SUSTAINABLE DEVELOPMENT AS A CONCEPT FOR HANDLING SPECIFIC WATER ISSUES AND FOR LAW MAKING AND INTERPRETATION: THE *GABCIKOVO-NAGYMAROS* CASE AND THE UNITED NATIONS INTERNATIONAL WATERCOURSES CONVENTION

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OUTLINES

ABSTRACT

This article argues that at the international level, the concept of sustainable development ("CSD") – being an integration of developmental needs and environmental protection – can act as a concept for handling specific water issues and for law making and

interpretation. In the *Gabcikovo-Nagymaros* dispute between Hungary and Czechoslovakia (now Slovakia), the International Court of Justice relied upon the CSD to reach its final decision. The U.N. International Watercourses Convention was drafted under the influence of the CSD; and the Convention's current text reflects, to an important extent, the spirit of the CSD. The CSD will continue to act as an important tool for interpretation of the Convention – a framework instrument regulating non-navigational uses of international watercourses.

I. THE ISSUES

In 1987, the World Commission on Environment and Development ("WCED"), tracing back to an idea emerging a decade and a half earlier(1), advanced a definition of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"(2).

Either termed as the requirement to ensure both present and future generations' needs, or integration of development and environment, the concept of sustainable development ("CSD")(3), since its advancement by the WCED, has indeed been incorporated into several general and environmental legal instruments. These, *inter alia*, include the Climate Change Convention(4), the WTO Agreement(5), the Convention to Combat Desertification(6), the Environmental Impact Assessment Convention(7), the Endangered Species Convention(8), the North American Environmental Cooperation Agreement(9), and the Rio Declaration(10). Several water and water related agreements, in one degree or another, provide for the CSD(11). The concept as such was relied upon in the recent International Court of Justice ("ICJ") case of Gabcikovo-Nagymaros project (1997)(12), and in World Trade Organization ("WTO") Shrimp/Turtle Appellate Body Report(13).

It is not difficult to observe that while all the aforesaid

instruments superficially mention sustainable development, none of them elaborates on what the CSD actually means, and how it should be applied in practice. To the dismay of those who like details, these instruments have not gone much farther than the general idea proposed by the WCED. Even the 1992 Rio Declaration – a soft law document believed to have elaborated rather thoroughly on the concept – can only stop at a general proposition that sustainable development is a combination of development and environment[14]. The latest idea proposed by the prestigious International Law Association ("ILA") – Resolution 15/2000 – does not offer anything more than a promise that the ILA would do its best to clarify how economic development and environmental protection are integrated in the hotly debated CSD[15].

Perplexed by the CSD's generality, experts have begun to try finding out if some more light can be shed on. And here, even within the free reign of the academic world, the picture does not seem much clearer. Some regard the CSD as a combination of a large number, if not all, of existing principles in international law[16]. Others look insight, trying to identify the constituent parts of the concept. According to Boyle and Freestone, the concept contains six elements of which there is one on the integration of environmental protection and economic development[17]. P. Sands offers a four-element concept which *inter alia* includes an equitable allocation of rights and obligations[18]. Later, P. Sands suggests a notion of "cross-fertilization" to reinforce the theoretical roots of the concept as integration of norms in the areas of developmental and environmental laws[19]. Matsui offers a simpler composition, arguing that "sustainable development seems to be the successor of the right to development on a higher plane"[20], and "the right to development plus the right to environment would make the right to sustainable development"[21]. Yes, Matsui's suggestion can be regarded a summarization of the other views mentioned in this paragraph.

The basic rationale of the CSD is clear: the aggregate scale of human economic activities has reached such an extent of the ecology's limits that virtually fills up the available ecological space[22]. Something must be done in this respect to keep the earth

for us and for our children[23]. It is also equally clear that "environmentally sustainable development is now part of the lexicon of international law; [and the] basic issue now is not whether it is part of the law, but how it is to be applied and developed in a practical manner, and in specific cases"[24]. Yes, the crux of the issue is *how to*. Given its general nature of "integration," the CSD would likely lose in the fight to become a legal norm which tells the states exactly what they must, and must not do. A legal norm regulating states' behavior must be clear and definite[25]. Being a difficult-to-quantify legal phenomenon, the CSD has, and would fail, to set a clear boundary between, and the percentage of each of, its two constituent elements: development and environment. Even in the best case where it is accepted as a hard legal principle, the CSD would still require a mechanism to administer its application in each given circumstance. In other words, the CSD would remain a guiding principle[26]; and room should be left for the concerned parties to fit it in as much as they feel reasonable within an acceptable limit.

Fortunately, it is in this direction that certain consensus has been reached. In a broader context, sustainable development is understood as not being a technically determined or ideologically prescribed end state of relationship among economic, environmental, and political security; it refers to characteristics of processes for making choices[27]. Decades ago within the area of law, a view was expressed that a principle of law could be used as a means to reach an end[28]. By way of an example, the WTO Appellate Body mentioned above is believed to base a part of its analysis on the *Shrimp/Turtle case* on the principle of sustainable development to reach its decisions[29]. In finding a solution for the application of another general environmental law concept having relevance to the topic under discussion in this article – the principle of common but differentiated responsibilities – Matsui suggests that a legal principle may operate as a guiding principle for law-making and interpretation[30]. Castro argues that a legal principle must scarify details to become an umbrella[31]. It has also been suggested in the case of water law that the CSD should be understood not as a product or outcome but as a

process for achieving consensus in water management issues[32]. Thus there seems to be a consensus that while not being a specific legal norm, the CSD can act as a principle or a concept for legislative making and interpretation, and for handling specific issues.

Thus, while the search to find out what the CSD actually means continues, two important understandings of the concept have been reached to date: 1) the concept represents an integration of development and environment; and 2) the concept could act as a guiding principle in handling specific cases where the developmental and environmental needs are at stake. This article does not attempt to further the never ending theoretical debate on the CSD – a question which requires time, interdisciplinary efforts, and even tolerance of all the actors involved. Premised on the two major and "state-of-the-art" understandings of the CSD, the article sets its objective to do two things. First, it examines how the International Court of Justice applied the CSD to reach its final decision in the case of dispute over the *Gabcikovo-Nagymaros* project[33]. Second, the article examines to what extent the CSD acted as a guiding concept for the elaboration of, and how it is actually reflected in, the United Convention on the Law of the Non-Navigational Uses of International Watercourses (the "1997 Watercourses Convention")[34]. The case and the Convention are chosen for study because these are the two events of immense importance[35] that will not only help the formulation of new water instruments in the future[36] but also to be relied on for interpretation and implementation of existing water agreements and treaties[37]. The article concludes that as a guiding concept, the CSD can perfectly be fitted in, and can guide the states' behavior in the use and protection of international waters. Part II examines the *Gabcikovo-Nagymaros* case. Part III addresses the Watercourses Convention. Concluding remarks will be presented in Part IV.

II. SUSTAINABLE DEVELOPMENT AS A GUIDING CONCEPT FOR DISPUTE SETTLEMENT IN THE *GABCIKOVO-NAGYMAROS* CASE

1. In place of introduction: the case's synopsis, the ICJ's judgment and the scope of Part II

The Gabcikovo-Nagymaros case(38) is concerned with a dispute between Hungary and Czechoslovakia over a project planned by the two countries on the Danube River(39). Hungary and Czechoslovakia (Slovakia after January 1993), by virtue of a Treaty(40), agreed to construct a large system of locks on a stretch of the river between Bratislava in Czechoslovakia and Budapest in Hungary(41). The system was planned to include dams, canals, hydropower plants and other installations on the Danube for the development of the national economy of the two countries in the form of "joint investment"(42). The two series of locks to be built – one at Gabcikovo in the Czechoslovakian territory and the other at Nagymaros in the Hungarian territory – would create a single and indivisible operational system of works(43). The system would then be used for producing hydroelectricity, improving navigation on the relevant section of the Danube, and protecting areas along the banks of the river against flooding(44). It was agreed that the technical specifications for the system would be included in the "Joint Contractual Plan" to be drawn up in accordance with the Agreement by the parties(45). Work on the Project started in 1978; and, on Hungary's initiative, the two parties first agreed in 1983 to slow the work down and to postpone putting into operation the power plants, and then agreed to accelerate the Project again in 1989(46).

