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Case Concerning the Gabčíkovo–Nagymaros Project (Hungary/Slovakia)[1]

International Court of Justice, The Hague

5 February 1997 (Bedjaoui, *President*; Schwebel, *Vice-President*; Oda, Guillaume, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin and Parra-Aranguren, *Judges*; Skubiszewski, *Judge* ad hoc)

25 September 1997 (Schwebel, *President*; Weeramantry, *Vice-President*; Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans and Rezek, *Judges*; Skubiszewski, *Judge* ad hoc)

Waters – rivers – joint investment project for the production of hydroelectricity, improvement of navigation and flood protection – effects on the environment – emergence of new norms of environmental law – sustainable development – equitable and reasonable share of the resources of an international watercourse

Responsibility and liability – state of necessity as a ground for precluding wrongfulness – Article 33 of the Draft Articles on State Responsibility[2] – essential interest – circumstances constituting an essential interest – whether safeguarding the ecological balance an essential interest of all States – grave and imminent peril – act having to constitute the only means of safeguarding the interest threatened – party having contributed to the occurrence of the state of necessity

Treaties – treaty between Hungary and Czechoslovakia, 16 September 1977 – termination – fundamental change of circumstances – progress of environmental knowledge – development of new norms of international environmental law – changes not unforeseen – treaty allowing Parties to take account of and apply new developments – whether radical transformation of Treaty obligations

Compliance – international environmental law norms – Treaty-based obligation to apply evolving environmental standards to protect water quality, nature and fishing interests

Damage and compensation – ex injuria jus non oritur *– objectives of Treaty – whether purpose and intention of parties in concluding Treaty prevail over literal interpretation – Treaty obligations overtaken by events – recognition of positions adopted by the parties after conclusion of Treaty – good faith negotiations – joint regime – reparation for acts committed by both Parties – intersecting wrongs – settlement of accounts for the construction*

SUMMARY *The facts* On 16 September 1977, Hungary and Czechoslovakia entered into a treaty ('the Treaty') concerning the construction and operation of the Gabčíkovo–Nagymaros System of Locks ('the Project'). The Project was an integrated joint investment aimed at the production of hydroelectricity, the improvement of navigation and flood protection. The Parties were to share the financing, construction and operation of the works, and to benefit in equal measure from the power generated.

The Treaty provided for the building of two series of locks, one upstream at Gabčíkovo in Czechoslovak territory, and the other downstream at Nagymaros in Hungarian territory, designed to constitute a 'single and indivisible system of works'. The upstream section principally comprised a reservoir above the weir at Dunakiliti (on Hungarian territory) and a bypass canal leading to the Gabčíkovo hydroelectric power plant. Downstream at Nagymaros, a further series of locks and a smaller hydroelectric plant were planned. The technical specifications of the system and the preliminary operating and maintenance rules were set out in a related instrument known as the 'Joint Contractual Plan'. Articles 15, 19 and 20 of the Treaty obliged the Parties to take appropriate measures in connection with the construction and operation of the locks to ensure the protection of water quality, nature and fishing interests.

Work on the Project began in 1978. By early 1989, the Gabčíkovo sector was well advanced, but the construction of the Nagymaros sector was only in a preliminary phase. The profound political and economic changes which occurred at this time throughout Central Europe engendered in public opinion and scientific circles a growing apprehension as to the economic and environmental viability of the Project. On 13 May 1989,

Hungary was represented by HE Mr György Szénási, HE Mr Dénes Tomaj, Mr James Crawford, Mr Pierre-Marie Dupuy, Mr Alexandre Kiss, Mr László Valki, Mr Boldizsár Nagy and Mr Philippe Sands. The Slovak Republic was represented by HE Dr Peter Tomka, Dr Václav Mikulka, Mr Derek W. Bowett, Mr Stephen C. McCaffrey, Mr Alain Pellet, Mr Walter D. Sohier, Sir Arthur Watts, KCMG, QC, Mr Samuel S. Wordsworth, Mr Igor Mucha, Mr Karra Venkateswara Rao and Mr Jens Christian Refsgaard.

This article was adopted by the International Law Commission in substantially the same terms in [illegible] of States for Internationally Wrongful Acts

the Hungarian Government decided to suspend works at Nagymaros pending completion of various studies. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros, and suspended the works at Dunakiliti. On 27 October 1989, Hungary decided to abandon works at Nagymaros altogether and to maintain the status quo at Dunakiliti.

Czechoslovakia protested against this action, and the Parties began negotiations towards an agreed modification of the Project. Hungary proposed a draft treaty to exclude peak power operation (the mode of maximum power generation, but with greater potential ecological impact) of the Gabčíkovo power plant and the abandonment of the Nagymaros dam. Czechoslovakia expressed a willingness to consider new technical, operational and ecological guarantees for the Project if Hungary was prepared to commence work at Dunakiliti with a view to putting the Gabčíkovo sector into operation on a modified timetable. Czechoslovakia informed Hungary that it would otherwise be compelled to take unilateral measures to put the Gabčíkovo sector into operation without Hungarian cooperation. No agreement was reached.

In November 1991, Czechoslovakia commenced construction of what it termed the 'provisional solution'. 'Variant C', as this unilateral option was known, involved the construction of a new dam upstream of Dunakiliti exclusively on Czechoslovak territory at Čunovo. Discussions between the Parties continued to no avail: Hungary made clear its view that Variant C was a contravention of the 1977 Treaty; Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a *Note Verbale* terminating the 1977 Treaty and its related instruments with effect from 25 May 1992. Work on Variant C was largely completed on 27 October 1992, with the diversion of 80 to 90 per cent of the waters of the Danube into the Gabčíkovo bypass canal.

On 1 January 1993, Slovakia became an independent State as a successor State to Czechoslovakia. On 7 April 1993, Hungary and Slovakia concluded the 'Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo–Nagymaros Project'.[3] Article 2 of the Special Agreement provided that:

[3] The text of the Special Agreement (extracted) can be found at pp. 290–2.

1. The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

(a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, 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 river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

2. The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

Order of 5 February 1997

The Court decided to hold a visit to a number of locations along the Danube. The visit took place between 1 and 4 April 1997 in accordance with arrangements agreed between the Parties.

Judgment of 25 September 1997

Held by the International Court of Justice

(1) With regard to Article 2, paragraph 1, of the Special Agreement

(by fourteen votes to one) (A) That Hungary was not 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 and related instruments attributed responsibility to it;

(by nine votes to six) (B) That Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution' as described in the terms of the Special Agreement;

(by ten votes to five) (C) That Czechoslovakia was not entitled to put into operation, from October 1992, this 'provisional solution';

(by eleven votes to four) (D) That the notification, on 19 May 1992, of the termination of the Treaty and related instruments by Hungary did not have the legal effect of terminating them.

(2) With regard to Article 2, paragraph 2, of the Special Agreement

(by twelve votes to three) (A) That Slovakia, as successor to Czechoslovakia, became party to the Treaty as from 1 January 1993;

(*by thirteen votes to two*) (B) That Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty, in accordance with such modalities as they might agree upon;

(*by thirteen votes to two*) (C) That, unless the Parties otherwise agreed, a joint operational regime must be established in accordance with the Treaty;

(*by twelve votes to three*) (D) That, unless the Parties otherwise agreed, Hungary should compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and that Slovakia should compensate Hungary for the damage it had sustained on account of the operation of the 'provisional solution' by Czechoslovakia and its maintenance in service by Slovakia;

(*by thirteen votes to two*) (E) That the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty and related instruments, taking due account of measures taken by the Parties in application of points 2(B) and (C) of the Judgment.

I. Article 2, paragraph 1, of the Special Agreement

(1) The Parties both accepted that the 1977 Treaty and related instruments were validly concluded and duly in force throughout the operative period. The texts did not envisage the possibility of unilateral suspension or abandonment of the work provided for.

(2) The Vienna Convention on the Law of Treaties was not directly applicable as both States ratified the Convention only after the conclusion of the 1977 Treaty. Nonetheless, the provisions of the Convention concerning the termination and the suspension of the operation of treaties set forth in Articles 60 to 62 were a codification of existing customary law.

(3) The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as 'single and indivisible'. By invoking a 'state of necessity' to justify its conduct, Hungary had placed itself within the ambit of the law of State responsibility, implying that, in the absence of necessity, its conduct would be unlawful. Hungary had also acknowledged that a state of necessity would not exempt it from a duty to compensate.

(4) Necessity, however, could only be invoked on an exceptional basis. All of the strict conditions set forth in Article 33 of the Draft Articles on

State Responsibility had to be satisfied. The State concerned was not the sole judge of whether those conditions had been met.

(5) The characterisation of an 'essential interest' was to be assessed in the light of each particular case, and was not restricted to matters affecting the 'existence' of the State. Safeguarding the ecological balance had come to be considered an essential interest of all States. Thus the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo–Nagymaros Project did relate to an essential interest of the State.

(6) On several occasions in 1989, Hungary had expressed 'uncertainties' as to the ecological impact of the Gabčíkovo–Nagymaros Project and called for new scientific studies. However, a state of necessity could not exist without a 'peril' duly established at the relevant time period. Such a requirement had to be imminent, not merely possible. It would have been difficult to determine in light of the scientific record in 1989 that the alleged peril was sufficiently certain and therefore 'imminent'.

(7) Hungary could also have resorted to other means to respond to the dangers it apprehended. Within the framework of the original Project, Hungary was in a position to control, at least partially, the distribution of water within the system, and could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, the Treaty provided for the possibility that each of the Parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan in exchange for a corresponding reduction of the share of electric power.

(8) Hungary was thus not entitled to suspend, and subsequently to abandon, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

(9) In reaction to Hungary's suspension and abandonment of works and its refusal to resume performance of its obligations under the Treaty, Czechoslovakia had decided to put the Gabčíkovo system into operation unilaterally, under its exclusive control and for its own benefit. To justify those actions, Slovakia had invoked what it described as the 'principle of approximate application'. It was not necessary to determine the existence of such a principle because, even if such a principle existed, it could only be employed within the limits of the treaty in question. Despite having a certain external physical similarity to the original Project, Variant C differed sharply from it in its legal characteristics.

(10) The 1977 Treaty provided for the construction of the Gabčíkovo–Nagymaros Barrage System Project as a joint investment consisting of a single and indivisible operational system of works, jointly owned and operated. By definition, this could not be carried out by unilateral action. In practice, the operation of Variant C had led Czechoslovakia to appropriate between 80 and 90 per cent of the waters of a shared international watercourse and international boundary river. Hungary, by the violation of its legal obligations under the Treaty, had not forfeited its basic right to an equitable and reasonable share of the resource. In putting Variant C into operation, Czechoslovakia had committed an internationally wrongful act.

(11) However, a wrongful act or offence was frequently preceded by preparatory actions which were not to be confused with the act or offence itself. In so far as Czechoslovakia had confined itself to the execution on its own territory of the works necessary for the implementation of Variant C, which could have been abandoned if an agreement had been reached between the parties and had not therefore predetermined the final decision to be taken, it had not committed a wrongful act.

(12) As the putting into operation of Variant C constituted an internationally wrongful act, it was not necessary to examine the issue of the duty to mitigate invoked by Slovakia.

(13) Slovakia had argued that 'Variant C could be presented as a justified countermeasure to Hungary's illegal acts.' The diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

(14) On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In its pleadings, Hungary presented five arguments in support of the lawfulness of its notification of termination. These were: (i) the existence of a state of necessity; (ii) the impossibility of performance of the Treaty; (iii) the occurrence of a fundamental change of circumstances; (iv) the material breach of the Treaty by Czechoslovakia; and (v) the development of new norms of international environmental law.

(15) The 1977 Treaty did not contain any provision regarding its termination or the possibility of denunciation or withdrawal. On the contrary, the Treaty established a long-standing and durable regime of joint investment and joint operation. Consequently, the Treaty could be terminated only on the limited grounds enumerated in Articles 60 to 62 of the Vienna Convention which were declaratory of customary international law.

(16) Necessity was not a ground for the termination of a treaty. It might only be invoked to negate the responsibility of a State that had failed to implement a treaty. The treaty might be ineffective as long as the condition of necessity continued to exist. The treaty nevertheless continued to exist, even if dormant, unless the parties agreed to terminate it. In the absence of such agreement, as soon as the state of necessity ceased to exist, the duty to comply with treaty obligations revived.

(17) Article 61, paragraph 1, of the Vienna Convention required 'the permanent disappearance or destruction of an object indispensable for the execution' of the treaty to justify the termination of a treaty on grounds of impossibility of performance. Hungary contended that the essential object of the Treaty – a single and indivisible operational system of works, jointly owned and operated – had permanently disappeared and that the Treaty had become impossible to perform. The 1977 Treaty, however, provided a means to make required readjustments between economic and ecological imperatives. Thus the 'object', even if understood to embrace a legal regime, had not definitively ceased to exist. If the joint exploitation of the investment was no longer possible, Hungary was itself responsible. Article 61, paragraph 2, of the Vienna Convention precluded the invocation of impossibility by a party when the impossibility of performance resulted from that party's own breach.

(18) Hungary further invoked a fundamental change of circumstances brought about by profound political and economic changes, and the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law. The Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. The prevalent political conditions were not so closely linked to the object and purpose of the Treaty, nor the estimated profitability so fixed, that changes in these matters had radically altered the extent of the obligations to be performed. New developments in the state of environmental knowledge and of environmental law could not have been completely unforeseen. Articles 15, 19 and 20 of the Treaty allowed the Parties to take account of such developments and apply them when implementing those provisions.

(19) The changed circumstances were not of such a nature that their effect would be radically to transform the extent of the obligations still

to be performed to accomplish the Project. Moreover, a fundamental change of circumstances must have been unforeseen, and 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. The stability of treaty relations required that the plea of fundamental change of circumstances be applied only in exceptional cases.

(20) Articles 15, 19 and 20 of the Treaty obliged the Parties jointly and on a continuous basis to take appropriate measures necessary for the protection of water quality, nature and fishing interests. Hungary contended that Czechoslovakia had violated these articles by refusing to enter into negotiations in order to adapt the Project to new scientific and legal developments regarding the environment. In this case, both Parties could be said to have contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations. Only a material breach of a treaty by a State party might be relied upon by another party as a ground for termination. The violation of other rules of general international law might justify the taking of certain measures, including countermeasures, by the injured State, but did not constitute a ground for termination under the law of treaties.

(21) Hungary's principal argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. Czechoslovakia had violated the Treaty only when it had diverted the waters of the Danube in October 1992. The notification of termination by Hungary on 19 May 1992 had predated that diversion. Hungary had not yet suffered injury, and consequently was not entitled to invoke any such breach as a ground for termination. Moreover, Czechoslovakia had committed the internationally wrongful act as a result of Hungary's own prior wrongful conduct. Hungary had thus prejudiced its right to terminate the Treaty.

(22) Hungary claimed that it was entitled to terminate the Treaty, because of new requirements of international law for the protection of the environment which precluded performance of the Treaty. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty. The obligations in Articles 15, 19 and 20 entailed a joint responsibility to adapt the Treaty to emerging norms through a process of good faith consultation and negotiation.

(23) Hungary maintained that by their conduct both Parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties

could not survive. The reciprocal wrongful conduct of Hungary and Czechoslovakia did not justify the termination of the Treaty. The 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 had implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance.

II. Article 2, paragraph 2, of the Special Agreement

(1) The content of the 1977 Treaty indicated that it must be regarded as establishing a territorial regime within the meaning of Article 12 of the 1978 Vienna Convention on the Succession of States. It created rights and obligations 'attaching to' the parts of the Danube to which it related; thus the Treaty could not be affected by a succession of States. The Treaty became binding upon Slovakia on 1 January 1993.

(2) The 1977 Treaty was still in force and consequently governed the relationship between the Parties. That relationship was also determined by the rules of other relevant conventions to which the two States were party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it was governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.

(3) At the same time, it was essential that the factual situation as it had developed since 1989 be placed within the context of the preserved and developing treaty relationship in order to achieve the object and purpose in so far as that was feasible. What might have been a correct application of the law in 1989 or 1992 could be a miscarriage of justice if prescribed in 1997. Variant C had been in operation for nearly five years in a run-of-the-river mode. The weir at Nagymaros had not been built, and with the effective discarding by both Parties of peak power operation, there was no longer any point in building it.

(4) The other objectives of the Treaty – navigability, flood control, ice control and protection of the environment – could adequately be served by the existing structures. The 1977 Treaty did not lay down a rigid system. In practice, the Parties, in adopting their subsequent positions, had acknowledged that the explicit terms of the Treaty were negotiable.

(5) The Parties were under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider in what way the multiple objectives of the 1977 Treaty could best be served. The Parties were obliged by Articles 15 and 19 of the Treaty to assess

the impact of the Gabčíkovo power plant on the environment by current standards of evaluating environmental risks.

(6) The purpose of the Treaty and the intentions of the Parties in concluding it should prevail over its literal interpretation. When bilateral negotiations without preconditions were held to give effect to the Judgment, a readiness to accept the assistance and expertise of a third party would evidence the good faith of the Parties.

(7) The joint regime provided for in the Treaty should be restored. The works at Čunovo should become jointly operated in view of their pivotal role in the operation of what remained of the Project and for the water-management regime. Variant C, which operated in a manner incompatible with the Treaty, should be made to conform to it so as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C would be transformed from a *de facto* status into a treaty-based regime reflecting in an optimal way the concept of common utilisation of shared water resources.

(8) Reparation must, as far as possible, wipe out all the consequences of the illegal act (*Factory at Chorzów*, PCIJ, Series A, No. 17, p. 47).[4] In the present case, this would be achieved if the Parties resumed their cooperation in the utilisation of the shared water resources. Both Parties had committed internationally wrongful acts giving rise to damage. Consequently Hungary and Slovakia were each under an obligation to pay compensation and each entitled to obtain compensation. Given the intersecting wrongs of both Parties, the issue of compensation could satisfactorily be resolved if each of the Parties were to renounce or cancel all financial claims and counter-claims.

Declaration of President Schwebel The construction of Variant C was inseparable from its being put into operation. Hungary's position as the Party initially in breach did not deprive it of the right to terminate the Treaty in response to Czechoslovakia's material breach.

Declaration of Judge Rezek The 1977 Treaty was no longer in force as the Hungarian notification of 19 May 1992 constituted the formal act of termination of a treaty both Parties had already repudiated. The consequences were similar to those inferred by the majority.

Separate Opinion of Vice-President Weeramantry (1) The Court had to strike a balance between environmental and developmental

[4] 4 *Ann Dig* 268.

considerations in light of the emerging concept of sustainable development. From the early 1970s, there had been widespread recognition of the concept in a broad range of international and regional instruments, and in State practice. This case presented an opportunity to strengthen the concept, taking a multi-disciplinary approach to draw upon the world's diversity of cultures and traditional legal systems. Sustainable development could be seen as one of the most ancient of ideas of human heritage, and not merely a principle of modern international law.

(2) A recognition of the principle of contemporaneity in the application of environmental norms applied to the joint supervisory regime envisaged in the Court's Judgment, requiring the Parties to take into consideration the emergence of new environmental standards in the application of the Treaty.

(3) In entering into the 1977 Treaty, Hungary had taken a considered decision, despite warnings of the possible environmental dangers, and had continued to treat the Treaty as valid for nearly twelve years. In reliance, Czechoslovakia had devoted substantial resources to the Project. Present in this sequence of events were the ingredients of a legally binding estoppel. However, in cases involving potential environmental damage of a far-reaching and irreversible nature, the limitations of *inter partes* adversarial procedure might not be appropriate to determine obligations of an *erga omnes* character.

