Treaty, but also as a breach of Hungary's right to an equitable and reasonable share of the natural resources of the Danube under general international law. Such a breach of a treaty obligation or of a rule or principle of general international law is, however, a constituent element of the concept of a countermeasure and henceforth does not make the countermeasure *necessarily* unlawful.

So, more is needed to make such a breach of an obligation of international law an unlawful countermeasure, such as because the countermeasure was *not proportionate*. As we have seen, the Court did indeed conclude that this was the case with Variant C. The point is, however, that the Court hardly elaborated on *why* Variant C was to be considered as a disproportionate reaction to Hungary's unlawful suspension and abandonment of the works it was obliged to construct under the 1977 Treaty. It seems as if in the statement of the Court a breach of the 1977 Treaty or of Hungary's right under general international law to an equitable and reasonable share of the natural resources of the Danube almost necessarily involved a *disproportionate* breach, compared to the breach of the 1977 Treaty committed by Hungary itself. Remarkable in this connection is also that the Court makes such broad references to concepts or principles of *general* international water law, as if no treaty obligation existed between Czechoslovakia and Hungary. It is submitted that in the present situation, where not only in the eyes of Slovakia but also of the Court the 1977 Treaty continued to be valid between Czechoslovakia and Hungary, the *unlawfulness* and the *disproportionate nature* of the unlawful Variant C should have been judged by the Court – at least as between Slovakia and Hungary – in the light of the 1977 Treaty and perhaps certain other treaties, such as, according to Hungary, the 1976 Budapest Convention on the Regulation of Water Management Issues of Boundary Waters, *alone*.

5. HUNGARY'S NOTIFICATION ON 19 MAY 1992 OF THE TERMINATION OF THE 1977 TREATY

In order to justify the lawfulness of its notification, on 19 May 1992, of the termination of the 1977 Treaty, Hungary presented five arguments, *viz.*: again the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the

49. *See* Gabčikovo-Nagymaros Project, *supra* note 1, para. 85 (emphasis added).

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material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. None of these arguments convinced the Court.[50]

Even if a state of necessity were found to exist, it could, according to the Court, not be a ground for the termination of the Treaty. It could only be invoked to exonerate from its responsibility a state which had failed to implement a treaty. Impossibility of performance[51] as a ground for terminating the 1977 Treaty did not exist, according to the Court, as the "object indispensable for the execution of the treaty"[52] (supposedly the legal régime envisaged by it) could not be deemed to have definitively ceased to exist.

The 1977 Treaty – and in particular its Articles 15, 19, and 20 – actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The invocation by Hungary of the occurrence of a fundamental change of circumstances[53] was rejected by the Court because the changed circumstances advanced by Hungary were, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. Moreover, the prevalent political conditions and economic system in force at the time of the conclusion of the 1977 Treaty were not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties. Nor did the Court consider that the new developments in the state of environmental knowledge and of environmental law could be said to have been completely unforeseen. Indeed the formulation of Articles 15,19, and 20 were designed to accommodate change.[54]

Hungary's main argument for invoking a material breach[55] of the 1977 Treaty as a ground for terminating it was the construction and putting into operation of Variant C. The Court made, however, a distinction between the *construction* of the works which would lead to the putting into operation of Variant C, which it did not regard unlawful, on the one hand, and the *putting into operation* of Variant C when Czechoslovakia diverted the waters of the Danube into the bypass canal in October 1992, on the other hand, which it did regard as a breach of the 1977 Treaty. Accordingly, the notification of termination of the Treaty by Hungary on 19 May 1992 took place at a moment when, according to the Court, no breach of the Treaty by Czechoslovakia had yet taken place. Moreover, it should be kept in mind, that, ac-

50. *Id.*, paras. 89-115.
51. *See* Art. 61 of the 1969 Vienna Convention on the Law of Treaties, *supra* note 9.
52. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 51, and para. 102.
53. Art. 62 of the 1969 Vienna Convention on the Law of Treaties, *supra* note 9.
54. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 104.
55. Art. 60 of the 1969 Vienna Convention on the Law of Treaties, *supra* note 9.

