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DO TWO WRONGS MAKE A RIGHT? ADJUDICATING SUSTAINABLE DEVELOPMENT IN THE DANUBE DAM CASE

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The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[1]

I. INTRODUCTION

Principle 7 of the Rio Declaration talks of "common but differentiated responsibilities" for the future course of global sustainable development:

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1. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 241-242, para. 29, *cited in* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162, 185 (1998).

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[2]

The adoption of this principle at the United Nations Conference on Environment and Development (UNCED) in 1992 produced acrimonious and bipolar debate that divided developed from developing countries.[3] Whereas special reference was made to economies in transition[4] in Agenda 21,[5] this general expression of concern did little to resolve the question of Central and Eastern Europe's position with respect to its common but differentiated responsibilities, and the relationship of economies in transition to the dichotomy between developed and developing countries.[6] Yet, the very process of restructur-

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2. U.N. Conf. on Env't and Dev., princ. 7, U.N. Doc. A/CONF.151/5/Rev. 1 (1992), *reprinted in* 31 I.L.M. 876, 877 (1992) [hereinafter Rio Declaration].

3. *See* Ileana M. Porras, *The Rio Declaration: A New Basis for International Cooperation, in* GREENING INTERNATIONAL LAW 20, 28 (Philippe Sands ed., 1993). Porras, who attended some of the negotiations, noted that Russia somewhat uneasily joined the developed nations camp, which came to be known as the "OECD and Russia Group." *Id.* at 23 n. 10. *See also* Aaron Schwabach, *Diverting the Danube: The Gabcikovo-Nagymaros Dispute and International Freshwater Law*, 14 BERKELEY J. INT'L L. 290, 333 (1996) ("[M]ore than any of its predecessors, the Rio Declaration takes into account and expresses the needs of developing nations.").

4. "Economies in transition" and "countries in transition" are terms applied to the nations of Central and Eastern Europe and Eurasia making up the former Communist Bloc.

5. Paragraph 1.5 of Agenda 21 states:

> [I]n the implementation of the relevant program areas identified in Agenda 21, special attention should be given to the particular circumstances facing the economies in transition. It must also be recognized that these countries are facing unprecedented challenges in transforming their economies, in some cases in the midst of considerable social and political tension.

U.N DEPT. OF PUB. INFO., *Agenda 21: Programme of Action for Sustainable Development, in* AGENDA 21: THE UNITED NATIONS PROGRAMME OF ACTION FROM RIO 13, 15 (1992).

6. The countries of Central and Eastern Europe are developed in the sense of impact on the global environment and in technology. The collapse of an economic system has rendered them less developed in the sense of the ability to bring financial resources

ing may lead to forms of assistance to the global partnership called for in Principle 7 that do not depend upon material wealth. Because of the obvious unsustainability of the previous developmental paradigm, the manner in which Central and Eastern European countries discharge their responsibilities ought to be uniquely informed. One form of assistance, therefore, may be in the progressive development of environmental law.

Against this backdrop it is perhaps significant that the first occasion on which the International Court of Justice (ICJ) considered the principle of sustainable development[7] arose out of Central and Eastern Europe, the case concerning the Gabcikovo-Nagymaros Project between Hungary and Slovakia.[8] Expectations were high[9] that the case represented an opportunity for the ICJ to strike a new balance between international environmental law, in particular the law of sustainable development with respect to an international watercourse, and the law of treaties. What better scenario to give some definition to the notion of sustainable development than a case concerning a "gigomaniacal"[10] scheme with its roots in the discredited and

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to bear and in terms of the implied flow of assistance from the developed to the developing world. From a viewpoint of common but differentiated responsibilities, Central and Eastern Europe certainly bears a good measure of responsibility for overall global environmental degradation, but is ill-equipped to provide financial solutions.

7. *See* Gabcikovo -Nagymaros Project (Hung. v. Slovk.) 37 I.L.M. 162 (1998) (V.P. Weeramantry, separate opinion) [hereinafter *Weeramantry*].

8. Gabcikovo -Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162 [hereinafter *Judgment*]. Considering its genesis in political changes in Central and Eastern Europe, the dispute is linked to issues other than environmental ones. *See* Paul R. Williams, *International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary Concerning Construction of the Gabcikovo and Nagymaros Dams*, 19 COL. J. ENV. LAW 1, 3 (1994) (mentioning minority rights, inviolability of international borders, and the "lingering power of the communist apparatus"). *See also* discussion *infra* notes 80-106.