Separate Opinion of Judge Bedjaoui (1) The essential basis for the interpretation of a treaty remained the 'fixed reference' to contemporary international law at the time of its conclusion. The 'mobile reference' to the law which subsequently developed was only applicable in exceptional cases. The definition of 'environment' was essentially static, unlike the evolutionary concept of the 'sacred trust' interpreted in the *Namibia* case.[5]

(2) An interpretation of a treaty which would amount to substituting a completely different law to the one governing at the time of its conclusion would be a distorted revision. A State incurred specific obligations contained in a body of law as it existed on the conclusion of the treaty and in no wise incurred evolutionary and indeterminate duties.

(3) In the present case, subsequent law relating to the environment and international watercourses might be applied advisedly on the basis of Articles 15, 19 and 20 for an 'evolutionary interpretation' of the 1977 Treaty.

[5] 49 *ILR* 2.

(4) The 1977 Treaty had the threefold characteristic of being (i) a territorial treaty; (ii) a treaty to which Slovakia had succeeded; and (iii) a treaty which was still in force.

(5) There was no theory of 'approximate application' in international law. If accepted, it would be a detriment to legal certainty and would signal the end of the cardinal principle *pacta sunt servanda*. The theory provided no reliable criterion for measuring a tolerable degree of 'approximation', and lacked the basic condition of the consent of the other State.

(6) Variant C substantially differed in concept and design from the initial Project. It fell into one of the categories of breaches termed 'continuing', 'composite' or 'complex', each phase of which was unlawful. The unlawful nature of Variant C, from the commencement of its construction to the diversion of the river, could only be divisible if it had been shown that no phase of its implementation, apart from the diversion, prejudiced Hungary's rights and interests. It did not qualify as a countermeasure. It was a definitive, irreversible breach of the Treaty.

(7) The intersecting violations committed by both Parties gave rise to two *effectivités*. The first was that Variant C was nearly complete, and represented a partial application of the Treaty. The second was that Hungary had abandoned work on all fronts and decided not to build the Nagymaros dam. These *effectivités* had been mutually recognised by the Parties, and provided signals in the attempt to find appropriate solutions.

(8) The 1977 Treaty had largely been stripped of its material content, but remained a formal instrument, ready to accommodate new commitments by the Parties. In taking into consideration the *effectivités*, the Court had no intention to legitimise the unlawful facts established for which the Parties must assume responsibility. This made it possible to salvage Articles 15, 19 and 20, which would provide a basis for renegotiation. This would also make possible the conservation of the general philosophy and major principles of the Treaty.

(9) The Parties must negotiate again in good faith conditions to restore Hungary to its status as a partner in the use of the water and co-owner of the works.

Separate Opinion of Judge Koroma (1) Variant C was a genuine application of the Treaty inasmuch as it constituted the minimum modification of the original Project necessary to realise its aims and objectives. Czechoslovakia would otherwise have been stranded with a largely finished but inoperative system.

(2) Hungary had agreed within the context of the Project to the diversion of the Danube, modifying its entitlement to an equitable and reasonable share of the water of the Danube.

(3) The finding of an intersection of wrongs and a reciprocal obligation of reparation suggested that the Court found the wrongful conduct of the Parties to be equivalent. The operation of Variant C was a genuine attempt by an injured party to secure the achievement of the agreed objectives of the Treaty in ways consistent with the Treaty, international law and equity.

Dissenting Opinion of Judge Oda (1) Hungary's claim of ecological necessity was ill-founded as the Project was prepared and designed with full consideration of its potential environmental impact. Any subsequent impact assessment could not justify its total abandonment.

(2) Czechoslovakia was entitled to proceed with Variant C, both its construction and the diversion of the Danube, as an alternative means of implementing the Project in the face of Hungary's wrongful act. The cost of its construction should be borne in part by Hungary, in exchange for co-ownership. However, if the operation of Variant C had led to tangible damage to Hungary, Slovakia bore responsibility.

(3) Negotiations between the Parties should be based on the understanding that Czechoslovakia was entitled to proceed to the implementation of Variant C and that it would in future form part of the Joint Contractual Plan. Its mode of operation should be defined to avoid peak mode and ensure an equitable share of the waters. The Parties should continue the environmental assessment of the region and search out technical remedies to prevent environmental damage.

Dissenting Opinion of Judge Ranjeva (1) The intersecting nature of the wrongs had a bearing both on the declaratory part and on the prescriptive part of the Judgment. The Court should have considered whether the Hungarian wrong caused a sufficiently proven risk which forced the construction and putting into operation of Variant C.

(2) The distinction between 'proceeding to the provisional solution' and its 'putting into operation' was artificial as the two elements were part of a single, continuing act. The fact of substituting a national project in place of a joint international project was a serious breach of the Treaty. Limiting the sanction to the factual consequences of the breach itself represented a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda*.

Dissenting Opinion of Judge Herczegh (1) The Project was an audacious scheme in scale, design and mode of operation, criticised not

only by the Hungarian party but also by the Czechoslovak leaders as obsolete and contrary to nature. It was regrettable that the Court acknowledged the need to apply developing environmental norms and standards to new and continuing activities only in the prescriptive part of its Judgment.

(2) There was an obvious contradiction between a project designed for peak mode operation and the absence of an agreement between the parties as to this mode of operation. There was no legal obstacle to prevent the Project from being adapted to a less dangerous mode of operation.

(3) In suspending the construction of the Nagymaros dam, Hungary had acted under a state of necessity to safeguard an essential interest – the provision of drinking water for the 2 million inhabitants of the Hungarian capital – against a grave and imminent peril.

(4) The unilateral diversion of the Danube and its exclusive utilisation by Slovakia were a breach of a provision essential to the accomplishment of the object and purpose of the Treaty, whereas the conduct of Hungary simply delayed but did not preclude the commissioning of the power plant. Czechoslovakia had acted unlawfully when it embarked on the construction of the works necessary for the diversion.

(5) Since Variant C, from its commencement, constituted a grave breach of the Treaty, Hungary was entitled to terminate the Treaty. The Treaty did not survive the joint effect of the diversion of the Danube and Hungary's notification of its termination.

(6) The termination of the Treaty would not have left the Parties in a legal vacuum. The relationship was determined by rules of general international law and other treaties and conventions in force between the Parties. These were sufficient to ensure an equitable and reasonable sharing of the Danube waters.

Dissenting Opinion of Judge Fleischhauer (1) Hungary validly terminated the 1977 Treaty by its notification of termination of 19 May 1992. The putting into operation of Variant C constituted a continuing wrongful act which extended from the passing from mere studies and planning to construction in November 1991 and lasted to the actual damming of the Danube in October 1992. Recourse to Variant C was neither automatic nor the only possible reaction to Hungary's violations of the Treaty. The fact that Hungary violated the Treaty first did not deprive it of the right to terminate the same Treaty in reaction to its later violation by Czechoslovakia.

(2) After the valid termination of the Treaty, the Parties were released from any further obligation to perform, and the situation was governed by general international law and by those treaties that remain in force between the Parties. There was no legal obligation for Slovakia to provide for joint operation of Variant C or for sharing of profits. By reason of its past behaviour, Hungary was not entitled to restoration of the full flow of the Danube, but a water-management regime must be established that took account of Hungary's ecological needs. Each Party owed the other compensation: Hungary for damages arising out of the delays in construction caused by its suspension and subsequent abandonment of the Project; and Slovakia for losses and damages sustained out of the unilateral diversion of the Danube.

Dissenting Opinion of Judge Vereshchetin Variant C met all of the conditions for the lawfulness of a countermeasure: it was a necessary, reversible and proportionate response to Hungary's violation of its Treaty obligations. The Court would impose the requirement of Variant C that it be the only means available to Czechoslovakia of asserting its rights and inducing Hungary's compliance. This over-reached the requirements established by the ILC Draft Articles on State Responsibility. Even accepting this requirement, there was no effective alternative option available to Czechoslovakia.

Dissenting Opinion of Judge Parra-Aranguren Czechoslovakia was legally justified in adopting Variant C to guarantee the achievement of the object and purpose of the Treaty as a reaction to Hungary's violation of its obligations. Even assuming Variant C could be characterised as an internationally wrongful act, its wrongfulness was precluded because it was a legitimate countermeasure, meeting all the conditions required by Article 30 of the Draft Articles on State Responsibility.

Dissenting Opinion of Judge ad hoc *Skubiszewski* (1) Hungary, alone, followed a policy of freeing itself from the bonds of the Treaty. For its part, Czechoslovakia insisted on the implementation of the Treaty, though it was ready to adopt a flexible attitude with regard to the operation of the system. When the Treaty was negotiated, the state of knowledge was sufficient to assess the impact of the Project. Progress in science and knowledge was constant, and required adaptation and negotiation.

(2) By its unilateral rejection of the Project, Hungary had precluded itself from asserting that the utilisation of the hydraulic force of the Danube was dependent on the condition of a prior agreement between it and Czechoslovakia. Czechoslovakia had the right to put Variant C

into operation, but it also had the duty to respect Hungary's right to an equitable and reasonable share of the waters of the Danube. To find the operation of Variant C unlawful overlooked the considerations of equity.

(3) Pecuniary compensation could not wipe out all of the consequences of the abandonment of the Project by Hungary. The attainment of the objectives of the Treaty was legitimate under the Treaty, general law and equity. The question was not simply one of damages for loss sustained, but the creation of a new system of utilisation of the water. Negotiations between the Parties should not focus on the enforcement of responsibility and compensation, but on seeking a common solution.

There follows

Order of International Court of Justice, 5 February 1997 (extract)

[3] Having regard to the Special Agreement between the Republic of Hungary and the Slovak Republic, signed in Brussels on 7 April 1993 and notified jointly to the Court on 2 July 1993, whereby the Parties submitted to the Court the differences between them concerning the Gabčíkovo–Nagymaros Project,

Having regard to the Memorials, Counter-Memorials and Replies [4] which were filed by the Parties within the time-limits fixed to that end by the Orders dated 14 July 1993 and 20 December 1994;

Whereas, by a letter dated 16 June 1995, the Agent of Slovakia asked the Court 'to be so good as to implement its powers under Article 66 of the Rules of Court and to decide to visit the locality to which the case concerning the *Gabčíkovo–Nagymaros Project* relates, and there to exercise its functions with regard to the obtaining of evidence'; and whereas a copy of that letter was duly transmitted to the Agent of Hungary;

Whereas, by a letter dated 28 June 1995, the Agent of Hungary informed the Court that if it 'should decide that a visit to the various areas affected by the Project (or, more precisely, affected by variant C) would be useful, Hungary would be pleased to co-operate in organizing such a visit';

Whereas, further to certain exchanges of views between the President of the Court and the Agents of the Parties on 30 June 1995, the Agents, by a letter dated 14 November 1995, jointly notified the Court of the text of a 'Protocol of Agreement between the Republic of Hungary and the Slovak Republic with a view to proposing to the International Court of Justice the arrangements for a visit *in situ* in the case concerning the *Gabčíkovo–Nagymaros Project*', done in Budapest and New York on 14 November 1995, and signed by them;

Whereas by the terms of that Protocol the Parties 'propose[d] by mutual agreement to the Court that it should effect a visit' *in situ* under the conditions set forth therein; and whereas those conditions included the outline of a programme, the precise dates and details of which were to be defined at a later time by the Court, after ascertaining the view of the Parties;

Whereas, during a meeting held by the President of the Court with the Agents of the Parties on 5 December 1996, the Agents agreed on dates at which the proposed visit might take place; and whereas the Registrar confirmed to them, by letters dated 6 December 1996, that those dates were agreeable to the Court;

Whereas the Agents of the Parties jointly notified to the Court, by letter dated 3 February 1997, the text of Agreed Minutes done at Budapest and at New York on 3 February 1997, and signed by them; and whereas those Agreed Minutes supplemented the Protocol of Agreement of 14 November 1995 and contained detailed proposals for the conduct of the visit *in situ*;

Whereas it appears to the Court that to exercise its functions with regard to the obtaining of evidence at a place or locality to which the case relates may facilitate its task in the instant case, and whereas the proposals made by the Parties to that end may be accepted,

[5] THE COURT,

Unanimously,

(1) *Decides* to exercise its functions with regard to the obtaining of evidence by visiting a place or locality to which the case relates;

(2) *Decides* to adopt to that end the arrangements proposed by the Parties in the Protocol of Agreement dated 14 November 1995, as subsequently specified, in accordance with the provisions of that Protocol, in the Agreed Minutes dated 3 February 1997.

[. . .]

[Reports: *ICJ Reports 1997*, p. 3; 116 *ILR* 1 at p. 15]

[6] The declarations of President Schwebel and Judge Rezek are not reproduced in this volume but can be found at *ICJ Reports 1997*, pp. 85 and 86 respectively. The dissenting opinions of Judges Ranjeva, Fleischhauer, Vereshchetin and Parra-Aranguren are not reproduced in this volume but can be found at *ICJ Reports 1997*, pp. 170, 204, 219 and 227 respectively.

Judgment of International Court of Justice, 25 September 1997 (extract)

[10] 1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called 'Hungary') to the Netherlands and the Chargé d'affaires *ad interim* of the Slovak Republic (hereinafter called 'Slovakia') to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

[11] *The Republic of Hungary and the Slovak Republic,*

Considering that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabčíkovo–Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as 'the Treaty'), and on the construction and operation of the 'provisional solution';

Bearing in mind that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo–Nagymaros Project;

Recognizing that the Parties concerned have been unable to settle these differences by negotiations;

Having in mind that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabčíkovo–Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

Desiring that these differences should be settled by the International Court of Justice;

Recalling their commitment to apply, pending the Judgment of the International Court of Justice, such a temporary water management régime of the Danube as shall be agreed between the Parties;

Desiring further to define the issues to be submitted to the International Court of Justice,

Have agreed as follows:

Article 1

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

Article 2

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

(a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November [illegible] 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 river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) [12] what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

Article 3

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

(a) a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

(b) a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties within such time-limits as the Court may order.

(d) The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

Article 4

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

Article 5

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article 6

(1) The present Special Agreement shall be subject to ratification.

(2) **[13]** The instruments of ratification shall be exchanged as soon as possible in Brussels.

(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals.

[. . .]

[17] [. . .] 15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty 'concerning the construction and operation of the Gabčíkovo–Nagymaros System of Locks' (hereinafter called the '1977 Treaty'). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.

It provides for the construction and operation of a System of Locks by the parties as a 'joint investment'. According to its Preamble, the barrage system was designed to attain

> the broad utilization of the natural resources of the Bratislava–Budapest section of the Danube river for the development of water **[18]** resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties.

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

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Malý Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region,

by the main channel of the river. The area lying between the Malý Danube and that channel, in Slovak territory, constitutes the Žitný Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetköz. Čunovo and, further downstream, Gabčíkovo, are situated in this sector of the river on Slovak territory, Čunovo on the right bank and Gabčíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).[7]

17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.

[20] Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

[. . .]

[29] 27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 *(a)*, of the Special Agreement, the Court is requested to decide first

> whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary.

[. . .]

[35] [. . .] 40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a 'state of ecological necessity'.

[7 Not reproduced in this volume.]

Hungary contended that the various installations in the Gabčíkovo–Nagymaros System of Locks had been designed to enable the Gabčíkovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 km^2) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčíkovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows. At Gabčíkovo/Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 m^3/s, in addition to the water provided to the system of side-arms. That volume could be increased to 200 m^3/s during the growing season. Additional discharges, and in particular a number of artificial floods, could also be effected, at an unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetköz. Furthermore, the groundwater would then no longer have been supplied by the Danube – which, on the contrary, would have acted as a drain – but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir; instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built, [36] the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells would have deteriorated in this sector. What is more, the operation of the Gabčíkovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would have been severely jeopardized.

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

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 – in particular Articles 15 and 19 relating, respectively, to water quality and nature protection – in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project's impact on the environment; Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it imputes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

[...]

[37] [...] 44. In the course of the proceedings, Slovakia argued at length that the state of necessity upon which Hungary relied did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. At the same time, it cast doubt upon whether 'ecological necessity' or 'ecological risk' could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act.

In any event, Slovakia denied that there had been any kind of 'ecological state of necessity' in this case either in 1989 or subsequently. It invoked the authority of various scientific studies when it claimed that Hungary had given an exaggeratedly pessimistic description of the situation. Slovakia did not, of course, deny that ecological problems could have arisen. However, it asserted that they could to a large extent have been remedied. It accordingly stressed that no agreement had been reached with respect to the modalities of operation of the Gabčíkovo power plant in peak mode, and claimed that the apprehensions of Hungary related only to operating conditions of an extreme kind. In the same way, it contended that the original Project had undergone various modifications since 1977 and that it would have been possible to modify it even further, for example with respect to the discharge of water reserved for the old bed of the Danube, or the supply of water to the side-arms by means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977 Treaty – particularly its Articles 15 and 19 – and maintained, *inter alia*, that according to the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 relating to the Joint Contractual Plan, research into the impact of the Project on the environment was not the exclusive responsibility of Czechoslovakia but of either one of the parties, depending on the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in violation [38] of the provisions

of Article 27 of the 1977 Treaty (see paragraph 18 above),[8] which it submits required prior recourse to the machinery for dispute settlement provided for in that Article. [...]

[39] [...] 48. The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as 'single and indivisible'.

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary – supposing it to have been established – thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

*

49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

> *Article 33. State of Necessity*
>
> (1) A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
>
> *(a)* the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

[8 Not reproduced in this volume.]

> *(b)* [40] the act did not seriously impair an essential interest of the State towards which the obligation existed.
>
> (2) In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
>
> *(a)* if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
>
> *(b)* if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
>
> *(c)* if the State in question has contributed to the occurrence of the state of necessity.
>
> (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 34.)
>
> [...]

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

> in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception – and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness ... (*ibid.*, p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an 'essential interest' of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a 'grave and imminent peril'; the act being challenged must [41] have been the 'only means' of safeguarding that interest; that act must not have 'seriously impair[ed] an essential interest' of the State towards which the obligation existed; and the State which is the author of that act must not have 'contributed to the occurrence of the state of necessity'. Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo–Nagymaros Project related to an 'essential interest' of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an 'essential interest' to a matter only of the 'existence' of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, 'a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]' (*ibid.*, p. 35, para. 3); and specified, with reference to State practice, that 'It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an "essential interest" of all States.' (*Ibid.*, p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

> the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, pp. 241–2, para. 29.)[9]

54. The verification of the existence, in 1989, of the 'peril' invoked by Hungary, of its 'grave and imminent' nature, as well as of the absence of any 'means' to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

[**42**] As the Court has already indicated (see paragraphs 33 *et seq.*),[10] Hungary on several occasions expressed, in 1989, its 'uncertainties' as to the ecological impact of putting in place the Gabčíkovo–Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a 'peril' in the sense of a component element of a state of necessity.

[. . .]

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, 'grave' and 'imminent' 'peril' existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

[9 See p. 256 above.]

[10 Not reproduced in this volume.]

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment – and in particular the drinking water resources – in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gabčíkovo [**43**] power plant would 'mainly operate in peak-load time and continuously during high water', the final rules of operation had not yet been determined (see paragraph 19 above);[11] however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established – which, in the Court's appreciation of the evidence before it, was not the case – that the reservoir would ultimately have constituted a 'grave peril' for the environment in the area, one would be bound to conclude that the peril was not 'imminent' at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though – and this is not determinative of the state of necessity – the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčíkovo sector. It will recall that Hungary's concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality

[11 Not reproduced in this volume.]

of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szigetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it apprehended [**44**] had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above,[12] Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the *ad hoc* Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35[13] of the present Judgment, does not express any awareness of an authenticated peril – even in the form of a definite peril, whose realization would have been inevitable in the long term – when it states that:

> The measuring results of an at least five-year monitoring period following the completion of the Gabčíkovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included.