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cording to the Court, even if at the time of Hungary's termination of the Treaty, Czechoslovakia had violated a provision essential to the accomplishment of the object or purpose of the Treaty, that violation would have been the result of Hungary's own prior wrongful conduct and that such conduct would have prejudiced the right of Hungary to terminate the Treaty.[56]

However, as we will explain later, the distinction made by the Court between the lawful construction of the works of Variant C and the unlawful putting into operation of those works may be regarded as questionable.

6. Development of New Norms or Standards of International Environmental Law

It is interesting to see how the Court dealt with Hungary's claim that it was entitled to terminate the 1977 Treaty because *new requirements of international law for the protection of the environment* precluded performance of the 1977 Treaty.

Neither of the parties had – in our view rightly – contended that new *peremptory* norms of environmental law (*ius cogens*) had emerged since the conclusion of the 1977 Treaty, so that there was no need for the Court to consider the (analogous) application of Article 64 of the 1969 Vienna Convention on the Law of Treaties, which provides that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." However, thereafter, the Court pointed out:

> [t]hat newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.
>
> By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.
>
> The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation

56. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 110.

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> and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.[57]

Later, when dealing with the legal consequences of the Judgment, the Court would emphasize again the obligation of the parties to take new environmental norms and standards into consideration:

> [i]n order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing – and thus necessarily evolving – obligation on the parties to maintain the quality of the water of the Danube and to protect nature.
>
> 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. [...]
>
> Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such 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. 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. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[58]

It becomes clear from these statements that the Court found a basis *in the 1977 Treaty itself* for the obligation of the parties to take newly developed norms and standards of international environmental law into consideration when agreeing upon the means to be specified in the Joint Contractual Plan or evaluating the Project's impact on the environment. Those newly developed norms or standards of environmental law were also to be incorporated by the parties *by agreement* through the application of Articles 15, 19, and

57. *Id.*, para. 112.
Art. 15 (Protection of Water Quality) reads: "1. The Contracting Parties shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks. 2. The Monitoring of water quality in connection with the construction and operation of the System of Locks shall be carried out on the basis of the agreements on frontier waters in force between the Governments of the Contracting Parties."
Art. 19 (Protection of Nature) reads: "[t]he Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."
Art. 20 (Fishing Interests) reads: "[t]he Contracting Parties, within the framework of national investment, shall take appropriate measures for the protection of fishing interests in conformity with the Danube Fisheries Agreement, concluded at Bucharest on 29 January 1958." (*See* 339 UNTS 23).

58. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para 140.

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20 of the Treaty. The Court spoke of those Articles as imposing a continuing – and thus necessarily evolving – obligation on the parties to maintain the quality of the water of the Danube and to protect nature. The fact that those Articles did not contain *specific* obligations of performance for the parties was also important in this respect as well as the fact that Articles 15 and 19 obliged the parties to protect the quality of the water in the Danube and nature in general *by means which were still to be specified by them in the Joint Contractual Plan*. Under these circumstances it may be regarded quite normal that the parties were under a legal obligation to "take into consideration" new norms and standards of international environmental law which should be incorporated in the 1977 Treaty "by agreement". In other words the Court did *not* state that new norms or standards of international law which had developed *after* the conclusion of an international agreement were *always* to be *applied* by the parties to that agreement where relevant, or were *always* to be taken into account *in the interpretation* of provisions of such an agreement where relevant.

It also became clear in the case under discussion that although new norms or standards of international environmental law were to play a role, it was a much more modest role *subject to mutual agreement* than the one Hungary had in mind when it invoked those new norms as a justification for *terminating the 1977 Treaty*. Of that, there was no question at all. On this matter the Court finally concluded:

> [b]oth Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.[59]

The Court finally concluded that the fact that both Hungary and Czechoslovakia had failed to comply with their obligations under the 1977 Treaty did not bring the Treaty to an end or justified its termination. In the light of this and other considerations and conclusions of the Court set forth above, the Court finally found that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty.