As a result of intense criticism of negative environmental impacts of the project, the Hungarian Government decided on May 13, 1989 to suspend the works at Nagymaros pending the completion of various studies of the impacts; and on October 27, 1989 Hungary abandoned the works at Nagymaros and maintained the status quo at Dunakiliti(47).

During this period, negotiations took place between the parties; and Czechoslovakia started looking for alternative solutions. Subsequently, Czechoslovakia decided on the so-called "provisional solution" known as "Variant C" which entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 km upstream Dunakiliti, and the construction at Cunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal(48). Regardless of Hungary's objection, Czechoslovakia decided in September 1991 to begin the work of Variant C. On October 15, 1992, Czechoslovakia began work to enable the Danube to be closed; and began to dam the river. As a result of the diversion of water by Czechoslovakia under Variant C, water flow into the original channel of the point of diversion dropped more than 80 percent causing the water level in the original river channel to drop by two to four meters(49).

Upon Hungary's formally renouncing the 1977 Treaty in May 1992, the two countries submitted their dispute to the International Court of Justice (ICJ) in 1993(50). Under the *Special Agreement* between Hungary and Slovakia(51), the Court was requested to rule on the following questions: 1) Whether Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the 1977 Treaty attributed responsibility to Hungary; 2) Whether Czechoslovakia was entitled to construct and put into operation Variant C in 1992; 3) What are the legal effects of Hungary's notification of the termination of the Treaty on 19 May 1992; and 4) What are the legal consequences, including the rights and obligations for the parties arising from the judgment of the Court's judgment on the above-mentioned three questions(52).

On September 25, 1997, the ICJ made its judgment on the case. With respect to points 1–3 of the Parties' request(53), the ICJ's decided as follows: 1) Hungary was not entitled to suspend and abandon the works on the Gabcikovo-Nagymaros project for which it is responsible under the 1977 Treaty; 2) Czechoslovakia was entitled to proceed to the "provisional solution" (Variant C) in November 1991, but was not entitled to put it into operation from

October 1992; and 3) Hungary's May 19, 1992 notice of the termination of the 1977 Treaty and related instruments did not have the legal effect of terminating them[54]. Regarding point 4 of the Parties' request[55], the Court ruled: 1) Hungary and Slovakia (successor to Czechoslovakia with respect to the 1977 Treaty as from January 1, 1993) must negotiate in good faith to find out measures to ensure the achievement of the objectives of the 1977 Treaty; 2) there must be a joint operational regime for the project; 3) Hungary shall compensate for the damage caused to Slovakia due to the Hungary's suspension and abandonment of works on the project; and Slovakia shall compensate Hungary for damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia; and 4) settlement of accounts of the works on the project must be effected on the basis of the 1977 Treaty and the related instruments[56].

The Gabcikovo-Nagymaros is a rather complex and multifaceted case. It is multifaceted in that it is concerned with a number of issues; and these *inter alia* include interpretation and implementation of treaties, succession of states, state of necessity as ground for terminating a treaty, state responsibility, and the interrelationship among different branches of international law[57]. The complexity of the case lies in the fact that the issues mentioned are intertwined, often with one linking to another. Part II does not set its objective of covering the case as a whole. It is confined to an analysis of two sets of issues relevant to the overall topic of discussion in this article: sustainable development of shared water resources. Hungary's claim of, and arguments for, the state of ecological necessity are understood as representing the "environmental leg" of the CSD. Vice versa, Czechoslovakia's counter claims and arguments, centered upon the legality of Variant C, are a clear reflection of the CSD's developmental component. In the end, the ICJ's judgment was made on the basis of balancing the two Parties' interests – the core of the CSD. Against this background, Section 2 highlights the Parties' claims and arguments and the Court's related decisions. Section 3 reflects on the Court's reasoning of the CSD. Brief Section 4 addresses Judge Weeramantry's separate opinion – an additional, yet

important, part of the case. Section 5 summarizes the major points discussed in Part II.

2. Claims and arguments of the Parties and the Court's decision

(a) Hungary's claims and its arguments for a state of ecological necessity

Hungary argued for five major points: 1) Hungary was entitled to suspend and later abandoned the works, and Slovakia was not entitled to Variant C (Provisional solution); 2) Hungary validly terminated the 1977 Treaty; 3) Slovakia would bear the responsibility to Hungary for operating Variant C; 4) Slovakia would be responsible for damage caused to Hungary; and 5) Slovakia would have an obligation to restore the Danube to the situation it was prior to putting Variant C into operation[58].

The "ace in the hole" that Hungary invoked to justify its unilateral suspension and abandonment of certain works on the unwanted project was a state of ecological necessity[59]. Hungary argued that if the project was to be proceeded, the volume of the residual discharge into the old bed of the Danube at Gabcikovo/ Dunakiliti would considerably be increased from 50 cubic meters/ second as originally specified to 200 cubic meters/second. As a result, the groundwater level would have fallen in most of the Skigetkoz[60]. No longer being able to supply underground waters, this part of the Danube would have acted as a drain of stagnant water at Dunakiliti[61]. In the long run, therefore, the quality of water would have been seriously impaired, and the Danube's surface water would be threatened by eutrophication[62]. Thus, with a large number of scientific data and research presented before the Court[63], Hungary claimed that serious environmental problems of the Danube compelled it to abandon the project.

It follows from the above arguments that whether Hungary's wrongfulness arising from its suspension and abandonment of works on the project would be excluded would depend on two important

factors: 1) the Court's attitude towards the environment, and 2) the law it relies upon to scrutinize the arguments. With respect to the first factor, it would seem that the Court did not treat the protection of the environment lightly(64). Earlier in the case, it quoted a passage in the *Legality of the Threat or Use of Nuclear Weapons* to substantiate the obligation that an activity within a state does not cause harm to the environment in other states(65). It then repeatedly mentioned that concern for natural environment is a matter of "essential interest of all States"(66); and the environment is not an abstraction, but it is "the quality of life and the very health of human beings"(67). Since "[t]here are newly developed norms of environmental law [which] are relevant for the implementation of the ... [1977] Treaty, "[t]he awareness of the vulnerability of the environment..." would have to be assessed on a continuous basis(68). The Court implicitly acknowledged that Article 15(69) and Article 19(70) which required protection of the environment during the term of the project were fundamental terms of the 1977 Treaty(71).

With respect to the second factor, the Court made it clear that since Hungary invoked the state of necessity to justify its conduct, this country chose to place itself within the ambit of the law of State responsibility; and therefore the latter would apply(72). In this connection, the Court cited Article 33 of the ILC Draft Articles on the International Responsibility of States adopted on first reading. The article, among other things, sets strict conditions to permit "a state of necessity" as a ground for precluding the wrongfulness of an act: 1) the act was the only means of safeguarding an essential interests of the State against a grave and imminent peril; and 2) the act did not seriously impair essential interests of the State towards which the obligation existed(73).

The Court recognized the possibility of "a state of necessity" as a ground recognized by international customary law for excluding a wrongfulness(74). On the basis of Article 33 of the ILC Draft Articles, and given the circumstances of the case, the Court indicated five conditions that Hungary must meet to justify its conduct related to a state of necessity: 1) its conduct has been occasioned by an essential interest; 2) that interest must have been threatened by a

grave and imminent peril; 3) the act being challenged must have been the only means to safeguard Hungary's interests; 4) that act must not have seriously impaired an essential interest of Slovakia; and 5) Hungary must not have contributed to the occurrence of the said state of necessity(75). Except for a periphery recognition that an "essential interest" of a state could include preservation of the natural environment of its territory(76), the Court did not agree that Hungary met all these conditions to justify its acts of suspending and abandoning the works on the project. Dwelling upon one of the conditions – a grave and imminent peril – the Court concluded that the invoked peril was not real(77), not certain, and not grave and imminent(78). For this reason, Hungary was not entitled to suspend the works and terminate the 1977 Treaty(79).