The report concludes as follows:

> It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.
>
> The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use.

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However 'grave' it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore 'imminent' in 1989.

[12 Not reproduced in this volume.]
[13 Not reproduced in this volume.]

The Court moreover considers that Hungary could, in this context [**45**] also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, 'the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced'.

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they 'imminent'; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation 'characterized so aptly by the maxim *summum jus summa injuria*' (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which – whatever the political circumstances prevailing at the time of its conclusion – was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo–Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly, [**46**] for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant

development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission, to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, 'seriously impair[ed] an essential interest' of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission – a finding which does not in any way prejudge the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(a)*, of the Special Agreement (see paragraph 27 above), finds that Hungary was not 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 1977 Treaty and related instruments attributed responsibility to it.

*
* *

60. By the terms of Article 2, paragraph 1 *(b)*, of the Special Agreement, the Court is asked in the second place to decide

> *(b)* whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' **[47]** 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 river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course).

[. . .]

[52] [. . .] 72. [. . .] the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčíkovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24[14] of the present Judgment, that not using the system would have **[53]** led to considerable financial losses, and that it could have given rise to serious problems for the environment.

[. . .]

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

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo–Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo–Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried **[54]** out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic

[14 Not reproduced in this volume.]

right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

[. . .]

[56] [. . .] The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube – with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz – failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations **[57]** under international law, and that the measure must therefore be reversible.

* *

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(b)*, of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

*
* *

89. By the terms of Article 2, paragraph 1 *(c)*, of the Special Agreement, the Court is asked, thirdly, to determine 'what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary'.

[. . .]

[58] [. . .] 91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia's refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the

Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

* *

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

[. . .]

[62] [. . .] 97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the 'precautionary principle'. On this basis, Hungary argued, its termination was 'forced by the other party's refusal to suspend work on Variant C'.

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather 'to the language of self-help or reprisals'.

* *

98. The question, as formulated in Article 2, paragraph 1 *(c)*, of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty.

[. . .]

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment **[63]** and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

[. . .]

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties.

[. . .]

103. Hungary contended that the essential object of the Treaty – an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly – had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term 'object' in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it [**64**] would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty – and in particular its Articles 15, 19 and 20 – actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

*

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).[15]

The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that

> Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances (*ICJ Reports 1973*, p. [18], para. 36).[16]

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was

[15 Not reproduced in this volume.]
[16 See p. 23 above.]

bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of [**65**] environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

[. . .]

[**67**] [. . .] 111. Finally, the Court will address Hungary's claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the [**68**] Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 'the environment is not

an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn' (*ICJ Reports 1996*, p. 241, para. 29;[17] see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

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

[. . .]

[69] 115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(c)*, of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

*
* *

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

[. . .]

[72] [. . .] 123. [. . .] Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations 'attaching to' the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

[. . .]

[73] [. . .] 125. The Court now turns to the other legal consequences arising from its Judgment.

[. . .]

[75] [. . .] 130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the *past* conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty.

[17 See p. 256 above.]

131. Now the Court has, on the basis of the foregoing findings, to **[76]** determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

* *

132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.

133. The 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.

This does not mean that facts – in this case facts which flow from wrongful conduct – determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčíkovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Čunovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of **[77]** 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. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.

136. It could be said that that part of the obligations of performance which related to the construction of the System of Locks – in so far as they were not yet implemented before 1992 – have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Čunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 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. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak hour mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties – even if their conclusions are often contradictory – provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of [78] Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing – and thus necessarily evolving – obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

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

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 a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the *North Sea Continental Shelf* cases:

> [the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it (*ICJ Reports 1969*, p. 47, para. 85).

142. What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that 'Every treaty in force is binding upon the parties to it and [79] 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.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared

Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that contracting party in the jointly prescribed manner.

The Court is of the opinion that the works at Čunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Čunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a *de facto* status into a treaty-based régime.

It appears from various parts of the record that, given the current state [**80**] of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint regime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

> Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention. (General Assembly doc. A/51/869 of 11 April 1997.)

* *

148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed (*PCIJ, Series A, No. 17*, p. 47).

150. Reparation must, 'as far as possible', wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out 'as far as possible' if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What it is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Čunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.

[**81**] 151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo–Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in

the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Čunovo complex, it must pay a proportionate share of the building and running costs.

*
* *

[82] 155. For these reasons,
THE COURT,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. By fourteen votes to one,
Finds that Hungary was not 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 of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;
AGAINST: *Judge Herczegh*;

B. By nine votes to six,
Finds that Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution' as described in the terms of the Special Agreement;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;
AGAINST: *President* Schwebel; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. By ten votes to five,
Finds that Czechoslovakia was not entitled to put into operation, from October 1992, this 'provisional solution';

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;
AGAINST: *Judges* Oda, Koroma, Vereshchetin, Parra-Aranguren; *Judge* ad hoc Skubiszewski;

D. By eleven votes to four,
Finds that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;
AGAINST: *President* Schwebel; *Judges* Herczegh, Fleischhauer, Rezek;

[83] (2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. By twelve votes to three,
Finds that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;
AGAINST: *Judges* Herczegh, Fleischhauer, Rezek;

B. By thirteen votes to two,
Finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;
AGAINST: *Judges* Herczegh, Fleischhauer;

C. By thirteen votes to two,
Finds that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

D. By twelve votes to three,

Finds that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the 'provisional solution' by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;
AGAINST: *Judges* Oda, Koroma, Vereshchetin;

[84] E. By thirteen votes to two,

Finds that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and 2 C of the present operative paragraph.

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;
AGAINST: *Judges* Herczegh, Fleischhauer.

[. . .]

[88] SEPARATE OPINION OF VICE-PRESIDENT WEERAMANTRY

Introduction

This case raises a rich array of environmentally related legal issues. A discussion of some of them is essential to explain my reasons for voting as I have in this very difficult decision. Three issues on which I wish to make some observations, supplementary to those of the Court, are the role played by the principle of sustainable development in balancing the competing demands of development and environmental protection; the protection given to Hungary by what I would describe as the principle of continuing environmental impact assessment; and the appropriateness of the use of *inter partes* legal principles, such as estoppel, for the resolution of problems with an *erga omnes* connotation such as environmental damage.

A. The concept of sustainable development

Had the possibility of environmental harm been the only consideration to be taken into account in this regard, the contentions of Hungary could well have proved conclusive.

Yet there are other factors to be taken into account – not the least important of which is the developmental aspect, for the Gabčíkovo scheme is important to Slovakia from the point of view of development. The Court must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development.

The Court has referred to it as a concept in paragraph 140 of its Judgment. However, I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case. Without the benefits of its insights, the issues involved in this case would have been difficult to resolve.

Since sustainable development is a principle fundamental to the determination of the competing considerations in this case, and since, although it has attracted attention only recently in the literature of international law, it is likely to play a major role in determining important environmental disputes of the future, it calls for consideration in some detail. Moreover, this is the first occasion on which it has received attention in the jurisprudence of this Court.

[89] When a major scheme, such as that under consideration in the present case, is planned and implemented, there is always the need to weigh considerations of development against environmental considerations, as their underlying juristic bases – the right to development and the right to environmental protection – are important principles of current international law.

In the present case we have, on the one hand, a scheme which, even in the attenuated form in which it now remains, is important to the welfare of Slovakia and its people, who have already strained their own resources and those of their predecessor State to the extent of over two billion dollars to achieve these benefits. Slovakia, in fact, argues that the environment would be improved through the operation of the Project as it would help to stop erosion of the river bed, and that the scheme would be an effective protection against floods. Further, Slovakia has traditionally been short of electricity, and the power generated would be important to its economic development. Moreover, if the Project is halted in its tracks, vast structural works constructed at great expense, even prior to the repudiation of the Treaty, would be idle and unproductive, and would pose an economic and environmental problem in themselves.

On the other hand, Hungary alleges that the Project produces, or is likely to produce, ecological damage of many varieties, including harm to river bank fauna and flora, damage to fish breeding, damage to surface water quality, eutrophication, damage to the groundwater régime, agriculture, forestry and soil, deterioration of the quality of drinking water reserves, and sedimentation. Hungary alleges that many of these dangers have already occurred and more will manifest themselves, if the scheme continues in operation. In the material placed before the Court, each of these dangers is examined and explained in considerable detail.

How does one handle these considerations? Does one abandon the Project altogether for fear that the latter consequences might emerge? Does one proceed with the scheme because of the national benefits it brings, regardless of the suggested

environmental damage? Or does one steer a course between, with due regard to both considerations, but ensuring always a continuing vigilance in respect of environmental harm?

It is clear that a principle must be followed which pays due regard to both considerations. Is there such a principle, and does it command recognition in international law? I believe the answer to both questions is in the affirmative. The principle is the principle of sustainable development and, in my view, it is an integral part of modern international law. It is clearly of the utmost importance, both in this case and more generally.

I would observe, moreover, that both Parties in this case agree on the **[90]** applicability to this dispute of the principle of sustainable development. Thus, Hungary states in its pleadings that:

> Hungary and Slovakia agree that the principle of sustainable development, as formulated in the Brundtland Report, the Rio Declaration and Agenda 21 is applicable to this dispute . . .
>
> International law in the field of sustainable development is now sufficiently well established, and both Parties appear to accept this. (Reply of Hungary, paras. 1.45 and 1.47.)

Slovakia states that 'inherent in the concept of sustainable development is the principle that developmental needs are to be taken into account in interpreting and applying environmental obligations' (Counter-Memorial of Slovakia, para. 9.53; see also paras. 9.54–9.59).

Their disagreement seems to be not as to the existence of the principle but, rather, as to the way in which it is to be applied to the facts of this case (Reply of Hungary, para. 1.45).

The problem of steering a course between the needs of development and the necessity to protect the environment is a problem alike of the law of development and of the law of the environment. Both these vital and developing areas of law require, and indeed assume, the existence of a principle which harmonizes both needs.

To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result.

Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development.

This case offers a unique opportunity for the application of that principle, for it arises from a Treaty which had development as its objective, and has been brought to a standstill over arguments concerning environmental considerations.

The people of both Hungary and Slovakia are entitled to development for the furtherance of their happiness and welfare. They are likewise entitled to the preservation of their human right to the protection of their environment. Other cases

raising environmental questions have been considered by this Court in the context of environmental pollution arising from such sources as nuclear explosions, which are far removed from development projects. The present case thus focuses attention, as no other case has done in the jurisprudence of this Court, on the question of the harmonization of developmental and environmental concepts.

[91] (a) Development as a principle of international law

Article 1 of the Declaration on the Right to Development, 1986, asserted that 'The right to development is an inalienable human right.' This Declaration had the overwhelming support of the international community[1] and has been gathering strength since then.[2] Principle 3 of the Rio Declaration, 1992, reaffirmed the need for the right to development to be fulfilled.

'Development' means, of course, development not merely for the sake of development and the economic gain it produces, but for its value in increasing the sum total of human happiness and welfare.[3] That could perhaps be called the first principle of the law relating to development.

To the end of improving the sum total of human happiness and welfare, it is important and inevitable that development projects of various descriptions, both minor and major, will be launched from time to time in all parts of the world.

(b) Environmental protection as a principle of international law

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to

[1] 146 votes in favour, with one vote against.

[2] Many years prior to the Declaration of 1986, this right had received strong support in the field of human rights. As early as 1972, at the Third Session of the Institut international de droits de l'homme, Judge Kéba Mbaye, President of the Supreme Court of Senegal and later to be a Vice-President of this Court, argued strongly that such a right existed. He adduced detailed argument in support of his contention from economic, political and moral standpoints. (See K. Mbaye, 'Le droit au développement comme un droit de l'homme', *Revue des droits de l'homme*, 1972, Vol. 5, p. 503.)

Nor was the principle without influential voices in its support from the developed world as well. Indeed, the genealogy of the idea can be traced much further back even to the conceptual stages of the Universal Declaration of Human Rights, 1948.

Mrs Eleanor Roosevelt, who from 1946 to 1952 served as the Chief United States representative to Committee III, Humanitarian, Social and Cultural Affairs, and was the first Chairperson, from 1946 to 1951, of the United Nations Human Rights Commission, had observed in 1947, 'We will have to bear in mind that we are writing a bill of rights for the world and that one of the most important rights is the opportunity for development.' (M. Glen Johnson, 'The Contribution of Eleanor and Franklin Roosevelt to the Development of the International Protection for Human Rights', *Human Rights Quarterly*, 1987, Vol. 9, p. 19, quoting Mrs Roosevelt's column, 'My Day', 6 February 1947.)

General Assembly resolution 642 (VII) of 1952, likewise, referred expressly to 'integrated economic and social development'.

[3] The Preamble to the Declaration on the Right to Development (1986) recites that development is a comprehensive, economic, social and cultural process which aims at the constant improvement and well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

health and the right to life itself. It is [92] scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

While, therefore, all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.

(c) Sustainable development as a principle of international law

After the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved.

It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development.

The concept of sustainable development can be traced back, beyond the Stockholm Conference of 1972, to such events as the Founex meeting of experts in Switzerland in June 1971;[4] the conference on environment and development in Canberra in 1971; and United Nations General Assembly resolution 2849 (XXVI). It received a powerful impetus from the Stockholm Declaration which, by Principle 11, stressed the essentiality of development as well as the essentiality of bearing environmental considerations in mind in the developmental process. Moreover, many other Principles of that Declaration[5] provided a setting for the development of the concept of sustainable development[6] and more than one-third of the Stockholm Declaration related to the harmonization of environment and development.[7] The Stockholm Conference also produced an Action Plan for the Human Environment.[8]

[93] The international community had thus been sensitized to this issue even as early as the early 1970s, and it is therefore no cause for surprise that the 1977 Treaty, in Articles 15 and 19, made special reference to environmental considerations. Both Parties to the Treaty recognized the need for the developmental process to be in harmony with the environment and introduced a dynamic element into the Treaty which enabled the Joint Project to be kept in harmony with developing principles of international law.

[4] See *Sustainable Development and International Law*, Winfried Lang (ed.), 1995, p. 143.

[5] For example, Principles 2, 3, 4, 5, 8, 9, 12, 13 and 14.

[6] These principles are thought to be based to a large extent on the Founex Report – see *Sustainable Development and International Law*, Winfried Lang (ed.), *supra*, p. 144.

[7] *Ibid.*

[8] Action Plan for the Human Environment, United Nations doc. A/CONF.48/14/Rev.1. See especially Chapter II which devoted its final section to development and the environment.

Since then, it has received considerable endorsement from all sections of the international community, and at all levels.

Whether in the field of multilateral treaties,[9] international declarations;[10] the foundation documents of international organizations;[11] the practices of international financial institutions;[12] regional declarations and planning documents;[13] or State practice,[14] there is a wide and general recognition of the concept. The Bergen ECE Ministerial Declaration on Sustainable Development of 15 May 1990, resulting from a meeting of [94] Ministers from 34 countries in the ECE region, and the Commissioner for the Environment of the European Community, addressed 'The challenge of sustainable development of humanity' (para. 6), and prepared a Bergen Agenda for Action which included a consideration of the Economics of Sustainability, Sustainable Energy Use, Sustainable Industrial Activities, and Awareness Raising and Public

[9] For example, the United Nations Convention to Combat Desertification (The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Droughts and/or Desertification, Particularly in Africa), 1994, Preamble, Art. 9 (1); the United Nations Framework Convention on Climate Change, 1992 (*ILM*, 1992, Vol. XXXI, p. 849, Arts. 2 and 3); and the Convention on Biological Diversity (*ILM*, 1992, Vol. XXXI, p. 818, Preamble, Arts. 1 and 10 – 'sustainable use of biodiversity').

[10] For example, the Rio Declaration on Environment and Development, 1992, emphasizes sustainable development in several of its Principles (e.g., Principles 4, 5, 7, 8, 9, 20, 21, 22, 24 and 27 refer expressly to 'sustainable development' which can be described as the central concept of the entire document); and the Copenhagen Declaration, 1995 (paras. 6 and 8), following on the Copenhagen World Summit for Social Development, 1995.

[11] For example, the North American Free Trade Agreement (Canada, Mexico, United States) (NAFTA, Preamble, *ILM*, 1993, Vol. XXXII, p. 289); the World Trade Organization (WTO) (paragraph 1 of the Preamble of the Marrakesh Agreement of 15 April 1994, establishing the World Trade Organization, speaks of the 'optimal use of the world's resources in accordance with the objective of sustainable development' – *ILM*, 1994, Vol. XXXIII, pp. 1143–4); and the European Union (Art. 2 of the ECT).

[12] For example, the World Bank Group, the Asian Development Bank, the African Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development all subscribe to the principle of sustainable development. Indeed, since 1993, the World Bank has convened an annual conference related to advancing environmentally and socially sustainable development (ESSD).

[13] For example, the Langkawi Declaration on the Environment, 1989, adopted by the 'Heads of Government of the Commonwealth representing a quarter of the world's population' which adopted 'sustainable development' as its central theme; Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, Bangkok, 1990 (doc. 38a, p. 567); and Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region, 1983 (para. 10: 'sustainable, environmentally sound development').

[14] For example, in 1990, the Dublin Declaration by the European Council on the Environmental Imperative stated that there must be an acceleration of effort to ensure that economic development in the Community is 'sustainable and environmentally sound' (*Bulletin of the European Communities*, 6, 1990, Ann. II, p. 18). It urged the Community and Member States to play a major role to assist developing countries in their efforts to achieve 'long-term sustainable development' (*ibid.*, p. 19). It said, in regard to countries of Central and Eastern Europe, that remedial measures must be taken 'to ensure that their future economic development is sustainable' (*ibid.*). It also expressly recited that:

> As Heads of State or Government of the European Community, . . . [w]e intend that action by the Community and its Member States will be developed . . . on the principles of sustainable development and preventive and precautionary action. (*Ibid.*, Conclusions of the Presidency, Point 1.36, pp. 17–18.)

Participation. It sought to develop 'sound national indicators for sustainable development' (para. 13 *(b)*) and sought to encourage investors to apply environmental standards required in their home country to investments abroad. It also sought to encourage UNEP, UNIDO, UNDP, IBRD, ILO, and appropriate international organizations to support member countries in ensuring environmentally sound industrial investment, observing that industry and government should co-operate for this purpose (para. 15 *(f)*).[15] A Resolution of the Council of Europe, 1990, propounded a European Conservation Strategy to meet, *inter alia*, the legitimate needs and aspirations of all Europeans by seeking to base economic, social and cultural development on a rational and sustainable use of natural resources, and to suggest how sustainable development can be achieved.[16]

The concept of sustainable development is thus a principle accepted not merely by the developing countries, but one which rests on a basis of worldwide acceptance.

In 1987, the Brundtland Report brought the concept of sustainable development to the forefront of international attention. In 1992, the Rio Conference made it a central feature of its Declaration, and it has been a focus of attention in all questions relating to development in the developing countries.

[95] The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.

The concept has a significant role to play in the resolution of environmentally related disputes. The components of the principle come from well-established areas of international law – human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighbourliness – to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements. It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be neglected.

The general support of the international community does not of course mean that each and every member of the community of nations has given its express and specific support to the principle – nor is this a requirement for the establishment of a principle of customary international law.

As Brierly observes:

> It would hardly ever be practicable, and all but the strictest of positivists admit that it is not necessary, to show that every state has recognized a certain practice, just as in English law the existence of a valid local custom or custom of trade can be established without proof that every individual in the locality, or engaged in the trade, has practised the custom. This test of *general* recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international . . .[17]

[15] *Basic Documents of International Environmental Law*, Harald Hohmann (ed.), Vol. 1, 1992, p. 558.
[16] *Ibid.*, p. 598.
[17] J. Brierly, *The Law of Nations*, 6th ed., 1963, p. 61; emphasis added.