7. Did Slovakia Become a Party to the 1977 Treaty as Successor to Czechoslovakia?

Hungary contended that, even if the 1977 Treaty survived the notification of termination, it ceased in any event to be in force as a treaty on 31 December

59. *Id.*, para 113.

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1992 as a result of the "disappearance of one of the Parties".[60] On that date Czechoslovakia ceased to exist as a legal entity and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence. According to Hungary, there was no rule of international law which provided for automatic succession to bilateral treaties on the disappearance of a party and such a treaty would only survive by express agreement between the succeeding state and the remaining party. Such agreement, it maintained, was never reached with regard to the 1977 Treaty. The Court refused to pronounce itself on the question whether or not there existed a rule of customary international law providing for automatic succession to treaties in the case of dissolution of a state. Instead it drew attention to the *special nature and character of the 1977 Treaty*. According to the Court:

> [a]n examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational régime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the Parties undertook to ensure uninterrupted and safe navigation on the international fairway in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.[61]

According to the Court, the 1977 Treaty constituted a treaty establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention on Succession of States in respect of Treaties.[62] It stated further that the International Law Commission which had drafted Article 12 had indicated that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties".[63]

According to Article 12, such treaties created rights and obligations attached to territory – *in casu* parts of the Danube – which were not affected by a succession of states. Article 12 reflected, moreover, in the view of the Court, a rule of customary international law, a fact which neither Hungary or Slovakia had disputed. The Court, therefore, concluded that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

60. *Id.*, para.117.
61. *Id.*, para. 123.
62. 1978 Vienna Convention on Succession of States in Respect of Treaties, *supra* note 11.
63. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 123.

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8. LEGAL CONSEQUENCES OF THE JUDGMENT

After having determined the lawfulness or unlawfulness of the conduct of the parties in the *past*, the Court proceeded to determine what the rights and obligations of the parties would be in the *future*. The parties would have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.[64] Although it was of cardinal importance that the Court had found that the 1977 Treaty was still in force and consequently governed the relationship between the parties, the Court also realized that the Treaty had not been fully implemented by either party for years and that a new factual situation – with the practical possibilities and impossibilities to which it gave rise – had arisen, which could not be disregarded when deciding on the legal requirements for the future conduct of the parties. It was, however, essential that this new factual situation would be placed within the context of the preserved and developing treaty relationship in order to achieve its object and purpose in so far as that was feasible.

The Court then went on to state that the parties were under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty – not only production of energy, but also improvement of the navigability of the Danube, flood control, regulation of ice-discharge, and protection of the environment – could best be served, keeping in mind that all of them should be fulfilled. The Court then stressed again, as we have already set forth above, the obligation of the parties to take new norms and standards of international environmental law into consideration when judging the Project's impact upon, and its implications for, the environment. As stated by the Court:

> [t]he Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.[65]

However, the Court also made clear that it was not for the Court to determine what should be the final result of these negotiations to be conducted:

> [i]t 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

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64. *See* 1993 Special Agreement, *supra* note 20.
65. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 140.

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> well as the norms of international environmental law and the principles of the law of international watercourses.[66]

What was required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties,[67] was that the parties were to find an agreed solution within the co-operative context of the 1977 Treaty. It was the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application.