(b) Slovakia's counter claims and arguments, and the Court's decision

Slovakia also made five points of counter argument which specifically were: 1) the 1977 Treaty was still in force, and termination by Hungary was without legal effect; 2) Hungary was not entitled to abandoned the works at Nagymaros; 3) variant C was lawful; 4) Hungary must continue to fulfill its obligations under the 1977 Treaty; and 5) Hungary was liable to pay full compensation, in the amount to be determined by the Court, for the loss and damage caused to Slovakia(80).

Variant C was at the center of Slovakia's arguments. It was constructed and operated by Slovakia after the project went sour(81). Slovakia maintained that Variant C had been an appropriate act to mitigate the damage resulting from Hungary's unlawful acts(82); that the operation of Variant C was based on the principle of approximate application, conducted in good faith, to rescue the 1977 Treaty from a total failure(83); and therefore did not constitute internationally wrongful acts(84).

One would expect that since Hungary's cause of the state of ecological necessity was turned down, Slovakia's justification of Variant C would surface. Indeed, the Court was rather sympathetic

to the serious problems with which Czechoslovakia was confronted as a result of Hungary's abandonment of the project. It was aware of the facts that Czechoslovakia had made vast investment and the construction at Gabcikovo was all but finished; and that not using the almost completed system of locks would have led to considerable financial losses and serious problems for the environment(85). The Court's decision on the "fate" of Variant C, however, is rather peculiar: the construction of Variant C had been lawful, but its operation had not(86).

Diverting almost 80 per cent of the water in the concerned part of the Danube(87), the operation of Variant C was too unfair to Hungary(88). Slovakia maintained that Variant C could be justified as a countermeasure to Hungary's unlawful suspension and abandonment of works on the project(89); and that Variant C was applied on the principle of "approximate application" to rescue the failure of the 1977 Treaty(90). The Court did not agree with this argument, maintaining, among other things, that one of the conditions of a countermeasure is that the "countermeasure must be commensurate with the injury suffered," but by unilaterally assuming the control of a shared resource, Czechoslovakia had "failed to respect the proportionality which is required by international law"(91). In the Court's view, the putting of Variant C into operation violated both the concept of the community of interests and the principle of equitable and reasonable share of international watercourses(92). Hungary is entitled to a common utilization of shared water resources(93).

3. The concept of sustainable development and the Court's reasoning

As events in the case developed, it gradually became clear that there was not going to be an absolute winner or absolute loser. Throughout the case, the Court seemed to be caught in between the arguments of the two parties. That it did not accept Hungary's cause of ecological necessity means that environmental issues did not seem to bother much. Vise versa, the seemingly justifiable Variant C did

not have a better fate, either, because it deprived Hungary of the right to an equitable share of the Danube. Turning down both parties' arguments, the Court's final decision was the requirement that the parties negotiate "to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in an integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses"(94). Voices have been heard that such a decision would not live up to the expectations of the parties(95).

The most distinguishing feature of the decision in the case is the spirit of pulling together two extremes by way of balancing and reconciling. The Court spoke of "required adjustments between ... the economic imperatives and ecological imperatives"(96). It further emphasized the need for a broader vision when it quoted approvingly Article 5(2) of the Watercourses Convention which combines the "use, development and protection" of a watercourse(97). As indicated earlier in this article, the balancing between developmental and environmental needs creates the core of sustainable development(98). The following passage reflects the Court' thinking on the concept:

> In 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 necessary involving – obligation on the parties to maintain the quality of the water of the Danube 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.
>
> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to 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[99].

The first paragraph of the quoted passage clearly speaks of a continuing process of updating environmental needs. It indicates that the obligation of the parties concerning protection of the environment of the Danube specified in Articles 15 and 19 of the original 1977 Treaty quoted elsewhere above are not sufficient and static; and this involving obligation should be updated with the "current standards." A similar point was already mentioned at least once in the case[100]. If taken alone, the passage could mean that the Court would take Hungary's arguments that new norms of international environmental law had been developed as a justifiable reason for terminating the 1977 treaty. Such an inference is quite possible in the context of the Court's constantly mentioning of the need for environmental protection, and of the fact that the Court never denied the possibility of "ecological necessity" as a ground for breaking an international obligation. Before returning to the reason why the court did not in fact accept Hungary's arguments, it is important to elaborate on the "current standards" mentioned in the passage.

The "current standards" can only be inferred. That the Court turned down Variant C of Slovakia due to damage it had caused to Hungary may suggest that the non-significant harm principle, as applied to the environment, might be one of those current standards. A second one could be the emerging principle of environmental impact assessment[101]. A third, though subtle, could be the precautionary principle[102]. Would the Court incline to declarative environmental law since these principles are mainly mentioned in non-treaty instruments? Those have remained cryptic questions and are up to interpretation. The Court did not say them clearly, it 'did not *invoke* these principles, it *evoked* them" [*sic*][103]. In the third paragraph of the quoted passage, the Court speaks again of "new norms and standards [which] have been developed [and] set forth in a great number of instruments during the last two decades." While

the norms are those that are fixed in a treaty, the standards are not necessarily; and the Court does make a distinction between them. Thus, the norms "have to be taken into account," and the standards must be "given proper weight." This point suggests that the Court recognizes a diverse nature of environmental rules; and, for the first time, "accords some significant to 'soft,' 'technical' law"(104). Such an interpretation is reinforced by the fact that the majority of current environmental law principles are emerging ones.

For the first time in the case the Court made it clear that the "need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development." Thus, the first important point of this passage is that it confirms the constituent parts of the concept of sustainable development: economic development and environmental protection. They are on par, have to be balanced through the reconciliation process, and one does not necessarily have priority over the other(105). It is perhaps for this reconciling nature that the Court, after careful consideration, had to turn down Hungary's pure environmental arguments(106). It is also perhaps for this reason that the Court's decision has been criticized of failing to actually achieve environmental goals(107).

The second important point of the passage is concerned with the Court's view on the status of sustainable development. As noted, whether sustainable development is a "concept" or a "legal principle" is not of primary importance for the purpose of this article, given the complexity of the debate and the practical approaches it proposes. But since the question of the status of the concept has certain relevance to the points to be made in this section, it is necessary to have a short discussion on the issue. It should be noted that the term "concept" used here is carefully chosen by the Court. Referring to sustainable development as a concept, the Court perhaps did not want to become entangled in the question of qualifications/legal status of the concept(108). Since the Court is not clear on the point, scholarly commentaries are rather cautious in assessing the legal status of the concept of sustainable development in the preceding passage. V. Lowe, for example, observes that a

delicate ambiguity in the phrasing of the passage does not make clear at all if sustainable development is among the current norms and standards[109]. Lowe is joined by B. Fuyane & F. Madai who are of the view that the concept did not receive anything more than *orbiter* recognition[110]. Some others, however, argue that sustainable development, among other things, may be incorporated into the customary rules of international water law[111].

The issue being discussed, however, is not that simple. Whether it is a legal principle could depend on one's view of what is a principle and how it should be applied in a given circumstance. According to Castro, one of the essential characteristics of a principle – and a characteristic that differentiates it from an individual or more specific rules – is that the former [the principle] has a less narrowly defined scope and a less defined normative message[112]. This is the price the principle has to pay for covering a much bigger scope of relationship[113]. Undoubtedly, the "concept" of sustainable development which the Court spoke of here conveys a general idea that the environmental factors should be taken on a continuing basis in determining the legitimacy of water uses, placing "economic imperatives and ecological imperatives" on par. The court also spoke that any balancing of interest must look not only to the present but also to the future. One should remember that the Court in this case was directing the parties to further negotiations for an acceptable solution which the Court intentionally evaded.

