The *Gabčíkovo-Nagymaros* Case: The Law of Treaties

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Abstract: The subject-matter of this article are the issues of treaty law as expounded in the Judgment in the *Gabčíkovo-Nagymaros* case. The following problems are discussed: unilateral suspension and abandonment of obligations deriving from the binding treaty; the principle of fundamental change of circumstances; unilateral termination of a treaty; applicability of the 1969 Vienna Convention on the Law of Treaties in this case; legal status of so-called 'provisional solution'; impossibility of performance and material breach of treaty; the application of the principle of 'approximate application'; and the principle *pacta sunt servanda*. The issues are discussed at the background of the Drafts of the International Law Commission.

1. INTRODUCTION

The main issues in the judgment in the *Gabčíkovo-Nagymaros* case[1] focus on the law of treaties, and the Court in rendering this judgment has contributed greatly to the development, or at least clarification, of the law in this field by rendering this judgment. The author of this study does not wish to diminish the importance of other aspects of this case, such as environmental law or law of international watercourses; nonetheless, the basis of the whole dispute between Hungary and Slovakia in this case, is derived from the interpretation of the treaty in question and other related documents.

The judgment contains a wealth of particular issues on the law of treaties including the following: unilateral suspension and abandonment of obligations stemming from a treaty in force; unilateral termination of a treaty; applicability of the 1969 Vienna Convention on the Law of Treaties;[2] interpretation of Articles 60 and 62 of the 1969 Vienna Convention (material breach, impossibility of performance, and fundamental change of circumstances); the principle of 'approximate application'; and the principle *pacta sunt servanda*. Apart from these clear-cut issues of the law of treaties, the

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1. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997 (not yet published). The full text of the Judgment is available on the Internet: http://www.icj-cij.org/idocket/ihs/ihsjudgement/ihsjudcontent.html.
2. 1969 Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), reproduced *in* 8 ILM 679 (1969).

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Court further touched upon a large group of related problems, including, for instance, the relationship between the law of treaties and state responsibility; succession of treaties; and territorial régimes. In a short essay, however, it is impossible to analyse all these problems and the present author will thus concentrate on the relatively clear cut issues, leaving the wider issues for future study.

2. THE FACTUAL BACKGROUND RELATING TO THE LAW OF TREATIES

2.1. Relevant terms of the 1977 Treaty

The dispute between Hungary and Czechoslovakia (as it then was) over the Danube River Dam aroused great interest even before it was ruled upon by the International Court of Justice (ICJ).[3] It is an undisputed fact that the project to build the dam in question arose from the wish to "strengthen the relationship between the two countries and to bring economic development to the region".[4] In order to put the project into effect, the two states concluded the 1977 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks (the 1977 Treaty).[5] The 1977 Treaty provided for the construction of a single and indivisible operational system of locks. The head-water installation was to be erected in Hungarian territory at Dunakiliti, which is situated at the border between the two states. The Danube as a result would be dammed and an artificial lake would be created of about 60 square kilometers, two thirds of which was to be situated in Czechoslovak territory and one third in Hungarian territory. From there, water would flow for about 17 kilometers through a by-pass canal to the hydro-electric station at Gabčíkovo and thence would flow for about 8 kilometers through a canal back to the original bed of the Danube. A second

3. *See, e.g.*, E. Hoenderkamp, *The Danube: Damned or Dammed? The Dispute Between Hungary and Slovakia Concerning the Gabčíkovo-Nagymaros Project*, 8 LJIL 287 (1995); G.M. Berrisch, *The Danube Dam Dispute Under International Law*, 46 Austrian Journal of International Law 231 (1994); P.R. Williams, *International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary Concerning Construction of the Gabčíkovo and Nagymaros Dams*, 19 Columbia Journal of Environmental Law 1 (1994); C. Cepelka, *The Dispute Over Gabčíkovo-Nagymaros System of Locks Is Drawing to a Close*, 20 Polish Yearbook of International Law 64 (1991); and E. Robert, *L'Affaire relative au project Gabčíkovo-Nagymaros (Hongarie/Slovaquie). Un nouveau conflit en matière d'environment devant la Cour International de Justice?*, XLVII Studia Diplomatica 17 (1994).
4. Berrisch, *supra* note 3, at 233.
5. 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 on 16 September 1977 (1977 Treaty), reproduced *in* 32 ILM 1247 (1993).

power station was to be built at Nagymaros, about 100 kilometers downstream. As a part of the project, the parties agreed to the modification of the Danube bed between Dunakiliti and Nagymaros (Article 1, paragraphs 1, 2, and 3). The costs of the project were to be borne by the parties jointly in equal measure (Article 1(1)). Each party had specified responsibilities as to the construction and operation of the project (Article 5(1)). All the major constructions were to be owned jointly by the parties (Article 8). The parties would jointly use and benefit from the operation of the project (Article 9(1)). An Agreement on mutual assistance, concluded by the two parties on 30 June 1978, fixed the schedule of works.[6]

As stated by the Court in its Judgment,

> the Project was to have taken the form of an integrated joint project with two contracting parties on an equal footing in respect to financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have the control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have control of the works at Gabčíkovo.[7]

There were also a number of provisions in the 1977 Treaty covering additional objectives, such as environmental protection, flood control, and navigation on the relevant stretches of the river Danube. In this respect, the Court found, in a statement to which further reference will be made in Section 5 *infra*,

> that the 1977 Treaty was not only a joint investment project for the production of energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy.[8]

Finally, on the terms of the 1977 Treaty, it is necessary to note, in view of the considerable importance attached to it by the Court (*see* Section 5 *infra*) that the Court further found that "[t]he 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabčíkovo and Nagymaros was prescribed by the Treaty itself".[9] The Court then refers to various manifestations of the parties desire for, or willingness to contemplate, alterations to aspects of the works as prescribed in the original Treaty,

6. 1977 Agreement on Mutual Assistance, reproduced *in* 32 ILM 1263 (1993).
7. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 20.
8. *Id.*, para. 135.
9. *Id.*, para. 138.

and concludes by stating that "[t]he explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable".[10]

2.2. The course of work on the Project

The work on the Project started to break down in the early 1980s due to growing scepticism in Hungary as to its ecological viability. This was coupled with economic problems. Hungary subsequently suspended construction of its share of the project.