Thereafter the Court proceeded stating that the 1977 Treaty did not only contain a joint investment programme but also established a régime. According to the Treaty, the main structures of the System of Locks would be the joint property of the parties; their operation would take the form of a co-ordinated single unit; and the benefits of the project should be equally shared. Since the Court had found that the Treaty was still in force and that, under its terms, the joint régime was a basic element, it considered that, unless the parties agreed otherwise, such a régime should be restored. The Court was therefore of the opinion that the works at Čunovo should become a jointly operated unit as had been the original plan for the works at Dunakiliti. The Court also concluded that Variant C, which it considered operated in a manner incompatible with the Treaty, should be made to conform to it.[68]

Having thus indicated what in its view should be the effects of its finding that the 1977 Treaty was still in force, the Court then turned to the legal consequences of the internationally wrongful acts committed by the parties. Both parties claimed to have suffered considerable financial losses and both claimed pecuniary compensation for them. In its Judgment the Court concluded that both parties committed internationally wrongful acts and that consequently Hungary and Slovakia were both under an obligation to pay compensation and were both entitled to obtain compensation. The Court observed, however, that given the fact that there had been intersecting wrongs by both parties, the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the parties were to renounce or cancel all financial claims and counter-claims. Of course, the settlement of accounts for the construction of the works was not to be confused with the issue of compensation and had to be resolved in accordance with the 1977 Treaty. If Hungary was to share in the operation and benefits of the Čunovo complex, it would also have to pay a proportionate share of the building and running costs.[69]

66. *Id.*, para. 141.
67. 1969 Vienna Convention on the Law of Treaties, *supra* note 9.
68. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 146.
69. *Id.*, para. 154.

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9. CONCLUDING REMARKS

The question that most divided the Court was whether Czechoslovakia was entitled to proceed in November 1991 with Variant C (only nine votes out of six in favour) and whether it was entitled to put Variant C into operation as from October 1992 (only ten votes in favour and five against).

One of the basic questions here was whether it was really possible to view – as the Court did – the construction of Variant C as separable from the putting into operation thereof. Further, if the construction and putting into effect of Variant C was to be considered unseparate, was this construction and putting into operation of Variant C then to be considered lawful or unlawful?

It is clear that since the conclusion of the 1977 Treaty the legal relationship between Czechoslovakia and Hungary was no longer governed by rules and principles of general international water law. The 1977 Treaty prescribed the principal works in Czechoslovakia and Hungary to be constructed in pursuance of the Project. It provided for the *construction and operation* of the works by the parties as a "*joint investment*".

According to the 1977 Treaty, the works were to constitute a *single* and *indivisible* operational system of works the technical specifications of which were to be included in the Joint Contractual Plan, which was to be drawn up in accordance with the Agreement signed by the two governments for this purpose on 6 May 1976.[70] It provided for the *construction*, financing, and management of the works *on a joint basis* in which the parties were to participate in equal measure. Under these circumstances it was in my view extremely difficult to separate – as the Court did – the construction phase of Variant C from the phase of the putting into operation thereof and to come to different conclusions as to the lawfulness of each phase.

It appears from the declarations, separate and dissenting opinions of 11 of the 15 judges that an "unseparated" approach would have had their preference. This did, of course, not mean that all those judges would subsequently have come to the same conclusion as to the lawfulness of the construction and the putting into operation of Variant C by Czechoslovakia. Indeed not less than 6 of the above-mentioned 11 judges (i.e. President Schwebel and Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, and Rezek) held the view with which I agree that not only the putting into operation of Variant C but also its construction constituted in itself a clear deviation from the obligations resting upon Czechoslovakia under the 1977 Treaty and was therefore unlawful. It is interesting that among the five judges who considered not only the construction, but also the putting into operation of Variant C lawful (i.e. Judges Oda, Koroma, Vereshchetin,

70. *Id.*, para. 18.

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Parra-Aranguren, and Skubiszewski), only one (i.e. Judge Vereshchetin) clearly seemed to base his conclusion mainly on the ground that Variant C could be considered as a valid *countermeasure* under international law.

The Court's decision to distinguish between the construction phase and the putting into operation of Variant C and to consider the former lawful and the latter unlawful enabled it to arrive at a much more "balanced" and therefore "politically" palatable decision than would otherwise have been possible. In this way the Court was able to reach its conclusion that at the time Hungary notified the termination of the 1977 Treaty (i.e. on 19 May 1992), Hungary could not validly invoke a material breach of the 1977 Treaty by Czechoslovakia as a ground for terminating that treaty, for at that time Variant C had not yet been put into operation. In this way it was not difficult for the Court to uphold its finding that the 1977 Treaty continued to be valid between Czechoslovakia and Hungary.

