THE ICJ AND THE *DANUBE DAM CASE*: A MISSED OPPORTUNITY FOR INTERNATIONAL ENVIRONMENTAL LAW?*

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[This article considers the decision of the International Court of Justice in the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia). *The court relied on the law of treaties, countermeasures, state responsibility, international watercourses, and state succession to resolve an environment versus development dispute. Environmental factors were considered only when international watercourse law and treaty law allowed it. The ICJ's most important contribution to international environmental law is found only in its recommendations to Hungary and Slovakia as to their future courses of action towards each other. In this regard the court acknowledges the relevance of environmental factors independent of any connection they may have to the international law of treaties or watercourse law. Of particular significance is the court's reference to sustainable development and continuing environmental monitoring. Vice-President Weeramantry, however, in a separate opinion views international environmental law as having more influence on treaty relations and makes the most important contribution made by a judge of the court to the development of environmental law.]*

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* The authors acknowledge the assistance of Dr Ellen Hey in the preparation of the article and the helpful comments of two referees. However, all errors and omissions remain the responsibility of the authors.

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I INTRODUCTION

In 1997 the International Court of Justice ('ICJ') handed down its judgment in the *Case Concerning the Gabčíkovo-Nagymaros Project* between Hungary and Slovakia ('*Danube Dam Case*').[1] The decision was eagerly anticipated as for the first time the ICJ was delivering final judgment on a contentious case clearly raising environmental issues. This is not to suggest that the court has not previously deliberated on cases raising environmental issues. However, through a variety of circumstances those environmental issues have not been central to the final judgment.[2] This failure to deal with a case finally on the strength of its environmental arguments, despite its efforts in some cases,[3] has lessened the impact of the ICJ on the development of international environmental law.[4]

The principal legal issues in the *Danube Dam Case* concerned the interpretation and implementation of the *Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks* ('*1977 Treaty*')[5] in relation to the Danube River, and the subsequent actions of Hungary and Slovakia. In response to these issues, the ICJ gave considerable attention in its judgment to treaty law issues to determine the legal consequences of the alleged breaches of the *1977 Treaty* by the parties. State responsibility for actions taken, especially by Slovakia, was also an important aspect of the judgment. An

[1] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* (1998) 37 ILM 162.

[2] See, eg, *Nuclear Tests (Australia v France) (Merits)* [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France) (Merits)* [1974] ICJ Rep 457; *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240; *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)* [1995] ICJ Rep 288; *Legality of the Threat and Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

[3] In addition to the cases referred to, above n 2, all of which saw the court address some of the environmental issues raised in argument before it, perhaps the most significant decision of the ICJ in this area is *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, in which the court outlined principles of state responsibility which have had an important influence on the development of this area of international law in relation to liability for environmental harm: see Patricia Birnie and Alan Boyle, *International Law and the Environment* (1992) 90; Alexandre Kiss and Dinah Shelton, *International Environmental Law* (1991) 36. For general comments on the development of international environmental law by the ICJ, see Nagendra Singh, *The Role and Record of the International Court of Justice* (1989) 164–72; Malgosia Fitzmaurice, 'Environmental Protection and the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996) 293; Stephen Schwebel, 'The Contribution of the International Court of Justice to the Development of International Law' (Paper presented at The Hague's 750th Anniversary International Law Conference: 'The Hague, Legal Capital of the World', The Hague, 4 July 1998).

[4] Cf Philippe Sands, *Principles of International Environmental Law* (1995) vol 1, 172.

[5] *1977 Treaty*, opened for signature 16 September 1977, 1109 UNTS 235 (entered into force 30 June 1978).

important side issue concerned succession of states, as the original treaty had been concluded between Hungary and Czechoslovakia. Since Slovakia became an independent state in 1993, it was necessary to determine Slovakia's obligations under the *1977 Treaty*.[6]

However, the *Danube Dam Case* also squarely raised important environmental issues and this was reflected in the arguments put before the court by Hungary and Slovakia. To that end, emphasis was placed in both the argument and the judgment on international watercourse law and international environmental law. International watercourse law has developed a distinctive jurisprudence throughout the 20th century,[7] culminating in the adoption in 1997 of the *Convention on the Law of the Non-Navigational Uses of International Watercourses*.[8] There are also clear intersections between international watercourse law and international environmental law,[9] and this is partly reflected in the ICJ's judgment.

The focus of this article, however, is the ICJ's approach to the environmental issues raised, and the implications those comments have for the development of international environmental law. As the court has so rarely considered cases dealing with environmental issues on their merits, and since international environmental law is undergoing a period of consolidation following the negotiation and implementation of a vast array of conventions from the 1970s through to the mid-1990s, any comments by the ICJ on this area of international law are much anticipated. This is especially given that some international environmental law concepts, such as sustainable development, remain the subject of considerable academic and political debate as to their status, content and effect. This article will address these issues by firstly reviewing the decision in the *Danube Dam Case* with a broad assessment of the questions before the court. An analysis will then be undertaken of the role of sustainable development in the decision, with special reference to the separate opinion of Judge Weeramantry. Finally, an attempt will be made to assess the impact of the court's approach on the international environmental law issues raised in the case, including those which the court did and did not address.

[6] For an assessment of some of these issues see Peter Bekker, 'Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment' (1998) 92 *American Journal of International Law* 273; Martin Dixon, 'The Danube Dams and International Law' (1998) 57 *Cambridge Law Journal* 1; Ida Bostian, 'The International Court of Justice Decision Concerning the Gabčíkovo-Nagymaros Project' (1997) 9 *Colorado Journal of International Environmental Law and Policy* 186.

[7] See Patricia Wouters (ed), *International Water Law: Selected Writings of Professor Charles B Bourne* (1997); Eyal Benvenisti, 'Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law' (1996) 90 *American Journal of International Law* 384; Johan Lammers, *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law* (1984).

[8] Opened for signature 21 May 1997, (1997) 36 ILM 700; see also Stephen McCaffrey and Mpazi Sinjela, 'The 1997 United Nations Convention on International Watercourses' (1998) 92 *American Journal of International Law* 97.

[9] See generally the discussion in Birnie and Boyle, above n 3, 215–50; Kiss and Shelton, above n 3, 202–27.

II THE JUDGMENT

A *History and Background*[10]

The *1977 Treaty* set up a 'joint investment' project to construct a 'single and indivisible' system of locks at Gabčíkovo (Czechoslovakia) and Nagymaros (Hungary) ('System of Locks').[11] The barrage system was aimed at producing hydroelectricity, improving navigation on the relevant section of the Danube and protecting areas along the bank of the river against flooding.[12] Hungary and Czechoslovakia were to jointly finance, operate and construct the various components of the System of Locks.[13]

The potential damage to the ecology of the Danube and the riparian states caused by the construction and operation of the System of Locks at both Nagymaros and Gabčíkovo was taken into account in the drafting of the *1977 Treaty*. In accordance with articles 15 and 19,[14] measures to protect the quality of water in the Danube and its environment generally would be included in a 'Joint Contractual Plan' which would be drafted independently of the *1977 Treaty*. The Joint Contractual Plan would also include technical specifications of the construction process. The *1977 Treaty* also provided for the preservation of the bed of the Danube and protection of the fishing interests in conformity with the *Danube Fisheries Agreement*.[15] Work on the System of Locks eventually began in 1978.

In 1983 Hungary and Czechoslovakia signed a protocol to slow down work on the project,[16] and to postpone by four years the deadline for operating the power plants. Intense public criticism in Hungary of the environmental impact of the System of Locks was the main reason why the protocol was drafted.[17] In Febru-

[10] See the discussion in Sands, *Principles of International Environmental Law*, above n 4, 351–4; Paul Williams, 'International Environmental Dispute Resolution: The Dispute between Slovakia and Hungary Concerning Construction of the Gabčíkovo and Nagymaros Dams' (1994) 19 *Columbia Journal of Environmental Law* 1; Joanne Linnerooth, 'The Danube River Basin: Negotiating Settlements to Transboundary Environmental Issues' (1990) 30 *Natural Resources Journal* 629.

[11] *1977 Treaty*, above n 5, art 1.

[12] Ibid 'Preamble'. See also *Danube Dam Case* (1998) 37 ILM 162, 174.

[13] *1977 Treaty*, above n 5, art 5.

[14] Article 15 specified that: 'Contracting Parties shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks.' Article 19 specified the following: '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.'

[15] *Convention Concerning Fishing in the Waters of the Danube*, opened for signature 29 January 1958, 339 UNTS 23, arts 16, 60 (entered into force 20 December 1958).