It would seem that in the sense that a principle is more general than an individual rule, and given the circumstance of the case (the parties will have to re-negotiate in light of the concept), sustainable development possesses conditions of a principle with certain normative nature[114]. In this case, the success of the concept lies in that it establishes "a mechanism for taking into account the progressive development of international law in order to modify a treaty-based regime that does not depend on specific provisions of the treaty itself"[115]. The concept will act as an operative factor when determining disputes between parties that involve conflicts between developmental and environmental rights[116].

The normativity of sustainable development can also be found

in a different, yes, indirect way. Lowe sees the special normativity of the concept in connection with what he terms judicial reasoning: "Norms may function primarily as rules for decision, of concern to judicial tribunals, rather than as rules of conduct"[117]. He suggests looking for a normative force of sustainable development in the area of these norms, since the concept can claim a normative status as an element of the process of judicial reasoning[118]. He argues that the rationale for this kind of legal normativity lies in the fact that all legal systems are very indeterminate which cannot always predict or fix every social relation in a fixed legal fold[119]. The normativity of the concept, then, should be found in the final decision of the ICJ which is binding upon the parties of the dispute he calls a modifying norms. In this case, while the Court could have managed without the concept, but it did refer to the concept, thus opening an additional opportunity for the parties as a new framework for the reconciliation of conflicts between development and environmental protection[120]. Lowe interestingly opines that viewed from a customary law perspective, the concept is not created by the traditional combination of state practice and *opinio juris*, but it is essentially a judicial rule created by judges and under their control[121].

Though different in methods of putting forward the thesis, Lowe's arguments on "judicial normativity" and those holding that sustainable development is a guiding principle have a common, logical point. That is, the Court was guided by the concept of sustainable development in making the binding decision; and the parties will renegotiate for a final solution also under the guidance of sustainable development[122]. In this sense, the concept of sustainable development is "an innovation not only in the jurisprudence of the Court but also in the law relating to utilization of natural resources"[123].

Another important point of the case in general and that of the quoted passage in particular is the idea of cross-fertilization of norms in international law, and sustainable development seems to be the thread weaving them together[124]. The Court's reasoning seems to be rooted in the proposition that norms of water, environmental

and developmental laws are increasingly interlinked[125]: current standards of environmental law should be taken into account in deciding a water use; and though construction of Variant C was legal, its operation was not because of violating Hungary's right to a reasonable sharing of the Danube. The findings of the case, with respect to the increasing tendency of international law and water law to adopt an environment friendly perspective[126], are a continuation of those in a series of previous cases[127]. In this case, the Court places equitable utilization in the wider context of sustainable development[128]; and a given use may be equitable in a bilateral context without it necessarily being sustainable[129]. As a result, "the balance between the development of a watercourse and the protection of the environment is not simply a matter of equity between the parties but is a matter that must take into account of the international community's interests in sustainable development"[130].

By introducing sustainable development, the Court not only cross-fertilizes international legal norms, it also enriches them[131]. For example, Articles 15 and 19 of the 1977 Treaty are enriched with newer contents of environmental protection under the "current standards." Speaking of the required adjustments between economic and ecological imperatives, the Court enriches the norm on using water for economic development with an ecological content, and places them on the same level to form a new quality of balancing[132].

4. Judge Weeramantry's separate opinion

The Separate Opinion of Judge Weeramantry is an inseparable part of the judgment in the *Gabcikovo-Nagymaros case*[133]. It is a continuation and further development of the views taken by the ICJ in the case. Judge Weeramantry spoke of three major issues, two of which are discussed in this sub-section: the principle of sustainable development and the principle of continuing environmental impact assessment[134].

(a) The principle of sustainable development

The judge was clearer and more definite than the Court, holding that sustainable development is not just a concept, but actually is a firm legal principle[135]. Sustainable development – the idea of reconciling between development and environmental protection – has its historical roots in early civilization in many parts of the world[136]. As a principle of reconciliation, sustainable development contains two major elements: development and environmental conservation[137]. The right to development is enshrined in a number of important international legal documents[138]; and the requirement of environmental protection is a vital part of contemporary human rights doctrine which needs no further elaboration[139]. Sustainable development *per se*, can also be found in a large number of international legal instruments[140].

There are two important points worthy of note. *First*, the components of sustainable development are established human rights[141]. The right to development is considered an inalienable human right. Similarly, protection of the environment is viewed anthropocentrically as being a vital part of human right doctrines. The philosophical basis of sustainable development is, among other things, the reconciliation of two incompatible forms of human right[142]. *Second*, Judge Weeramantry viewed sustainable development not simply as a right in itself, but as a means for resolving disputes between the rights to development and environmental protection; and the underlying juristic basis of sustainable development is therefore reconciliation of the tension between environmental and developmental rights[143]. Thus, the judge confirms the point, though followed, but not made very clear, by the ICJ in the case. That is, as mentioned elsewhere above, the Court was guided by the concept of sustainable development as a tool in making the decision.

(b) The continuing process of environmental impact assessment

The most important point developed by the judge is perhaps that environmental impact assessment (EIA) of a project is a continuing process. EIA is a dynamic principle which is not confined to a pre-project evaluation of environmental consequences, but continues well after to take into account unexpected consequences(144). He noted that no action should be permissible which is today considered environmentally unsound, even though it is taken under an instrument of more than 20 years ago(145). This view of the judge is absolutely in harmony with the ICJ's holding that "in order to evaluate the environmental risks, current standards should be taken into account"(146). The environmental considerations which were built into Articles 15 and 19 of the 1977 Treaty were not sufficient, and the new developments in international environmental law, including the emerging concept of sustainable development should be additionally incorporated.

5. Summary

The judgment in the Gabcikovo-Nagymaros case is the first ever case in history of the ICJ that directly touches the legal aspects of international water uses. It poses a few important issues which can be summarized as follows.

International water utilization has entered a new, and more complicated phase. In here, both the needs to use water for developmental purposes and environmental protection are clearly, fully, and comprehensively demonstrated. The developmental need, represented by Variant C, is in no way underestimated. The clear proof of this is the Court's confirmation that Variant C was legally built. The only reason that the Court thought its operation was unlawful was that it violated still another principle of international water law – the principle of equitable and reasonable utilization of

a shared water. The Court mentioned several times of the need to protect the environment, and even admitted that ecological necessity could act as an excuse for terminating a treaty obligation. A *first message* of the judgment, then, is the reinforcement of the omnipresent proposition that international waters must be used for development, but must be protected.

While the specific questions referred by the parties to the Court were satisfactorily answered(147), certain issues were left open. For this reason, certain experts think that there might be a "Gabcikovo II" where the Court would be asked to clarify, among other things, whether a) Hungary would have to build a second dam; and b) What involving norms of international law that the parties would have to take into account in their negotiations(148). The Court might already have had in mind answers to these questions in the very case. It could have already answered them, but it did in fact evade to be direct. Yes, the nature of water uses had changed, and because of this, no single water issue can be said to be definitely right or wrong, just as there was no clear winner nor loser in the case. A *second message* of the case therefore is that nowadays it is quite possible that no clear cut answer can be found for certain water issues, especially those involving both development and protection of water.

For the first time in its history, the ICJ touched upon the rather controversial and much debated concept of sustainable development. The ICJ did send the message through that sustainable development represents a reconciliation of economic development and protection of the environment. That there was no clear winner in the case may therefore be explained by the ICJ's having to reach an uncomfortable compromise. It tried to inject flexibility into a rigid treaty regime(149) which, while providing for a developmental project, did not foresee the changing circumstances of the need for environmental protection. The difficulty is that while a mechanical application of the traditional law of development is no longer acceptable as it excludes the changing environmental values, environmental law is not strong enough to prevail in a specific circumstance. In such a circumstance, sustainable development represents a force that pulls between, and holds the two ends together. So long as these ends still

revolve and coexist on the same orbit, sustainable development remains a successful tool. A *third message* of the case therefore is that the CSD should be seen in its being a tool to handle cases where developmental needs and environmental values seem to be irreconcilable. It can therefore be concluded that the Court was actually guided by the CSD in its reasoning and making the final decision in this case.