The question may be raised whether this finding would not have been possible when the Court had come to the conclusion that also the *construction* of Variant C did already in fact constitute a breach of the 1977 Treaty. Certain statements made by the Court seemed to imply a negative answer to this question, i.e. "that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct" and that

> Hungary, by its own conduct, had prejudiced its right to terminate the Treaty" and "this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.[71]

The Court did not pursue the matter further so we do not know what the definitive view of the Court would have been. In any event, one may wonder whether a distinction should be made on the one hand between non-compliance by Czechoslovakia of certain obligations under the 1977 Treaty as a result of Hungary's conduct which hindered Czechoslovakia's compliance with those obligations, and on the other hand certain conduct by Czechoslovakia to which it was not absolutely compelled by Hungary's wrongful conduct and which violated the 1977 Treaty, such as the construction and putting into operation of Variant C. By declaring the construction of Variant C not unlawful, the Court was able to evade this question. The continued existence of the 1977 Treaty between Czechoslovakia and Hungary enabled the Court to infer therefrom continued – although as a result of the past conduct of both parties modified – obligations to achieve as much as possible the object and purpose of the 1977 Treaty.

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71. *Id.*, para. 110.

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In concluding that the construction of Variant C was lawful, but the putting into operation of it unlawful, the Court eventually not only placed Slovakia in a position of having committed an internationally wrongful act, but also under an obligation to pay compensation to the other party for any damage caused to it. Since Hungary found itself *mutatis mutandis* in the same position, a certain balance in the position of the two parties existed also on the point of compensation. This created the basis for a settlement whereby both parties were to renounce or cancel all financial claims and counter-claims.

The fact that only three (instead of five) judges voted against the operative paragraph of the Court which declared both Hungary and Slovakia liable to pay compensation to the other party is explained by the fact that the majority of the judges decided not to allow a separate vote on each of the two issues.

It should be noted that the fear which may have existed on the part of some that the Court would take the opportunity in the present case to declare the prevalence of environmental concerns or (developing) norms of international environmental law over incompatible (earlier) treaty obligations were not realised. This fear was by the way not entirely unjustified in view of the fact that in the words of Judge Bedjaoui the case

> est la première grande affaire que la Cour traite, dans laquelle il existe un arrière-fond écologique tellement sensible qu'il a envahi le devant de la scène au point de risquer de détourner le regard du droit des traités.[72]

First of all, neither of the two parties in this case claimed that norms of international environmental law constituted existing or emerging norms of *ius cogens* and the Court in its turn was clearly not eager to deal with that question.

Moreover, while the Court recognized that the concept of the state of necessity as a circumstance precluding wrongfulness could arise in the case of a grave danger to the preservation of all or some of a state's territory and that safeguarding the ecological balance has come to be considered an essential interest of all states, it was also clear that it was only willing to recognize the existence of a state of ecological necessity under very strict conditions which in the present case had not been met by Hungary.

Further, there was no question in the present case of an autonomous application (i.e. beyond the will of the parties to the 1977 Treaty) by the Court of new norms or standards of international environmental law in derogation of obligations assumed by the parties in the 1977 Treaty at the time of its

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72. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 18 (Judge Bedjaoui, Separate Opinion) (not yet published).