9. *See, e.g.*, Schwabach, *supra* note 3, at 341 (noting that the decision of the International Court of Justice in the Gabcikovo-Nagymaros dispute should provide a "much-needed and long-awaited clarification" of the customary international law regarding the non-navigational use of international freshwater resources). *See also* Gabriel Eckstein, *Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute over Gabcikovo-Nagymaros*, 19 SUFFOLK TRANSNAT'L L. REV. 67, 114 (1995) (noting that the case "presents an opportunity for the development of international water law and for the application of an integrated approach to the management and protection of shared water resources").

10 In the words of Vaclav Havel, *see Czechoslovak President on Security Cooperation and Nagymaros Barrage*, BBC SUMMARY OF WORLD BROADCASTS, Feb. 18,

inherently unsustainable form of development known as scientific socialism?

The dispute between Hungary and Slovakia over the construction of a system of barrages on the Danube presented an extraordinarily complex set of facts of a technical nature, especially with respect to the assessment of the potential environmental impacts of the project. The case presented an opportunity for the consideration of the extent to which environmental concerns could justify the substantial reformation or termination of a treaty-based regime. In so doing the ICJ could give shape to developing concepts such as sustainable development and the precautionary principle. As the dispute involved the unilateral diversion of the Danube by Czechoslovakia,[11] the Court had the opportunity to elaborate on the development of international law concerning shared natural resources, in particular pertaining to the equitable and reasonable use of a transboundary watercourse, recently clarified through the

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1991, Pt. 2, Eastern Europe; A. International Affairs; 2 USSR—Eastern European Relations; EE/0999/A2/1. *See Judgment, supra* note 8, at 182, para. 38. Compare the statement of Janos Martonyi, State Secretary of the Hungarian Foreign Ministry, *quoted in* Judith Ingram, *Slovaks Pushing Danube Project*, N.Y. TIMES, Oct. 25, 1992, 1 at 13, *in* Williams, *supra* note 8, at 3 ("[F]or us, [the Gabcikovo] power station is a manifestation of voluntarist gigantomania and disdain for public opinion and science. In Slovakia, however, this power station stands for new national independence, national pride and Slovak strength, will, decisiveness and creativity.") *Compare* the description of Mikulas Huba, former Chairman of the Committee on Environmental Protection of the Slovakian Parliament, of the application of "foreign, i.e., Soviet models and methods" to the Slovakian environment, including "unnecessarily megalomaniac plants." Mikulas Huba, *Slovak Republic, in* THE ENVIRONMENTAL CHALLENGE FOR CENTRAL EUROPEAN ECONOMIES IN TRANSITION 230 (Jurg Klarer & Bedich Moldan eds., 1997). Huba describes the Gabcikovo-Nagymaros Project dispute as a conflict between two camps, members of which can be found on both sides of the border—the old fashioned technocratic approach to nature, and preservation of natural and cultural values and sustainable development. *Id.* at 233. *See also* Boldizsar Nagy, *The Danube Dispute: Conflicting Paradigms*, ISTER (November 1992), *cited in* Judit Galambos, *An International Environmental Conflict on the Danube: The Gabcikovo-Nagymaros Dams, in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE 176, 221 n.27 (A. Vari & P. Tamas eds., 1993) [hereinafter Galambos I]) (describing the conflict as one between two paradigms, in similar terms).

11. Following the 1989 transformations, the Czechoslovak Socialist Republic became the Czech and Slovak Federal Republic, then in the "velvet divorce" split into two independent countries on Jan. 1 1993. For simplicity's sake, both the Czechoslovak Socialist Republic and the Czech and Slovak Federal Republic are generally referred to as Czechoslovakia herein. In the ICJ case, Slovakia was found to have succeeded to Czechoslovakia's rights and obligations.