On 10 October 1983, two Protocols to the 1977 Treaty were signed.[11] One amended Article 4(4) of the 1977 Treaty and the other amended the Agreement on mutual assistance,[12] to slow down the works and to postpone putting the power plants into operation. Further, at the request of Hungary, the two states signed a third Protocol on 6 February 1989 (1989 Protocol).[13] The purpose of this Protocol was to accelerate construction and shorten it to 15 months. On 13 May 1989, the Hungarian government unilaterally announced suspension of the construction works on the Nagymaros Project for two months in order to conduct further studies and to consider the Project alternatives.[14] On 20 July 1989, it extended suspension for a further three months, i.e. until 31 October 1989. This extension related as well to the Dunakiliti and Gabčíkovo sites.

In response to these measures, the Czechoslovak government warned of the possibility of the introduction of a unilateral provisional solution. On 31 October 1989, the Hungarian Parliament stopped construction of the entire Project indefinitely and authorized the Hungarian Council of Ministers to conduct negotiations with the other party on the modification of the 1977 Treaty. Negotiations were interrupted by the "velvet revolution". They resumed, and at the same time domestic experts appointed by both parties were to conduct ecological studies. The new Hungarian government considered construction of the Project a mistake. In 1991, the Hungarian Parliament authorized termination of the 1977 Treaty and conclusion of a new agreement which would provide for the consequences of discontinuation of the Project and the rehabilitation of the Danube area. Since the negotiations proved to be unsuccessful, Czechoslovakia started, on 18 November 1991,

10. *Id.*, para. 139.
11. *See* 32 ILM 1263 (1993).
12. Agreement on Mutual Assistance, *supra* note 6.
13. *See* 32 ILM 1263 (1993).
14. Hungary informed Czechoslovakia on 24 May 1989 of the suspension. *See* Declaration of the Government of the Republic of Hungary on the Termination of the Treaty Concluded Between the People's Republic of Hungary and the Socialist Republic of Czechoslovakia on the Construction and Joined Operation of the Gabčíkovo-Nagymaros Barrage System, reproduced *in* 32 ILM 1260-1290 (1993).

to construct within its territory the 'provisional solution' (so-called "Variant C"). The purpose of this was to allow operation of the Gabčíkovo Dam without Hungary.

In February 1992, the Hungarian government notified the Czechoslovak Government that it regarded the provisional solution to be incompatible with international law and a violation of its territorial integrity. On 16 May 1992, the Hungarian government unilaterally announced termination of the 1977 Treaty. The Czechoslovak government refused to accept this termination on the basis that the declaration of the Hungarian government did not state the grounds for termination, in consequence of which the Czechoslovak government considered the 1977 Treaty to be still in force. On 24 October 1992, the Czechoslovaks began to divert the Danube into the power canal.

An attempt by the EC Commission to bring about an interim solution between the parties to the dispute failed. On 1 January 1993, Czechoslovakia dissolved into two successor states: the Czech Republic and the Slovak Republic. In relation to the Gabčíkovo-Nagymaros Project, Slovakia was marked as the sole successor. On 7 April 1993, the 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 was concluded.[15]

3. THE TERMS OF THE SPECIAL AGREEMENT AND THE LAW OF TREATIES

The Court was asked by the parties to the dispute to decide numerous issues of the law of treaties. Firstly, it was requested to determine the status of the 1977 Treaty. This involved the determination by the Court of

> 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 the responsibility to the Republic of Hungary.[16]

and "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".[17]

The Court was also requested to determine the status of the 'provisional solution' in that it was asked to answer the question

15. 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 1293 (1993).
16. *Id.*, Art. 2(1a). *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 2.
17. *Id.*

> whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1992, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at the river kilometre 1851.7 on the Czechoslovak territory and resulting consequences on water and navigation course).[18]

Finally, the Court was 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".[19]

4. THE PROVISIONS OF THE JUDGMENT AND THE LAW OF TREATIES

4.1. The applicability of the 1969 Vienna Convention on the Law of Treaties to the present Case

The Court remarked, as it has done on many previous occasions, that some rules contained in the 1969 Vienna Convention "might be considered as a codification of existing customary law".[20] It may be said that in many respects Articles 60 and 62 of the 1969 Vienna Convention,[21] which relate to termination and suspension of treaties, contain such rules. On this point, the parties to the dispute were broadly in agreement. The 1969 Vienna Convention is not directly applicable to the 1977 Treaty, since both parties to the dispute ratified the 1969 Vienna Convention only after the conclusion of the 1977 Treaty.[22] Nonetheless, the 1969 Vienna Convention is applicable to the 1989 Protocol.