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conclusion. The Court, as we have seen, did not go in any detail to specify those new norms or standards of international environmental law leaving that matter rather to the parties themselves to decide by agreement. It rather generally referred to "the *concept* of sustainable development" as aptly expressing the "*need* to reconcile economic development with protection of the environment".[73] Vice-President Weeramantry was in fact the only judge who on this point was considerably more explicit in his separate opinion. In his view both the right to development and the right to environmental protection are principles currently forming part of the *corpus* of international law. These two rights might collide unless there was a principle of international law which indicated how they should be reconciled. That principle is the principle of sustainable development, which, in his view, is more than a mere concept, but is itself a recognized principle of contemporary international law. Sustainable development is not a new concept and a rich body of global experience is available for its development today. The Court, as representing the main forms of civilization, needs, in his view, to draw upon the wisdom of all cultures. Among the principles that can be so derived from these cultures are the principles of trusteeship of earth resources, intergenerational rights, protection of flora and fauna, respect for land, maximization of the use of natural resources while preserving their regenerative capacity, and the principle that development and environmental protection should go hand in hand. Judge Weeramantry further stressed the duty of continuous environmental impact assessment of a project as long as it continues in operation.[74]

It should be concluded that seen from the perspective of the *general* international law of international watercourses or protection of the environment the present Judgment of the Court brought little news.

The Court re-confirmed that

> the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment,[75]

a statement which it had already made in its Advisory Judgment in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*.[76]

The Court further recognized "the basic right [of a watercourse State] to an equitable and reasonable sharing of the resources of an international wa-

73. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para 140.
74. Gabčíkovo-Nagymaros Project, *supra* note 1, Parts A and B (Vice-President Weeramantry, Separate Opinion).
75. *Id.*, para. 53.
76. Legality of the Threat or Use of Nuclear Weapons, *supra* note 32.

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tercourse" basing itself on the earlier Judgment of the PCIJ in the *River Oder* case and on "evidence" provided 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".[77]

Interesting, and to be kept well in mind by international water lawyers, is the Court's conclusion that the 1977 Treaty constituted a treaty establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention on Succession of States in respect of Treaties and that this Article reflected a rule of customary international law, thereby underwriting the ILC's view that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties",[78] which are not affected by a succession of States.

Finally, it may be recalled that, according to the Special Agreement (Article 5, paragraph 2), Hungary and Slovakia were to enter into negotiations on the modalities of the execution of the Judgment immediately after its transmission, which took place on 25 September 1997. In case they would be unable to reach agreement within six months, either Slovakia or Hungary would be entitled to request the Court to render an additional Judgment to determine the modalities for executing its Judgment (Article 5, paragraph 3).

Indeed, Hungarian and Slovak delegations have met on a number of occasions after the rendering of the Court's Judgment to negotiate on the modalities of the execution of the Judgment. According to the summary of the Press Conference held after the Hungarian government meeting of 3 March 1998 and other reports in the press,[79] this has eventually led to a draft agreement between the two delegations. The draft agreement would, *inter alia*, provide that Hungary was to build a dam at Nagymaros after all. Moreover, the respective claims for compensation were to be settled on mutual terms. The draft agreement still requires the formal agreement of the two governments. Although the Hungarian government seems to consider the draft agreement as a good basis for a formal intergovernmental agreement, it has made its formal approval dependent on the outcome of further studies on the economic viability and technical feasibility of the project and its environmental impact. These studies are to be completed at the end of December 1998 at the latest. This was a device to maintain the negotiating process and at the same time to preserve the unity of the Hungarian government coalition through a crucial electoral period. Although the Slovak government would be entitled to bring the matter before the International Court

77. Gabcikovo-Nagymaros Project, *supra* note 1, para. 85.
78. *Id.*, para. 123.
79. *See* the summary of the Press Conference held after the (Hungarian) government meeting of 3 March 1998; *see also* NRC-Handelsblad, 2 March 1998, at 5, and De Volkskrant, 2 March 1998, at 4.

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of Justice again as from 25 March 1998, the Hungarian government hopes and expects that the Slovak government will refrain from doing so since the negotiating process has not broken down and the draft agreement remains under consideration. However, if the Slovak government were to decide to bring the matter before the Court again, Hungary recognizes, that it would not be in a position to prevent it from doing so and will be prepared to appear again before the Court.

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