United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses.[12] The Court had the opportunity to balance two interests—each of which involved an intrusion upon sovereignty—first, the interest in enforceable rules of conduct guiding relations among nations and, second, the interest in protecting the common heritage of mankind against ill-conceived development.[13]

II. SUSTAINABLE DEVELOPMENT AS A PRINCIPLE OF INTERNATIONAL LAW

The construct of "sustainable development"[14] is an attempt to embody a set of values, in which better account is taken of previously uncaptured environmental impacts arising from traditional forms of development.[15] In general, it refers to an approach towards economic development, taking the environment into account, that meets the needs of the present generation without depriving future generations of the ability to meet their own needs.[16] Thus, it requires the integration of envi-

12. 36 I.L.M. 700 (1997) [hereinafter Non-Navigational Uses Convention].

13. *See* Stephen Stec & Gabriel E. Eckstein, *Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabcikovo-Nagymaros Project*, 8 Y.B. INT'L. ENV'T. L. 41, 42 (1998).

14. There is no single formulation for the definition of sustainable development. The term appeared in an early conspicuous form in the work of the Experts Group on Environmental Law of the World Commission on Environment and Development ("Brundtland Commission"). BRUNDTLAND COMM'N, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS (1986). Although the term was not used specifically in the 1984 mandate for the Brundtland Commission, an even earlier use can be found in IUCN/UNEP/WWF, WORLD CONSERVATION STRATEGY: LIVING RESOURCE CONSERVATION FOR SUSTAINABLE DEVELOPMENT (1980). Precursors to the concept can be seen in the Founex meeting of experts in Switzerland in June 1971, *see* SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW 143 (Winfried Lang ed., 1971), and the conference on environment and development in Canberra in the same year, and U.N. General Assembly Resolution 2849 (XXVI). *See Weeramantry*, 37 I.L.M. at 206.

15. The failure of traditional forms of development to take into account environmental costs – externalities – was legendarily put forward in G. Hardin, *The Tragedy of the Commons*, SCIENCE 162, 1243 (1968). One commentator argues that the failure to internalize externalities is a cause of the divergence of individual and national economics. Christian Leipert, *Grundfragen einer okologisch ausgerichteten Wirtschafts- und Umweltpolitik*, AUS POLITIK & ZEITGESCHICHTE B 27/88, 29-37 (1988) (supplement to *Das Parlament*), *cited in* HARALD HOHMANN, PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW 4 n.22 (1994).

16. *See* Rio Declaration, *supra* note 2, princ. 3. Principle 3 states "[t]he right to development must be fulfilled so as to equitably meet developmental and environ-

ronmental and development policies.[17] The concept, which originally focused on stable local resource bases,[18] has steadily grown in scope and significance.[19]

Sustainable development has rapidly received currency and acceptance by representatives of a wide range of interests. This is because it is sufficiently vague and flexible to be used for many purposes. The attractiveness of "sustainable development" as a concept does not depend upon a strict definition.[20] Its vagueness is in fact one of its most useful attributes, as it merely establishes an ill-defined goal while admitting that the

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mental needs of present and future generations." *Compare* Stockholm Declaration on the Human Environment, UN Doc. A/CONF.48/14/Rev.1 (UN Pub. E.73, IIA.14) princ. 13 (1973).

17. Rio Declaration, *supra* note 2, princs. 2, 4.

18. The Brundtland Commission in OUR COMMON FUTURE preferred to focus on particular resource bases and defined sustainable use or development as a use which maintains and enhances renewable natural resource bases without compromising the ability of future generations to meet their own needs from the same resource base. HOHMANN, *supra* note 15, at 2 traces the concept of sustainable development to the late eighteenth century "sustaining principle" developed with respect to forestry. This principle, applicable only to renewable resources, required resource functions to be sustainable indefinitely, spanning generations, and depended upon active management. The same principle is evidently at work in the examples from all over the world pointed out by Weeramantry, *infra* note 172, some of them reaching back millennia into the past. Note, however, that no concepts of sustainability have sufficiently taken non-renewable resources into account.

19. The United Nations Council on Sustainable Development held its first meeting in 1993. A significant parrallel initiative consists of the National Councils for Sustainable Development organized by the Earth Council, based in San Jose, Costa Rica, and chaired by Maurice Strong. President Bill Clinton established the President's Council on Sustainable Development by Executive Order No. 12852 on June 19, 1993. Organizations such as the World Business Councils for Sustainable Development, the Asia Pacific Sustainable Development Center, the Sustainable Development Institute, and the Sustainable Development Research Institute have sprung up in the last decade. An internet search for the term "sustainable development" done on March 7, 1999 resulted in 70,400 hits, some of which are contained on a "Sustainability Web Ring."