Judge Weeramantry made clear several points. The views in his Separate Opinion are a logical continuation of the ideas already reflected in the judgment by the ICJ. He went further than the ICJ to confirm that sustainable development is a principle of international law. This confirmation does not seem to be of much importance if one agrees that sustainable development should be regarded as a tool for dealing with disputes; and the ICJ was actually guided in its "judicial reasoning" by the CSD in reaching the final decision in the case. What is more important is Judge Weeramantry's view that environmental impacts assessment is a continuing process. This is an additional buttress of the ICJ's holding that in order to evaluate environmental risks, current standards must be taken into consideration. Though not clearly stated, the spirit of sustainable development can be subtly seen beyond the Court's and the Judge's reasoning. A *fourth message* of the case, therefore, is that sustainable development is a flexible, difficult-to-quantify concept since it continually has to take into account the standards that keep changing over time.

It has remained to add a few words on the present standing of the case to conclude this section. On September 3, 1998, Slovakia, on the basis of the terms of the 1993 Special Agreement(150), filed a request to the ICJ for an additional judgment concerning the Gabcikovo-Nagymaros project(151). According to Slovakia, such an additional judgment is necessary due to Hungary's unwillingness to implement the September 25, 1997 judgment made by the Court(152). As of March 2002, the case concerning Slovakia's request for an additional judgment is still pending with the ICJ.

ENDNOTES

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(1) *See* Declaration of the United nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416 (1972) (Principle 13 stating that States "should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment") [hereinafter 1972 Stockholm Declaration]. Scholars even suggest that the ideas of "sustainability" have been a feature in international legal relations since at least 1893 when the United States asserted a right to ensure the legitimate and proper use of seals to protect them, for the benefit of mankind, from wanton destruction. *See* PHILIPPE SANDS, 1 PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 199 (1995) (citing the Pacific Fur Seals Arbitration to substantiate the view).

(2) WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (WCED), OUR COMMON FUTURE 43 (1987).

(3) In this article, the terms "concept" and "principle" are, depending on the context, used interchangeably to denote the same meaning.

(4) *See* U.N. Framework Convention on Climate Change (FCCC), U.N. Doc. A/AC.237/18 (Part. II) (Add. 1) (art. 3(1) stating that the Parties, among other things should protect the climate system for present and future generations of humankind) [hereinafter Climate Change Convention].

(5) *See* Agreement Establishing the World Trade Agreement, Apr. 15, 1994, 33 I.L.M. 1144 (1994) (the pmbl. stating, among other things, that "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, [the parties seek] both to protect and preserve the environment").

(6) *See* U.N. Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Jun. 17, 1994, 33 I.L.M. 1328 (1994) (the pmbl. reminding that combating desertification is needed at all levels within the framework of sustainable development) [hereinafter Convention to

Combat Desertification].

(7) *See* Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (1991) (the pmbl. affirming "the *need* [*sic*] to ensure environmentally sound and sustainable development.") [hereinafter EIA Convention].

(8) *See* Convention on International Trade of Endangered Species of Wild Fauna and Flora, Mar. 3, 1973 (amended on June 22, 1979), 993 U.N.T.S. 243 (the pmbl. providing for the protection of fauna and flora for both the present and future generations).

(9) *See* North American Agreement on Environmental Cooperation, Sep. 14, 1993, Canada-Mexico-U.S., 32 I.L.M. 1482 (1993) (pmbl. & art. 1 providing that the parties are to achieve sustainable for the benefit of the present and future generations).

(10) *See* Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M 874 (1992) (Principle 3 providing that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations," and Principle 4 further adding that "[I]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." [hereinafter 1992 Rio Declaration].

(11) *See*, for example, Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River, May 28, 1987, Botswana-Mozambique-Tanzania-Zambia-Zimbabwe, 27 I.L.M. 1112 (1988) (the pmbl. establishing the Agreement's aim to manage the waters of the river system on an environmentally sound manner to strengthen their regional cooperation for sustainable development); Agreement on the Protection of the River Meuse, Apr. 26, 1994, 34 I.L.M. 854 (1995) (art. 3(5) stating that the Contracting Parties shall work together to ensure sustainable development for the Meuse and its drainage area."); Agreement on the Protection of the River Scheldt, Apr. 26, 1994, 34 I.L.M. 859 (1995) (art. 3(5) stating that the Contracting Parties shall work together to ensure sustainable development for the Scheldt and its drainage area."); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312 (1992); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312 (1992) (art. 2(5)(c) stating that water resources shall be managed so

that the needs of the present generation are met without compromising the ability of future generations to meet their own needs); Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Apr. 5, 1995, Laos-Cambodia-Thailand-Vietnam, 34 I.L.M. 864 (1995) [hereinafter 1995 Mekong Agreement]; and Southern African Development Community (SADC): Revised Protocol on Shared Watercourses in the Southern African Development Community, Aug. 7, 2000, 40 I.L.M. 321 (2001), (art. 3(4) providing, in an indirect manner, for a legal principle that state parties shall maintain a proper balance between resources development for a higher standard of living for their people and conservation and enhancement of the environment to promote sustainable development).

(12) *See infra* Part II of this article.

(13) On Nov. 6, 1998, the Dispute Settlement Body ("DSB") of the WTO adopted the Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R) and the Panel Report (WT/DS58/R), as modified by the Appellate Body Report, requesting the United States to bring its measure found to be inconsistent with art. XI of the GATT 1994 (General Elimination of Quantitative Restrictions), and not justified under art. XX of the GATT 1994 (General Exceptions) into conformity with the obligations of the United States under that Agreement. In its Report WT/DS58/AB/R, the Appellate Body referred to the principle of sustainable development which is embodied in the Preamble of the 1994 WTO Agreement. In footnote 107 of the Report, the Appellate Body states that "this concept [sustainable development] has been generally accepted as integrating economic and social development and environmental protection."

(14) *See* 1992 Rio Declaration, *supra* note 10.

(15) In its Resolution No 15/2000 the ILA, among other things raises its hope that international law could play a role in clarifying the CSD in the spirit that due weight should be given to both the developmental and environmental concerns. *See* ILA, *Report of the Sixty-ninth Conference* (London, 2000), at 38.

(16) A Meeting of the Expert Group which was convened by the Secretariat of the United Nations Commission on Sustainable Development ("UNCSD Expert Group") held on Sep. 26–28, 1995 suggested a set of principles for sustainable development. These

include: 1) a fundamental principle of interrelationship and integration; 2) eight principles related to the environment and development; 3) three principles related to international cooperation; 4) three principles related to participation, decision-making and transparency; and 5) four principles related to dispute avoidance, resolution procedures, monitoring and compliance, *See generally* U.N. DEPARTMENT FOR POLICY COORDINATION AND SUSTAINABLE DEVELOPMENT, REPORT OF THE EXPERT GROUP MEETING ON IDENTIFICATION OF PRINCIPLES OF INTERNATIONAL LAW FOR SUSTAINABLE DEVELOPMENT, (Geneva, Sep. 26–28, 1995), para. 15, http://www.un.org/gopher-data/esc/cn17/1996/backgrnd/law.txt. [hereinafter 1995 EXPERT GROUP].

(17) These specifically are: 1) sustainable utilization; 2) integration of environmental protection and economic development; 3) an arguable right to development; 4) intergenerational equity; 5) intra-generational equity; and 6) procedural elements. *See* Allan Boyle & David Freestone, *Introduction, in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 1, 9–16 (A. Boyle & D. Freestone, eds, 1999) [hereinafter Boyle & Freestone].