[16] Signed in Prague on 10 October 1983, as referred to in *Danube Dam Case* (1998) 37 ILM 162, 177. See also the *Declaration of the Government of the Republic of Hungary on the Termination of the Treaty Concluded between the People's Republic of Hungary and the Socialist Republic of Czechoslovakia on the Construction and Joint Operation of the Gabčíkovo-Nagymaros Barrage System, Signed 16 September 1977*, 16 May 1992, (1993) 32 ILM 1260 ('*Hungarian Declaration*').

[17] *Danube Dam Case* (1998) 37 ILM 162, 177.

ary 1989 a second protocol was signed accelerating work on the project.[18] However work was suspended in May of that year while environmental impact studies were commissioned.[19] The project was eventually abandoned by the Hungarian Government in October 1989.[20]

Following these events, Czechoslovakia began negotiating with Hungary for an alternative solution in the Gabčíkovo section, so that they could capitalise on the significant work already done in that sector. These negotiations proved unsuccessful and eventually Czechoslovakia unilaterally decided in July 1991 to commence work on a 'provisional solution' which would have the effect of putting the Gabčíkovo project into operation. The alternative solution, called 'Variant C', consisted of the diversion of the Danube by Czechoslovakia on its territory, the construction of an overflow dam and ancillary works.[21] Construction of Variant C commenced in 1991, and in October 1992 Czechoslovakia began work to close the Danube and eventually to dam the river. Hungary objected to Variant C, and refused to negotiate with Czechoslovakia until it suspended work on the alternative measure it had adopted. In May 1992 Hungary issued a note to Czechoslovakia terminating its obligations under the *1977 Treaty*.

The ICJ was originally seised of the dispute on 23 October 1992 when Hungary commenced proceedings against the Czech and Slovak Republic. However, Hungary acknowledged that there was no basis on which the court could found its jurisdiction in relation to an action which Czechoslovakia failed to take. The Commission of the European Communities subsequently intervened and attempted mediation. Slovakia became an independent state on 1 January 1993 and for the purposes of the dispute became the successor state of Czechoslovakia.[22] Eventually, in April 1993 the parties signed 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*,[23] thereby agreeing to send the dispute before the court.

[18] Signed in Budapest on 6 February 1989, as referred to in *Danube Dam Case* (1998) 37 ILM 162, 177; see also *Hungarian Declaration*, above n 16, 1262.

[19] Eg the Hungarian Academy of Sciences had studied the 'environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabčíkovo-Nagymaros Barrage System.' They had concluded that they had inadequate knowledge of the impact of the project on the environment: *Danube Dam Case* (1998) 37 ILM 162, 181.

[20] For a detailed explanation of why Hungary abandoned the project, see *Hungarian Declaration*, above n 16.

[21] These included weirs, shiplocks and two hydroelectric power plants: *Danube Dam Case* (1998) 37 ILM 162, 188–9.

[22] While some argument arose before the court on this issue, the court accepted, on the basis of both customary international law and treaty law, that Slovakia was the successor state of Czechoslovakia in this instance and as such was bound by the provisions of the *1977 Treaty* between Hungary and Czechoslovakia: *Danube Dam Case* (1998) 37 ILM 162, 197–8.

[23] 7 April 1993, 32 ILM 1293 (entered into force 28 June 1993) ('*Special Agreement*').

B *The Court Decision*[24]

In the *Special Agreement* the ICJ was asked to decide the legality of the actions of Hungary and Slovakia from 1989–92. It was permitted to apply general international law and treaties in determining the answers to three questions:[25]

1 whether the Republic of Hungary was entitled in 1989 to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the *1977 Treaty* attributed responsibility to the Republic of Hungary;
2 whether the Czech and Slovak Republic was entitled in November 1991 to proceed to the 'provisional solution' and to put into operation from October 1992 this system, as described in the *Report of the Working Group of Independent Experts of the Commission of the European Communities*;[26] and
3 what were the legal effects of the notification, on 19 May 1992, of the termination of the *1977 Treaty* by the Republic of Hungary.

In relation to the first question of whether Hungary could have suspended and subsequently abandoned its obligations in relation to the System of Locks, the court (by a majority of 14–1) found that Hungary had acted unlawfully.[27] Both Hungary and Slovakia had agreed that the *1977 Treaty* did not allow either party to unilaterally suspend and abandon work on the project and therefore deciding this question was not difficult.[28] The court however rejected Hungary's further argument that a state of necessity existed to justify its wrongful conduct.[29]

Secondly, the court had to determine whether Slovakia was entitled to construct and operate Variant C.[30] The court elected to deal separately with the question of construction, and the operation of Variant C. It declared that Slovakia was entitled to proceed to construct Variant C.[31] Slovakia had acted unlawfully only when it diverted the Danube to pass water through the bypass canal to operate Variant C.[32] Slovakia was left to argue that, even though it had acted illegally, it

[24] The court was composed of President Schwebel, Vice-President Weeramantry and Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans and Rezek and Judge ad hoc Skubiszewski.

[25] *Special Agreement*, above n 23, art 2(1).

[26] The Republic of Hungary and the Czech and Slovak Federal Republic, *Report of the Working Group of Independent Experts of the Commission of the European Communities* (1992). The provisional solution involved damming the Danube at river kilometre 1851.7 on Czechoslovak territory: *Danube Dam Case* (1998) 37 ILM 162, 187.

[27] *Danube Dam Case* (1998) 37 ILM 162 (Judge Herczegh dissenting).

[28] Ibid 182.

[29] Ibid 162 (Judge Herczegh dissenting).

[30] *Special Agreement*, above n 23, art 2(1)(b).

[31] Nine judges (Vice-President Weeramantry; Judges Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans and ad hoc Skubiszewski) voted for it, and six judges (President Schwebel, Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer and Rezek) against: *Danube Dam Case* (1998) 37 ILM 162, 202.

[32] In this regard the court noted, ibid at 190:

> [B]etween November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the par-

had taken a lawful countermeasure against Hungary's unlawful act of suspending and abandoning work on the System of Locks, and as a result it was not internationally responsible for diverting the Danube.[33] The court found that Slovakia had the right to take countermeasures against Hungary's actions, but that by implementing Variant C it took measures that were not proportionate to the injury it had suffered.[34]

As to the effect of Hungary's 1992 notification terminating the *1977 Treaty*, the court found this had no legal effect because there was no fundamental change in the circumstances of the contracting parties since 1977.[35] It also found that the *1977 Treaty* had not become impossible to perform because of the disappearance or destruction of the object considered indispensable for the execution of the treaty.[36] The court found that Slovakia had not breached its environmental obligations under the *1977 Treaty*, and thus Hungary had no right to terminate it.[37] Finally, it declared that no peremptory norms had come into existence since 1977 which would render unlawful the implementation of the *1977 Treaty*.[38]

C *Environmental Law Issues Addressed by the Court*

1 *State of Ecological Necessity*

States are responsible in international law for breaking obligations owed to other states,[39] and under the law of treaties a state which breaches a multilateral or bilateral treaty becomes responsible to other contracting parties, though defences exist in the event of supervening impossibility of performance and of fundamental change of circumstances.[40] A further defence has been recognised by the International Law Commission ('ILC') which, on its first reading in 1980, adopted the state of necessity defence in the Draft Articles on State Responsibility.[41] Article 33 states that:

> 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

ties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

33 Ibid 190–1.

34 Ibid 191.

35 Ibid 194–5. Four judges (President Schwebel, Judges Herczegh, Flieschhauer and Rezek) dissented: at 194.

36 Ibid 194.

37 Ibid 195.

38 Ibid.

39 See *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4; see generally Ian Brownlie, *State Responsibility: Part 1* (1983).

40 See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, arts 61–2 (entered into force 27 January 1980) ('*Vienna Convention*').

41 For the current version see ILC, 'Draft Articles on State Responsibility' (1998) 37 ILM 440, art 33 ('Draft Articles'); for the original version see ILC, 'Draft Articles on State Responsibility' [1980] 2 *Yearbook of the International Law Commission: Part Two* 33, art 33

b The act did not seriously impair an essential interest of the State towards which the obligation existed.