20. In fact, there is already some evidence that it may be an interim or temporary formulation that will be supplanted by a more precise term. Compare the term "sustainable society." *See, e.g.*, WORLDWATCH INSTITUTE, BUILDING A SUSTAINABLE SOCIETY (1981). *Cf.* Marc Pallemaerts, *International Environmental Law from Stockholm to Rio: Back to the Future? in* GREENING INTERNATIONAL LAW, *supra* note 3, at 13-16 (arguing that a shift in terminology from "sustainable development" to "sustainable growth" indicates a restoration of the "mythology of economic growth"). *See also* ENVIRONMENTALLY SUSTAINABLE ECONOMIC DEVELOPMENT: BUILDING ON BRUNDTLAND (R. Goodland et al. eds., 1991). The term "sustainable development" may be an oxymoron and raises many more questions than it answers. It begs the question whether in fact development as understood in terms of the present paradigm of economic growth can ever be sustainable.

means of reaching it are not only unclear, but may also involve enormous costs.[21] The intensifying social debate over sustainable development and environmental protection generally has helped to promote a shift towards longer-term thinking in economics and other fields. As a great unknown, it may set the stage for major developments in thinking and new approaches to problem-solving.[22]

It is settled that sustainable development seeks to integrate environment and development.[23] One view of the path followed by international environmental law holds that in any confrontation between environment and development, development naturally prevails.[24] According to this view, the international law of sustainable development represents an absorption of environmental law into the law of development.[25] Increasingly, however, the notion that international environmental law or the international law of sustainable development has special characteristics that may have application in other areas of domestic and international law is being recognized.[26] A main ex-

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21. As a result, the struggle between developed and developing blocs, evident at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, to give shape to the concept of sustainable development according to various interpretations can be expected to sharpen. The fact that many writers point out that sustainable development is universally accepted indicates that the various interests are clamoring over ownership of the term. *See, e.g., Weeramantry*, 37 I.L.M. at 207 ("[T]he concept of sustainable development is thus a principle accepted *not merely by the developing countries*, but one which rests on a basis of worldwide acceptance") (emphasis added).

22. *See* HOHMANN, *supra* note 15, at 4 n.24 (stating that economists have discussed the social costs of pollution since the 1980s, but today these costs are still not widely recognized).

23. *See* Rio Declaration, *supra* note 2. The Preamble to the Rio Declaration refers to "the integrity of the global environmental and developmental system." *Id.* Principle 2 repeats the formulation of Principle 21 of the Stockholm Declaration, while adding the words "and developmental" between "environmental" and "policies." *Id.* Principle 4 states: "[I]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." *Id.* at 877. Principle 25 provides: "[P]eace, development and environmental protection are interdependent and indivisible." *Id.* at 880.

24. *See* Pallemaerts, *supra* note 20.

25. *See id.*

26. *See, e.g.*, Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 125-128 (1992) (stating that international environmental law has special characteristics, so that traditional rules of state responsibility are insufficient). *See also* HOHMANN, *supra* note 15, at 335 n.12.

ample is the precautionary principle, developed out of the need to reach beyond traditional liability notions.[27]

The extension of the precautionary principle from a German administrative norm,[28] to one of the most fundamental emerging norms of international environmental law[29] is an example of the link between domestic and international law in the field of the environment. The importance of linking international and domestic environmental law has been explained through the theory on compatibility of international and national environmental law.[30] This theory brings attention to the interdependence of international and national environmental law and the need for integration. According to this theory, international and national environmental law are inherently linked. International law in the field of environmental protection often arises out of the need to recognize common progressive developments in domestic legal systems, or to address particular

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27. *See* HOHMANN, *supra* note 15. Although Hohmann describes the exact contours of the precautionary principle as being unclear, he lists certain obligations that are indisputably recognized as being a part of the precautionary principle, including obligations for minimization of conceivable causes of environmental damage according to accepted standards; obligations for avoidance of production of wastes and of the transporting of hazardous substances; obligations for the recycling of waste; the principle of preservation of the environmental status quo; the need for continuous consideration of environmental concerns during planning and decision-making; proactive environmental management; efficient use of natural resources, and restrictions on marketing of hazardous substances. *See id.* at 10-11. A corollary of the precautionary principle is the rule that positivistic solutions prove to be disastrous because of the inability to predict all the consequences of a particular decision. A proper respect for uncertainty leads one to tread softly on unknown territory—otherwise damage is sure to result. *See generally* Daniel Bodansky, *Scientific Uncertainty and the Precautionary Principle*, 33 ENV'T 4 (1991).