(18) Namely, 1) the requirement to take into consideration the needs of present and future generations (intergenerational equity), 2) on the environmental protection grounds, acceptance of limits of use of natural resources (sustainable use), 3) the role of equitable principles in allocation of rights and obligations (equitable use), and 4) the need to integrate all aspects of environment and development (integration). *See* P. Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 53, 57–62. (Winfred Lang, ed., 1995) [hereinafter Sands, International Law]; and P. Sands, *Environmental Protection in the Twenty-First Century: Sustainable Development and International Law, in* ENVIRONMENTAL LAW, THE ECONOMY AND SUSTAINABLE DEVELOPMENT 369, 374 (Richard L. Revesz, Philippe Sands & Richard B. Stewart, eds., 2000) [hereinafter Sands, Environmental Protection].

(19) Sands argues that norms in different areas of international law, such as human rights and development, trade and environment, human rights and environment, and development assistance and human

rights, to name but a few, do touch, co-mingle, and compete. This type of interconnection has its base on the "principle of integration" reflected in a universal instrument – the 1969 Vienna Convention on the Law of Treaties. He goes on to suggest that the trend of inter-mingling of norms can probably be best seen in the areas of development and environment. Thus, while early instruments such as the 1947 GATT generally exclude other areas of international law, and focus on purely economic and financial matters, the picture is different today. The 1994 Agreement on WTO, for example, commits parties to expanding the production of and trade in services whilst "seeking both to protect and preserve the environment." *See generally*, P. Sands, *Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law, in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 39, especially at 40, 43–56 (A. Boyle & D. Freestone, eds., 1999) [hereinafter Sands, Sustainable Development].

(20) Y. Matsui, *The Road to Sustainable Development: Evolution of the Concept of Development in the U.N. in* SUSTAINABLE AND GOOD GOVERNANCE 53, 68 (K. Ginther, E. Denters & Paul J. I. M. De Waart, eds., 1995).

(21) *Id.* at 69. *See* also H. J. DE GRAAF, *et al.*, REGIONAL OPPORTUNITIES FOR SUSTAINABLE DEVELOPMENT 15 (1999) (who cites several other authors to assert that sustainable development is an umbrella concept, embracing all issues pertaining to the interrelationship between the environment and human development).

(22) *See generally* Robert Goodland, Herman Daly, and Salah El Serafy, *Environmentally Sustainable Development: Building on Brundtland*, Working Paper, Environment Department, WB, Washington D.C. July 1991). The authors, a group of experts within the WB, criticize the misleading view that society has built its economic theory and institutions on the premise that the total demand that human economic activities place on the environment is inconsequential relative to the scale of the ecology's regenerative capacities. As a result, contemporary economic theory and policy wrongly assume an *empty* world. The reality is: we now live a *full* world. For comments on this point *see* David Korten, "Sustainable Development: Reflections on Japan's Role" – Presentation at International Symposium on Global Initiatives for Sustainable Development,

Osaka, Japan, Nov. 28–29, 1991 – Report of the Symposium published by the Japanese Foundation for Advanced Studies on International Development, 1992, at 8.

(23) For the theory of intergenerational equity and the right of future generations *see generally* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERNATIONAL EQUITY 17–45 (1989).

(24) P. Sands, Environmental Protection, *supra* note 18, at 408.

(25) *See* BLACK'S LAW DICTIONARY 1083 (1999) (explaining that a rule/norm is a model standard accepted; and an example of norm is the standard for a right or wrong behavior).

(26) *See id.* (defining a principle as a basic rule, law or doctrine).

(27) Bruce Koppel, *Sustainable Development: Moving beyond the Accidental Consensus*, Presentation at International Symposium on Global Initiatives for Sustainable Development, Osaka, Japan, Nov. 28–29, 1991 – Report of the Symposium published by the Japanese Foundation for Advanced Studies on International Development, 1992, at 16.

(28) *See* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969), *passim*, especially at 145–51 (who generally asserts that a law should best be envisioned from the angle of practical reasoning and legal normativity, and in the end lies in the interaction of ends and means).

(29) Axel Bree, *Article XX GATT – QUO VADIS? The Environmental Exceptions After the Shrimp/Turtle Appellate Body Report*, 17 Dick. J. Int'l L. 99, 109 (1998).

(30) Matsui convincingly argues that the principle/concept of common but differentiated responsibilities actually guided the drafting process of instruments such as the Framework Convention on Climate Change and the Montreal and Kyoto Protocols, and now operates as a guiding principle for interpretation and application of these instruments. Also, according to him, the WTO Panel in the *Shimp/Turtle* case requested Malaysia and the United States, in taking into account the principle of common but differentiated responsibilities, to conclude an agreement which will permit the protection and preservation of sea turtles. *See* Yoshiro Matsui, "Some Aspects of the Principle of Common but Differentiated Responsibilities," a paper presented at the Seminar International Law and Sustainable Development: Principle and Practice, Amsterdam, Nov. 29 – Dec. 1, 2001, (on file

with author), at 14 [hereinafter Matsui, Some Aspects]. For the WTO Panel opinion *see* United States – Import Prohibition of Certain Shrimp and Shrimp Product: Recourse to Article 21.5 by Malaysia, Report of the Panel, WT/DS58/RW, June 15, 2001, para. 7.2, upheld by the Appealate Body, WT/DS58/AB/RW, Oct. 22, 2001.

(31) According to Castro, one of the essential characteristics of a legal principle, characterized by its nature of much bigger scope of relationship than a specific rule, is that the principle has a less narrowly defined scope and a less defined normative message than the rule. *See* Paulo Canelas de Castro, *The Judgment in the Case Concerning the Gabcikovo-Nagymaros Project: Positive Signs for the Evaluation of International Water Law, in* (1997) 8 Y. B. INT'L ENVT'L L., 21, 28 (J. Brunnee & E. Hey, eds., 1998). Matsui also notes that "... to characterize a principle as a legal principle does not necessarily define its concrete legal operations or consequences. These will depend on its context in the convention [Framework Convention on Climate Change] as well as on the context of its actual application." *See* Matsui, Some Aspects, *id.*

(32) William Goldfarb, *Watershed Management: Slogan or Solution?*, 21 B. C. Envtl. Aff. L. Rev. 483, 504 (1994).

(33) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7.

(34) United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700 (1997) [hereinafter 1997 Watercourses Convention].

(35) *See* Aaron Schwabach, *The United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians*, 33 Tex. Int'l L.J. 257, 257–8 (1998) (who observes that 1997 Watercourses Convention and the Gabcikovo-Nagymaros case adjudicated by the ICJ are two major developments in public international law regarding the non-navigational uses of the waters of international watercourses) [hereinafter Schwabach, The United Nations Convention].

(36) The 1997 Watercourses Convention will remain a framework convention. The preamble states that it is "a framework convention." Under art. 3, the Convention does not affect existing water agreements between the parties of the Convention, nor does it prevent any parties from entering into one or more agreements which adjust

the provisions of the Convention. Even opponents of the Convention who believe it fails to properly protect the interests of developing upper riparians observe that the Convention "does provide for a guideline for interpreting and possibly predicting the actions of most states with respect to international watercourses." *See* Schwabach, *id.* at 279.

(37) *See* S. C. McCaffrey, *An Overview of the U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses*, 20 J. Land Resources & Envtl. L. 57, 71 (2000) [hereinafter McCaffrey, An Overview]. It should be noted that while the intent of the parties at the time of a treaty's conclusion obviously cannot be disregarded, developments in the law may be relevant to the treaty's interpretation. *See* statement of the ICJ in the Namibia advisory opinion that where matters involved "were not static, but were by definition evolutionary," the provision in question would be interpreted within the framework of the entire legal system prevailing at the time of the interpretation." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 53 (June 21). The conception of international watercourses have without question evolved considerably during the 20th century. *See* e.g. Stephen McCaffrey, *The Evolution of the Law of International Watercourses*, 45 Austrian J. Pub. & Int'l L. 87 (1993) [hereinafter McCaffrey, The Evolution].