4.2. Suspension and Termination of the 1977 Treaty

The starting point of the analysis of this issue is the statement included in the Judgment that

> [t]he two parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place[23]

18. *Id.*, Art. 2(1b) of the Special Agreement, *supra* note 15.
19. *Id.*, Art. 2(2).
20. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 46.
21. 1969 Vienna Convention, *supra* note 2.
22. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 99.
23. *Id.*, para. 39.

and that the 1977 Treaty does not contain any provision on its termination. Moreover, the Court could not infer any indication that the parties intended to admit even any possibility of denunciation or withdrawal. The Court was of the view that the contrary conclusion may be drawn, namely, that the 1977 Treaty aimed at the establishment of "a long-standing and durable régime of joint investment and joint operation".[24]

The Court stated that determination of the issue whether a convention is or is not in force, and whether all conditions to suspend it or denounce it have been fulfilled, is to be made by the Court on the basis of the law of treaties, not on the basis of the law of state responsibility. The Court, however, admitted that

> 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.[25]

The Court interpreted the conduct of Hungary in 1989, i.e. suspending and subsequently abandoning the works, as clearly indicating its unwillingness to comply with at least some provisions of the 1977 Treaty and the 1989 Protocol, as specified in the Joint Contractual Plan.[26] Indeed, the Court put it quite forcefully in saying that "[t]he effect of Hungary's conduct was to render impossible the accomplishment of the system of works the Treaty expressly described as 'single and indivisible'".[27]

The first question which arises is whether a treaty may be suspended or terminated in the absence of a special suspension or termination clause. This topic was considered by the International Law Commission, as well as having been the subject of many publications.[28] The question of unilateral suspension or termination of a treaty in the absence of an explicit provision contained in it, was for the first time taken up at the forum of the International Law Commission by Fitzmaurice and its consideration was subsequently continued by Waldock.[29]

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24. *Id.*, para. 100.
25. *Id.*, para. 47.
26. Joint Contractual Plan, signed on 6 May 1976, reproduced *in* 32 ILM 1248 (1993).
27. Gabčíkovo-Nagymaros case, *supra* note 1, para. 48.
28. *E.g.*, K. Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clauses*, 35 BYIL 83 (1982); J. Garner & V. Jobst, *The Unilateral Denunciation of Treaties by One Party Because of Alleged Non-Performance by Another Party or Parties*, 24 AJIL 569 (1935); S.E. Nahlik, *The Grounds of Invalidity and Termination of Treaties*, 65 AJIL 736 (1971); B. Simma, *Termination and Suspension of Treaties: Two Recent Austrian Cases*, 21 GYIL 74 (1979); and H. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AJIL 51 (1974).
29. Second Report of G. Fitzmaurice (Fitzmaurice II), UN Doc. A/CN.4/107, 1957 YILC, Vol. II (Part Two), at 16; Fourth Report of Fitzmaurice (Fitzmaurice IV), UN Doc. A/CN.4/120, 1959 YILC, Vol. II (Part Two), at 37; First Report of Waldock (Waldock I), UN Doc. A/CN.4/144,

According to Fitzmaurice, in the event of the absence of any provision on termination or suspension of a treaty, there is a presumption that the treaty was intended to be of indefinite duration and could only to be terminated by mutual agreement by all the parties. This presumption may, however, be negated in the following cases:

a. by necessary inference to be derived from the terms of the treaty in question which would generally indicate the possibility of its expiry under certain circumstances or an intention to permit unilateral termination or withdrawal; and
b. in cases of treaties which by their nature are deemed to belong to a category in which the possibility of withdrawal appears to exist for the parties if the contrary is not indicated. Treaties of alliance or of a commercial character belong to this group.[30]

In either category of cases, termination or withdrawal may be effected by giving such period of notice as is reasonable, taking into account the nature of the treaty in question and all surrounding circumstances.

Waldock proposed, in his Draft Article 17, a series of rules according to which the duration of a treaty which contains no provision regarding its duration or termination should be governed.[31] In the case of a treaty whose purposes are by their nature limited in duration, the treaty would not be subject to denunciation or withdrawal on notice, but would continue in force until devoid of purpose. In cases not falling into this category, a party would have the right to denounce or withdraw from the treaty by giving 12 months' notice to that effect to the depository, or to the other party or parties when the treaty is one of the following: a commercial or trading treaty (other than one establishing an international régime for a particular area, river, or waterway); a treaty of alliance or military co-operation (other than special agreements concluded under Article 43 of the UN Charter); a treaty for technical co-operation in economic, social, cultural, scientific, communications, or any other such matters; or a treaty of arbitration, conciliation, or judicial settlement. He emphasized that a treaty would continue in force indefinitely with respect to each party where the treaty establishes a boundary between two states; or effects a cession of a territory or a grant of rights in or over a territory; establishes a special international régime for a particular area, territory, river, waterway, or air space; is a treaty of peace, a treaty of

1962 YILC, Vol. II (Part Two), at 27; Second Report of Waldock (Waldock II), UN Doc. A/CN.4/156, 1963 YILC, Vol. II (Part Two), at 36; Fourth Report of Waldock (Waldock IV), UN Doc. A/CN.4/177, 1965 YILC, Vol. II (Part Two), at 3; and Fifth Report of Waldock (Waldock V), UN Doc. A/CN.4/ 183, 1966 YILC, Vol. II (Part Two), at 51.

30. *See* Fitzmaurice II, *supra* note 29, at 38.
31. *See* Waldock II, *supra* note 29, at 64.

disarmament or for maintenance of peace; effects a final settlement of an international dispute; or is a general multilateral treaty providing for the codification or progressive development of general international law.[32] In other cases, not enumerated in his Draft Article, a treaty would continue indefinitely unless it clearly appeared from the nature of the treaty or the circumstances of its conclusion that it was intended to have only temporary application.