28. The precautionary principle in international law has its origins in the *Vorsorgeprinzip* of German law.

29. *See, e.g.*, HOHMANN, *supra* note 15, at 333-34; David Freestone & Ellen Hey, *Origins and Development of the Precautionary Principle*, *in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 4 n.13 (Freestone & Hey eds., 1996), and sources cited therein. This principle is a general principle of administrative law found in many continental legal systems. It entered into the international arena through regional agreements on the North Sea. *See The North Sea: Perspecitive on Regional Environmental Cooperation*, 5 INT'L J. ESTUARINE & COASTAL L. (David Freestone & Ton Ijlstra eds., 1990) (special issue). While the precautionary principle may have come into international law in this way, Weeramantry persuasively argues that the same principle may be found in indigenous civilizations around the world, *infra* note 172 and accompanying text.

30. *See* JONAS EBBESSON, COMPATIBILITY OF INTERNATIONAL AND NATIONAL ENVIRONMENTAL LAW (1996).

international concerns through analogy to domestic situations. Meanwhile, international legal developments require transposition of their principles into domestic legislation, or under some legal systems are directly applicable and compose a part of the corpus of national law. Insofar as environmental protection challenges are global or at least transboundary in scope, the traditional structural impediment of sovereignty is particularly anachronistic in relation to environmental law.[31] Consequently the distinction between international and national environmental law ought to become progressively blurred.[32] This adds another dimension of integration to the Rio Declaration's call for integration of environmental protection with development.

Environmental law has a role to play in the development of domestic law and practice, especially in the contexts of human rights, sustainable development, and intergenerational equity. Courts around the world are responding to a growing number of cases with difficult and sometimes innovative decisions. But environmental law also has played a significant role in more general and theoretical international law concepts such as state responsibility.[33] It has been said that "[i]nternational environmental law is one of the most energetic fields of international law. It appears that its contribution to international law will continue."[34] Thus, rather than *absorption* of environmental law into development law, the path of the development of environmental law is one of the *adsorption* of environmental law

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31. *See id.* at 48-62. Ebbesson discusses monist and dualist theories of the relationship between international and national law, and concludes that any distinctions between the two are artificial ones arising out of the conceptual basis of sovereignty. *Id.*

32. Consequently any "setbacks" in the international arena ought to be considered in the light of the growth of the unity of international and national environmental law. The "Rio Reaction" may be seen therefore as an anachronistic assertion of sovereignty that will be overcome by events.

33. *See* Malgosia Fitzmaurice, *The Contribution of Environmental Law to the Development of Modern International Law, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 909, 925 (Jerzy Makarczyk ed., 1996). Fitzmaurice alludes to the lockstep development of international and national environmental law when discussing the extent to which theoretical concepts have entered practice.

34. *Id.*

principles onto other fields of law.[35] The integration of international and national environmental law indicates that environmental law will be a vehicle for progressive development of both international and domestic law. Environmental law reform is at once an expression as well as a vehicle for sustainable development.

III. POTENTIAL FOR THE PROGRESSIVE DEVELOPMENT OF THE LAW OF SUSTAINABLE DEVELOPMENT IN CENTRAL AND EASTERN EUROPE

A. ENVIRONMENTAL DEGRADATION

The environmental legacy of the communist economic system is well-documented.[36] Although Chernobyl is the most highly evident single manifestation of the Soviet Union's environmentally damaging policies, it represents only the tip of the iceberg. Decades of scientific socialism left large parts of the former Communist Bloc in a state of severe environmental degradation,[37] with a resultant devastating impact on nature.[38]

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35. Although in a different context, *see* Vladimir Pastukhov, *The End of Postcommunism: Perspectives on Russian Reformers*, 7 E. EUR. CONST. REV. 64, 64-70 (Summer 1998) (pointing to "absorption" of new institutions into state structures).