In the *Danube Dam Case*, Hungary used the state of necessity defence to support a temporary suspension of its obligations under the *1977 Treaty*. Hungary argued that its suspension of work on the System of Locks in 1989 did not mean it terminated its obligations under the *1977 Treaty*, thereby becoming responsible to Slovakia. While the court was prepared to accept the customary international law basis of the state of necessity defence,[42] it noted that this 'ground for precluding wrongfulness can only be accepted on an exceptional basis'.[43] The court further noted that to successfully argue a state of necessity, the following criteria have to be established:

- the act, otherwise in breach of international law, '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 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.'[44]

The court ruled that the state of necessity defence presupposed an internationally wrongful act and could not be used in the manner suggested by Hungary. It thereby sought to examine whether Hungary's actions in 1989 came within the very restrictive terms of the Draft Articles.[45]

The court accepted that an 'essential interest' of a state could include preservation of the natural environment of its territory.[46] The damage to the environment must, however, represent an imminent peril. To the court, 'imminent peril' meant that the possibility of harm must have been 'duly established' at the point in time when the state claimed a state of necessity.[47] Hungary had not established that future damage to the environment was certain,[48] and thereby failed in its claim of the existence of a state of necessity. The court also declared that Hungary had contributed to the existence of any state of necessity.[49] This was based on the finding that the parties had considered the impact of the System of Locks on the environment at the time of drafting the *1977 Treaty*, and had required subsequent

42 *Danube Dam Case* (1998) 37 ILM 162, 184.
43 Ibid.
44 Ibid 194.
45 ILC, Draft Articles, above n 41, art 33.
46 *Danube Dam Case* (1998) 37 ILM 162, 185.
47 Ibid.
48 Ibid 185–6. The court said, in relation to the potential damage to the environment of Nagymaros, that 'the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain.'
49 Ibid 186.

action to be taken under articles 15, 19 and 20 to protect the ecology and resources of the Danube.[50]

The court's comments on the state of necessity defence, as it applies when environmental peril is involved, are instructive. To demonstrate 'grave and imminent peril' from an environmental or ecological standpoint requires a degree of scientific certainty, and therefore a state of necessity could not exist without a 'peril' being duly established. Mere apprehension of a possible peril is insufficient.[51] From the point of environmental protection, the very high threshold required to establish a state of necessity will, in some instances, defeat the precautionary principle, especially where there is scientific uncertainty regarding the extent of the environmental impact.[52] However, environmental protection is treated no differently to other events which may justify reliance upon this defence, such as humanitarian concerns.[53] The court's ruling clearly indicates that in any reliance upon a state of necessity defence, strict compliance with the elements of the defence will be required.

2 *International Watercourses and Protection of Their Environment*

International watercourse law has developed throughout the 20th century, based on individual state practice dealing with the management of international watercourses (including rivers, lakes and groundwater sources shared by two or more states), and also through the work of international bodies such as the International Law Association ('ILA') and the ILC.[54] A fundamental principle in international watercourse law is that watercourses are shared resources subject to 'equitable utilization' by the riparian states. Birnie and Boyle describe the concept as follows:

> Equitable utilization rests on a foundation of equality of rights, or shared sovereignty, and is not to be confused with equal division. Instead, it will generally entail a balance of interests which accommodates the needs, and uses of each state. This basic principle enjoys substantial support in judicial decisions, state practice and international codifications. ... What constitutes 'reasonable and equitable' utilization is not capable of precise determination. As in other contexts, the issue turns on a balancing of relevant factors and must be responsive to the circumstances of individual cases.[55]

This principle was important in determining the rights and obligations of Hungary and Slovakia in relation to the Danube.

[50] Ibid.

[51] Ibid 185.

[52] As to the definition of the precautionary principle and its use by the court in the *Danube Dam Case*, see text accompanying nn 135–141.

[53] See the comments on the state of necessity defence in *Rainbow Warrior Arbitration (New Zealand v France)* (1990) 82 ILR 499, 554–66.

[54] See the discussion in Birnie and Boyle, above n 3, 215–50.

[55] Ibid 220–1. These approaches are reflected in the following decisions: *Territorial Jurisdiction of the International Commission of the River Oder (UK, Czechoslovak Republic, Denmark, France, Germany and Sweden v Poland) (Judgment)* [1929] PCIJ (ser A), No 23 ('*River Oder Case*'); *The Diversion of Water from the Meuse (The Netherlands v Belgium) (Merits)* [1937] PCIJ (ser A/B), No 70; *Lake Lanoux Arbitration (France v Spain)* (1957) 24 ILR 101.

The court declared that a party which breaches a treaty does not lose its right to an equitable and reasonable share of an international watercourse.[56] The court noted particularly that if it had found otherwise, Hungary would have lost its right to use its share of the natural resource and to protect the environment of its territory. Judge Koroma, in dissent, argued that the *1977 Treaty* had displaced Hungary's right to an equitable and reasonable share of an international watercourse.[57] Judge ad hoc Skubiszewski asserted that customary international law does not require a state to seek consent before it uses the hydraulic force of an international watercourse.[58] It will be responsible only if it uses more than an equitable share of it. The court's declaration is significant in this respect, as it accepted that the principle of equitable and reasonable sharing of an international watercourse was customary international law, and that a state's use of the watercourse without the consent of interested states was illegal, especially if their environment was affected.[59]

3 *Countermeasures and the Environment*

An important element of the case was whether Slovakia was entitled to take countermeasures following Hungary's decision to terminate the *1977 Treaty* in 1992. The court declared that a countermeasure can be taken 'in response to a previous international wrongful act of another state and must be directed against that state'.[60] In addition, it is necessary for the injured state to first call upon the state committing the wrongful act to 'discontinue its wrongful conduct or to make reparation for it.'[61] Finally, the countermeasure should be commensurate with the injury suffered,[62] a ruling influenced by the decision of the Permanent Court of International Justice in the *River Oder Case*.[63]

Relying on the above principles the court declared 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.[64]

What the court neglected to mention was that Hungary's breach of the *1977 Treaty* had cost Slovakia in the order of $2.5 billion. No mention was made of the uncertainty surrounding the potential damage to the environment of the Szigetköz, even though this was crucial in ascertaining state responsibility. Nor did the

56 *Danube Dam Case* (1998) 37 ILM 162, 190.
57 Ibid 220.
58 Ibid 240.
59 In this regard the decision is a significant advance on *Lake Lanoux Arbitration (France v Spain)* (1957) 24 ILR 101.
60 *Danube Dam Case* (1998) 37 ILM 162, 191.
61 Ibid.
62 Ibid. For background see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 127.
63 See *River Oder Case* [1929] PCIJ (ser A), No 23; *Danube Dam Case* (1998) 37 ILM 162, 191.
64 *Danube Dam Case* (1998) 37 ILM 162, 191.

court assess the long-term economic implications for Hungary of the loss of its use of the watercourse resource. This would have been necessary if the court had found that natural resources and the environment have quantifiable economic values which, using the proportionality test, could be weighed against the financial loss to another state arising from a breach of a treaty.

The implication of this finding is that scientific certainty is not necessary to determine proportionality, if the environment is affected by a countermeasure taken against a state by the injured state. Further, damage to the environment is prohibited when taking countermeasures, because it will not be proportionate to the injury which a state could suffer as a result of a breach of treaty arrangements.

4 *Termination of Treaties*

The *1977 Treaty* did not include provisions relating to its termination. As a result only articles 61 (impossibility of performance), 62 (fundamental change in circumstances) and 64 (breach of a peremptory norm) of the *Vienna Convention*[65] could be used as the basis of terminating the *1977 Treaty*.[66] Hungary presented five arguments for the legality of its termination. These were:

- state of necessity;
- impossibility of performance of the *1977 Treaty*;[67]
- occurrence of a fundamental change of circumstances;[68]
- the material breach of the *1977 Treaty* by Czechoslovakia;[69] and
- the development of new norms of international environmental law.[70]

The court accepted that a breach of a peremptory norm could justify terminating a treaty. No arguments were put to the court as to the existence of a peremptory norm relating to the environment. The *Vienna Convention* requires the 'permanent disappearance or destruction of an object indispensable for the execution' of a treaty before it is terminated.[71] The court did not determine whether the term 'object' could extend to the disappearance of a legal regime. It was argued in this case that the legal regime was 'an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties'.[72]

The court rejected Hungary's argument that the progress in environmental knowledge since 1977 and the development of new norms and prescriptions of international law had been so significant as to constitute a fundamental change in circumstances. These conditions were not accepted as having been 'completely

65 *Vienna Convention*, above n 40.

66 See generally Lord McNair, *The Law of Treaties* (1961) ch 42; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963); Athanassios Vamvoukos, *Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude* (1985).

67 *Vienna Convention*, above n 40, art 61(1).

68 Ibid art 62.

69 Ibid art 60(1).

70 *Danube Dam Case* (1998) 37 ILM 162, 192.

71 *Vienna Convention*, above n 40, art 61(1).

72 *Danube Dam Case* (1998) 37 ILM 162, 194.

unforeseen'.[73] The court's foreseeability test was applied strictly and would probably never give contracting parties a right to terminate based on scientific and legal developments pertaining to the environment.