Waldock stated in his report that

> [i]n principle the question is one of the intention of the parties in each case, for the parties are certainly free, as and when they wish, to make their treaty terminable upon notice.[33]

He further states that the absolute rule of termination only by mutual agreement has become a residuary rule. Since practice appears to be very divergent according to Waldock

> [t]he true position today seems to be that there are certain classes of treaty where by reason of the nature of the treaty the presumption is against a right of denunciation and also certain classes of treaty where by reason of the nature of the treaty it is in favour of such a right.[34]

The residuary rule applies perhaps to treaties which fall outside these classes. According to Waldock the real problem is to define these different categories, i.e. those where the presumption is in favour of a right of denunciation and those where it is against such a presumption. This, and further proposals of Waldock in relation to the codification of unilateral denunciation of treaties without a special provision to this effect, divided the Commission and have proved to be inconclusive. The solution proposed by ILC Draft Article 53 was subject to further criticism in the forum of the Sixth Committee.[35] Draft Article 53 was also unsupported by the practice of states. The views expressed by publicists are diverse and do not adhere to one particular view.[36]

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32. *Id.*
33. *Id.*, at 67.
34. *Id.*
35. Official Records of the General Assembly, 22nd Session, 18 October 1967, UN Doc. A/C.6/SR.974, at 94-95.
36. Lord McNair was of the view that "the normal basis of approach adopted in the United Kingdom and, it is believed, in most States, towards a treaty that it is intended to be of perpetual duration and incapable of unilateral termination, unless, expressly, or by implication, it contains a right of a unilateral termination or some other provision for its coming to an end. There is nothing juridically impossible in the existence of a treaty creating obligations which are incapable of termination except by the agreement of all parties. Some existing British treaties have endured for nearly six centuries, and many for three". *See* Lord McNair, The Law of Treaties 493-494 (1961).

The Diplomatic Conference failed to produce any uniform conclusions.[37] Therefore Article 56 of the 1969 Vienna Convention reflects a compromise in relation to the right to denunciation of or withdrawal from a treaty. This Article provides that

> [a] treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: a. it is established that the parties intended to admit the possibility of denunciation or withdrawal; or b. a right of denunciation or withdrawal may be implied from the nature of the treaty.[38]

From the point of view of the law of treaties, on a more theoretical plane, the grounds for termination of a treaty can be grouped into four categories:

1. objective circumstances specified in the treaty itself;
2. objective circumstances for which there is no provision in the treaty;
3. concordant action of the parties; and
4. action of one party only.

The 1969 Vienna Convention enumerates three possible objective circumstances "which, although not mentioned by the parties in the treaty itself, may be invoked as ground for termination".[39] Suspension of the operation of a treaty raises less complicated problems than termination does. It may be said that in many articles of the 1969 Vienna Convention, suspension of a treaty has been introduced as an alternative, and by implication, in many circumstances, a preferable solution to its final termination. This solution was adopted to maintain to the highest degree the obligatory force of treaties. Termination of a treaty is treated as the ultimate means of bringing a treaty to an end.

> [t]he Convention brings to the attention of the parties to any treaty the possibility of suspending its operation instead of acting to bring about its termination whenever either the very occurrence of such ground, or the appraisal of an extent to which it has occurred, may depend upon subjective judgment of a party, or else the occurrence of such a ground does not necessarily mean that it would have become permanent or irrevocable.[40]

In particular this applies to the following grounds: impossibility of performance, fundamental change of circumstances, and material breach.

37. Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March – 25 May 1968, UN Doc. A/CONF.39/11, at 335.
38. Art. 56 of the 1969 Vienna Convention, *supra* note 2.
39. Nahlik, *supra* note 28, at 747.
40. *Id.*, at 752.

The terms of the 1977 Treaty and related documents indicate clearly that recourse to unilateral termination was neither the intention of the parties to it nor to be implied from the nature of the 1977 Treaty. Indeed, the opposite is the case; the parties to the 1977 Treaty intended to create a lasting and durable régime for their mutual benefit. Hungary thus had to rely upon different provisions of the law of treaties to find grounds "in support of the lawfulness, and thus the effectiveness, of its notification of termination".[41] Hungary presented five arguments which are based on the law of treaties, the law of state responsibility, and, finally, environmental considerations, i.e. on the development of new norms of environmental law. In relation to the law of treaties, Hungary in fact invoked three grounds for termination, namely: impossibility of performance; the occurrence of a fundamental change of circumstances; and material breach of the 1977 Treaty by Czechoslovakia.

4.2.1. Impossibility of performance

According to Nahlik, the ground for termination of a treaty on the basis of supervening impossibility of performance is established and uncontested, and comes from a concept of ancient standing in civil law and is a principle admitted by international law. The 1969 Vienna Convention limits the possibility of invoking this ground to the "permanent disappearance or destruction of an object indispensable for the execution of the treaty";[42] and further it cannot be invoked by a party that was itself instrumental in causing it by a breach of its international obligations.[43]

In light of the above, the Court rightly says that

> Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention.[44]

During this Diplomatic Conference[45] proposals were made to broaden the scope of working of Article 61, nonetheless, the parties chose to limit themselves to a narrower concept. The contention of Hungary was that the essential object of the 1977 Treaty, i.e. an economic joint investment which was consistent with environmental considerations, had permanently disappeared and the 1977 Treaty had become impossible to perform. In order to make a decision as to the applicability of Article 61, the Court did not have to determine whether the term 'object' in Article 61 could also be understood

41. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 92.
42. Nahlik, *supra* note 28, at 747.
43. *Id.*
44. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 102.
45. *See* Diplomatic Conference, *supra* note 37.

> to embrace legal régime as in any event, even if that were the case, it would have to conclude that in this instance that régime had not definitively ceased to exist.[46]

Further, the Court stated that the 1977 Treaty, in particular its Articles 15, 19, and 20, provided for the parties the necessary means to proceed at any time, through negotiations in order to readjust "between economic imperatives and ecological imperatives".[47] In fact, the Court noticed that if the joint exploitation of the investment was no longer possible, it was due originally to Hungary's failure to perform most of the works for which it was responsible under the 1977 Treaty. As indicated above, according to Article 61(2) of the 1969 Vienna Convention, impossibility of performance cannot be invoked by a party as a ground for termination of a treaty when it results from that party's own failure to perform its obligations deriving from that treaty.