Evidence appearing in international instruments and State practice (as in development assistance and the practice of international financial institutions) likewise amply supports a contemporary general acceptance of the concept.

Recognition of the concept could thus, fairly, be said to be worldwide.[18]

[96] (d) The need for international law to draw upon the world's diversity of cultures in harmonizing development and environmental protection

This case, which deals with a major hydraulic project, is an opportunity to tap the wisdom of the past and draw from it some principles which can strengthen the concept of sustainable development, for every development project clearly produces an effect upon the environment, and humanity has lived with this problem for generations.

This is a legitimate source for the enrichment of international law, which source is perhaps not used to the extent which its importance warrants.

In drawing into international law the benefits of the insights available from other cultures, and in looking to the past for inspiration, international environmental law would not be departing from the traditional methods of international law, but would, in fact, be following in the path charted out by Grotius. Rather than laying down a set of principles *a priori* for the new discipline of international law, he sought them also *a posteriori* from the experience of the past, searching through the whole range of cultures available to him for this purpose.[19] From them, he drew the durable principles which had weathered the ages, on which to build the new international order of the future. Environmental law is now in a formative stage, not unlike international law in its early stages. A wealth of past experience from a variety of cultures is available to it. It would be pity indeed if it were left untapped merely because of attitudes of formalism which see such approaches as not being entirely *de rigueur*.

I cite in this connection an observation of Sir Robert Jennings that, in taking note of different legal traditions and cultures, the International Court (as it did in the *Western Sahara* case):

> was asserting, not negating, the Grotian subjection of the totality of international relations to international law. It seems to the writer, indeed, that at the present juncture in the development of the international legal system it may be more important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions . . .[20]

Moreover, especially at the frontiers of the discipline of international **[97]** law, it needs to be multi-disciplinary, drawing from other disciplines such as history, sociology, anthropology, and psychology such wisdom as may be relevant for its purpose. On the need for the international law of the future to be interdisciplinary, I refer to

[18] See, further, L. Krämer, *EC Treaty and Environmental Law*, 2nd ed., 1995, p. 63, analysing the environmental connotation in the word 'sustainable' and tracing it to the Brundtland Report.
[19] Julius Stone, *Human Law and Human Justice*, 1965, p. 66: 'It was for this reason that Grotius added to his theoretical deductions such a mass of concrete examples from history.'
[20] Sir Robert Y. Jennings, 'Universal International Law in a Multicultural World', in *International Law and the Grotian Heritage: A Commemorative Colloquium on the Occasion of the Fourth Centenary of the Birth of Hugo Grotius*, edited and published by the TMC Asser Institute, The Hague, 1985, p. 195.

another recent extra-judicial observation of that distinguished former President of the Court that:

> there should be a much greater, and a practical, recognition by international lawyers that the rule of law in international affairs, and the establishment of international justice, are inter-disciplinary subjects.[21]

Especially where this Court is concerned, 'the essence of true universality'[22] of the institution is captured in the language of Article 9 of the Statute of the International Court of Justice which requires the 'representation of the *main forms of civilization* and of the principal legal systems of the world' (emphasis added). The struggle for the insertion of the italicized words in the Court's Statute was a hard one, led by the Japanese representative, Mr Adatci,[23] and, since this concept has thus been integrated into the structure and the Statute of the Court, I see the Court as being charged with a duty to draw upon the wisdom of the world's several civilizations, where such a course can enrich its insights into the matter before it. The Court cannot afford to be monocultural, especially where it is entering newly developing areas of law.

This case touches an area where many such insights can be drawn to the enrichment of the developing principles of environmental law and to a clarification of the principles the Court should apply.

It is in this spirit that I approach a principle which, for the first time in its jurisprudence, the Court is called upon to apply – a principle which will assist in the delicate task of balancing two considerations of enormous importance to the contemporary international scene and, potentially, of even greater importance to the future.

(e) Some wisdom from the past relating to sustainable development

There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are specially pertinent to the concept of sustainable development which was well [**98**] recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia – in fact, the whole world. This is a rich source which modern environmental law has left largely untapped.

As the Court has observed, 'Throughout the ages mankind has, for economic and other reasons, constantly interfered with nature.' (Judgment, para. 140.)

[21] 'International Lawyers and the Progressive Development of International Law', *Theory of International Law at the Threshold of the 21st Century*, Jerzy Makarczyk (ed.), 1996, p. 423.

[22] Jennings, 'Universal International Law in a Multicultural World', *op. cit.*, p. 189.

[23] On this subject of contention, see *Procès-Verbaux of the Proceedings of the Committee, 16 June–24 July 1920*, esp. p. 136.

The concept of reconciling the needs of development with the protection of the environment is thus not new. Millennia ago these concerns were noted and their twin demands well reconciled in a manner so meaningful as to carry a message to our age.

I shall start with a system with which I am specially familiar, which also happens to have specifically articulated these two needs – development and environmental protection – in its ancient literature. I refer to the ancient irrigation-based civilization of Sri Lanka.[24] It is a system which, while recognizing the need for development and vigorously implementing schemes to this end, at the same time specifically articulated the need for environmental protection and ensured that the technology it employed paid due regard to environmental considerations. This concern for the environment was reflected not only in its literature and its technology, but also in its legal system, for the felling of certain forests was prohibited, game sanctuaries were established, and royal edicts decreed that the natural resource of water was to be used to the last drop without any wastage.

This system, some details of which I shall touch on,[25] is described by [**99**] Arnold Toynbee in his panoramic survey of civilizations. Referring to it as an 'amazing system of waterworks',[26] Toynbee describes[27] how hill streams were tapped and their water guided into giant storage tanks, some of them four thousand acres in extent,[28] from which channels ran on to other larger tanks.[29] Below each great tank and each great channel were hundreds of little tanks, each the nucleus of a village.

The concern for the environment shown by this ancient irrigation system has attracted study in a recent survey of the Social and Environmental Effects of Large Dams,[30] which observes that among the environmentally related aspects of its

[24] This was not an isolated civilization, but one which maintained international relations with China, on the one hand, and with Rome (1st c.) and Byzantium (4th c.), on the other. The presence of its ambassadors at the Court of Rome is recorded by Pliny (lib. vi c. 24), and is noted by Grotius – *De Jure Praedae Commentarius*, G. L. Williams and W. H. Zeydol (eds.), *Classics of International Law*, James B. Scott (ed.), 1950, pp. 240–1. This diplomatic representation also receives mention in world literature (e.g., Milton, *Paradise Regained*, Book IV). See also Grotius' reference to the detailed knowledge of Ceylon possessed by the Romans – Grotius, *Mare Liberum* (Freedom of the Seas), trans. R. van Deman Magoffin, p. 12. The island was known as Taprobane to the Greeks, Serendib to the Arabs, Lanka to the Indians, Ceilao to the Portuguese, and Zeylan to the Dutch. Its trade with the Roman Empire and the Far East was noted by Gibbon.

[25] It is an aid to the recapitulation of the matters mentioned that the edicts and works I shall refer to have been the subject of written records, maintained contemporaneously and over the centuries. See footnote 38 below.

[26] Arnold J. Toynbee, *A Study of History*, Somervell's Abridgment, 1960, Vol. 1, p. 257.

[27] *Ibid.*, p. 81, citing John Still, *The Jungle Tide*.

[28] Several of these are still in use, e.g., the *Tissawewa* (3rd c. BC); the *Nuwarawewa* (3rd c. BC); the *Minneriya tank* (275 AD); the *Kalawewa* (5th c. AD); and the *Parakrama Samudra* (Sea of Parakrama, 11th c. AD).

[29] The technical sophistication of this irrigation system has been noted also in Joseph Needham's monumental work on *Science and Civilization in China*. Needham, in describing the ancient irrigation works of China, makes numerous references to the contemporary irrigation works of Ceylon, which he discusses at some length. See especially, Vol. 4, *Physics and Physical Technology*, 1971, pp. 368 *et seq.* Also p. 215: 'We shall see how skilled the ancient Ceylonese were in this art.'

[30] Edward Goldsmith and Nicholas Hildyard, *The Social and Environmental Effects of Large Dams*, 1985, pp. 291–304.

irrigation systems were the 'erosion control tank' which dealt with the problem of silting by being so designed as to collect deposits of silt before they entered the main water storage tanks. Several erosion control tanks were associated with each village irrigation system. The significance of this can well be appreciated in the context of the present case, where the problem of silting has assumed so much importance.

Another such environmentally related measure consisted of the 'forest tanks' which were built in the jungle above the village, not for the purpose of irrigating land, but to provide water to wild animals.[31]

[100] This system of tanks and channels, some of them two thousand years old, constitute in their totality several multiples of the irrigation works involved in the present scheme. They constituted development as it was understood at the time, for they achieved in Toynbee's words, 'the arduous feat of conquering the parched plains of Ceylon for agriculture'.[32] Yet they were executed with meticulous regard for environmental concerns, and showed that the concept of sustainable development was consciously practised over two millennia ago with much success.

Under this irrigation system, major rivers were dammed and reservoirs created, on a scale and in a manner reminiscent of the damming which the Court saw on its inspection of the dams in this case.

This ancient concept of development was carried out on such a large scale that, apart from the major reservoirs,[33] of which there were several **[101]** dozen, between

[31] For these details, see Goldsmith and Hildyard, *ibid.*, pp. 291 and 296. The same authors observe:

> Sri Lanka is covered with a network of thousands of man-made lakes and ponds, known locally as *tanks* (after *tanque*, the Portuguese word for reservoir). Some are truly massive, many are thousands of years old, and almost all show a high degree of sophistication in their construction and design. Sir James Emerson Tennent, the nineteenth century historian, marvelled in particular at the numerous channels that were dug underneath the bed of each lake in order to ensure that the flow of water was 'constant and equal as long as any water remained in the tank'.

[32] Toynbee, *op. cit.*, p. 81. Andrew Carnegie, the donor of the Peace Palace, the seat of this Court, has described this ancient work of development in the following terms:

> The position held by Ceylon in ancient days as the great granary of Southern Asia explains the precedence accorded to agricultural pursuits. Under native rule the whole island was brought under irrigation by means of artificial lakes, constructed by dams across ravines, many of them of great extent – one still existing is twenty miles in circumference – but the system has been allowed to fall into decay. (Andrew Carnegie, *Round the World*, 1879 (1933 ed.), pp. 155–60.)

[33] The first of these major tanks was thought to have been constructed in 504 BC (Sir James Emerson Tennent, *Ceylon*, 1859, Vol. I, p. 367). A few examples, straddling 15 centuries, were:
- the *Vavunik-kulam* (3rd c. BC) (1,975 acres water surface, 596 million cubic feet water capacity); the *Pavatkulam* (3rd or 2nd c. BC) (2,029 acres water surface, 770 million cubic feet water capacity) – Parker, *Ancient Ceylon*, 1909, pp. 363, 373;
- the *Tissawewa* (3rd c. BC); and the *Nuwarawewa* (3rd c. BC), both still in service and still supplying water to the ancient capital Anuradhapura, which is now a provincial capital;
- the *Minneriya tank* (275 AD) ("The reservoir upwards of twenty miles in circumference . . . the great embankment remains nearly perfect') (Tennent, *op. cit.*, Vol. II, p. 600);
- the *Topawewa* (4th c. AD), area considerably in excess of 1,000 acres;

25,000 and 30,000 minor reservoirs were fed from these reservoirs through an intricate network of canals.[34]

The philosophy underlying this gigantic system,[35] which for upwards of two thousand years served the needs of man and nature alike, was articulated in a famous principle laid down by an outstanding monarch[36] that 'not even a little water that comes from the rain is to flow into the ocean without being made useful to man'.[37] According to the ancient chronicles,[38] these works were undertaken 'for the benefit of the country', and 'out of compassion for all living creatures'.[39] This complex of irrigation works was aimed at making the entire country a granary. They embodied the concept of development *par excellence*.

- the *Kalawewa* (5th c. AD) – embankment 3.25 miles long, rising to a height of 40 feet, tapping the river Kala Oya and supplying water to the capital Anuradhapura through a canal 50 miles in length;
- the *Yodawewa* (5th c. AD). Needham describes this as 'A most grandiose conception . . . the culmination of Ceylonese hydraulics . . . an artificial lake with a six-and-a-half mile embankment on three sides of a square, sited on a sloping plain and not in a river valley at all.' It was fed by a 50-mile canal from the river Malvatu-Oya;
- the *Parakrama Samudra* (Sea of Parakrama) (11th c. AD), embankment 9 miles long, up to 40 feet high, enclosing 6,000 acres of water area. (Brohier, *Ancient Irrigation Works in Ceylon*, 1934, p. 9.)

[34] On the irrigation systems, generally, see H. Parker, *Ancient Ceylon*, *op. cit.*; R. L. Brohier, *Ancient Irrigation Works in Ceylon*, 1934; Edward Goldsmith and Nicholas Hildyard, *op. cit.*, pp. 291–304. Needham, describing the ancient canal system of China, observes that 'it was comparable only with the irrigation contour canals of Ceylon, not with any work in Europe' (*op. cit.*, Vol. 4, p. 359).

[35] 'so vast were the dimensions of some of these gigantic tanks that many still in existence cover an area from fifteen to twenty miles in circumference' (Tennent, *op. cit.*, Vol. I, p. 364).

[36] King Parakrama Bahu (1153–86 AD). This monarch constructed or restored 163 major tanks, 2,376 minor tanks, 3,910 canals, and 165 dams. His masterpiece was the Sea of Parakrama, referred to in footnote 33. All of this was conceived within the environmental philosophy of avoiding any wastage of natural resources.

[37] See Toynbee's reference to this:

> The idea underlying the system was very great. It was intended by the tank-building kings that none of the rain which fell in such abundance in the mountains should reach the sea without paying tribute to man on the way. (*Op. cit.*, p. 81.)

[38] *The Mahavamsa*, Turnour's translation, Chap. XXXVII, p. 242. The *Mahavamsa* was the ancient historical chronicle of Sri Lanka, maintained contemporaneously by Buddhist monks, and an important source of dating for South Asian history. Commencing at the close of the 4th century AD, and incorporating earlier chronicles and oral traditions dating back a further eight centuries, this constitutes a continuous record for over 15 centuries – see *The Mahavamsa or The Great Chronicle of Ceylon*, translated into English by Wilhelm Geiger, 1912, Introduction, pp. ix–xii. The King's statement, earlier referred to, is recorded in the *Mahavamsa* as follows:

> In the realm that is subject to me are . . . but few fields which are dependent on rivers with permanent flow . . . Also by many mountains, thick jungles and by widespread swamps my kingdom is much straitened. Truly, in such a country not even a little water that comes from the rain must flow into the ocean without being made useful to man. (*Ibid.*, Chap. LXVIII, verses 8–12.)

[39] See also, on this matter, Emerson Tennent, *op. cit.*. Vol. I, p. 311.

Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century BC. The ancient chronicles record that when the King (Devanampiya Tissa, 247–207 BC) was on a hunting trip (around 223 BC), the Arahat[40] Mahinda, son of the Emperor Asoka of India, preached to him **[102]** a sermon on Buddhism which converted the king. Here are excerpts from that sermon:

> O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it.[41]

This sermon, which indeed contained the first principle of modern environmental law – the principle of trusteeship of earth resources – caused the king to start sanctuaries for wild animals – a concept which continued to be respected for over twenty centuries. The traditional legal system's protection of fauna and flora, based on this Buddhist teaching, extended well into the eighteenth century.[42]

The sermon also pointed out that even birds and beasts have a right to freedom from fear.[43]

The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. It translated well into environmental attitudes. '*Alienum*' in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach.

This marked concern with environmental needs was reflected also in royal edicts, dating back to the third century BC, which ordained that certain primeval forests should on no account be felled. This was because adequate forest cover in the highlands was known to be crucial to the irrigation system as the mountain jungles intercepted and stored the monsoon rains.[44] They attracted the rain which fed the river and irrigation systems of the country, and were therefore considered vital.

Environmental considerations were reflected also in the actual work of construction and engineering. The ancient engineers devised an answer to the problem of silting (which has assumed much importance in the present case), and they invented a device (the *bisokotuwa* or valve pit), the counterpart of the sluice, for dealing with this environmental problem,[45] **[103]** by controlling the pressure and the quantity of

[40] A person who has attained a very high state of enlightenment. For its more technical meaning, see Walpola Rahula, *History of Buddhism in Ceylon*, 1956, pp. 217–21.

[41] This sermon is recorded in *The Mahawamsa*, Chap. XIV.

[42] See K. N. Jayatilleke, 'The Principles of International Law in Buddhist Doctrine', *Recueil des cours de l'Académie de droit international*, Vol. 120, 1967, p. 558.

[43] For this idea in the scriptures of Buddhism, see *Digha Nikaya*, III, Pali Text Society, p. 850.

[44] Goldsmith and Hildyard, *op. cit.*, p. 299. See, also, R. L. Brohier, 'The Interrelation of Groups of Ancient Reservoirs and Channels in Ceylon', *Journal of the Royal Asiatic Society (Ceylon)*, 1937, Vol. 34, No. 90, p. 65. Brohier's study is one of the foremost authorities on the subject.

[45] H. Parker, *Ancient Ceylon*, *op. cit.*, p. 379:

> the outflow of water when it was released from the reservoir.[46] Weirs were also built, as in the case of the construction involved in this case, for raising the levels of river water and regulating its flow.[47]

This juxtaposition in this ancient heritage of the concepts of development and environmental protection invites comment immediately from those familiar with it. Anyone interested in the human future would perceive the connection between the two concepts and the manner of their reconciliation.

Not merely from the legal perspective does this become apparent, but even from the approaches of other disciplines.

Thus Arthur C. Clarke, the noted futurist, with that vision which has enabled him to bring high science to the service of humanity, put his finger on the precise legal problem we are considering when he observed: 'the small Indian Ocean island ... provides textbook examples of many modern dilemmas: *development* versus *environment*',[48] and proceeds immediately to recapitulate the famous sermon, already referred to, relating to the trusteeship of land, observing, 'For as King Devanampiya Tissa was told three centuries before the birth of Christ, we are its guardians – *not* its owners.'[49]

The task of the law is to convert such wisdom into practical terms – **[104]** and the law has often lagged behind other disciplines in so doing. Happily for international law, there are plentiful indications, as recited earlier in this opinion, of that degree of 'general recognition among states of a certain practice as obligatory'[50] to give the principle of sustainable development the nature of customary law.

> Since about the middle of the last century, open wells, called 'valve towers' when they stand clear of the embankment or 'valve pits' when they are in it, have been built in numerous reservoirs in Europe. Their duty is to hold the valves, and the lifting-gear for working them, by means of which the outward flow of water is regulated or totally stopped. Such also was the function of the *bisokotuwa* of the Sinhalese engineers; they were the first inventors of the valve-pit more than 2,100 years ago.

[46] H. Parker, *op. cit.* Needham observes:

> Already in the first century AD they [the Sinhalese engineers] understood the principle of the oblique weir ... But perhaps the most striking invention was the intake-towers or valve towers (*Bisokotuwa*) which were fitted in the reservoirs perhaps from the 2nd Century BC onwards, certainly from the 2nd Century AD ... In this way silt and scum-free water could be obtained and at the same time the pressure-head was so reduced as to make the outflow controllable. (Joseph Needham, *Science and Civilization in China*, *op. cit.*, Vol. 4, p. 372.)

[47] K. M. de Silva, *A History of Sri Lanka*, 1981, p. 30.

[48] Arthur C. Clarke, 'Sri Lanka's Wildlife Heritage', *National Geographic*, August 1983, No. 2, p. 254; emphasis added.