(38) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7.

(39) The Danube River flows 1,776 miles (about 2,800 km) from Germany to the Black Sea. It traverses through Austria, Slovakia, Hungary, Croatia, Serbia, Bulgaria, Romania and the Ukraine. *See* Aaron Schwabach, *Diverting the Danube: The Gabcikovo-Nagymaros Dispute and International Freshwater law*, 14 Berk. J. Int'l Law 291, 292 (1996) [hereinafter Schwabach, Diverting the Danube].

(40) Treaty Concerning the Construction and Operation of the Gabcikovo – Nagymaros System of Locks, Sep. 16, 1977, Czechoslovakia – Hungary, 1109 U.N.T.S. 235, Treaty No. 17131; 32 I.L.M. 1247 (1993) [hereinafter 1977 Treaty].

(41) Ida L Bostian, *Flushing the Danube: The World Court's Decision Concerning the Gabcikovo Dam*, 9 Colo. J. Int'l Envtl. L. & Policy

401, 401 (1998).

(42) *See* 1977 Treaty, *supra* note 40, art. 1.

(43) *Id.*

(44) *Id.*

(45) *Id.* art. 4.

(46) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 21.

(47) *Id.* para. 22.

(48) *See generally id.* paras. 23 & 66.

(49) G. E. Eckstein & Y. Eckstein, *International Water Law, Groundwater Resources and the Danube Dam Case* http://home.att.net/~intlh2olaw/trnasboundary_grounwater.htm.

(50) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, paras. 23, 24 & 25.

(51) Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic Concerning the Gabcikovo-Nagymaros Project, Apr. 7, 1993, Hungary-Slovakia, 32 I.L.M. 1293 (1993) [hereinafter 1993 Special Agreement].

(52) *Id.* art. 2.

(53) *See* note 52 and accompanying text.

(54) *See* Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 155.

(55) *See* note 52 and accompanying text.

(56) *See* Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 155.

(57) *See id.* Summary.

(58) *Id.* para. 13.

(59) *See id.* para. 40. For more details on the state of ecological necessity and environmental problems of the project *see* also Schwabach, Diverting the Danube, *supra* note 39, at 301 (who suggested that the two major environmental problems were: the replacement of a steady flow of the Danube with a periodic flow and the replacement of a permeable riverbed with an impermeable lined canal. There would also be common problems caused by dams).

(60) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), para. 40.

(61) *Id.*

(62) *Id.*

(63) *Id.* paras. 33–40. For a presentation and analysis of Hungary's environmental evidence *see* also Bostian, *supra* note 41, at 414–8.
(64) C. B. Bourne, *The Case Concerning the Gabcikovo-Nagymaros Project: An Important Milestone in International Water Law, in* (1997) 8 Y. B. INT'L ENVT'L L., 6, 8 (J. Brunnee & E. Hey, eds., 1998).
(65) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 53.
(66) *Id.*
(67) *Id.*
(68) *Id.* para. 112.
(69) Article 15: Protection of Water Quality:
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.

(70) Article 19: Protection of Nature:
"The 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".
(71) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 57.
(72) *Id.* para. 48.
(73) *See id.* para. 50 for the Court's full quotation of Article 33 of the Draft Articles.
(74) *Id.* para. 51.
(75) *Id.* para. 52.
(76) *Id.* para. 53.
(77) *Id.* para. 54.
(78) *Id.* paras. 56, 57.
(79) *Id.* para. 59
(80) *Id.* para. 13.
(81) *See supra* notes 48–49 and accompanying text for a description of Variant C.

(82) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 68.
(83) *Id.* paras. 64 & 67.
(84) *Id.*
(85) *Id.* para. 72.
(86) This is evident from the votes of the Court concerning "proceeding to" the "Provisional Solution" on the one hand and "putting it into operation" on the other. *See id.* para. 88.
(87) *Id.* para. 78.
(88) Additional information supplied by Hungary and scholars sheds more light on the negative effects of Variant C. It diverted approximately 80 percent of the Danube flow, causing the water level in the original channel to drop by two to four meters. It re-routed the Danube at Cunovo away from its original border with Hungary, into a canal on the Slovak territory. It caused other problems such as aquifer contamination, threatening agricultural land and destroying Europe's largest freshwater wetlands. For more details on the negative impacts of variant C *see*, for example, Gabriel Eckstein, *Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute Over Gabcikovo-Nagymaros*, 19 Suffold Transnat'l. L.Rev. 67, 103 (1995); Jane Perlez, *World Court Leaves Fight over Danube Unresolved*, N.Y. Times, Sep. 26, 1997 at A12; Margaret Bowman & David Hunter, *Environmental Reform in Post-Communist Central Europe: From High Hopes to Hard Reality*, 13 Mich. J. Int'l L. 921, 925 & n.8 (1992); and Bostian, *supra* note 41, at 411 & n 103.
(89) *See* Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 69.
(90) *See id.* para. 75.
(91) *Id.* para. 85.
(92) *Id.*
(93) *Id.* para. 78.
(94) *Id.* para. 141.
(95) A. E. Boyle, *The Gabcikovo-Nagymaros Case: New Law in Old Bottles, in* (1997) 8 Y. B. INT'L ENVT'L L., 13, 14 (J. Brunnee & E. Hey, eds., 1998) [hereinafter Boyle, The Gabcikovo-Nagymaros Case]. Bostian seemed frustrated, saying that the decision of the ICJ in the case "did not live up to the expectations of many; it neither resolved the dispute between Hungary and Slovakia nor clarified nor

strengthened international environmental law." *See* Bostian, *supra* note 41, at 420–21.

(96) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 103.

(97) *Id.* para. 147.

(98) *See supra* Part I, "The Issues."

(99) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 140.

(100) In para. 112, the Court mentioned that the 1977 Treaty is not static, and that newly developed norms of environmental law could be incorporated by agreement of the parties for the implementation of the 1977 treaty.

(101) Para. 112 which states in part that the "recognition that environmental risks have to be assessed on a continuous basis" can be said to refer to the tool of environmental impact assessment.

(102) The Court mentioned "required precautionary measures." (para. 113.)

(103) Castro, *supra* note 31, at 28.

(104) Id. at 24–25.

(105) Afshin A-Khavari & Donald R Rothwell, *The I.C.J. and the Danube Dam Case: A Missed Opportunity for International Environmental Law?* 22 Melbourne U. L.R. 507, 520 (1998). This point is shared by other authors. Bourne is also of the view that the passage establishes that the protection of the environment has no absolute priority over other considerations, and that "the protection of the environment of other states is of high, but not overriding, importance; it cannot frustrate rational development. A balance between the two competing interests must be sought." *See* Bourne, *supra* note 64, at 11.

(106) Out-of-the-court records and data pointed to different reasons why Hungary had to abandon the project. It was believed, for example, that the ecological necessity claimed by Hungary was a ruse. The project was planned during the centrally planned economy when natural rules of market economy were ignored, and it was possible that Hungary, for political reason was under the pressure of the former USSR to accept the project in a hurry which Hungary did not really like. There was also historical and boundary reason that the Czechoslovakians were suspected to take the advantage of the project to obtain more Hungarian territory. Hungary's disadvantageous position, especially in terms of the navigational route for its trade

with other countries in the region, and economic difficulties also added up. Last but not least, ethnic problem contributed to Hungary's decision to abandon the project. For more details see Peter Heywood & Karoly Ravasz, Danube Diversion Stirs Controversy, Engineering News Rec., Feb. 9, 1989, at 23; Brian James, *Dam Nation; Hungary; Czechoslovakia*, Times of London, Jun. 6, 1992; and Trade and Environment Data Base (TED Cases), *Hungary Dam* http://www.american.edu/projetcs/mandala/TED/HUNGARY.htm.