4.2.2. Fundamental change of circumstances

'Fundamental change of circumstances' as a ground to invoke termination of a treaty has been controversial and debatable. The legal nature of this concept was the subject of a heated discussion between its supporters and opponents, both during the Diplomatic Conference[48] and in many publications on the subject. In broad terms, the controversy is based, on one side, upon the principle of primacy of stability of contractual obligations and the conviction that "it is the function of the law to enforce contracts or treaties even if they become burdensome for the party bound by them",[49] and on the other side, upon the view that

> one could not insist upon petrifying a state of affairs which had become anachronistic because based on a treaty which either did not contain any specific clause as to its possible termination or which even proclaimed itself to be concluded for all times to come.[50]

The formulation of Article 62 of the 1969 Vienna Convention is particularly cautious. The possibility to invoke the principle is admitted, although limited in its scope. It may not be invoked in relation to a treaty which establishes a boundary; and further no state may invoke it if the change was caused by a breach of its own international obligations, either under the treaty in question or any other international agreement.

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46. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 103.
47. *Id.*
48. *See* Diplomatic Conference, *supra* note 37.
49. R.Y. Jennings & A.D. Watts (Eds.), Oppenheim's International Law, Vol. 1, at 1307 (1992). On the subject generally, *see also* O.J. Lissitzyn, *Treaties and Changed Circumstances (rebus sic stantibus)*, 61 AJIL 895-1005 (1967).
50. Nahlik, *supra* note 28, at 748.

In the *Fisheries Jurisdiction* case,[51] the ICJ was equally cautious as to interpretation of this principle. In general it may be said that the Court, while recognizing the principle as set forth in the 1969 Vienna Convention and in international customary law, "found that the rights were surrounded in each case by substantive conditions limiting their application".[52]

Hungary identified several 'substantive elements' present at the conclusion of the 1977 Treaty which it alleged had changed fundamentally by the date of notification of termination. These were the following: the notion of 'socialist integration' for which the 1977 Treaty originally had been a 'vehicle', but which had since disappeared; the 'single and indivisible operational system', which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been frustrated by the sudden emergence of both states into the market economy; the attitude of Czechoslovakia which had turned the 'framework treaty' into an 'immutable norm'; and, finally, the transformation of a treaty consistent with environmental protection into a 'prescription for environmental disaster'.[53] Slovakia argued that the changes invoked by Hungary had not altered the nature of the obligations under the 1977 Treaty from those originally undertaken, so no right to terminate it arose from them.[54]

The Court came to the conclusion that the political situation was of relevance to the conclusion of the 1977 Treaty. Nonetheless, the object and purpose of the 1977 Treaty, i.e. a joint investment programme for the production of energy, the control of floods, and the improvement of navigation on the Danube, were not so closely linked to political conditions as to render these an essential basis of the consent of the parties which, in changing, radically altered the extent of the obligations still to be performed.[55] The Court drew the same conclusion as to the economic system in question, and further concluded that even if the estimated profitability of the project had diminished as viewed in 1992 by comparison to 1977, it had not done so to such an extent as to transform parties' obligations in a radical manner as a result. Likewise, new developments in the state of environmental knowledge

51. *See* Fisheries Jurisdiction (United Kingdom *v.* Iceland), Jurisdiction, Judgment of 2 February 1973 ICJ Rep. 3, at 18. The Court said as follows: "[i]nternational law admits that a fundamental change in the circumstances which determined the parties to accept the treaty, if it has resulted in radical transformation of the extent of obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of termination of a treaty relationship on account of change circumstances".
52. Briggs, *supra* note 28, at 68.
53. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 95.
54. *Id.*
55. *Id.*, para. 104.

and of environmental law were not completely unforeseen. Furthermore, Articles 15, 19, and 20 of the 1977 Treaty allowed the parties, as the Court found, to take account of these changes and to accommodate them when implementing the 1977 Treaty provisions. The Court, having analyzed arguments submitted by both parties, was of the view that

> [t]he changed circumstances advanced by Hungary are, in the Court's view, not of such 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.[56]

Thus, the Court followed and further developed the cautious approach towards Article 62 of the 1969 Vienna Convention adopted by it in the *Fisheries Jurisdiction* case[57] and interpreted strictly the manner in which the 'fundamental change of circumstances' clause may be invoked. A fundamental change of circumstances must, the Court said,

> 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.[58]

The Court further made an important contribution towards our understanding of Article 62 of the 1969 Vienna Convention in having elucidated that the wording of this Article is negative and conditional and that this constitutes a clear indication that "the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases".[59]

4.2.3. Material breach

The next ground for termination of the 1977 Treaty put forward by Hungary was based on material breach (Article 60 of the 1969 Vienna Convention). Hungary claimed that Czechoslovakia violated Articles 15, 19, and 20 of the 1977 Treaty, together with other conventions and rules of international law; and that the planning, construction, and putting into operation of 'Variant C' also amounted to a material breach of the 1977 Treaty.