[49] Arthur C. Clarke has also written:

> Of all Ceylon's architectural wonders, however, the most remarkable – and certainly the most useful – is the enormous irrigation system which, for over two thousand years, has brought prosperity to the rice farmers in regions where it may not rain for six months at a time. Frequently ruined, abandoned and rebuilt, this legacy of the ancient engineers is one of the island's most precious possessions. Some of its artificial lakes are ten or twenty kilometres in circumference, and abound with birds and wildlife. (*The View from Serendip*, 1977, p. 121.)

[50] J. Brierly, *The Law of Nations*, *op. cit.*, p. 61.

This reference to the practice and philosophy of a major irrigation civilization of the pre-modern world[51] illustrates that when technology on this scale was attempted it was accompanied by a due concern for the environment. Moreover, when so attempted, the necessary response from the traditional legal system, as indicated above, was one of affirmative steps for environmental protection, often taking the form of royal decrees, apart from the practices of a sophisticated system of customary law which regulated the manner in which the irrigation facilities were to be used and protected by individual members of the public.

The foregoing is but one illustrative example of the concern felt by prior legal systems for the preservation and protection of the environment. There are other examples of complex irrigation systems that have sustained themselves for centuries, if not millennia.

My next illustration comes from two ancient cultures of sub-Saharan Africa – those of the Sonjo and the Chagga, both Tanzanian tribes.[52] Their complicated networks of irrigation furrows, collecting water from the mountain streams and transporting it over long distances to the fields below, have aroused the admiration of modern observers not merely for their technical sophistication, but also for the durability of the complex irrigation systems they fashioned. Among the Sonjo, it was considered to be the sacred duty of each generation to ensure that the system was kept in good repair and all able-bodied men in the villages were expected to take part.[53] The system comprised a fine network of small canals, reinforced by a superimposed network of larger channels. The water did **[105]** not enter the irrigation area unless it was strictly required, and was not allowed to pass through the plots in the rainy season. There was thus no over-irrigation, salinity was reduced, and water-borne diseases avoided.[54]

Sir Charles Dundas, who visited the Chagga in the first quarter of this century, was much impressed by the manner in which, throughout the long course of the furrows, society was so organized that law and order prevailed.[55] Care of the furrows was a prime social duty, and if a furrow was damaged, even accidentally, one of the elders would sound a horn in the evening (which was known as the call to the furrows), and

[51] It is possible that in no other part of the world are there to be found within the same space the remains of so many works for irrigation, which are at the same time of such great antiquity and of such vast magnitude as in Ceylon . . . (Bailey, *Report on Irrigation in Uva*, 1859; see also R. L. Brohier, *Ancient Irrigation Works in Ceylon*, *op. cit.*, p. 1);

No people in any age or country had so great practice and experience in the construction of works for irrigation. (Sir James Emerson Tennent, *op. cit.*, Vol. I, p. 468);

The stupendous ruins of their reservoirs are the proudest monuments which remain of the former greatness of their country . . . Excepting the exaggerated dimensions of Lake Moeris in Central Egypt, and the mysterious 'Basin of Al Aram' . . . no similar constructions formed by any race, whether ancient or modern, exceed in colossal magnitude the stupendous tanks of Ceylon. (Sir James Emerson Tennent, quoted in Brohier, *supra*, p. 1.)

[52] Goldsmith and Hildyard, *op. cit.*, pp. 282–91.

[53] *Ibid.*, pp. 284–5.

[54] Goldsmith and Hildyard, *op. cit.*, p. 284.

[55] Sir Charles Dundas, *Kilimanjaro and Its Peoples*, 1924, p. 262.

next morning everyone would leave their normal work and set about the business of repair.[56] The furrow was a social asset owned by the clan.[57]

Another example is that of the *qanats*[58] of Iran, of which there were around 22,000, comprising more than 170,000 miles[59] of underground irrigation channels built thousands of years ago, and many of them still functioning.[60] Not only is the extent of this system remarkable, but also the fact that it has functioned for thousands of years and, until recently, supplied Iran with around 75 per cent of the water used for both irrigation and domestic purposes.

By way of contrast, where the needs of the land were neglected, and massive schemes launched for urban supply rather than irrigation, there was disaster. The immense works in the Euphrates Valley in the third millennium BC aimed not at improving the irrigation system of the local tribesmen, but at supplying the requirements of a rapidly growing urban society (e.g., a vast canal built around 2400 BC by King Entemenak) led to seepage, flooding and over-irrigation.[61] Traditional farming methods and later irrigation systems helped to overcome the resulting problems of waterlogging and salinization.

China was another site of great irrigation works, some of which are still in use over two millennia after their construction. For example, the ravages of the Mo river were overcome by an excavation through a **[106]** mountain and the construction of two great canals. Needham describes this as 'one of the greatest of Chinese engineering operations which, now 2,200 years old, is still in use today'.[62] An ancient stone inscription teaching the art of river control says that its teaching 'holds good for a thousand autumns'.[63] Such action was often inspired by the philosophy recorded in the *Tao Te Ching* which 'with its usual gemlike brevity says "Let there be no action [contrary to Nature] and there will be nothing that will not be well regulated"'.[64] Here, from another ancient irrigation civilization, is yet another expression of the idea of the rights of future generations being served through the harmonization of human developmental work with respect for the natural environment.

Regarding the Inca civilization at its height, it has been observed that it continually brought new lands under cultivation by swamp drainage, expansion of irrigation works, terracing of hillsides and construction of irrigation works in dry zones, the goal being always the same – better utilization of all resources so as to maintain

[56] Goldsmith and Hildyard, *op. cit.*, p. 289.

[57] See further Fidelio T. Masao, 'The Irrigation System in Uchagga: An Ethno-Historical Approach', *Tanzania Notes and Records*, No. 75, 1974.

[58] *Qanats* comprise a series of vertical shafts dug down to the aquifer and joined by a horizontal canal – see Goldsmith and Hildyard, *op. cit.*, p. 277.

[59] Some idea of the immensity of this work can be gathered from the fact that it would cost around one million dollars to build an eight kilometres *qanat* with an average tunnel depth of 15 metres (*ibid.*, p. 280).

[60] *Ibid.*, p. 277.

[61] Goldsmith and Hildyard, *op. cit.*, p. 308.

[62] *Op. cit.*, Vol. 4, p. 288.

[63] *Ibid.*, p. 295.

[64] Needham, *Science and Civilization in China*, Vol. 2, *History of Scientific Thought*, 1969, p. 69.

an equilibrium between production and consumption.[65] In the words of a noted writer on this civilization, 'in this respect we can consider the Inca civilization triumphant, since it conquered the eternal problem of *maximum use* and *conservation of soil*'.[66] Here, too, we note the harmonization of developmental and environmental considerations.

Many more instances can be cited of irrigation cultures which accorded due importance to environmental considerations and reconciled the rights of present and future generations. I have referred to some of the more outstanding. Among them, I have examined one at greater length, partly because it combined vast hydraulic development projects with a meticulous regard for environmental considerations, and partly because both development and environmental protection are mentioned in its ancient records. That is sustainable development *par excellence*; and the principles on which it was based must surely have a message for modern law.

Traditional wisdom which inspired these ancient legal systems was able to handle such problems. Modern legal systems can do no less, achieving a blend of the concepts of development and of conservation of the environment, which alone does justice to humanity's obligations to itself and **[107]** to the planet which is its home. Another way of viewing the problem is to look upon it as involving the imperative of balancing the needs of the present generation with those of posterity.

In relation to concern for the environment generally, examples may be cited from nearly every traditional system, ranging from Australasia and the Pacific Islands, through Amerindian and African cultures to those of ancient Europe. When Native American wisdom, with its deep love of nature, ordained that no activity affecting the land should be undertaken without giving thought to its impact on the land for seven generations to come;[67] when African tradition viewed the human community as three-fold – past, present and future – and refused to adopt a one-eyed vision of concentration on the present; when Pacific tradition despised the view of land as merchandise that could be bought and sold like a common article of commerce,[68] and viewed land as a living entity which lived and grew with the people and upon whose sickness and death the people likewise sickened and died; when Chinese and Japanese culture stressed the need for harmony with nature; and when Aboriginal custom, while maximizing the use of all species of plant and animal life, yet decreed that no

[65] Jorge E. Hardoy, *Pre-Columbian Cities*, 1973, p. 415.

[66] John Collier, *Los indios de las Americas*, 1960, cited in Hardoy, *op. cit.*, p. 415. See also Donald Collier, 'Development of Civilization on the Coast of Peru', in *Irrigation Civilizations: A Comparative Study*, Julian H. Steward (ed.), 1955.

[67] On Native American attitudes to land, see Guruswamy, Palmer and Weston (eds.), *International Environmental Law and World Order*, 1994, pp. 298–9. On American Indian attitudes, see further J. Callicott, 'The Traditional American Indian and Western European Attitudes towards Nature: An Overview', *Environmental Ethics*, 1982, Vol. 4, p. 293; A. Wiggins, 'Indian Rights and the Environment', *Yale J. Int'l Law*, 1993, Vol. 18, p. 345; J. Hughes, *American Indian Ecology*, 1983.

[68] A Pacific Islander, giving evidence before the first Land Commission in the British Solomons (1919–24), poured scorn on the concept that land could be treated 'as if it were a thing like a box' which could be bought and sold, pointing out that land was treated in his society with respect and with due regard for the rights of future generations. (Peter G. Sack, *Land between Two Laws*, 1993, p. 33.)

land should be used by man to the point where it could not replenish itself,[69] these varied cultures were reflecting the ancient wisdom of the human family which the legal systems of the time and the tribe absorbed, reflected and turned into principles whose legal validity cannot be denied. Ancient Indian teaching so respected the environment that it was illegal **[108]** to cause wanton damage, even to an enemy's territory in the course of military conflict.[70]

Europe, likewise, had a deep-seated tradition of love for the environment, a prominent feature of European culture, until the industrial revolution pushed these concerns into the background. Wordsworth in England, Thoreau in the United States, Rousseau in France, Tolstoy and Chekhov in Russia, Goethe in Germany spoke not only for themselves, but represented a deep-seated love of nature that was instinct in the ancient traditions of Europe – traditions whose gradual disappearance these writers lamented in their various ways.[71]

Indeed, European concern with the environment can be traced back through the millennia to such writers as Virgil, whose *Georgics*, composed between 37 and 30 BC, extols the beauty of the Italian countryside and pleads for the restoration of the traditional agricultural life of Italy, which was being damaged by the drift to the cities.[72]

This survey would not be complete without a reference also to the principles of Islamic law that inasmuch as all land belongs to God, 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 generations. The first principle of modern environmental law – the principle of trusteeship of earth resources – is thus categorically formulated in this system.

The ingrained values of any civilization are the source from which its legal concepts derive, and the ultimate yardstick and touchstone of their validity. This is so in international and domestic legal systems alike, save that international law would

[69] On Aboriginal attitudes to land, see E. M. Eggleston, *Fear, Favour and Affection*, 1976. For all their concern with the environment, the Aboriginal people were not without their own development projects:

> There were remarkable Aboriginal water control schemes at Lake Condah, Toolondo and Mount William in south-western Victoria. These were major engineering feats, each involving several kilometres of stone channels connecting swamp and watercourses.
>
> At Lake Condah, thousands of years before Leonardo da Vinci studied the hydrology of the northern Italian lakes, the original inhabitants of Australia perfectly understood the hydrology of the site. A sophisticated network of traps, weirs and sluices were designed . . . (Stephen Johnson *et al.*, *Engineering and Society: An Australian Perspective*, 1995, p. 35.)

[70] Nagendra Singh, *Human Rights and the Future of Mankind*, 1981, p. 93.

[71] Commenting on the rise of naturalism in all the arts in Europe in the later Middle Ages, one of this century's outstanding philosophers of science has observed:

> The whole atmosphere of every art exhibited direct joy in the apprehension of the things around us. The craftsmen who executed the later mediaeval decorative sculpture, Giotto, Chaucer, Wordsworth, Walt Whitman, and at the present day the New England poet Robert Frost, are all akin to each other in this respect. (Alfred North Whitehead, *Science and the Modern World*, 1926, p. 17.)

[72] See the *Georgics*, Book II, l. 36 ff.; l. 458 ff. Also *Encyclopaedia Britannica*, 1992, Vol. 29, pp. 499–500.

require a worldwide recognition of those values. It would not be wrong to state that the love of nature, the desire for its preservation, and the need for human activity to respect the [**109**] requisites for its maintenance and continuance are among those pristine and universal values which command international recognition.

The formalism of modern legal systems may cause us to lose sight of such principles, but the time has come when they must once more be integrated into the corpus of the living law. As stated in the exhaustive study of *The Social and Environmental Effects of Large Dams*, already cited, 'We should examine not only what has caused modern irrigation systems to *fail*; it is much more important to understand what has made traditional irrigation societies to *succeed*.'[73]

Observing that various societies have practised sustainable irrigation agriculture over thousands of years, and that modern irrigation systems rarely last more than a few decades, the authors pose the question whether it was due to the achievement of a 'congruence of fit' between their methods and 'the nature of land, water and climate'.[74] Modern environmental law needs to take note of the experience of the past in pursuing this 'congruence of fit' between development and environmental imperatives.

By virtue of its representation of the main forms of civilization, this Court constitutes a unique forum for the reflection and the revitalization of those global legal traditions. There were principles ingrained in these civilizations as well as embodied in their *legal systems*, for legal systems include not merely written legal systems but traditional legal systems as well, which modern researchers have shown to be no less legal systems than their written cousins, and in some respects even more sophisticated and finely tuned than the latter.[75]

Living law which is daily observed by members of the community, and compliance with which is so axiomatic that it is taken for granted, is not deprived of the character of law by the extraneous test and standard of reduction to writing. Writing is of course useful for establishing certainty, but when a duty such as the duty to protect the environment is so well accepted that all citizens act upon it, that duty is part of the legal system in question.[76]

Moreover, when the Statute of the Court described the sources of international law as including the 'general principles of law recognized [**110**] by civilized nations', it expressly opened a door to the entry of such principles into modern international law.

(f) Traditional principles that can assist in the development of modern environmental law

As modern environmental law develops, it can, with profit to itself, take account of the perspectives and principles of traditional systems, not merely in a general way, but with reference to specific principles, concepts, and aspirational standards.

[73] Goldsmith and Hildyard, *op. cit.*, p. 316.

[74] *Ibid.*

[75] See, for example, M. Gluckman, *African Traditional Law in Historical Perspective*, 1974, *The Ideas in Barotse Jurisprudence*, 2nd ed., 1972, and *The Judicial Process among the Barotse*, 1955; A. L. Epstein, *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, 1954.

[76] On the precision with which these systems assigned duties to their members, see Malinowski, *Crime and Custom in Savage Society*, 1926.

Among those which may be extracted from the systems already referred to are such far-reaching principles as the principle of trusteeship of earth resources, the principle of intergenerational rights, and the principle that development and environmental conservation must go hand in hand. Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community. When it is used by humans, every opportunity should be afforded to it to replenish itself. Since flora and fauna have a niche in the ecological system, they must be expressly protected. There is a duty lying upon all members of the community to preserve the integrity and purity of the environment.

Natural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people. There should be no waste, and there should be a maximization of the use of plant and animal species, while preserving their regenerative powers. The purpose of development is the betterment of the condition of the people.

Most of them have relevance to the present case, and all of them can greatly enhance the ability of international environmental law to cope with problems such as these if and when they arise in the future. There are many routes of entry by which they can be assimilated into the international legal system, and modern international law would only diminish itself were it to lose sight of them – embodying as they do the wisdom which enabled the works of man to function for centuries and millennia in a stable relationship with the principles of the environment. This approach assumes increasing importance at a time when such a harmony between humanity and its planetary inheritance is a prerequisite for human survival.

*
* *

Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia [**111**] of human experience, it has an important part to play in the service of international law.

B. The principle of continuing Environmental Impact Assessment

(a) The principle of continuing Environmental Impact Assessment

Environmental Impact Assessment (EIA) has assumed an important role in this case.

In a previous opinion[77] I have had occasion to observe that this principle was gathering strength and international acceptance, and had reached the level of general recognition at which this Court should take notice of it.[78]

[77] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, ICJ Reports 1995*, p. 344 [see p. 186 above]. See, also, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports 1996*, p. 140 [see p. 227 above].

[78] Major international documents recognizing this principle (first established in domestic law under the 1972 National Environmental Protection Act of the United States) are the 1992 Rio Declaration (Principle 17); United Nations General Assembly resolution 2995 (XXVII), 1972; the 1978 UNEP Draft Principles of Conduct (Principle 5); Agenda 21 (paras. 7.41 (b) and 8.4); the 1974 Nordic

I wish in this opinion to clarify further the scope and extent of the environmental impact principle in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring.[79]

The greater the size and scope of the project, the greater is the need for a continuous monitoring of its effects, for EIA before the scheme can never be expected, in a matter so complex as the environment, to anticipate every possible environmental danger.

In the present case, the incorporation of environmental considerations into the Treaty by Articles 15 and 19 meant that the principle of EIA was also built into the Treaty. These provisions were clearly not restricted to EIA before the project commenced, but also included the concept of **[112]** monitoring during the continuance of the project. Article 15 speaks expressly of monitoring of the water quality during the *operation* of the System of Locks, and Article 19 speaks of compliance with obligations for the protection of nature arising in connection with the construction and *operation* of the System of Locks.

Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme.

Over half a century ago the *Trail Smelter Arbitration*[80] recognized the importance of continuous monitoring when, in a series of elaborate provisions, it required the parties to monitor subsequent performance under the decision.[81] It directed the Trail Smelter to install observation stations, equipment necessary to give information of gas conditions and sulphur dioxide recorders, and to render regular reports which the Tribunal would consider at a future meeting. In the present case, the Judgment of the Court imposes a requirement of joint supervision which must be similarly understood and applied.

The concept of monitoring and exchange of information has gathered much recognition in international practice. Examples are the Co-operative Programme for the Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe, under the ECE Convention, the Vienna Convention for the Protection of the Ozone Layer, 1985 (Arts. 3 and 4), and the Convention on Long-Range Transboundary Air Pollution, 1979 (Art. 9).[82] There has thus been growing international recognition of the concept of continuing monitoring as part of EIA.

Environmental Protection Convention (Art. 6); the 1985 EC Environmental Assessment Directive (Art. 3); and the 1991 Espoo Convention. The status of the principle in actual practice is indicated also by the fact that multilateral development banks have adopted it as an essential precaution (World Bank Operational Directive 4.00).

[79] *Trail Smelter Arbitration* (United Nations, *Reports of International Arbitral Awards (RIAA)*, 1941, Vol. III, p. 1907).

[80] *RIAA*, 1941, Vol. III, p. 1907.

[81] See *ibid.*, pp. 1934–7.

The Court has indicated in its Judgment (para. 155 (2) (C)) that a joint operational régime must be established in accordance with the Treaty of 16 September 1977. A continuous monitoring of the scheme for its environmental impacts will accord with the principles outlined, and be a part of that operational régime. Indeed, the 1977 Treaty, with its contemplated régime of joint operation and joint supervision, had itself a built-in régime of continuous joint environmental monitoring. This principle of environmental law, as reinforced by the terms of the Treaty and as now incorporated into the Judgment of the Court (para. 140), would require the Parties to take upon themselves an obligation to set up the machinery for continuous watchfulness, anticipation and evaluation **[113]** at every stage of the project's progress, throughout its period of active operation.

Domestic legal systems have shown an intense awareness of this need and have even devised procedural structures to this end. In India, for example, the concept has evolved of the 'continuous mandamus' – a court order which specifies certain environmental safeguards in relation to a given project, and does not leave the matter there, but orders a continuous monitoring of the project to ensure compliance with the standards which the court has ordained.[83]

EIA, being a specific application of the larger general principle of caution, embodies the obligation of continuing watchfulness and anticipation.