Further, the court was asked by Hungary to determine whether Slovakia had breached a fundamental term of the *1977 Treaty*, such as article 15, 19 or 20. The court declared that Hungary's unwillingness to negotiate until work on Variant C ceased was the reason for Slovakia's alleged breaches. What is important is that the court implicitly acknowledged that articles 15, 19 and 20 (which required protection of the environment during the term of the project) were fundamental terms of the *1977 Treaty*. However the court rejected the possibility that a non-material breach of treaty and general rules of international law could justify Hungary terminating the *1977 Treaty*.[74]

III SUSTAINABLE DEVELOPMENT AND ITS ROLE IN THE DECISION

In addition to the issues noted above, the *Danube Dam Case* also raised the question of sustainable development. Since the late 1980s, one of the great challenges for most commentators, international environmental conventions and the courts has been reaching agreement on a definition of sustainable development. This reflects the perception of sustainable development as multidimensional and multifaceted. Nevertheless, a common starting point for understanding sustainable development is the report *Our Common Future* prepared by the World Commission on Environment and Development (Brundtland Commission). The report proposed that sustainable development reflects 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[75] Sustainable development encompassed two concepts:

1 the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
2 the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.[76]

In the *Danube Dam Case* the court considered the nature of sustainable development to determine whether the proposed development of the Danube, in both the original 1977 project and Slovakia's subsequent development works adopted as part of Variant C, was justifiable in modern international environmental law terms on the grounds of sustainability. The notion of sustainable development was also relevant in the context of Hungary's suspension and termination of the *1977 Treaty*, Slovakia's response via Variant C and the future management of the Danube by the two states following the court's decision. Despite its relevance, sustainable development was only first considered a principle of international

[73] Ibid.
[74] Ibid 195.
[75] World Commission on Environment and Development, *Our Common Future* (1987) 43 approved by General Resolution of the United Nations General Assembly in 1987: GA Res 187, 42 UN GAOR (96th plen mtg), UN Doc A/42/821Add.5 (1987).
[76] Ibid.

environmental law in the 1980s, although support for this position strengthened after the adoption of the Rio Declaration on Environment and Development[77] at the United Nations Conference on Environment and Development ('UNCED') held at Rio de Janeiro. This presented a challenge for the ICJ in this instance.

A *The Court's Conception and Definition of Sustainable Development*

In the judgment of the court, sustainable development was not referred to as a concept or norm to ascertain the rights and obligations of the parties. Rather, in prescribing a course of conduct for Hungary and Slovakia the court said:

> 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.[78]

The reference to sustainable development as a concept implies that it is not a principle and does not have normative value.[79] This view was not shared by Judge Weeramantry who, in his separate opinion, asserted that sustainable development is a principle of customary international law. The primary purpose of the principle was to reconcile the difference between the right to protect the environment and the right to development.[80] The 'inescapable logical necessity' and the wide and general acceptance by the global community were two of the main reasons why sustainable development was a norm of customary international law.[81] The argument was that the need to provide a means of reconciling the right to development and the right to environmental protection resulted in the 'inescapable logical necessity' of the normative status of sustainable development.[82] In support of the existence of *opinio juris* he cited the wide and general use of sustainable development in multilateral treaties, international declarations, the foundation documents of international organisations, the practices of interna-

[77] Rio Declaration on Environment and Development, 31 ILM 874, UNCED Doc A/Conf.151/5/Rev.1 (1992) ('Rio Declaration').

[78] *Danube Dam Case* (1998) 37 ILM 162, 201.

[79] Ibid. Academic writing has also expressed similar ideas: see, eg, Ulrich Beyerlin, 'Rio-Konferenz 1992: Beginn einer neuen globalen Umweltrechtsordnung?' (1994) 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)* 124, referred to in Peter Malanczuk, 'Sustainable Development: Some Critical Thoughts in the Light of the Rio Conference' in Konrad Ginther, Erik Denters and Paul de Waart (eds), *Sustainable Development and Good Governance* (1995) 23, 51.

[80] *Danube Dam Case* (1998) 37 ILM 162, 205.

[81] Ibid 207.

[82] Ibid 205.

tional financial institutions and states, regional declarations and planning documents.[83]

The court did not clearly attempt to define sustainable development. Rather, it saw the concept as one which had developed over time to reconcile economic development with environmental protection. In this instance, the court saw sustainable development as a concept which required the parties to 'look afresh at the effects on the environment of the operation of the Gabčíkovo power plant.'[84] It is clear that the court believed that both environmental and development objectives had to be balanced through the reconciliation process and that one did not necessarily have priority over the other. In this regard, the court's approach was in sympathy with the definition of sustainable development in *Our Common Future*.

B *Sustainable Development as a Concept*

By referring to sustainable development as a concept, the court left unanswered the question of whether sustainable development was a principle in embryo or at best a political objective. As a concept, sustainable development is a socio-political objective that goes well beyond environmental and developmental questions.[85] This is illustrated by the following observations on the multidimensional nature of sustainability:

> There are many dimensions to sustainability. First, it requires the elimination of poverty and deprivation. Second, it requires the conservation and enhancement of the resources base which alone can ensure that the elimination of poverty is permanent. Third, it requires a broadening of the concept of development so that it covers not only economic growth but also social and cultural development. Fourth, and most important, it requires the unification of economics and ecology in decision-making at all levels.[86]

It is therefore easier to reconcile the fact that sustainable development has no precise operational objectives or content which are specific and tangible if we consider it a concept. This is not to say that none have been formulated.[87]

[83] Ibid 206–7. Some of the instruments referred to were: *Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS No 32, arts 1, 10 (entered into force 29 December 1993); Rio Declaration, above n 77, principles 4–5, 7–9, 20–2, 24, 27; *North American Free Trade Agreement*, opened for signature 17 December 1992, Canada–Mexico–USA, 32 ILM 289 (entered into force 1 January 1994); Langkawi Declaration on the Environment, 21 October 1989, <http://www.jas.sains.my/doe/lkawideg.html>, reproduced in K L Koh (ed), *Selected ASEAN Documents on the Environment* (1996) v.

[84] *Danube Dam Case* (1998) 37 ILM 162, 200.

[85] See, eg, Günther Handl, 'Sustainable Development: General Rules versus Specific Obligations' in Winfried Lang (ed), *Sustainable Development and International Law* (1995) 35. See also Malanczuk, above n 79.

[86] Ben Boer, 'Implementing Sustainability' (1992) 14 *Delhi Law Review* 1. See also Alexander King and Bertrand Schneider, *The First Global Revolution: A Report by the Council of the Club of Rome* (1991) 49; Kamal Hossain, 'Evolving Principles of Sustainable Development and Good Governance', in Ginther, Denters and de Waart (eds), above n 79, 15.

[87] See, eg, those defined by the World Commission of Environment and Development in *Our Common Future*, above n 75, 49 which include the following: reviving growth; changing the quality of growth; meeting essential needs for jobs, food, energy, water and sanitation; ensuring a sustainable level of population; conserving and enhancing the resource base; reorienting tech-

Perhaps the court classified sustainable development as a concept rather than as a principle because of this multidimensional character. This is a debate which is also reflected in the academic discourse on the nature and status of sustainable development. Günther Handl, for example, has asserted that the concept still has 'latent ambiguities and internal inconsistencies — whether intended or not — which undermine its policy guidance function and its role as a conceptually clear platform for initiatives enabling detailed follow-up or implementing legislation'.[88]

Notwithstanding these uncertainties, sustainable development can still draw support from a range of principles and standards with varying normative value. For instance, the following have been suggested by Sands as related to and supporting sustainable development:[89]

- the principle of sovereignty over natural resources and the responsibility not to cause environmental damage;[90]
- the principle of good neighbourliness and international cooperation;
- the principle of common but differentiated responsibility;
- the principle of good governance, including participatory democracy;
- the principle of preventative action;
- the precautionary principle; and
- the polluter-pays principle.

In the *Danube Dam Case* the court's judgment also appears to indicate that norms and standards have been developed to deal with the environmental problems associated with economic development projects.[91] This approach is, however, highly problematic, for it fails to recognise that notwithstanding these norms and standards, principles are commonly included in treaties, and that their definition is often a political compromise between North and South. Ultimately, one of the greatest difficulties with sustainable development is that the legal status of principles which support the concept vary, and, in many cases, is even doubtful.[92] For instance, the sustainable use of biological diversity forms the

nology and managing risk; merging environment technology and economics in decision-making; reorienting international economic relations; and making development more participatory.

88 Handl, 'Sustainable Development', above n 85, 37. See also Günther Handl, 'Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio' (1994) 5 *Colorado Journal of International Environmental Law and Policy* 305.