The right of a state based on material breach and involving suspension or termination of a treaty has its roots in the principle of reciprocity and deriving from the *do ut des* aspect of reciprocity which is expressed in the maxim

56. *Id.*
57. Fisheries Jurisdiction, *supra* note 51.
58. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 104.
59. *Id.*

inadimplenti non est adimplendum.[60] Article 60 exclusively regulates breaches which have their source in the law of treaties and not those deriving from the law of state responsibility. This limitation of Article 60 has been widely criticized as one of its shortcomings.[61] Material breach question was the subject of extensive discussion on the forum of the ILC based on reports by Special Rapporteurs Fitzmaurice and Waldock. The Commission took a cautious approach towards material breach, saying that it

> was agreed that a breach of a treaty, however serious, does not *ipso facto* put an end to the treaty, and also that it is not open to States simply to allege a violation of a treaty and pronounce the treaty at an end. On the other hand, it considered that within certain limits and subject to certain safeguards the right of a party to invoke the breach of a treaty as ground for terminating it or suspending its operation must be recognized.[62]

The intention of the Commission as it was explained by Waldock at the Diplomatic Conference,[63] was to strike a balance between the need to uphold the stability of treaties and the need to ensure reasonable protection of the innocent victim of the breach of a treaty. In general, however, the ILC approached material breach as a ground for suspension or termination of treaties in a strict manner.[64] The most important aspect of the formulation of the right to suspend or terminate a treaty in relation to material breach in Article 60 of the 1969 Vienna Convention is that it does not have an automatic effect on the life of a treaty, it merely gives a faculty of termination or suspension to the innocent party. The allegation of material breach merely to get rid of undesired obligations is extremely harmful for the stability of treaty relationships. "For the sake of legal security and treaty stability [...] termination or suspension have been subjected to many restrictive conditions and limitations to curb any possible abuse".[65] In bilateral relations, suspension or termination of a treaty on the ground of material breach by one of the parties, entitles the other party only to invoke it as a ground for termination (Article 60(1)). The above was the intention of the ILC which said that "[t]he formula 'to invoke as a ground' is intended to underline that the right

60. See B. Simma, *Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law*, 20 Österreichisches Zeitschrift fur Öffentliches Recht 18 (1970).
61. *See, e.g.*, Simma, *id.*, at 83 and S. Rosenne, Breach of Treaty 7 (1985).
62. ILC Reports of the Commission to the General Assembly on its 18th Session, 1966 YILC, Vol. II (Part Two), at 255.
63. *See* Diplomatic Conference *supra* note 37.
64. *See* Rosenne, *supra* note 61, at 23; *see also* the same view expressed by M.M. Gomaa, Suspension or Termination of Treaties on Grounds of Breach 183 (1996).
65. Gomaa, *id.*, at 184.

arising under that article is not a right arbitrarily to pronounce the treaty terminated".[66]

The ICJ has made certain pronouncements as to material breach. The most well known is that in the *South West Africa* cases. The Court said the following:

> [o]ne of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.[67]

The Judgment in this case was subject to criticism as to the statement of the Court that the general principle of law establishes "a right of termination on account of breach".[68] According to Briggs, such an allegation does not find support in state practice, and moreover finds no recognition in Article 60 of the 1969 Vienna Convention, which, according to the ICJ, in many respects is a codification of customary law on termination of treaty relations on account of breach. "The only recognition of such a right in the Vienna Convention is found in paragraph 2(a) of Article 60".[69]

Another case which related to material breach was the *ICAO* case.[70] In this case, the Court adopted a limited view as to material breach as a ground for termination. Although the statements of the Court on that matter were in relation to jurisdictional clauses, nonetheless, we may observe that

> much of the rationale advanced by the Court to restrict claims of unilateral right under general international law to terminate or suspend jurisdictional treaties for breach would appear to have cogency in relation to all the treaties, whether or not they contain jurisdictional clauses.[71]

The restrictive approach of the Court in the *ICAO* case was followed by it in the present case. In response to Hungary's reliance on other treaties and general rules of international law in application of material breach, the ICJ was of the view that

66. ILC Reports, *supra* note 62, at 254.
67. South West Africa cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Preliminary Objections, Judgment of 21 December 1962, 1962 ICJ Rep. 319, at 331 and 330.
68. *Id.*, at 320.
69. Briggs, *supra* note 28, at 56.
70. Appeal Relating to the Jurisdiction of the ICAO Council (India *v* . Pakistan), Judgment of 18 August 1972, 48 ILR 331 (1975).
71. Briggs, *supra* note 28, at 60-61.

> it is only material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as ground for terminating the treaty.[72]

The Court clarified the position that, while the violation of any other treaty or of rules of general international law may justify the taking of other measures, such as countermeasures, by an injured state, it does not constitute a ground to terminate a treaty under the law of treaties. The Court examined Hungary's contention that Czechoslovakia had violated Articles 15, 19, and 20 of the 1977 Treaty by refusing to enter into negotiations with Hungary to adapt the Joint Contractual Plan to new developments in environmental protection. These Articles were specially designed to oblige the parties to take appropriate measures necessary for the protection of water quality, of nature, and of fishing interests jointly on a continuous basis. The Court stressed that Articles 15 and 19 expressly provide that the obligation contained in them must be implemented by the means specified in the Joint Contractual Plan. The Court found that the failure of the parties to agree on those means was not attributable solely to one party. There was not sufficient evidence to substantiate the claim that Czechoslovakia had consistently refused to consult with Hungary upon the desirability or necessity of measures for the preservation of environment. The Court was of the view that while both parties indicated in principle a willingness to follow further research, in practice, Czechoslovakia refused to countenance a suspension of the works at Dunakiliti, and at a later stage on 'Variant C'. Hungary then asked for suspension as a prior condition of environmental research. It claimed that continuation of works would prejudice the outcome of negotiations. The Court observed that suspension of the works by Hungary at Nagymaros and Dunakiliti, was a contributory factor to creation of a situation which was not very favourable for conducting negotiations.[73]

Hungary mainly relied on the construction of 'Variant C' by Czechoslovakia as the basis for invoking material breach of the 1977 Treaty (see *infra* Section 2.2.). The Court found that Czechoslovakia only violated the 1977 Treaty when it diverted the waters of the Danube into the bypass canal in October 1992. However, in constructing the works which lead to the operation of 'Variant C', Czechoslovakia did not act unlawfully. The Court found that notification of termination by Hungary in 1992 was premature; and that Czechoslovakia had not yet breached the 1977 Treaty. This lead the Court to the conclusion that Hungary was not entitled to invoke any such breach of the 1977 Treaty as a ground for terminating it at the time it did. Moreover, the Court took the view that, Hungary's Declaration terminating the 1977

72. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 106.
73. *Id.*, para. 107.