(107) While, on the one hand, it confirmed the substantive nature of environmental protection as a core value implicit in sustainable development; on the other hand, it failed to take adequate account of the fundamental failure of technical solutions to protect the environment with respect to immense and inflexible public works projects, such as the Gabcikovo-Nagymaros project. *See* Castro, *supra* note 31, at 42.

(108) *See id.* at 28.

(109) *See* Vaughan Lowe, *Sustainable Development and Unsustainable Arguments, in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 19, 20 (A. Boyle & D. Freestone, eds., 1999).

(110) B. Fuyane & F. Madai, *The Hungary-Slovakia Danube River Dispute: Implications for Sustainable Development and Equitable Utilization of Natural Resources in International Law*, http://www.internationalwaterlaw.org/Bibliography/Gabcikovo.htm (Website of the University of Dundee).

(111) *See*, for example, A Dan Tarlock, *Safeguarding International Ecosystem in Times of Scarcity*, 3 U. Denv. Water L. Rev. 232, 245 (2000).

(112) Castro, *supra* note 31, at 28.

(113) *Id.*

(114) *Id.* at 29.

(115) *Id.* at 50.

(116) *See* Khavari & Rothwell, *supra* note 105, at 527.

(117) *See* Lowe, *supra* note 109, at 31.

(118) *See id.*

(119) *See id.* at 33.

(120) *See id.* at 35.

(121) *See id.*

(122) S. McCaffrey, for example, seems to have the view that the essence of sustainable development is compromise which the ICJ used to

make decision in the Gabcikovo-Nagymaros case. In this respect, a strict reference to the concept as being a purely technical legal norm might have not brought about the expected result. *See* S. McCaffrey, *Konvenxia Organizaxii Obedionnux Naxii o Prave Nhexudakhodnux Vidov Ixpolzobanii Mejdunarodnux Vodatokov: Perspetivu i Nhedostatki [United Nations Convention on the Law of Non-Navigational Uses of International Watercourses: Perspectives and Drawbacks] in* MEJDUNARODNOE I NAXIONALNOE VODNOE PRAVO I POLITICA [INTERNATIONAL AND NATIONAL WATER LAW AND POLICY] 139, 144 (Tashkent, Uzbekistan, 2001) [hereinafter McCaffrey, Konvenxia].

(123) Rosalyn Higgins, *Natural Resources in the Case Law of the International Court in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 87, 110–111 (A. Boyle & D. Freestone, eds., 1999).

(124) *See* Sands' arguments in Sands, Sustainable Development, *supra* note 19.

(125) *See* Boyle, The Gabcikovo-Nagymaros Case, *supra* note 95, at 13.

(126) *See* Castro, *supra* note 31, at 30–31.

(127) For example, *Trail Smelter Arbitration and Legality of the Threat or Use of Nuclear Weapons* cases. For a brief description of these two cases *see infra* note 273.

(128) *See* Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 85.

(129) Boyle, *supra* note 95, at 16.

(130) *Id.* at 19.

(131) Castro, *supra* note 31, at 21.

(132) *Id.* at 22.

(133) C. Weeramantry, Separate Opinion in the Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 37 I.L.M. 204 (1998).

(134) The third issue spoken of was the appropriateness of the use on *inter partes* legal principles, such as *estoppel*, for the resolution of problems with an *erga omnes* connotation such as environmental damage.

(135) Judge Weeramantry wrote that sustainable development is "more than a mere concept, but ... a principle with normative value which is crucial to the determination of [the *Gabcikovo-Nagymaros*] case," and an "integral part of modern international law." *See id.* at 205. A

similar view was held by the former President of the I.J.C., Nagendra Singh, who stated that sustainable development is a peremptory norm because it is a part of modern natural law. *See* H.E. Judge Nagendra Singh, *Sustainable Development as a Principle of International Law in* INTERNATIONAL LAW AND DEVELOPMENT xi–xii (Paul De Waart, Paul Peters & Erik Denters, eds., 1988); Nagendra Singh, "Foreword" in WCED, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS (1987) 1, 1–4.

(136) In Asia: In irrigation-based civilization of Sri Lanka (ca 1st C), amazing systems of waterworks were built which recognized the need for development and at the same time articulated the need for environmental protection. Irrigation works in China and India (3rd Century B.C) were established with the perception that earth was the sanctuaries for wild animals. *Qanats* (a series of vertical shafts dug down to the aquifer and joined by a horizontal canal still in use today) were built in Iran. In Africa: Tanzanian tribes built complicated networks of irrigation furrows, collecting water from the mountain streams and transporting it over long distances to the fields below with no over-irrigation, salinity reduced, and water born diseases avoided. In Europe: deep-seated tradition of love for the environment and the desire for its conservation (through works of writers and thinkers). In Islamic law: Land is never the subject of human ownership, but is only held in trust, with all the connotations that follow of due care, wise management, and custody for future generation (the first principle of environmental law – the principle of trusteeship of earth resources). *See* Weeramantry, *id.* at 209–213.

(137) *See id.* at 205–6.

(138) These, *inter alia*, include Declaration on the Right to Development (1986), Universal Declaration of Human Rights (1948), and Rio Declaration on Environment and Development (1992).

(139) Weeramantry, *supra* note 133, at 206.

(140) The Judge, among others, mentioned the following documents: Founex meeting of experts in Switzerland (June 1971), the 1972 Stockholm Declaration (Principle 11), the 1994 U.N. Convention to Combat Desertification (pmbl. & art. 9(1), the 1992 U.N. Climate Change Convention (arts. 2 & 3), Biological Diversity Convention (pmbl., arts. 1 & 10), the 1992 Rio Declaration on Development and Environment (Principles 4, 5, 7, 8, 9, 20, 21, 22 and 27), the 1994

WTO Agreement (para. 1 of the pmbl.), and the Brundtland Report.

(141) Weeramantry, *supra* note 133, at 207.

(142) Khavari & Rothwell, *supra* note 105, at 524.

(143) Weeramantry, *supra* note 133, at 207.

(144) *Id.* at 214.

(145) *Id.* at 215.

(146) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, para. 140.

(147) See *supra* note 52 and accompanying text.

(148) Stephen Stec, *Nature Beyond the Nation State Symposium: Do Two Wrongs Make a Right Adjudicating Sustainable Development in the Danube Dam Case*, 29 Golden Gate U.L. Rev. 317, 387 (1999). For an update of the post-judgment Gabcikovo-Nagymaros project *see Water: Update: Hungary-Slovakia and the Gabcikovo-Nagymaros Project*, 1998 Colo. J. Int'l Envtl L.Y.B. 260.

(149) *See* Stec, *id.* at 356.

(150) Under art. 5 of the 1993 Special Agreement, *supra* note 51, the Parties agreed: 1) to accept the Court's judgment as final and binding; 2) to immediately enter into negotiations for the modalities for the judgment's execution; and 3) if the Parties were unable to reach agreement within six months, either Party may request the Court to render an additional judgment to determine the modalities for executing the original judgment.

(151) *See* ICJ Press Communique 98/28, "Gabcikovo-Nagymaros Project, Slovakia Requests an Additional Judgment," Sep. 3, 1998, http://www.icj-cij.org/icjwwnw/ipresscom/iPress1998/ipr9828.htm. It should be noted that Slovakia's request for an additional judgment here is different from the possibility of "Gabcikovo II" mentioned in the accompanying text of *supra* note 148: the latter is inferred by experts to be necessary for clarifications of points made in the original judgment, while the former was actual, and was already made by Slovakia for the implementation of the original judgment

(152) Slovakia *inter alia* asked the ICJ to adjudge and declare that Hungary is responsible for the failure to agree on the ways to implement the September 25, 1997 judgment; that under the latter, the Parties are to ensure the achievement of the objectives of the 1977 Treaty; and that the Parties shall immediately resume their negotiations in good faith to expedite their agreement on the modalities for achieving the objectives of the 1977 Treaty. *See* ICJ Press Communique 98/28, *id.*