89 Philippe Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in Lang (ed), above n 85, 53, 62.

90 This is drawn from Declaration of the United Nations Conference on the Human Environment, 16 June 1972, (1972) 11 ILM 1416, principle 21; and Rio Declaration, above n 77, principle 2.

91 *Danube Dam Case* (1998) 37 ILM 162, 200–1. The court notes:

> 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.

92 For instance, it is generally accepted that there is uncertainty as to the precise scope of the precautionary principle which is one of the norms which guide states towards sustainable development. See, eg, David Freestone and Ellen Hey (eds), *The Precautionary Principle and International Law: The Challenge of Implementation* (1996)

basis of the *Convention on Biological Diversity*,[93] but the normative content of obligations which support sustainable use are 'relatively weak and most of its provisions are little more than purely exhortatory.'[94] Notwithstanding the merits of the *Convention on Biological Diversity*, a considerable degree of state practice will need to have developed before it will be possible with any degree of certainty to pinpoint the normative content of these obligations. As a result, future approaches to sustainable development in international law are likely to be incoherent and unsystematic.[95]

C *Sustainable Development as a Principle of Customary International Law*

What is the status of sustainable development in customary international law? The court implicitly rejected the assertion that sustainable development is a principle of international law by calling it a 'concept'.[96] Academic commentators have also shown strong scepticism towards its potential as a principle in international law.[97] Part of this scepticism derives from the uncertainty surrounding the function and legal effect of principles of international law relating to the environment.[98] Principles have been said to 'embody legal standards, but the standards they contain are more general than commitments and do not specify particular actions'.[99] This definition is particularly apposite to principles of international environmental law which, due to its relatively recent development, is constantly having its fundamental principles reassessed.[100] A feature of the development of international environmental conventions in the past decade is that basic principles have been written into these instruments in an attempt to provide guidance to the parties on how the conventions' objectives are to be achieved.[101]

However, the notion that sustainable development is a principle of international environmental law and a part of customary international law is not novel. Former President of the ICJ, Nagendra Singh, has stated that sustainable development is a peremptory norm because it is a part of modern natural law.[102] What is lacking

93 *Convention on Biological Diversity*, above n 83.

94 Sam Johnston, 'Sustainability, Biodiversity and International Law' in Michael Bowman and Catherine Redgwell (eds), *International Law and the Conservation of Biological Diversity* (1996) 51, 54.

95 Handl, 'Sustainable Development', above n 85, 37.

96 *Danube Dam Case* (1998) 37 ILM 162, 201.

97 See, eg, Handl, 'Sustainable Development', above n 85; Sands, 'International Law in the Field of Sustainable Development', above n 89, 53.

98 As to the status of principles in international law, see generally Bin Cheng, *General Principles of Law Applied by International Courts and Tribunals* (1953); Ronald Dworkin, *Taking Rights Seriously* (1977).

99 Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale Journal of International Law* 451, 501.

100 Some legal scholars even questioned the existence of a distinctive body of law which could be classified as 'international environmental law': Birnie and Boyle, above n 3, 1.

101 See, eg, *United Nations Framework Convention on Climate Change*, opened for signature 9 June 1992, [1994] ATS No 2, 31 ILM 849, art 4 (entered into force 21 March 1994) ('*Framework Convention on Climate Change*'); *Convention on Biological Diversity*, above n 83, art 3.

102 His Excellency Judge Nagendra Singh, 'Sustainable Development as a Principle of International Law', in Paul De Waart, Paul Peters and Erik Denters (eds), *International Law and Development* (1988) xi–xii; Nagendra Singh, 'Foreword' in World Commission on Environment and

is 'any comparable consensus on the meaning of sustainable development, or how to give it concrete effect in individual cases'.[103] This lack of consensus is reflected in the judgment of Judge Weeramantry who noted that even Hungary and Slovakia disagreed as to the application of sustainable development to the facts of the case.[104] Therefore, although *opinio juris* may exist for accepting sustainable development as a principle of customary international law, there are still very difficult questions to be answered about the point at and manner in which it becomes applicable to any given activity.

D *Judge Weeramantry and Sustainable Development*

A feature of the *Danube Dam Case* is the considerable emphasis Judge Weeramantry places on sustainable development. The weight given to sustainable development and the legal basis for articulating its content in this opinion deserves separate comment. While ordinarily a description of the legal roots of a principle is essential in order to appreciate and outline its precise content, Judge Weeramantry only briefly considers the roots of sustainable development. Rather, he applies a less traditional source for identifying 'specific principles, concepts, and aspirational standards' relevant for sustainable development. The methodology he adopted was explained as follows:

> 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. 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*.[105]

Using this approach Judge Weeramantry examined the 'perspectives and principles' of several traditional systems, such as those of Sri Lanka, India and Iran and concluded that there 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

Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (1987) 1, 1–4. See also Birnie and Boyle, above n 3, 122–4; Günther Handl, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 *Yearbook of International Environmental Law* 3, 24–8.

103 Birnie and Boyle, above n 3, 123.

104 *Danube Dam Case* (1998) 37 ILM 162, 205.

105 Ibid 207–8.

> 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 of the environment.[106]

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

This approach for justifying the basis of sustainable development does not rely on legal precedent. Rather, its basis is predominantly social and cultural history rooted in the practices adopted by past civilisations. It is highly subjective, and if courts and tribunals were to adopt it as the means for resolving disputes, it would raise numerous problems both in terms of evidence and scope, especially as numerous cultures can be selected as the basis of examination.

Ultimately, Judge Weeramantry viewed sustainable development not as a right in itself, but as a means for resolving disputes between the rights to development and environmental protection. The underlying juristic basis of sustainable development is therefore reconciliation of the tension between environmental and developmental rights. The right to development is considered an inalienable human right.[107] Similarly, protection of the environment is viewed anthropocentrically as being a vital part of human rights doctrines. In Judge Weeramantry's words, the protection of environment is '*sine qua non* for numerous human rights such as right to health and the right to life itself'.[108] The philosophical basis of sustainable development is therefore the reconciliation of two incompatible forms of human rights.

This view is consistent with the Rio Declaration which states that human beings are at the centre of concerns for sustainable development.[109] It has been said that principle 1 'represents a triumph of unrestrained anthropocentricity. ... The word 'nature' appears nowhere else in the text [of the Rio Declaration] and there is no recognition of the intrinsic value of natural ecosystems and wild species.'[110] It is therefore surprising that Judge Weeramantry's assessment of sustainable development does not tell us anything about the place of nature and its value in the international system as a whole. At most he conceives of the environment instrumentally, in terms of human happiness, rather than as having intrinsic

106 Ibid 213.

107 Judge Weeramantry cites Declaration on the Right to Development, GA Res 128, 41 UN GAOR (97th plen mtg), UN Doc A/Res/41/128 (1986), art 1 as having the approval of the international community: *Danube Dam Case* (1998) 37 ILM 162, 205. As to the right to development, see Subrata Chowdhury, Erik Denters and Paul de Waart (eds), *The Right to Development in International Law* (1992); and de Waart, Peters and Denters (eds), above n 102.

108 *Danube Dam Case* (1998) 37 ILM 162, 206.

109 Rio Declaration, above n 77, principle 1 provides in full: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.' See also generally Marc Pallemaerts, 'International Environmental Law from Stockholm to Rio: Back to the Future?' in Philippe Sands (ed), *Greening International Law* (1993) 1; Michael Bowman, 'The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law' in Bowman and Redgwell (eds), above n 94, 5.

110 Pallemaerts, above n 109, 12–13.

value.[111] This conception is more focussed on the environment than one with its legal roots firmly based in development.[112] If environmental protection is necessary to preserve human rights, then sustainable development only serves the interest of humans and is not concerned with the intrinsic or inherent value of nature itself. This interpretation is both contradictory to certain international instruments and indifferent to conservation of nature for its own sake.[113]

IV THE IMPACT UPON INTERNATIONAL ENVIRONMENTAL LAW

The *Danube Dam Case* presented an opportunity for the ICJ to review a number of international environmental law issues. It clearly did so when it addressed the question of sustainable development. However, the case also raised a number of other international environmental law issues, some of which were only addressed tangentially. The purpose in this section is to analyse what the court did, or in some cases did not, say on these issues and assess them against the backdrop of some of the principles of international environmental law.