Treaty issued on 6 May 1992 with effect as from 25 May 1992, was not in accordance with the principle of good faith.[74]

In fact, both parties were in agreement that Articles 65 to 67 of the 1969 Vienna Convention, if not codifying customary law, at least generally reflect it, and contain certain procedural principles which are based on good faith. The Court concluded that by its own conduct, Hungary prejudiced its right to terminate the 1977 Treaty. The Court quite forcefully stated that

> 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.[75]

It may be observed that the Court applied the rules and procedures relating to material breach in a very rigorous manner. Not only substantive rules have to be observed, but procedural ones as well. The present Judgment indicates that the Court supports the principle of stability of treaties and approaches all rules concerning the possibility of unilateral termination, including those relating to material breach, with due caution.

4.3. Principle of Approximate Application

Slovakia invoked the so-called 'principle of approximate application' to justify the construction and operation of 'Variant C'. The application of this principle was, according to Slovakia, the only possibility which remained open to it to fulfil the purposes of the 1977 Treaty and to enable it to continue to implement its obligations deriving from the Treaty in good faith.[76] Another purpose of the employment of this principle was that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary's unlawful actions. Slovakia maintained that "a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrong-doing State".[77] Slovakia submitted that mitigation of damages constitutes an aspect of performance of obligations in good faith. Slovakia also pleaded, in the alternative, that use of the 'principle of approximate application' may be treated as constituting a countermeasure.

Hungary argued that 'Variant C' constituted a material breach of the 1977 Treaty.[78] It further pleaded that 'Variant C' violated Czechoslovakia's obligations under other treaties, in particular the 1976 Convention on the

74. *Id.*, para. 109.
75. *Id.*, para. 110.
76. *Id.*, para. 67.
77. *Id.*, para. 68.
78. *See also supra* Section 2.2.

Regulation of Water Management Issues of Boundary Waters of 31 May 1976,[79] and its obligations under general international law. Hungary contended that Slovakia's arguments were wrong both in facts and in law. It denied the commission of any violation of its treaty obligations which would justify Slovakia's application of 'Variant C'. Further, Hungary argued that no 'principle of approximate application' exists in international law. As regards the mitigation of damages argument, it claimed that it has to do with quantification of loss, and could not justify action which is unlawful. 'Variant C', furthermore, did not satisfy the requirements for lawfulness of countermeasures in international law, i.e. condition of proportionality.[80]

The 'principle of approximate application' was expounded by Sir Hersch Lauterpacht in his Separate Opinion in *Admissibility of Hearings of Petitioners by the Committee on South Africa*.[81] He said as follows:

> [i]t is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument not to change it.[82]

The views of Lauterpacht need to be read in a broader context expressed by him in his Opinion. He was of the view that operation and application of multilateral agreements establishing "an international status, an international régime" exceeds a mere contractual relation.[83] To this effect their validity continues regardless changing in states' attitudes or status or existence of individual parties or persons concerned. The unity and operation of any régime created by legal instruments cannot be broken down by an act of one party. Lauterpacht further stated that:

> [t]he treaty as a whole does not terminate as a result of a breach of an individual clause. Neither is it necessarily rendered impotent and inoperative as the result of the action or inaction of one of the parties. It continues in being subject to adaptation to circumstances which have arisen.[84]

Lauterpacht, however, made a distinction between treaties creating régimes and as he described them in his Opinion "ordinary treaties", in that in the latter category "breach creates, as a rule, a right for the injured party to de-

79. 1976 Convention on the Regulation of Water Management Issues of Boundary Waters.
80. *See* Gabčíkovo-Nagyamaros Project, *supra* note 1, para. 71.
81. Admissibility of Hearings of Petitioners by the Committee on South Africa, Jurisdiction, Judgment of 1 June 1956, 1956 ICJ Rep. 46 (Judge Lauterpacht, Separate Opinion).
82. *Id.*, at 53-54.
83. *Id.*, at 48.
84. *Id.*, at 49. *See also* Rosenne, *supra* note 61, at 95-101.

nounce it and claim damages".[85] It appears that he referred the operation of the 'principle of approximate application' to multilateral treaties which create an international status.

According to Rosenne, the Opinion of Lauterpacht led to a bifurcation of law. It supplies a philosophical and scientific basis for the view that a breach of treaty provisions must not be assessed in isolation but in the wider context of a treaty régime as a single whole. On the other hand this principle means that, confronted with a situation of established breach, the parties themselves may in first instance renegotiate and apply the treaty in good faith or in the event of failure to do that, they may be legally obliged acting through or with assistance of a competent international organ to take steps to redraft or reformulate the sub-system in order to ensure its continued application. In other words, according to Rosenne, this principle

> if skilfully used may serve as a prod to the renegotiation, reinterpretation or readaptation of a treaty which in general lines remains desirable to all parties but which in its details cannot stand up to wear and tear of daily life.[86]

According to the same author, this principle contributes constructively to stability of treaties. There is no space in the present essay to discuss the possible juridical bases of this interesting doctrine, which, however, appears to involve some degree of extension of the circumstances in which it may apply even beyond those evidently envisaged by Sir Hersch Lauterpacht.