(b) The principle of contemporaneity in the application of environmental norms

This is a principle which supplements the observations just made regarding continuing assessment. It provides the standard by which the continuing assessment is to be made.

This case concerns a treaty that was entered into in 1977. Environmental standards and the relevant scientific knowledge of 1997 are far in advance of those of 1977. As the Court has observed, new scientific insights and a growing awareness of the risks for mankind have led to the development of new norms and standards:

> 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. (Para. 140.)

This assumes great practical importance in view of the continued joint monitoring that will be required in terms of the Court's Judgment.

Both Parties envisaged that the project they had agreed upon was not one which would be operative for just a few years. It was to reach far into the long-term future, and be operative for decades, improving in a permanent way the natural features

[82] *ILM*, 1979, Vol. XVIII, p. 1442.

[83] For a reference to environmentally related judicial initiatives of the courts of the SAARC Region, see the Proceedings of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, held in Colombo, Sri Lanka, 4–6 July 1997, shortly to be published.

that it dealt with, and forming a lasting contribution to the economic welfare of both participants.

If the Treaty was to operate for decades into the future, it could not [**114**] operate on the basis of environmental norms as though they were frozen in time when the Treaty was entered into.

This inter-temporal aspect of the present case is of importance to all treaties dealing with projects impacting on the environment. Unfortunately, the Vienna Convention offers very little guidance regarding this matter which is of such importance in the environmental field. The provision in Article 31, paragraph 3 *(c)*, providing that 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account, scarcely covers this aspect with the degree of clarity requisite to so important a matter.

Environmental concerns are live and continuing concerns whenever the project under which they arise may have been inaugurated. It matters little that an undertaking has been commenced under a treaty of 1950, if in fact that undertaking continues in operation in the year 2000. The relevant environmental standards that will be applicable will be those of the year 2000.

As this Court observed in the *Namibia* case, 'an international instrument has to be interpreted and applied 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), Advisory Opinion, ICJ Reports 1971*, p. 31, para. 53), and these principles are 'not limited to the rules of international law applicable at the time the treaty was concluded'.[84]

Environmental rights are human rights. Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.

Support for this proposition can be sought from the opinion of Judge Tanaka in *South West Africa*, when he observed that a new customary law could be applied to the interpretation of an instrument entered into more than 40 years previously *(ICJ Reports 1966*, pp. 293–4). The ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standards of yesterday. Judge Tanaka reasoned that a party to a humanitarian instrument has no right to act in a manner which is today considered inhuman, even though the action be taken under an instrument of 40 years ago. Likewise, no action should be permissible which is today considered environmentally [**115**] unsound, even though it is taken under an instrument of more than 20 years ago.

[84] *Oppenheim's International Law*, R. Y. Jennings and A. Watts (eds.), 1992, p. 1275, note 21.

Mention may also be made in this context of the observation of the European Court of Human Rights in the *Tyrer* case that the Convention is a 'living instrument' which must be interpreted 'in the light of present-day conditions'.[85]

It may also be observed that we are not here dealing with questions of the *validity* of the Treaty which fall to be determined by the principles applicable at the time of the Treaty, but with the *application* of the Treaty.[86] In the application of an environmental treaty, it is vitally important that the standards in force *at the time of application* would be the governing standards.

A recognition of the principle of contemporaneity in the application of environmental norms applies to the joint supervisory régime envisaged in the Court's Judgment, and will be an additional safeguard for protecting the environmental interests of Hungary.

C. The handling of erga omnes *obligations in* inter partes *judicial procedure*

(a) The factual background: the presence of the elements of estoppel

It is necessary to bear in mind that the Treaty of 1977 was not one that suddenly materialized and was hastily entered into, but that it was the result of years of negotiation and study following the first formulations of the idea in the 1960s. During the period of negotiation and implementation of the Treaty, numerous detailed studies were conducted by many experts and organizations, including the Hungarian Academy of Sciences.

The first observation to be made on this matter is that Hungary went into the 1977 Treaty, despite very clear warnings during the preparatory studies that the Project might involve the possibility of environmental damage. Hungary, with a vast amount of material before it, both for and against, thus took a considered decision, despite warnings of possible danger to its ecology on almost all the grounds which are advanced today.

Secondly, Hungary, having entered into the Treaty, continued to treat it as valid and binding for around 12 years. As early as 1981, the Government [**116**] of Hungary had ordered a reconsideration of the Project and researchers had then suggested a postponement of the construction, pending more detailed ecological studies. Yet Hungary went ahead with the implementation of the Treaty.

Thirdly, not only did Hungary devote its own effort and resources to the implementation of the Treaty but, by its attitude, it left Czechoslovakia with the impression that the binding force of the Treaty was not in doubt. Under this impression, and in pursuance of the Treaty which bound both Parties, Czechoslovakia committed enormous resources to the Project. Hungary looked on without comment or protest and, indeed, urged Czechoslovakia to more expeditious action. It was clear to Hungary that Czechoslovakia was spending vast funds on the Project – resources clearly so large as to strain the economy of a State whose economy was not particularly strong.

[85] Judgment of the Court, *Tyrer* case, 25 April 1978, para. 31, publ. Court A, Vol. 26, at 15, 16.

[86] See further Rosalyn Higgins, 'Some Observations on the Inter-Temporal Rule in International Law', in *Theory of International Law at the Threshold of the 21st Century*, *op. cit.*, p. 173.

Fourthly, Hungary's action in so entering into the Treaty in 1977 was confirmed by it as late as October 1988 when the Hungarian Parliament approved of the Project, despite all the additional material available to it in the intervening space of 12 years. A further reaffirmation of this Hungarian position is to be found in the signing of a Protocol by the Deputy Chairman of the Hungarian Council of Ministers on 6 February 1989, reaffirming Hungary's commitment to the 1977 Project. Hungary was in fact interested in setting back the date of completion from 1995 to 1994.

Ninety-six days after the 1989 Protocol took effect, i.e., on 13 May 1989, the Hungarian Government announced the immediate suspension for two months of work at the Nagymaros site. It abandoned performance on 20 July 1989, and thereafter suspended work on all parts of the Project. Formal termination of the 1977 Treaty by Hungary took place in May 1992.

It seems to me that all the ingredients of a legally binding estoppel are here present.[87]

The other Treaty partner was left with a vast amount of useless project construction on its hands and enormous incurred expenditure which it had fruitlessly undertaken.

(b) The context of Hungary's actions

In making these observations, one must be deeply sensitive to the fact that Hungary was passing through a very difficult phase, having regard **[117]** to the epochal events that had recently taken place in Eastern Europe. Such historic events necessarily leave their aftermath of internal tension. This may well manifest itself in shifts of official policy as different emergent groups exercise power and influence in the new order that was in the course of replacing that under which the country had functioned for close on half a century. One cannot but take note of these realities in understanding the drastic official changes of policy exhibited by Hungary.

Yet the Court is placed in the position of an objective observer, seeking to determine the effects of one State's changing official attitudes upon a neighbouring State. This is particularly so where the latter was obliged, in determining its course of action, to take into account the representations emanating from the official repositories of power in the first State.

Whatever be the reason for the internal changes of policy, and whatever be the internal pressures that might have produced this, the Court can only assess the respective rights of the two States on the basis of their official attitudes and pronouncements. Viewing the matter from the standpoint of an external observer, there can be little doubt that there was indeed a marked change of official attitude towards the Treaty, involving a sharp shift from full official acceptance to full official rejection. It is on this basis that the legal consequence of estoppel would follow.

[87] On the application of principles of estoppel in the jurisprudence of this Court and its predecessor, see *Legal Status of Eastern Greenland, PCIJ, Series A/B, No. 53*, p. 22; *Fisheries (United Kingdom v. Norway), ICJ Reports 1951*, p. 116; *Temple of Preah Vihear, ICJ Reports 1962*, p. 151. For an analysis of this jurisprudence, see the separate opinion of Judge Ajibola in *Territorial Dispute (Libyan Arab Jamahiriya/Chad), ICJ Reports 1994*, pp. 77–83.

(c) Is it appropriate to use the rules of *inter partes* litigation to determine *erga omnes* obligations?

This recapitulation of the facts brings me to the point where I believe a distinction must be made between litigation involving issues *inter partes* and litigation which involves issues with an *erga omnes* connotation.

An important conceptual problem arises when, in such a dispute *inter partes*, an issue arises regarding an alleged violation of rights or duties in relation to the rest of the world. The Court, in the discharge of its traditional duty of deciding *between the parties*, makes the decision which is in accordance with justice and fairness *between the parties*. The procedure it follows is largely adversarial. Yet this scarcely does justice to rights and obligations of an *erga omnes* character – least of all in cases involving environmental damage of a far-reaching and irreversible nature. I draw attention to this problem as it will present itself sooner or later in the field of environmental law, and because (though not essential to the decision actually reached) the facts of this case draw attention to it in a particularly pointed form.

There has been conduct on the part of Hungary which, in ordinary **[118]** *inter partes* litigation, would prevent it from taking up wholly contradictory positions. But can momentous environmental issues be decided on the basis of such *inter partes* conduct? In cases where the *erga omnes* issues are of sufficient importance, I would think not.

This is a suitable opportunity, both to draw attention to the problem and to indicate concern at the inadequacies of such *inter partes* rules as determining factors in major environmental disputes.

I stress this for the reason that *inter partes* adversarial procedures, eminently fair and reasonable in a purely *inter partes* issue, may need reconsideration in the future, if ever a case should arise of the imminence of serious or catastrophic environmental danger, especially to parties other than the immediate litigants.

Indeed, the inadequacies of technical judicial rules of procedure for the decision of scientific matters has for long been the subject of scholarly comment.[88]

We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation.

When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing

[88] See, for example, Peter Brett, 'Implications of Science for the Law', *McGill Law Journal*, 1972, Vol. 18, p. 170, at p. 191. For a well-known comment from the perspective of sociology, see Jacques Ellul, *The Technological Society*, trans. John Wilkinson, 1964, pp. 251, 291–300.

the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.

The present case offers an opportunity for such reflection.

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Environmental law is one of the most rapidly developing areas of international law and I have thought it fit to make these observations on a few aspects which have presented themselves for consideration in this case. **[119]** As this vital branch of law proceeds to develop, it will need all the insights available from the human experience, crossing cultural and disciplinary boundaries which have traditionally hemmed in the discipline of international law.

[120] SEPARATE OPINION OF JUDGE BEDJAOUI (EXTRACT)

[Translation]

1. In my view, the majority of the Court has not sufficiently clarified two questions, i.e., the *applicable law* and the *nature* of the 1977 Treaty. In no way do I disagree with the analysis of the majority of the Court on these two points which will necessitate just a little finer shading and clarification from me at a later stage.

[. . .]

3. I agree with the majority of the Court on its general approach to the question of the *applicable law*. I shall refer to only one aspect of this question that I consider to be fundamental and that touches upon the applicability in this case of the conventions and other instruments *subsequent* to the 1977 Treaty, and concerning the environment and the law of international watercourses.

4. Hungary asks the Court to interpret the 1977 Treaty in the light of the new, more developed and more exacting law of the environment, and of the law of international watercourses. In support of its argument, it principally relies upon the Advisory Opinion rendered by the Court in 1971 in the *Namibia* case (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, p. 16). In that case, the Court stated that a treaty should be interpreted 'within the framework of the entire legal system prevailing at the time of the interpretation' (*ibid.*, p. 31).

[121] 5. Taken literally and in isolation, there is no telling where this statement may lead. The following precautions must be taken:

- an *'evolutionary interpretation'* can only apply *in the observation of the general rule of interpretation* laid down in Article 31 of the Vienna Convention on the Law of Treaties;
- the *'definition'* of a concept must not be confused with the *'law'* applicable to that concept;
- the *'interpretation'* of a treaty must not be confused with its *'revision'*.

A. The 'evolutionary interpretation' can only be applied if the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties is respected

(a) Respect for the principle *pacta sunt servanda* unless there is incompatibility with a peremptory norm appertaining to *jus cogens*

6. (i) It may be useful first to restate the obvious: *pacta sunt servanda*. Inasmuch as the 1997 Treaty is regarded as being in force for the purposes of a judicial interpretation, it is necessarily binding upon the parties. They are under an obligation to perform it in *good faith* (Article 26 of the 1969 Vienna Convention).

(ii) Moreover the parties cannot, in principle, evade a traditional interpretation based on Article 31 of the Vienna Convention unless the Treaty which they concluded in the past has become incompatible with a norm of *jus cogens*. Both Hungary and Slovakia appear to agree that this is not the case of the 1977 Treaty.

(b) The interpretation of the Treaty must comply with the intentions of the parties expressed at the time of its conclusion

7. (i) The Court's dictum, seized upon by Hungary in order to justify its *'evolutionary interpretation'*, needs to be put back into its proper context. Before settling on this dictum, the Court had been at pains, in the same 1971 Opinion and on the same page, to emphasize *'the primary necessity* of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion' (*ICJ Reports 1971*, p. 31; emphasis added).

(ii) The intentions of the parties are presumed to have been influenced by *the law in force at the time the Treaty was concluded*, the law which they were supposed to know, and not by future law, as yet unknown. As Ambassador Mustapha Kamil Yasseen, quoted by Hungary (Counter-Memorial of Hungary, para. 6.13), put it, only international law existing **[122]** when the Treaty was concluded 'could influence the intention of the Contracting States . . . , as the law which did not yet exist at that time could not logically have any influence on this intention'.[89]

(iii) Moreover, Hungary espouses this very classical approach by stating: 'the 1977 Treaty must *in the first place* be interpreted in the light of the international law prevailing at the time of its conclusion' (Counter-Memorial of Hungary, para. 6.28; emphasis added).

(c) Primacy of the principle of the *'fixed reference'* (*renvoi fixe*) over the principle of the *'mobile reference' (renvoi mobile)*

8. Hence, the essential basis for the interpretation of a treaty remains the *'fixed reference'* to contemporary international law at the time of its conclusion. The *'mobile reference'* to the law which will subsequently have developed can be recommended only in exceptional cases of the sort we shall be looking at.

[89] M. K. Yasseen, 'L'interprétation des traités d'aprés la Convention de Vienne sur le droit des traités', *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 151 (1976), p. 64.

B. 'Definition' of a concept not to be confused with the 'law' applicable to that concept

9. In the *Namibia* case, the Court had to interpret a very special situation. Among the obligations of the Mandatory Power, the treaty instituting a 'C' Mandate over South West Africa referred to that of a *'sacred trust'*. It was then for the Court to interpret that phrase. It could only do so by observing the reality, which shows that this notion of a *'sacred trust'*, fashioned in 1920 in the era of colonization, was not comparable to the idea people had of it half a century later in the period of successive decolonizations. The Court thus considered that the matters to be interpreted, such as the 'sacred trust', 'were not static, but were by definition evolutionary' (*ICJ Reports 1971*, p. 31). This being so, *the method of the mobile reference*, in other words the reference to new contemporary law, was wholly suitable for an interpretation seeking to avoid archaic elements, was in tune with modern times and was useful as regards the action of the Applicant, which in this case was the Security Council.

10. But the Court patently knew that it was pursuing this approach because the situation was special. Nowhere did it state that its method of the mobile reference was subsequently to become mandatory and extend to all cases of interpretation. The *definition* of the *'sacred trust'* is evolutionary. It is *the law* corresponding to the period when this concept is **[123]** being interpreted which must be applied to the concept. On the other hand, the *environment* remains the environment. It is water, air, earth, vegetation, etc. As a basic *definition*, the environment is not evolutionary. Its components remain the same. On the other hand, its *'status'* may change, deteriorate or improve, but this is different from a definition by its components.

11. I would add that what evolved in the case of the Mandate was the *object of the treaty* which created it. This *object* was the sacred trust. Yet this object has not evolved at all in the *Gabčíkovo–Nagymaros* case. The point here was to consent to a joint investment and to build a number of structures. This object, or objective, remains, even if the actual *means* of achieving it may evolve or become more streamlined.

C. 'Interpretation' of a treaty not to be confused with its 'revision'

12. An interpretation of a treaty which would amount to substituting a completely different law to the one governing it at the time of its conclusion would be a *distorted revision*. The *'interpretation'* is not the same as the *'substitution'*, for a negotiated and approved text, of a completely different text, which has neither been negotiated nor agreed. Although there is no need to abandon the *'evolutionary interpretation'*, which may be useful, not to say necessary in very limited situations, it must be said that it cannot automatically be applied to any case.

13. In general, it is noteworthy that the classical rules of interpretation do not require a treaty to be interpreted *in all circumstances* in the context of the entire legal system prevailing at the time of the interpretation, in other words, in the present case, that the 1977 Treaty should be interpreted *'in the context'* and in the light of the new contemporary law of the environment or of international watercourses. Indeed, it is quite the opposite that these rules of interpretation prescribe, seeking as they do

to recommend an interpretation consonant with the intentions of the parties at the time the Treaty was concluded.

14. In general, in a treaty, a State incurs specific obligations contained in a body of law as it existed on the conclusion of the treaty and *in no wise incurs evolutionary and indeterminate duties*. A State cannot incur unknown obligations whether for the future or even the present.

15. In this case, the new law of the environment or of international watercourses could have been incorporated into the 1977 Treaty with the consent of the parties and by means of the *'procedural mechanisms'* laid down in the Treaty. That would be a *'revision'* of the Treaty accepted within the limits of that Treaty. Similarly, the new law might have played a role in the context of a *'reinterpretation'* of the Treaty but provided it did so *with the consent* of the other party.

[124] *D. Cautiously take subsequent law into account as an element of interpretation or modification in very special situations*

16. It is true that one cannot be excessively rigid without failing to allow for the movement of life. The new law might, in principle, be relevant in two ways: as an element of the *interpretation* of the content of the 1977 Treaty and as an element of the *modification* of that content.

17. *The former case*, that of interpretation, is the simpler of the two. *In general*, there is certainly good reason to protect the autonomy of the will. But *in our case*, Articles 15, 19, and 20 of the 1977 Treaty are fortunately drafted in extremely vague terms (in them, reference is made to *'protection'* – without any further qualification – of water, nature or fishing). In the absence of any other specification, respecting the autonomy of the will implies precisely that provisions of this kind are interpreted in an evolutionary manner, in other words, taking account of the criteria adopted by *the general law* prevailing in each period considered. If this is the case, should it not be acknowledged that these criteria have evolved appreciably over the past 20 years? The new law, both the law of the environment and the law of international watercourses, may therefore advisedly be applied on the basis of Articles 15, 19 and 20 of the 1977 Treaty, for an 'evolutionary interpretation' of the Treaty.

18. This is the first major case brought before the Court in which there is such a sensitive ecological background that it has moved to centre stage, threatening to divert attention from treaty law. International public opinion would not have understood had the Court disregarded the new law, whose application was called for by Hungary. Fortunately the Court has been able to graft the new law onto the stock of Articles 15, 19 and 20 of the 1977 Treaty. And Slovakia, it must be said, was not opposed to taking this law into consideration. However in applying the so-called principle of *the evolutionary interpretation* of a treaty in the present case, the Court should have clarified the issue more and should have recalled that the general rule governing the interpretation of a treaty remains that set out in Article 31 of the 1969 Vienna Convention.

19. Concluding this consideration of the issue of the applicable law, let me say that considerable progress has been made over the last 20 or 30 years in mankind's knowledge of the environment. What has actually progressed however, all that could progress, is on the one hand the scientific explanation of ecological damage and on the other the technical means for limiting or eliminating such damage. The phenomenon of damage, as such, has existed since the dawn of time, each time that mankind has opposed the forces of nature. This means that damage was a known factor, before and after the 1977 Treaty, and this was the meaning behind my question to the Parties.