A *International Environmental Law and the Law of International Watercourses*

One of the clearest consequences of the decision in the *Danube Dam Case* is that the ICJ sees a distinct interaction between international environmental law and international watercourse law. While the treatment of these two areas as being related was inevitable,[114] the separate development of a distinctive jurisprudence and treaty law dealing with international watercourses has obscured their interaction. The ICJ's endorsement of developments in international watercourse law[115] was sometimes in tension with the parallel, though comparatively recent, developments in international environmental law. It was in the reconciliation of the two that the ICJ experienced some difficulty, especially when assessing sustainable development alongside management of the river.[116] Ultimately, international watercourse law prevailed, which was perhaps inevitable

[111] For comment on this type of approach see Bowman, above n 109, 15; see generally Freya Mathews, *The Ecological Self* (1991) chh 3, 4.

[112] See, eg, Konrad Ginther and Paul de Waart, 'Sustainable Development as a Matter of Good Governance: An Introductory View' in Ginther, Denters and de Waart (eds), above n 79, 1, 10.

[113] See, eg, *Convention on Biological Diversity*, above n 83, 'Preamble' where the intrinsic value of nature is recognised:

> The Contracting Parties
>
> Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.

See also the World Charter for Nature, GA Res 7, 37 UN GAOR (48th plen mtg), UN Doc A/Res/37/7 (1982), 'Preamble' which recognises the intrinsic value of nature:

> Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action.

[114] Charles Bourne, 'The Case Concerning the Gabčíkovo-Nagymaros Project: An Important Milestone in International Water Law' (1997) 8 *Yearbook of International Environmental Law* 6.

[115] Ibid 10.

[116] For further assessment of these issues, see Paulo Canelas de Castro, 'The Judgment in the Case Concerning the Gabčíkovo-Nagymaros Project: Positive Signs for the Evolution of International Water Law' (1997) 8 *Yearbook of International Environmental Law* 21, 21–31.

given that the ICJ found that the *1977 Treaty* remained operative for the parties.[117]

One of the more interesting international environmental law issues arising from the judgment is that the court seemed willing to countenance the impact of contemporary international environmental law upon the *1977 Treaty*, and therefore read the treaty obligations of Hungary and Slovakia in the light of the development of concepts such as sustainable development. This raises for consideration the impact of the inter-temporal rule of treaty interpretation and whether contemporary developments in international environmental law should have an impact on treaties in force prior to these developments.[118]

The inter-temporal rule, following from interpretations of the dictum of Judge Huber in the *Island of Palmas Arbitration*,[119] has traditionally been understood to mean that the validity and interpretation of provisions of a treaty are determined by reference to the law as it was when the instrument was drafted.[120] Although it would appear that certainty in the content of this rule is necessary, the jurisprudence of the ICJ on this issue has varied significantly.[121] Human rights provisions and generic terms in treaties have traditionally been seen as exceptions to this general rule.[122] However, it has been suggested that the inter-temporal rule now includes considering the 'intention of the parties, reflected by reference to the objects and purpose'.[123] This view does not extend to determining the validity of treaties, but applies only in relation to their interpretation.

In the *Danube Dam Case*, Judge Weeramantry argued in his separate opinion that the inter-temporal rule could not be applied to prevent the application of current environmental norms when interpreting the *1977 Treaty*. He stated:

> 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.[124]

117 *Danube Dam Case* (1998) 37 ILM 162, 201.

118 See Alan Boyle, 'The *Gabčíkovo-Nagymaros Case*: New Law in Old Bottles' (1997) 8 *Yearbook of International Environmental Law* 13, 15.

119 *(The Netherlands v US)* (1928) 2 RIAA 829, 845.

120 See, eg, *Case Concerning Right of Passage over Indian Territory (Portugal v India) (Merits)* [1960–61] ICJ Rep 6, 37; *Case Concerning Rights of Nationals of the United States of America in Morocco (France v US) (Merits)* [1952] ICJ Rep 176, 189.

121 Rosalyn Higgins, 'Some Observations on the Inter-Temporal Rule in International Law' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (1996) 173.

122 A generic term is a reference to words in a treaty which have not been given a specific meaning which is not subject to change.

123 Higgins, 'Some Observations on the Inter-Temporal Rule in International Law', above n 121, 181. Cases which support the new interpretation of the inter-temporal rule include *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 9, 31; *Aegean Sea Continental Shelf Case (Greece v Turkey) (Jurisdiction)* [1978] ICJ Rep 3, 32.

124 *Danube Dam Case* (1998) 37 ILM 162, 215.

Judge Weeramantry's conception of the inter-temporal rule clearly included applying contemporary environmental norms and principles to interpret a treaty, even if the parties intended otherwise. He noted that 'no action should be permissible which is today considered environmentally unsound, even though it is taken under an instrument of more than 20 years ago.'[125]

The implication of this finding is that Judge Weeramantry's interpretation of the inter-temporal rule rejects the premise that the intention of the parties to a treaty should determine its meaning, and that an exception to the traditional view includes interpreting human rights broadly to include the right to a clean environment. What is unclear is the kind of contemporary environmental standards that can be taken into account when interpreting the terms of a treaty which may have been negotiated prior to the development of these standards.[126]

B *Sustainable Development*

An important aspect of the ICJ's decision is the reference made to sustainable development as an operative factor when determining disputes between parties that involve conflicts between development rights and environmental rights. The court endorses sustainable development as a 'concept' which has a role to play in reconciling these two competing interests. This in itself is a considerable advance on any previous decision of the ICJ concerning the environment. The recognition by the court of sustainable development is therefore notable and will give further impetus to the entrenchment of sustainable development in international environmental law.

Unfortunately, the court does not go any further than this, leaving many questions unanswered over the nature of sustainable development. This is disappointing given the increasing role of sustainable development in environmental law at both the national and international level. No doubt the court was reluctant to place too much weight on sustainable development due to the concept not having fully emerged prior to the adoption of the *1977 Treaty*. The continuing debate over its content is also a factor. Notwithstanding these possible constraints, the court did make reference to sustainable development and relied upon it as a basis for shaping the future conduct of Hungary and Slovakia with respect to the Danube. However, the court did not refer to the legal or philosophical basis for sustainable development, despite the extensive academic writings on the subject,[127] and the many international instruments which now make reference, either directly or indirectly, to sustainable development.[128] In addition, the court failed to give any indication of the relationship between sustainable development and other principles of international environmental law.

[125] Ibid.

[126] In support of this proposition, Judge Weeramantry made reference to the dissenting opinion of Judge Tanaka in *South West Africa (Ethiopia and Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 293–4.

[127] See, eg, Lang (ed), above n 85; Ginther, Denters and de Waart (eds), above n 79.

[128] See Rio Declaration, above n 77; *Convention on Biological Diversity*, above n 83, arts 1, 10; *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*, opened for signature 5 April 1995, 34 ILM 864 (not yet in force).

Many commentators are of the view that sustainable development represents a principle of international environmental law. However the court's reference to it as a 'concept' suggests that it has yet to meet a normative standard and that at present it remains too vague to truly define. What is clear, however, from both the judgment of the court and the separate opinions of Judge Oda[129] and Judge Weeramantry, is that sustainable development, whether as a concept or principle, is born of the marriage between the right to development and the right to environmental protection, neither of which are new to international law, and both of which have customary law status.[130]

Ultimately, sustainable development is neither more vague nor more uncertain than other principles which have been applied and used as principles of customary law.[131] Even though Judge Weeramantry's conception of sustainable development fails to identify a precise content, this does not deprive the concept of the normative value which is vested in the principle. Even those who express scepticism about the normative value of sustainable development still acknowledge that 'binding principle might only be intended to guide parties and international organizations in the implementation of the substantive rules of international environmental obligation'.[132] In any event, the lack of precise content may not be viewed as too problematic in light of the possible practical legal consequences of being classified as a principle.[133] This is particularly true if international law sees sustainable development as a principle which can be used to balance the competing rights of environmental protection and development,

129 *Danube Dam Case* (1998) 37 ILM 162, 224. Judge Oda in his separate opinion noted at 224:

> It is a great problem for the whole of mankind to strike a satisfactory balance between more or less contradictory issues of economic development 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.

130 Declaration on the Right to Development, above n 107, art 1; Rio Declaration, above n 77, principle 3 confirming the right to development. Judge Weeramantry argued that the reason why the right to protection of the environment is part of customary international law is because it is indispensable for numerous kinds of human rights, such as the right to health: *Danube Dam Case* (1998) 37 ILM 162, 206. As to the right to protection of the environment as a human right, see Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996). As to the right to development in international law see Chowdbury, Denters and de Waart (eds), above n 107; de Waart, Peters and Denters (eds), above n 107.

131 James Cameron and Juli Abouchar, 'The Status of the Precautionary Principle in International Law' in Freestone and Hey (eds), above n 92, 29, 46, directly referring to the precautionary principle in international environmental law and the content of property rights.