The Court in the present case, made no direct determination on the legal nature of this principle, i.e. whether it is a principle of international law or a general principle of law, or, indeed, even on whether it exists at all. The Court stated that

> 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.[87]

In support of this, the Court stated that 'Variant C' as a unilateral action did not fulfil the conditions which were fundamental for the functioning of the whole system based on the 1977 Treaty. The Court also stated that Czechoslovakia appropriated for its use and benefit between 80 and 90 per cent of the waters of the Danube which is a shared resource and an international boundary river. Even though suspension and withdrawal of consent by Hungary constituted a violation of its treaty obligation, that "cannot mean that Hungary forfeited its basic right to equitable and reasonable sharing of the

85. Admissibility of Hearings of Petitioners by the Committee on South Africa, *supra* note 81, at 48-49.
86. Rosenne, *supra* note 61, at 100.
87. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 76.

resources of an international watercourse".[88] In general, the Court reached the conclusion

> 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 doing so, committed an internationally wrongful act.[89]

As to the problem of countermeasures, the Court decided

> that Czechoslovakia, by unilaterally assuming control of shared resources, 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 in international law.[90]

5. *PACTA SUNT SERVANDA*

It may generally be stated that in this case the Court advocated strict observation of the principle *pacta sunt servanda.* Despite allegations submitted by Hungary that by their conduct both parties had repudiated the 1977 Treaty and that a bilateral treaty repudiated by both parties cannot survive, the Court found that the reciprocal wrongful conduct of both parties "did not bring the Treaty to an end nor justify its termination".[91] The Judgment continued with the following important passage:

> [t]he Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *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.[92]

The Court observed that it would have been a different legal situation if the parties had terminated the 1977 Treaty upon mutual consent.

In taking up this position in the circumstances of the present case, in which both parties were actually in fundamental breach of important obligations with respect to significant parts of the subject matter of the 1977 Treaty, and stating that, notwithstanding these, the 1977 Treaty "cannot be treated as voided by unlawful conduct",[93] the Court indeed adopted a strong.

88. *Id.*, para. 78.
89. *Id.*
90. *Id.*, para. 85.
91. *Id.*, para. 114.
92. *Id.*
93. *Id.*, para. 133.

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possibly even a fairly extreme, position. Indeed, doing so faced the Court with something of a dilemma. It recognized this when it said:

> [t]he Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation, or the practical possibilities and impossibilities to which it gives rise, when deciding on the legal requirements for the future conduct of the Parties.[94]

In effect, the Court recognized that, while it had found that the Treaty remained in full force and effect, it could not order the parties to carry out its terms without substantial modification. What the Court did in these circumstances was to apply what appears to be very much like the developed form of the doctrine of 'approximate application' outlined by Rosenne.[95] In two important passages of the Judgment, the Court said, firstly, that:

> [w]hat is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed in the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible;[96]

and, later:

> [w]hat 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.[97]

And the Court then continued:

> [a]rticle 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.[98]

Were this doctrine to be applicable to treaties generally, it has to be said that it would have far reaching and controversial implications, consideration of which would be beyond the possible scope of the present essay. In fact, however, the Court found itself able to adopt this particular solution in the

94. *Id.*
95. *See supra* Section 4.3.
96. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 133.
97. *Id.*, para. 142.
98. *Id.*

present case on the basis of particular features of the 1977 Treaty in question. Limitations of space make it impossible to analyze in detail all of these features, which are set out in detail in the Judgment in paragraphs 134 to 139. But three factors, generally, may be seen as having been significant. Firstly, the Court emphasized the existence of multiple, equal objectives all of which, it appeared to the Court, might still be realized on the basis of an even substantially modified project. Secondly, on its own terms, the 1977 Treaty "never laid down a rigid system", and on the basis of the conduct of the parties in themselves modifying, or expressing willingness to modify the Project "[t]he explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable".[99] And, finally, while not expressly referred to again in this operative part of the Judgment, it is not without significance that the Court had found that the 1997 Treaty set up "territorial régime", at least within the meaning of Article 12 of the 1978 Vienna Convention on Succession.[100]

6. CONCLUSIONS

In conclusion, it may be said that in relation to the law of treaties, the Court further developed and elucidated certain principles. The Court unconditionally supported the principle of the stability of treaties; and the view that any grounds which may be invoked by states for their termination are treated with great caution. The Court appears to have taken the view that treaties should, at least in general, be terminated upon consent of the parties to them. Thus, the ICJ has, by the Judgment in the present case, and particularly in the declaratory part of its Judgment, strengthened the classical doctrine of the law of treaties.

The operative part of the Judgment is, as stated above, substantially dependent upon the special features of the 1977 Treaty. The extent to which the principles adopted in it could, or should, be extended beyond the particular circumstances of the present case is likely to prove a controversial issue which will merit consideration which is well beyond the scope of the present essay.[101]

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99. *Id.*, para. 138.
100. 1978 Vienna Convention on Succession of States With Respect to Treaties, 18 ILM 1488 (1978).
101. Due to the lack of space, this short essay unfortunately cannot deal with opinions expressed by individual Judges. These comprised two Declarations appended to the Judgment, namely, by the President Schwebel and Judge Rezek, and Dissenting Opinions of the following Judges: Bedjaoui, Oda, Herczegh, Vereshchetin, Ranjeva, Parra-Aranguren, Vice-President Weeramantry, Fleishhauer, and Judge *ad hoc* Skubiszewski. Of the Dissenting Opinions, those of Judge Fleishhauer and Judge ad hoc Skubiszewski contain interesting alternative views relating to a number of the issues of the Law of Treaties.

Finally we have to agree with the President of the International Court of Justice that the present 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.[102]

102. From the Key-note address by the President of the ICJ, Judge Stephen M. Schwebel, entitled "The influence of the International Court of Justice on the work of the International Law Commission and the influence of the Commission on the work of the Court", delivered at the United Nations Colloquium on Progressive Development and Codification of International Law to Commemorate the Fiftieth Anniversary of the International Law Commission, United Nations, New York, 28 October 1997.