*
* *

[125] 20. It seems to me that the issue of the *nature* of the 1977 Treaty and its related instruments warranted more attention from the majority of the Court. Actually, it is a crucial question. The nature of the Treaty largely conditions the succession of Slovakia to this instrument, which constitutes the substance of the applicable law, and which remains in force despite *intersecting violations* by both Parties.

21. The 1977 Treaty (including its related instruments) has the three-fold characteristic

- of being a *territorial treaty*;
- of being a treaty to which Slovakia validly *succeeded*; and
- of being a treaty which is still *in force today*.

22. The Treaty in question is a *territorial* treaty:

- *because it 'marries' the territories of two States*; it creates obligations between the States relating either to the use of a part of the territory of each of the two States or to restrictions as to its use. It creates a sort of *territorial 'dependency'* of one State in relation to the other; it institutes a *'territorial link'* between them in respecting the established frontiers. The operation of the Gabčíkovo hydroelectric power plant on Slovak territory is conditioned by the Dunakiliti dam on Hungarian territory. And the operation of that plant in 'peak power' mode is subordinate to the creation of the dam at Nagymaros on Hungarian territory;
- *because it creates a specific regional area between two neighbouring countries*; it concerns the joint construction and use of major structures, all constructed on the Danube, itself a frontier river, or around and for the river. Such regulation by treaty of a watercourse in a frontier zone affects navigation on this stretch of the river as well as the use and apportionment of the frontier waters and makes the two States partners in the benefits of an industrial activity producing energy. All this creates a *specific regional area and frontier régime*, undeniably giving the Treaty instituting this space and this régime the character of a 'territorial treaty';
- *lastly because it has a dual function, both confirming and slightly modifying the frontier between the two States*; the frontier had already been determined by other, previous instruments. However the 1977 Treaty concerns the regulation of a river which determines the State frontier between the two parties as the median line of its main channel. Moreover, the Treaty nonetheless contains a provision on the demarcation of the State boundary line, making it a boundary Treaty confirming the frontier. In addition it provides for a minor modification of the boundary line once the construction of the system of dams is completed. For this purpose it announces a limited exchange of territory on the basis of a separate treaty. Lastly, the 1977 Treaty thus affects not only the boundary *line*, but even its nature, since the frontier is no longer constituted *de facto* by the actual thalweg.

[126] 23. The Treaty is an instrument to which undeniably *Slovakia succeeded*:

- because it is a territorial treaty, the principle in such cases being automatic succession;
- because the type of succession concerned here (the dissolution of a State) is governed by the rule of continuity of succession;
- because Slovakia itself, prior to the dissolution of Czechoslovakia, participated in the conclusion of the Treaty; and lastly
- because, on its emergence, Slovakia declared that it was bound by all treaties concluded by the predecessor State, without ever excluding the 1977 Treaty.

24. The Special Agreement concluded by the Parties in 1993 cannot have been easy to draw up. The text appears to have been *inspired* by the desire to reconcile elements which remain contradictory. One of the Parties – Hungary – acknowledges that the 1977 Treaty applies to itself, Hungary, until its termination on 19 May 1992, but does not apply to the other Party. According to Hungary, that Party – Slovakia – did not inherit *the formal instrument* itself, but *its material content* made up of *'the rights and obligations'* which Slovakia allegedly derived from this – according to Hungary – now defunct Treaty.

25. With this convoluted structure as backdrop, the Court apparently has to judge not two States on the basis of one and the same treaty but to judge

(i) on the basis of one and the same treaty, one party to the dispute, Hungary, and a State now dissolved, Czechoslovakia, which is not a party to the dispute, and

(ii) at the same time, on another basis which is not *directly* the Treaty, two States, Hungary and Slovakia, the latter of which is not recognized to have the status of successor State to the Treaty concerned.

26. Slovakia did indeed succeed to the 1977 Treaty, which *is still in force* today between the two Parties in contention, despite the intersecting violations of it by the Parties. I concur with the reasoning and conclusions of the majority of the Court in adjudging and declaring on the one hand that both Hungary and Slovakia violated the Treaty, and on the other that the Treaty remains in force. However, I shall shortly go a little further than the majority of the Court on this question of the infringements

of the Treaty, which I hold to be *intersecting violations*, resulting in *effectivités* which must be reconciled with the *survival* of the Treaty.

[. . .]

[142] SEPARATE OPINION OF JUDGE KOROMA (EXTRACT)

[. . .]

Prior to the adoption of the Treaty and the commencement of the Project itself, both Czechoslovakia and Hungary had recognized that whatever measures were taken to modify the flow of the river, such as those contemplated by the Project, they would have environmental effects, some adverse. Experience had shown that activities carried on upstream tended to produce effects downstream, thus making international co-operation all the more essential. With a view to preventing, avoiding and mitigating such impacts, extensive studies on the environment were undertaken by the Parties prior to the conclusion of the Treaty. The Treaty itself, in its Articles 15, 19 and 20, imposed strict obligations regarding **[143]** the protection of the environment which were to be met and complied with by the contracting parties in the construction and operation of the Project.

When in 1989 Hungary, concerned about the effects of the Project on its natural environment, suspended and later abandoned works for which it was responsible under the 1977 Treaty this was tantamount to a violation not only of the Treaty itself but of the principle of *pacta sunt servanda*.

Hungary invoked the principle of necessity as a legal justification for its termination of the Treaty. It stated, *inter alia*, that the construction of the Project would have significantly changed that historic part of the Danube with which the Project was concerned; that as a result of operation in peak mode and the resulting changes in water level, the flora and fauna on the banks of the river would have been damaged and water quality impaired. It was also Hungary's contention that the completion of the Project would have had a number of other adverse effects, in that the living conditions for the biota of the banks would have been drastically changed by peak-mode operation, the soil structure ruined and its yield diminished. It further stated that the construction might have resulted in the waterlogging of several thousand hectares of soil and that the groundwater in the area might have become over-salinized. As far as the drinking water of Budapest was concerned, Hungary contended that the Project would have necessitated further dredging; this would have damaged the existing filter layer allowing pollutants to enter nearby water supplies.

On the other hand, the PHARE Report on the construction of the reservoir at Čunovo and the effect this would have on the water quality offered a different view. The Report was commissioned by the European Communities with the co-operation of, first, the Government of the Czech and Slovak Federal Republic and, later, the Slovak Republic. It was described as presenting a reliable integrated modelling system for analysing the environmental impact of alternative management régimes in the Danubian lowland area and for predicting changes in water quality as well as conditions in the river, the reservoir, the soil and agriculture.

As to the effects of the construction of the dam on the ecology of the area, the Report reached the conclusion that whether the post-dam scenarios represented an improvement or otherwise would depend on the ecological objectives in the area, as most fundamental changes in ecosystems depended on the discharge system and occurred slowly over many years or decades, and, no matter what effects might have been felt in the ecosystem thus far, they could not be considered as irreversible.

With regard to water quality, the Report stated that groundwater quality in many places changed slowly over a number of years. With this in mind, comprehensive modelling, some of which entailed modelling impacts for periods of up to 100 years, was undertaken and the conclusion **[144]** reached that no problems were predicted in relation to groundwater quality.

The Court in its Judgment, quite rightly in my view, acknowledges Hungary's genuine concerns about the effect of the Project on its natural environment. However, after careful consideration of the conflicting evidence, it reached the conclusion that it was not necessary to determine which of these points of view was scientifically better founded in order to answer the question put to it in the Special Agreement. Hungary had not established to the satisfaction of the Court that the construction of the Project would have led to the consequences it alleged. Further, even though such damages might occur, they did not appear imminent in terms of the law, and could otherwise have been prevented or redressed. The Court, moreover, stated that such uncertainties as might have existed and had raised environmental concerns in Hungary could otherwise have been addressed without having to resort to unilateral suspension and termination of the Treaty. In effect, the evidence was not of such a nature as to entitle Hungary to unilaterally suspend and later terminate the Treaty on grounds of ecological necessity. In the Court's view, to allow that would not only destabilize the security of treaty relations but would also severely undermine the principle of *pacta sunt servanda*.

Thus it is not as if the Court did not take into consideration the scientific evidence presented by Hungary in particular regarding the effects on its environment of the Project, but the Court reached the conclusion that such evidence was not sufficient to allow Hungary unilaterally to suspend or terminate the Treaty. This finding, in my view, is not only of significance to Slovakia and Hungary – the Parties to the dispute – but it also represents a significant statement by the Court rejecting the argument that obligations assumed under a validly concluded treaty can no longer be observed because they have proved inconvenient or as a result of the emergence of a new wave of legal norms, irrespective of their legal character or quality. Accordingly, not for the first time and in spite of numerous breaches over the years, the Court has in this case upheld and reaffirmed the principle that every treaty in force is binding upon the parties and must be performed in good faith (Article 26 of the Vienna Convention on the Law of Treaties).

Nor can this finding of the Court be regarded as a mechanical application of the principle of *pacta sunt servanda* or the invocation of the maxim *summum jus summa injuria* but it ought rather to be seen as a re-affirmation of the principle that a validly concluded treaty can be suspended or terminated only with the consent of all the parties concerned. Moreover, the Parties to this dispute can also draw comfort from the Court's finding in upholding the continued validity of the Treaty and enjoining them to fulfil their obligations under the Treaty so as to achieve its aims and objectives.

[**145**] I also concur with the Court's findings that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine its final decision. On the other hand, I cannot concur with the Court's finding that Czechoslovakia was not entitled to put Variant C into operation from October 1992. The Court reached this latter conclusion after holding that Hungary's suspension and abandonment of the works for which it was responsible under the 1977 Treaty was unlawful, and after acknowledging the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to abandon the greater part of the construction of the System of Locks for which it was responsible under the Treaty. The Court likewise recognized that huge investments had been made, that the construction at Gabčíkovo was all but finished, the bypass canal completed, and that Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect by completing work on the tailrace canal. The Court also recognized that not using the system would not only have led to considerable financial losses of some $2.5 billion but would have resulted in serious consequences for the natural environment.

[. . .]

[**148**] [. . .] the Court concluded that Czechoslovakia, by putting into operation Variant C, did not apply the Treaty, but, on the contrary, violated certain of its express provisions and in so doing committed an internationally wrongful act. In its reasoning, the Court stated that it had placed emphasis on the 'putting into operation' of Variant C, the unlawfulness residing in the damming of the Danube.

[. . .]

[**149**] [. . .] In my view Variant C was therefore a genuine application of the Treaty and it was indispensable for the realization of its object and purpose. If it had not proceeded to its construction, according to the material before the Court, Czechoslovakia would have been stranded with a largely finished but inoperative system, which had been very expensive both in terms of cost of construction and in terms of acquiring the necessary land. The environmental benefits in terms of flood control, which was a primary object and purpose of the Treaty, would not have been attained. Additionally, the unfinished state of the constructions would have exposed them to further deterioration through continued inoperation.

Variant C was also held to be unlawful by the Court because, in its opinion, Czechoslovakia, by diverting the waters of the Danube to operate Variant C, unilaterally assumed control of a shared resource and thereby deprived Hungary of its right to an equitable share of the natural resources of the river – with the continuing

effects of the diversion of these waters upon the ecology of the riparian area of the Szigetköz – and failed to respect the degree of proportionality required by international law.

The implication of the Court's finding that the principle of equitable utilization was violated by the diversion of the river is not free from doubt. That principle, which is now set out in the Convention on the Non-Navigational Uses of International Watercourses, is not new.

While it is acknowledged that the waters of rivers must not be used in such a way as to cause injury to other States and in the absence of any settled rules an equitable solution must be sought (case of the *Diversion of Water from the Meuse, Judgment, 1937, PCIJ, Series A/B, No. 70*) this rule applies where a treaty is absent. In the case under consideration Article 14, paragraph 2, of the 1977 Treaty provides that the contracting parties may, without giving prior notice, both withdraw from the Hungarian–Czechoslovak section of the Danube, and subsequently make use of the quantities of water specified in the water balance of the approved Joint Contractual Plan. Thus, the withdrawal of excess quantities of water from the Hungarian–Czechoslovak section of the Danube to operate the Gabčíkovo section of the system was contemplated with compensation to the other party in the form of an increased share of electric power. In other words, Hungary had agreed within the context of the Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube). Accordingly, it would appear that the normal entitlement of the Parties [**150**] to an equitable and reasonable share of the water of the Danube under general international law was duly modified by the 1977 Treaty which considered the Project as a *lex specialis*. Slovakia was thus entitled to divert enough water to operate Variant C, and more especially so if, without such diversion, Variant C could not have been put into productive use. It is difficult to appreciate the Court's finding that this action was unlawful in the absence of an explanation as to how Variant C should have been put into operation. On the contrary, the Court would appear to be saying by implication that, if Variant C had been operated on the basis of a 50–50 sharing of the waters of the Danube, it would have been lawful. However, the Court has not established that a 50–50 ratio of use would have been sufficient to operate Variant C optimally. Nor could the Court say that the obligations of the Parties under the Treaty had been infringed or that the achievement of the objectives of the Treaty had been defeated by the diversion. In the case concerning the *Diversion of Water from the Meuse*, the Court found that, in the absence of a provision requiring the consent of Belgium, 'the Netherlands are entitled . . . to dispose of the waters of the Meuse at Maestricht' provided that the treaty obligations incumbent on it were not ignored (*Judgment, 1937, PCIJ, Series A/B, No. 70*, p. 30). Applying this test in the circumstances which arose, Variant C can be said to have been permitted by the 1977 Treaty as a reasonable method of implementing it. Consequently Variant C did not violate the rights of Hungary and was consonant with the objectives of the Treaty régime.

Moreover the principle of equitable and reasonable utilization has to be applied with all the relevant factors and circumstances pertaining to the international watercourse

in question as well as to the needs and uses of the watercourse States concerned. Whether the use of the waters of a watercourse by a watercourse State is reasonable or equitable and therefore lawful must be determined in the light of all the circumstances. To the extent that the 1977 Treaty was designed to provide for the operation of the Project, Variant C is to be regarded as a genuine attempt to achieve that objective.

[. . .]

[151] [. . .] The Judgment also alluded to 'the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz'. It is not clear whether by this the Court had reached the conclusion that significant harm had been caused to the ecology of the area by the operation of Variant C.

In the light of the foregoing considerations, I take the view that the operation of Variant C should have been considered as a genuine attempt by an injured party to secure the achievement of the agreed objectives of the 1977 Treaty, in ways not only consistent with that Treaty but with international law and equity.

[. . .]

[152] [. . .] It is my view that this case, because of the circumstances surrounding it, is one which calls for the application of the principles of equity.

The importance of the River Danube for both Hungary and Slovakia cannot be overstated. Both countries, by means of the 1977 Treaty, had agreed to co-operate in the exploitation of its resources for their mutual benefit. That Treaty, in spite of the period in which it was concluded, would seem to have incorporated most of the environmental imperatives of today, including the precautionary principle, the principle of equitable and reasonable utilization and the no-harm rule. None of these principles was proved to have been violated to an extent sufficient to have warranted the unilateral termination of the Treaty. The Court has gone a long way, rightly in my view, in upholding the principle of the sanctity of treaties. Justice would have been enhanced had the Court taken account of special circumstances as mentioned above.

DISSENTING OPINION OF JUDGE ODA (EXTRACT)

II. The suspension and subsequent abandonment of the works by Hungary in 1989 (Special Agreement, Art. 2, para 1 (a); Art. 2, para. 2)

1. Special Agreement, Article 2, Paragraph 1 (a)

8. Under the terms of the Special Agreement, the Court is requested to answer the question

> whether [Hungary] was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to [Hungary] (Art. 2, para. 1 *(a)*).

[. . .]

[159] [. . .] Let me examine the situation in more detail. Hungary relies, in connection with the Dunakiliti dam and the diversion of waters into the bypass canal at Dunakiliti, upon the deterioration of the environment in the Szigetköz region owing to the reduced quantity of available water in the old Danube river bed. In my view, however, the decrease in the amount of water flowing into the old bed of the Danube as a result of the operation of the bypass canal would have been an inevitable outcome of the whole Project as provided for in the 1977 Treaty.

11. (*Hungary's ill-founded claim of ecological necessity.*) Certain effects upon the environment of the Szigetköz region were clearly anticipated by and known to Hungary at the initial stage of the planning of the whole Project. Furthermore, there was no reason for Hungary to believe that an environmental assessment made in the 1980s would give quite different results from those obtained in 1977, and require the total abandonment of the whole Project.

I have no doubt that the Gabčíkovo–Nagymaros System of Locks was, in the 1970s, prepared and designed with full consideration of its potential impact on the environment of the region, as clearly indicated by the fact that the 1977 Treaty itself incorporated this concept as its Article 19 (entitled Protection of Nature), and I cannot believe that this assessment made in the 1970s would have been significantly different from an ecological assessment 10 years later, in other words, in the late 1980s. It is a fact that the ecological assessment made in the 1980s did not convince scientists in Czechoslovakia.

I particularly endorse the view taken by the Court when rejecting the argument of Hungary, that ecological necessity cannot be deemed to justify its failure to complete the construction of the Nagymaros dam, and that Hungary cannot show adequate grounds for that failure by claiming that the Nagymaros dam would have adversely affected the downstream water which is drawn to the bank-filtered wells constructed on Szentendre Island and used as drinking water for Budapest (Judgment, para. 40).

12. (*Environment of the river Danube.*) The 1977 Treaty itself spoke of the importance of the protection of water quality, maintenance of the bed of the Danube and the protection of nature (Arts. 15, 16, 19), and the whole structure of the Gabčíkovo–Nagymaros System of Locks was certainly founded on an awareness of the importance of environmental protection. It cannot be said that the drafters of either the Treaty itself or of **[160]** the JCP failed to take due account of the environment. There were, in addition, no particular circumstances in 1989 that required any of the research or studies which Hungary claimed to be necessary, and which would have required several years to be implemented. If no campaign had been launched by environmentalist groups, then it is my firm conviction that the Project would have gone ahead as planned.

What is more, Hungary had, at least in the 1980s, no intention of withdrawing from the work on the Gabčíkovo power plant. One is at a loss to understand how Hungary could have thought that the operation of the bypass canal and of the Gabčíkovo power plant, to which Hungary had not objected at the time, would have been possible without the completion of the works at Dunakiliti dam.

13. (*Ecological necessity and State responsibility.*) I would like to make one more point relating to the matter of environmental protection under the 1977 Treaty. The performance of the obligations under that Treaty was certainly the joint responsibility of both Hungary and Czechoslovakia. If the principles which were taken as the basis of the 1977 Treaty or of the JCP had been contrary to the general rules of international law – environmental law in particular – the two States, which had reached agreement

on their joint investment in the whole Project, would have been held *jointly* responsible for that state of affairs and *jointly* responsible to the international community. This fact does not imply that the *one party* (Czechoslovakia, and later Slovakia) bears responsibility *towards the other* (Hungary).

What is more, if a somewhat more rigorous consideration of environmental protection had been needed, this could certainly have been given by means of remedies of a technical nature to those parts of the JCP – not the 1977 Treaty itself – that concern the concrete planning or operation of the whole System of Locks. In this respect, I do not see how any of the grounds advanced by Hungary for its failure to perform its Treaty obligations (and hence for its violation of the Treaty by abandoning the construction of the Dunakiliti dam) could have been upheld as relating to a state of 'ecological necessity'.

14. *(General comments on the preservation of the environment.)* If I may give my views on the environment, I am fully aware that concern for the preservation of the environment has rapidly entered the realm of international law and that a number of treaties and conventions have been concluded on either a multilateral or bilateral basis, particularly since the Declaration on the Human Environment was adopted in 1972 at Stockholm and reinforced by the Rio de Janeiro Declaration in 1992, drafted 20 years after the Stockholm Declaration.