132 Sands, 'International Law in the Field of Sustainable Development', above n 89, 56.

133 Sands has identified three possible legal consequences of principles all of which have particular relevance for sustainable development. These include: (1) legal and other implications may be drawn from them by courts and tribunals, particularly in the process of interpreting rules the meaning of which might be unclear; (2) principles provide a basis for the negotiation and elaboration of future international legal obligations within the context of existing or new instruments; and (3) principles can play a role in the application of procedural rules concerning verification and compliance by affecting the meaning and effect to be given to a particular obligation: ibid 56–7.

because until these competing interests intersect, the application of the principle may not be required.[134]

C *Precautionary Principle*

An important aspect of the *Danube Dam Case* is the court's assessment of the role of the precautionary principle and its impact after 1977. The Rio Declaration provides, with respect to the precautionary principle, that:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[135]

This principle has developed as a leading component of international environmental law throughout the past 25 years from foundations rooted in the individual practice of states.[136] However, despite the considerable state practice at both the national and international level where the precautionary principle has been applied and adopted in a number of international instruments,[137] as with sustainable development there remains uncertainty and disagreement surrounding its precise content.

Notwithstanding this uncertainty, there is little doubt that the precautionary principle plays an important role in environmental law at both the national and international level. There are numerous illustrations of its operation, ranging from the decision by the state parties to the *Antarctic Treaty*[138] to adopt a protocol prohibiting mining in Antarctica because of the potential environmental impact,[139] to the imposition of catch limits on marine living resources in order to maintain sustainable stock levels.[140]

There were many opportunities throughout the *Danube Dam Case* for the court to rely upon the precautionary principle. When Hungary suspended the operation of the *1977 Treaty* in 1989, it sought to rely upon a state of ecological necessity as justification. The court viewed this as essentially a variation on the defence of

[134] For example, would development rights need to be taken into account in the preservation of a wilderness area which a state has already declared to be protected and not subject to any developmental activities? This may arise in the context of an area which has been placed on the World Heritage List under the *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

[135] Rio Declaration, above n 77, principle 15.

[136] Sands, *Principles of International Environmental Law*, above n 4, 208–9

[137] See the collection of essays in Freestone and Hey (eds), above n 92.

[138] *Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

[139] *Protocol on Environmental Protection to the Antarctic Treaty of 1 December 1959*, opened for signature 4 October 1991, 30 ILM 1461 (entered into force 14 January 1998); Donald Rothwell, *The Polar Regions and the Development of International Law* (1996) 401.

[140] See, eg, *Convention for the Conservation of Southern Bluefin Tuna*, opened for signature 10 May 1993, [1994] ATS No 16 (entered into force 20 May 1994); *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, [1982] ATS No 9 (entered into force 7 April 1982); *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (as amended) (entered into force 10 November 1948).

state of necessity justifying the suspension or termination of a treaty. Ultimately, because of the high threshold imposed by that test, Hungary's defence failed. Much of Hungary's argument on this point was based on the environmental impact of the project in light of the scientific knowledge and understandings that had emerged since the negotiation of the *1977 Treaty*. On one view of the precautionary principle, the project should have been halted at that stage until there was full scientific certainty as to the environmental impact and both parties had taken this into account in formulating their future actions.

Likewise, the precautionary principle would also have required full scientific certainty as to the environmental impact of Variant C proposed by Slovakia, especially its transboundary impact. Finally, if the precautionary principle was accepted as a principle of international environmental law, it could also have formed the justification of Hungary's termination of the *1977 Treaty* in 1992. None of these concerns were evident in the judgment of the court, and the failure of the ICJ to consider the precautionary principle, instead primarily relying upon principles of treaty law, was a disappointment.[141]

D *Environmental Impact Assessment*

Throughout the 1990s there has been a growing recognition of the need for environmental impact assessment ('EIA') to be conducted by states when engaging in activities that may result in transboundary environmental harm, or harm to shared and common ecosystems which may be beyond the limits of national jurisdiction. The most prominent example of states agreeing to the conducting of EIA is the *Convention on Environmental Impact Assessment in a Transboundary Context*, adopted by member states of the United Nations Economic Commission for Europe.[142] The basis for EIA in international environmental law is the preventive principle. The *Basel Convention*[143] and the Rio Declaration[144] impose obligations upon states not to cause transboundary environmental harm. Consistent with this state responsibility towards environmental protection, the preventive principle obliges states to ensure that the activities they undertake do not cause transboundary environmental harm or impact.[145] International environmental law has therefore moved from attributing responsibility for environmental harm to actually imposing obligations upon states to not cause harm at all. As with a number of principles in international environmental law, the parameters of the preventive principle are somewhat uncertain. However, Sands argues that on the basis of both national and international practice it includes

141 For comment see de Castro, above n 116, 29–30.

142 *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 30 ILM 800 (not yet in force) ('*UNECE Convention*').

143 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1988, [1992] ATS No 7, art 4(2) (entered into force 5 May 1992) ('*Basel Convention*').

144 Rio Declaration, above n 77, principle 2.

145 The foundation of this principle in international environmental law is the decision in the *Trail Smelter Arbitration (US v Canada)* (1938 and 1941) 3 RIAA 1905.

> authorisation procedures, as well as the adoption of international and national commitments on environmental standards, access to environmental information, and the need to carry out environmental impact assessments in relation to the conduct of certain proposed activities.[146]

The conducting of EIA has become an important component in meeting the obligations of the preventive principle. Its basis is found in domestic environmental law, with the United States being one of the first jurisdictions to introduce EIA at the national level in the early 1970s.[147] It is now an integral part of many domestic environmental law regimes throughout the world. Bates has described EIA as

> a means of evaluating development proposals so that possible environmental impacts may be identified and mitigated. Ideally EIA should also include an assessment of possible alternatives to the proposal, monitoring of predicted and actual impacts, and auditing for determining compliance with conditions attached to an approval; and provide information and a process for ongoing environmental management which means that EIA can only function effectively in the context of a sound environmental planning system.[148]

The use of EIA in an international context has taken longer to be accepted, no doubt due to the sensitive issues of state sovereignty involved and the different approaches which states may adopt in undertaking such an evaluation. Nevertheless, it is increasingly becoming a key component of some international environmental treaties. For example, in addition to the *UNECE Convention*,[149] the parties to the *Antarctic Treaty*[150] agreed in 1991 upon mechanisms for compulsory EIA of all activities conducted in Antarctica that may cause environmental harm.[151] The Rio Declaration also referred to EIA being undertaken when proposed activities 'are likely to have a significant adverse impact on the environment'.[152]

The ICJ has had limited opportunities to consider the legal status of EIA.[153] The *Danube Dam Case* provided such an opportunity, given the environmental concerns raised over the Danube Dam project at various stages, Slovakia's response when it adopted Variant C, and the continuing obligations of Hungary and Slovakia in the management of the river. To determine the legitimacy of Variant C, the court concentrated solely on its justifiability under the terms of the *1977 Treaty* or as a countermeasure. The court did not consider whether, in

146 Sands, *Principles of International Environmental Law*, above n 4, 195.

147 See *Environmental Quality Improvement Act* Pub L No 91-224, 84 Stat 114 (1970).

148 Gerry Bates, *Environmental Law in Australia* (4th ed, 1995) 142–3 (footnotes omitted). *UNECE Convention*, above n 142, art 1 defines EIA as 'national procedure for evaluating the likely impact of a proposed activity on the environment'.

149 *UNECE Convention*, above n 142.

150 *Antarctic Treaty*, above n 138.