It is a great problem for the whole of mankind to strike a satisfactory balance between more or less contradictory issues of economic development **[161]** on the one hand and preservation of the environment on the other, with a view to maintaining sustainable development. Any construction work relating to economic development would be bound to affect the existing environment to some extent but modern technology would, I am sure, be able to provide some acceptable ways of balancing the two conflicting interests.

[. . .]

[167] [. . .] *V. The final settlement (Special Agreement, Article 5)*

30. Hungary and Slovakia have agreed under Article 5 of the Special Agreement, that: 'Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.'

[. . .]

The way in which the waters are divided at Čunovo should be negotiated in order to maintain the original plan, that is, an equitable share of the waters – and this should be spelt out in any revision or amendment of the JCP. The equitable sharing of the water must both meet Hungary's concern for the environment in the Szigetköz region and allow satisfactory operation of the Gabčíkovo power plant by Slovakia, as well as the **[168]** maintenance of the bypass canal for flood prevention and the improvement of navigation facilities. I would suggest that the JCP should be revised or some new version drafted during the negotiations under Article 5 of the Special Agreement in order to comply with the modalities which I have set out above.

33. *(Reassessment of the environmental effect).* Whilst the whole Project of the Gabčíkovo–Nagymaros System of Locks is now in operation, in its modified form

(that is, with the Čunovo dam instead of the Dunakiliti dam diverting the water to the bypass canal and with the abandonment of the work on the Nagymaros dam/power plant), the Parties are under an obligation in their mutual relations, under Articles 15, 16 and 19 of the 1977 Treaty, and, perhaps in relations with third parties, under an obligation in general law concerning environmental protection, to preserve the environment in the region of the river Danube.

The Parties should continue the environmental assessment of the whole region and search out remedies of a technical nature that could prevent the environmental damage which might be caused by the new Project.

[. . .]

[176] DISSENTING OPINION OF JUDGE HERCZEGH (EXTRACT)

[Translation]

I am most regretfully unable to share the position of the majority of Members of the Court as expressed in this Judgment, and I find myself obliged to draft a dissenting opinion to set out the facts and reasons which explain the different conclusions I have reached.

The subject of the dispute between Hungary and Czechoslovakia, and later Hungary and Slovakia, was the construction of a system of locks on the Danube (hereinafter called 'the G/N Project') intended to enhance 'the broad utilization of the natural resources of the Bratislava–Budapest section of the Danube . . . '. According to the Treaty concluded in Budapest on 16 September 1977,

> the joint utilization of the Hungarian–Czechoslovak section of the Danube will . . . significantly contribute to bringing about the socialist integration of the States members of the Council for Mutual Economic Co-operation . . .

The Project seemed in other respects likely to have a considerable impact on the environment. The Court, called upon by the Parties to resolve the dispute, was thus confronted with not only the implementation of the law of treaties, but also the problems raised by protection of the environment, and with questions concerning the international responsibility of States.

In its Advisory Opinion given to the General Assembly on 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court declared that it recognized

> that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. *(ICJ Reports 1996*, pp. 241–2, para. 29.)[90]

[90] See p. 256 above.]

This Judgment of the Court cites that passage and stresses the importance of respecting the environment, but then does not take due account of the application of that principle to the construction and operation of the G/N Project.

The Court only grants a very modest place to ecological considerations [177] in the 'declaratory' part of its Judgment. As a judicial organ, the Court was admittedly not empowered to decide scientific questions touching on biology, hydrology, and so on, or questions of a technical type which arose out of the G/N Project; but it could – and even should – have ruled on the legal consequences of certain facts alleged by one Party and either admitted or not addressed by the other, in order to assess their respective conduct in this case.

Before determining the facts which could thus be pertinent, I must make a few preliminary observations on the characteristics of the G/N Project. The Project was an audacious scheme, in a class of its own and the first to be designed as a system of locks for the exploitation in peak mode of the hydroelectric resources of the Danube. The locks built on the German and Austrian sections of the Danube do not operate in peak mode; moreover, the dams on the Rhine operating in that mode are much more modest works.

That mode of operation involved and involves risks which were not altogether unknown to those responsible for drawing up the plans for the G/N Project, but its designers reasoned within the confines of what was known in the 1960s and 1970s – and that way of thinking is today considered outmoded, and rightly so. They accordingly minimized the risks, whilst at the same time having an imperfect understanding of the damage they could cause, and therefore of the possible solutions.

[. . .]

Given the declarations of the Czechoslovak leaders, it is somewhat surprising that the Court adopted the approach that the ecological risks listed by Hungary in 1989 were already known when the Treaty was concluded but remained uncertain, and the provisions of Articles 15, 19 and 20 covered the protection of the natural environment, water quality, and [178] so forth, whereas it could and should have concerned itself with the problems which the interpretation and implementation of these provisions might raise in the field. However, the Judgment merely mentions the aims of the Project and the advantages it was presumed to offer.

Unfortunately, that picture is a far cry from reality. It is difficult to see otherwise why the Minister, Mr Vavroušek, would have considered the G/N Project contained in the 1977 Treaty to be 'old', of an 'obsolete' character, and needing to be 'changed' or 'modified', and so on. Moreover, the key question is not whether the Treaty contained certain provisions protecting the environment, but whether those provisions had been effectively implemented during the construction of the G/N Project.

Since the negotiations which led to the conclusion of the 1977 Treaty, ecological knowledge has become considerably broader and deeper whilst international environmental law has also progressed. In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court found that:

> Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years . . . have brought important developments . . . In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore. (*ICJ Reports 1971*, pp. 31–2, para. 53.)

What held good for the Mandate system of the League of Nations also holds good for the duty to safeguard the natural environment, the only difference being that instead of a 50-year period, we have to look at a 20-year period in this case. Under Article 19 of the 1977 Treaty,

> 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.

The original Hungarian wording uses, instead of the word 'obligations', the word 'requirements', but that does not in any way affect its essential scope: the protection of nature was to be ensured in a manner commensurate with the requirements of the day, that is to say, in 1989, in accordance with the requirements of 1989, and not those that might have prevailed in 1977. Likewise, and in so far as it is accepted, as it is by the majority of the Members of the Court, that the Treaty still applies as it stands, the same would hold good for 1997, and it is in accordance with [179] present-day requirements that the scope of the Parties' treaty obligations with regard to protection of the environment should be defined.

The Court, in the 'prescriptive' part of its Judgment, states:

> Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. (Para. 140.)

It is regrettable that the Court did not follow this principle even in the reasoning which led to its reply to the first question put to it in the Special Agreement.

To have perceived the shortcomings of a project – to avoid using the word 'error' – and to recognize that one is the source of those shortcomings are two very different things which may sometimes be very far apart. The principal argument put forward, in 1991, by the Czechoslovak party in favour of the G/N Project, was based on the fact that the Project was almost completed. By the acceleration of the works laid down in the Protocol of 6 February 1989, certain Hungarian leaders wanted to do the same thing – to claim that a point of no return had been reached – in order to deal with increasing opposition and resistance. Political changes during that year prevented them from achieving that aim.

The crucial problem posed by the G/N Project was that of peak mode operation, for which the 1977 Treaty makes no provision. Slovakia confirmed repeatedly that there was no agreement between the contracting parties with regard to the peak mode operation of the system of locks.

[. . .]

[180] [. . .] Between 1977 and 1989 Hungarian experts became aware of the ecological dangers potentially caused not only by the peak mode operation of the system of locks, but also by the construction of certain works of the system which had been designed with a view to such a mode of operation: more particularly the Nagymaros dam and the storage reservoir at **[181]** Dunakiliti as initially designed, that is, with an enormous surface area of 60 square kilometres, neither construction being indispensable or even of use if the Gabčíkovo power plant were to be operated in run-of-the-river mode. [. . .]

It is therefore difficult to understand why Czechoslovakia insisted with some vigour that Hungary had to continue with the construction of the Nagymaros dam – when its primary purpose was to allow peak mode operation of the Gabčíkovo power station – if the mode of operation, as Slovakia expressly concedes, was never the subject of an agreement between the Parties. There was therefore no legal obstacle to prevent the G/N Project from being modified for adaptation to a less dangerous mode of operation.

[. . .]

[182] [. . .] In order to justify its conduct, Hungary put forward various grounds and these included, *inter alia*, a state of necessity, the main and decisive reason. A state of necessity does not have the effect of extinguishing or suspending a treaty, but it is a circumstance exonerating the State from the responsibility it incurs in committing an act not in conformity with its international obligations.

[. . .]

[188] [. . .] The Court held that the state of necessity, as a ground for precluding the wrongfulness of an act not in conformity with an international obligation, can only be accepted on an exceptional basis and, referring to the relevant International Law Commission Report, added that

> the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met (para. 51).

I entirely concur with that approach, but I cannot accept the conclusions drawn in this case by the Court. It has concluded that, with respect to both Nagymaros and Gabčíkovo,

> the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they 'imminent'; and . . . Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted (para. 57).

This is absolutely not the case. As far as Hungary was concerned, what was at stake was the safeguarding of an essential interest against a peril which was grave and imminent, that is to say certain and inevitable, and any measures taken to counteract that peril would have radically transformed the scope of the obligations to be performed under the Treaty. By suspending and abandoning the works at Nagymaros, Hungary has not impaired an essential interest of Czechoslovakia, and it is precisely by constructing the dam at Nagymaros that it would have contributed to an unequalled state of necessity and to a situation catastrophic for its capital. The existence of the peril alleged by Hungary was recognized – at least in part – by the other Party, and Hungary therefore did not act in an arbitrary manner.

[. . .]

[189] [. . .] Moreover, it must be acknowledged that the ecological considerations that now weigh against the dam are the same as those holding in 1989. If it has finally been concluded that the dam should not have been built in 1997, this is because in reality it should not have been built in 1989, either.

The dispute between the two Parties is very much the result of their geographical situations. The harmonization of the interests of the countries upstream and downstream is the crucial problem of the law governing international watercourses. During the work done by the United Nations on the Draft Convention on the Law of the Non-Navigational Uses of International Watercourses, the upstream countries complained that the provisions of the draft limited their right to use and develop the resources of those watercourses, whereas the downstream countries criticized the provisions of the draft by maintaining that they failed to protect their interests adequately and even allowed significant damage to be inflicted upon them. As far as the course of the Danube is concerned, Slovakia is an upstream country and Hungary a downstream country. In this Judgment the Court should have maintained a balance, admittedly hard to achieve, between the interests of the upstream and the downstream countries, and have ensured that harmonious progress in enhancement of the natural resources would be carefully organized to prevent the long-term disadvantages from outweighing the immediate advantages. Unfortunately, in the present case, it has not succeeded in doing so.

I have found it necessary to stress this question since the position to be taken, in particular, on whether Hungary was entitled to suspend and subsequently abandon the works at Nagymaros, and to suspend those at Dunakiliti, to a large extent determines the replies, or at least the reasoning, for the questions which follow.

[. . .]

[232] DISSENTING OPINION OF JUDGE SKUBISZEWSKI (EXTRACT)

1. While agreeing with the Court in all its other holdings, I am unable to concur in the broad finding that Czechoslovakia was not entitled to put Variant C into operation from October 1992 (Judgment, para. 155, point 1 C). The finding is too general. In my view the Court should have distinguished between, on the one hand, Czechoslovakia's

right to take steps to execute and operate certain works on its territory and, on the other, its responsibility towards Hungary resulting from the diversion of most of the waters of the Danube into Czechoslovak territory, especially in the period preceding the conclusion of the 1995 Agreement (Judgment, para. 25.)[91]

I

[. . .]

[233] [. . .] 5. When Czechoslovakia and Hungary were negotiating and concluding their Treaty, they knew very well what they were doing. They made a conscious choice. A joint investment of such proportions inevitably entails some changes in the territories of the countries involved, including an impact on the environment. In particular, the two States were facing the dichotomy of socio-economic development and preservation of nature. Articles 15, 19 and 20 show that the two States paid attention to environmental risks and were willing to meet them. In the 1970s, when the Treaty was being negotiated, the state of knowledge was sufficient to permit the two partners to assess the impact their Project would have on the various areas of life, one of them being the environment. The number of studies was impressive indeed. The progress of science and knowledge is constant; thus, with regard to such a project, that progress becomes a reason for adaptation and, consequently, for entering into negotiations, no matter how long and difficult.

6. By its unilateral rejection of the Project, Hungary has precluded itself from asserting that the utilization of the hydraulic force of the Danube was dependent on the condition of a prior agreement between it and Czechoslovakia (and subsequently Slovakia). For this is what the Treaty was and is about: mutual regulation of the national competence of each riparian State, in particular, to use the hydraulic force of the river. Mutual rights and obligations have been created under the Treaty, but **[234]** during the period 1989 to 1992 Hungary progressively repudiated them. It thus created an estoppel situation for itself.

II

[. . .]

[236] [. . .] 11. In the *Lake Lanoux* case the Tribunal expressed its position on the right of each riparian State to act unilaterally in the following terms:

> In fact, States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements: there would thus appear to be an obligation to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements. . . .

[91] Not reproduced in this volume.]

> But international practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a *prior* agreement between the interested States cannot be established as a custom, even less as a general principle of law. The history of the formulation of the multilateral Convention signed at Geneva on December 9, 1923, relative to the Development of Hydraulic Power Affecting More than One State, is very characteristic in this connection. The initial project was based on the obligatory and paramount character of agreements whose purpose was to harness the hydraulic forces of international watercourses. But this formulation was rejected, and the Convention, in its final form, provides (Article I) that '[it] in no way alters the freedom of each State, within the framework of international law, to carry out on its territory all operations for the development of hydraulic power which it desires'; there is provided only an obligation upon the interested signatory States to join in a common study of a development programme; the execution of this programme is obligatory only for those States which have formally subscribed to it. (*RIAA*, Vol. XII, p. 308, para. 13; *ILR*, Vol. 24, 1957, p. 129, para. 13; footnote omitted)

[237] I think that the Court would agree that this is an exact statement of general law. That law is applicable in the present case. Czechoslovakia had the right to put the Gabčíkovo complex into operation. It also had the duty to respect Hungary's right to an equitable and reasonable share of the waters of the Danube.

[. . .]

III

[239] [. . .] 21. The degree to which Czechoslovakia has implemented the Treaty has reached such proportions that it would be both unreasonable and harmful to stop the completion of certain works and to postpone indefinitely the operation of the bypass canal, the Gabčíkovo hydroelectric power plant, navigation locks and appurtenances thereto, in so far as that operation was possible without Hungarian co-operation or participation. To find, as the Court does, that such operation is unlawful overlooks the considerations of equity. At the same time Hungary's right under general international law to an equitable and reasonable sharing of the waters of the Danube had to be preserved notwithstanding its repudiation of the Project and the Treaty.

IV

22. A State that concluded a treaty with another State providing for the execution of a project like Gabčíkovo–Nagymaros cannot, when that project is near completion, simply say that all should be cancelled and the **[240]** only remaining problem is compensation. This is a situation where, especially under equitable principles, the solution must go beyond mere pecuniary compensation. The Court has found that the refusal by Hungary to implement the Treaty was unlawful. By breaching the Treaty, Hungary could not deprive Czechoslovakia and subsequently Slovakia of all the benefits of the Treaty and reduce their rights to that of compensation. The advanced stage of the work on the Project made some performance imperative in

order to avoid harm: Czechoslovakia and Slovakia had the right to expect that certain parts of the Project would become operational.

23. Thus, pecuniary compensation could not, in the present case, wipe out even some, not to speak of all, of the consequences of the abandonment of the Project by Hungary. How could an indemnity compensate for the absence of flood protection, improvement of navigation and production of electricity? The attainment of these objectives of the 1977 Treaty was legitimate not only under the Treaty but also under general law and equity. The benefits could in no way be replaced and compensated by the payment of a sum of money. Certain works had to be established and it was vital that they be made operational. For the question here is not one of damages for loss sustained, but the creation of a new system of use and utilization of the water.

24. Once a court, whether international or municipal, has found that a duty established by a rule of international law has been breached, the subject to which the act is imputable must make adequate reparation. The finding in point 2 D of the operative paragraph is the consequence of the holdings in point 1. Absence of congruence between the vote on one or more of the findings in point 1 and the vote on point 2 D should be explained in order that any implication of an uncertainty regarding the foregoing principle on reparation may be eliminated.

25. The formulation of the finding in point 1 C of the operative paragraph does not correspond to the possibility of different evaluations concerning the various elements of the 'provisional solution'. There is equally no reflection of that possibility in the formulation of the finding in point 2 D. Indeed, the terms of that point made the position of those judges who voted against point 1 C quite difficult. The same applies to point 2 D when a judge does not agree with *all* the findings in point 1, though I think that there is a way out of this difficulty.

26. It is on the basis of the position taken in this dissenting opinion that I have voted in favour of the finding in point 2 D. However, there is a further reason which made it possible for me to accept that finding. That reason is linked to the task of the Court under Article 2, paragraph 2, of the Special Agreement and the ensuing negotiations of the **[241]** Parties on the modalities of the execution of the Judgment (Art. 5, para. 2). My understanding of point 2 D of the operative paragraph is that the enforcement of responsibility and the obligation to compensate, though elaborated upon by the Court in the part of the Judgment devoted to Article 2, paragraph 2, of the Special Agreement (paras. 148–51) need not be a primary factor in the negotiations on the future of the Gabčíkovo–Nagymaros Project. It should be noted that the said finding refers to the issue of compensation in rather general terms. At the same time the Court gives its support to what I would describe as the 'zero option' (para. 153 of the Judgment). In my view the underlying message of point 2 D to the negotiating Governments is that, notwithstanding their legal claims and counterclaims for compensation, they should seek – and find – a common solution.

[Reports: *ICJ Reports 1997*, p. 7; 116 *ILR* 1 at p. 17]

Fisheries Jurisdiction Case (Spain *v.* Canada)[1]

International Court of Justice, The Hague

4 December 1998 (Schwebel, *President*; Weeramantry, *Vice-President*; Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans and Rezek, *Judges*; Lalonde[2] and Torres Bernárdez,[3] *Judges* ad hoc)

Jurisdiction – International Court of Justice – optional clause – Statute of the Court, Article 36(2) – declaration accepting jurisdiction of the Court – reservations – right of State making declaration to define scope of acceptance of jurisdiction – Whether reservations to be construed restrictively – distinction between substantive law and rules governing jurisdiction of the Court – principles to be applied in interpretation of declaration and reservations – intention of State making declaration – principle of good faith

Powers and procedures of tribunals – procedure – International Court of Justice – preliminary objections – whether objection possessing an exclusively preliminary character – duty of the Court in dealing with preliminary objections

Waters – sea – high seas – jurisdiction – fisheries – conservation measures – arrest of Spanish vessel by Canada outside Canadian waters – legality – whether dispute falling within jurisdiction of International Court of Justice

Waters – maritime environment – fisheries conservation – limit of conservation measures – compatibility with regime of the high seas

[1] Spain was represented by Mr José Antonio Pastor Ridruejo, Mr Aurelio Pérez Giralda, Mr Pierre-Marie Dupuy, Mr Keith Highet, Mr Antonio Remiro Brotóns and Mr Luis Ignacio Sánchez Rodríguez. Canada was represented by HE Mr Philippe Kirsch QC, Mr Blair Hankey, Mr L. Alan Willis QC, Mr Prosper Weil, Ms Louise de La Fayette, Mr Paul Fauteux, Mr John F. G. Hannaford, Ms Ruth Ozols Barr, Ms Isabelle Poupart and Ms Laurie Wright.

[2] Judge *ad hoc* nominated by Canada.

[3] Judge *ad hoc* nominated by Spain.