151 See *Protocol on Environmental Protection to the Antarctic Treaty*, above n 139, art 8, annex I.

152 Rio Declaration, above n 77, principle 17.

153 Judge Weeramantry had occasion to consider the significance of EIA in international law in his dissenting opinion in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in Nuclear Tests Case (New Zealand v France)* [1995] ICJ Rep 288, 344–5; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66.

pursuing this course of action, Slovakia was under an obligation to conduct an EIA in order to assess the transboundary impact of Variant C upon Hungary. In comparison, the court did assess the impact of newly developed norms of environmental law in regard to Hungary's entitlement to terminate the *1977 Treaty*. While the obligations of Hungary and Slovakia regarding the Danube were still found to be based in the *1977 Treaty*, with articles 15 and 19 particularly relevant, the court was prepared to accept that these provisions had to be interpreted in light of the developments that had taken place in relation to environmental concerns.[154]

As to the continuing operation of the *1977 Treaty*, the court again made reference to the implications for the environment. For the *1977 Treaty* to remain on foot, it is accepted that in 'order to evaluate the environmental risks, current standards must be taken into consideration'.[155] However, apart from a subsequent reference to 'prevention', the court does not go on to specify the exact content of the parties' obligations, other than the need to reconcile economic development with environmental protection by way of sustainable development.[156]

The judgment of the court, then, in relation to the role of EIA is not particularly illuminating. Certainly it could be implied from the court's reference to the role of new environmental norms that EIA has a role to play, especially in meeting the goal of environmental 'protection'. However, there is no express reference made to EIA and certainly none as to the scope of any obligation. This is to be contrasted with the separate opinion of Judge Weeramantry who gives some attention to the role of EIA, especially the continuing obligation upon the parties to conduct such an investigation. Judge Weeramantry confirms that EIA is a 'specific application of the larger general principle of caution', and that at a minimum it requires an assessment to be undertaken prior to the commencement of a project.[157] The view is also taken that environmental law reads a 'duty' of EIA into treaties that would have a significant impact upon the environment.[158] This is a positive indicator that Judge Weeramantry believes not only that there is a duty to conduct EIA, but also that it has become an operative principle of international environmental law. It should be noted that Judge Weeramantry, by referring to a reasonable expectation of 'significant' environmental impact, suggests a high threshold must be met before there is a duty to undertake EIA. The remainder of Judge Weeramantry's assessment of EIA concentrates on the continuing obligation to undertake EIA and environmental monitoring, and unfortunately does not further address the scope or content of the initial obligation.

154 *Danube Dam Case* (1998) 37 ILM 162, 196 where it was noted: 'Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.'

155 Ibid 200.

156 Ibid 200–1

157 Ibid 214.

158 Ibid.

E *Environmental Monitoring*

As noted above, a component of EIA is the need to undertake environmental monitoring. At the municipal level this can be part of the EIA process, or it may be a continuing obligation when permitted activities have the potential for ongoing environmental impact, such as mines or industrial activities that cause atmospheric emissions.[159] With the development of EIA at the international level and its interaction with the preventive principle, environmental monitoring is also becoming an important part of international environmental law.[160] A clear example can be found in the *United Nations Convention on the Law of the Sea* which provides:

> States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.[161]

The monitoring process is essential if states are to appreciate the environmental impact of collective activities such as the emission of ozone-depleting gases[162] or so-called greenhouse gases responsible for climate change.[163] Likewise, the maintenance of biological diversity can only be assessed if monitoring of the state of the environment is undertaken.[164] It therefore follows that environmental monitoring is a key component in ensuring that states do not engage in trans-boundary environmental harm. This was recognised as far back as the *Trail Smelter Arbitration*.[165] Notwithstanding, then, that an activity may have been permitted to proceed following an EIA, there can be no certainty that, due to changing circumstances, the activity will not cause environmental harm in the future. Environmental monitoring mechanisms therefore need to be put into place to ensure the activity does not exceed the established limits.

Given the ongoing nature of the development projects along the Danube and the continuing interests of Hungary and Slovakia in these developments, environmental monitoring was potentially an important aspect of the ICJ's judgment of both past and future conduct. Hungary asserted that there were a number of ecological risks associated with the various installations in the System of Locks which required review.[166] Likewise, the acceptance by the court of the continued operation of Variant C raised questions about the avoidance of environmental

[159] Bates, *Environmental Law in Australia*, above n 148, 403.

[160] This process is all part of the need for 'environmental information': see Ian Clyde, 'Ignorance is Not Bliss: The Importance of Environmental Information' (1997) 2 *Asia Pacific Journal of Environmental Law* 253.

[161] Opened for signature 10 December 1982, [1994] ATS No 31, art 204(2)(b) (entered into force 16 November 1994).

[162] *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 293, art 3 (entered into force 22 September 1988).

[163] *Framework Convention on Climate Change*, above n 101, art 5.

[164] *Convention on Biological Diversity*, above n 83, art 7. See discussion in Sands, *Principles of International Environmental Law*, above n 4, 612–15.

[165] *Trail Smelter Arbitration (US v Canada)* (1938 and 1941) 3 RIAA 1905, 1934, 1966–9.

[166] *Danube Dam Case* (1998) 37 ILM 162, 182.

damage,[167] which could only be met if the states were prepared to engage in long-term monitoring of the impacts of the development. Relevant as it was, the court ignored the issue of environmental monitoring.

The exception was, again, Judge Weeramantry, who referred to the notion in the context of continual EIA. Two reasons were given for importing the need for continual monitoring into the EIA process. The first is that an 'EIA is a dynamic principle. ... EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring'.[168] Secondly, reference is made to the terms of the *1977 Treaty* itself, which, in Judge Weeramantry's opinion referred not only to the need for EIA but also the monitoring of the water quality throughout the duration of the project.[169] Judge Weeramantry went on to note in the context of the continuing operation of the regime between the two parties, that 'continuous monitoring of the scheme for its environmental impacts will accord with the principles outlined, and be a part of that operational regime.'[170]

The judgment of the court on the issue of environmental monitoring is a further disappointment. Notwithstanding the clear implications it has in the context of this project and the ongoing commitments that both Hungary and Slovakia were prepared to assume for the project along the Danube, the court did not expressly refer to the need for ongoing environmental monitoring. In this regard the decision of the court is notable for being silent on an important element of the ongoing obligations of Hungary and Slovakia, and is to be contrasted with the decision in the *Trail Smelter Arbitration* and the directions given in that case to Canada to monitor future environmental impact.[171]

V CONCLUSION

The *Danube Dam Case* was much anticipated by many commentators because it was seen as presenting the ICJ with a real opportunity to decide a case fully on the merits of the environmental issues raised before it. Unfortunately this proved to be a false hope. Ultimately, international environmental law ran a poor third to treaty law and international watercourse law as the basis for the court's judgment. The case turned essentially on the interpretation of the provisions of the *1977 Treaty* between Hungary and Czechoslovakia, and the treaty law consequences of the acts taken by Hungary and Czechoslovakia/Slovakia in the key period of 1989–92. The case does have a good deal to say about treaty law, especially important concepts such as state of necessity, countermeasures and fundamental change of circumstances. Likewise, in the case of international watercourse law the court confirmed the development of many of the customary international law

[167] Ibid 198–9.
[168] Ibid 214.
[169] Ibid
[170] Ibid.
[171] This point is directly made by Judge Weeramantry: ibid.

principles which have recently been codified in the *Convention on the Law of the Non-Navigational Uses of International Watercourses*.[172]

In retrospect it should not be surprising that the court's judgment is dominated by principles of treaty law and international watercourse law, for the key legal subject of the dispute was a treaty which dealt with the development of an international watercourse. Principles of international environmental law were only beginning to be recognised at the time the parties concluded their *1977 Treaty*, and while they have developed considerably since then, they were not sufficiently important to play a key role in determining the case.

Despite this assessment, the *Danube Dam Case* does break new ground in the development of international environmental law because, for all its faults, it probably remains the most important decision in which environmental law principles and concepts have genuinely influenced the final orders. In this respect the reference by the court to sustainable development is perhaps the most significant, especially given the status the concept has obtained in international environmental law. While in some respects the court's discussion of sustainable development raises more questions than it answers, the apparent acceptance by the court of the role that this concept plays in balancing environment and development issues may well prove to be a turning point in its legitimacy in international law. References to the precautionary principle and EIA, though helpful, are not as positive as they could have been under the circumstances. Other aspects such as environmental monitoring and the importance of scientific knowledge in managing environmental issues,[173] were virtually ignored by the court.

The separate opinion of Judge Weeramantry is, compared to the judgment of the rest of the court, a breath of fresh air. He almost exclusively concentrates on the international environmental law issues before the court, and thus gives a small hint as to the possible thinking of the majority judges. Judge Weeramantry's comments on sustainable development, in particular, will most likely become some of the most frequently quoted paragraphs from the *Danube Dam Case*. His opinion is a development of the views he has expressed in previous ICJ judgments.

International environmental law remains in a period of considerable development, notwithstanding the reflections that have taken place since UNCED. In particular, treaty law and customary international law are increasing in importance as states learn to appreciate the need to consider their international obligations more carefully. These are the elements which are driving the development and consolidation of international environmental law. The ICJ, while an important agent in the development of international law, is only formally recognised as being a subsidiary source even under its own statute. The *Danube Dam Case*

[172] *Convention on the Law of the Non-Navigational Uses of International Watercourses*, above n 8; see Bourne, above n 114.

[173] Stephen Stec and Gabriel Eckstein, 'Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabčíkovo-Nagymaros Project' (1997) 8 *Yearbook of International Environmental Law* 41, 46

tends to confirm the view that rather than being a leader in the development of international environmental law, as indeed the court has been in other areas of international law, the court will be more of a commentator with only the occasional separate or even dissenting opinion having the potential to have a major impact on the development of the law.