36. *See, e.g.*, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, AN ASSESSMENT OF THE ENVIRONMENTAL AND ECONOMIC SITUATION IN COUNTRIES IN TRANSITION (Geneva, 1995). Several shocking compilations of the extent of environmental degradation in the Soviet Union and Central and Eastern Europe have been made. *See, e.g.*, MURRAY FESHBACH & ALFRED FRIENDLY, JR., ECOCIDE IN THE USSR: HEALTH AND NATURE UNDER SIEGE (1992); RUBEN MNATSAKANIAN, ENVIRONMENTAL LEGACY OF THE FORMER SOVIET REPUBLICS (1992); JOAN DEBARDELEN, TO BREATHE FREE: EASTERN EUROPE'S ENVIRONMENTAL CRISIS (1991); ENVIRONMENTAL SECURITY AND QUALITY AFTER COMMUNISM (JOAN DEBARDELEN & JOHN HANNIGAN eds., 1995); BO LIBERT, ENVIRONMENTAL HERITAGE OF SOVIET AGRICULTURE (OECD, 1995); D. J. PETERSON, TROUBLED LANDS: THE LEGACY OF SOVIET ENVIRONMENTAL DESTRUCTION (1993); Hilary F. French, *Green Revolutions: Environmental Reconstruction in Eastern Europe and the Soviet Union*, WORLDWATCH INSTITUTE (Series No. 99 Nov. 1990).

37. Depending on the local circumstances, the huge physical transformation of the environment undertaken in two or three generations highly degraded the air (in Prague, for example, average concentrations of sulfur dioxide were double the World Health Organization standard, with 24 hour events of 60 times the WHO standard, *see* Richard N. L. Andrews, *Environmental Policy in the Czech and Slovak Republic, in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE, *supra* note 10, at 12), water (seventy percent of the surface waters in Czechoslovakia were considered to be heavily polluted in 1992, and 30% were biologically dead; heavy metal concentrations in drinking water exceeded standards in 123

Many health problems compounded by breakdowns in social services and economic security in Central and Eastern Europe could be traced to environmental degradation.[39] Prior to the fall of the Soviet Union, Soviet scholars estimated the costs of environmental damage in 1990 as 15 to 17 percent of GNP.[40] This figure, which did not include time lost as a result of environmentally-related illnesses, was 11 to 15 times higher than the budgetary amount allocated to environmental protection.[41]

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towns serving half a million people, *see id.* at 13) and soil (in Belarus, for example, 264,000 hectares of arable land lay fallow because of environmental contamination, and in 65% of the whole territory of the country the "ecological volume" was exhausted completely or overloaded, *see* PROPOSALS OF STATE COMMITTEE FOR ECONOMY AND PLANNING AND STATE COMMITTEE FOR THE ENVIRONMENT ON FOREIGN INVESTMENTS IN THE FIELD OF ENVIRONMENTAL PROTECTION (Belarus 1992)). The situation is most easily seen in deep pockets of industrial development which are among the most polluted places on earth. Such places include Silesia, Northern Bohemia, Zhaporizhzhye, Copsa Mica, the Donbass, Norilsk, and the Aral Sea. Outside these heavily polluted areas, however, ambient pollution levels are also high. "[T]he density of pollution per one square kilometre in the Ukraine is more than six and a half times higher than in the United States and more than 3.2 times higher than in the EC Member States." Y. Shemshuchenko, *Human Rights in the Field of Environmental Protection in the Draft of the New Constitution of the Ukraine*, *in* ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE 38 (S. Diemann & B. Dyssli eds., 1996). *See generally* EUROPE'S ENVIRONMENT: THE DOBRIS ASSESSMENT (David Stanners & Philippe Bourdeau eds., 1995).

38. In Czechoslovakia in the 1980s, for example, 50 to 90 species were considered endangered, "far more than in most other countries." Over 70% of the forests were damaged. Andrews, *supra* note 37, at 13.

39. *See* UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN SETTLEMENTS UNDER TRANSITION: THE CASE OF EASTERN EUROPE & THE CIS 85-86 (1996) [hereinafter SETTLEMENTS REPORT]. The report specifically mentions high levels of lead leading to brain damage and learning disabilities in the Czech Republic, infertility among Latvian men linked to the Chernobyl cleanup, leukemia and brain tumors in Lithuanian children, low birth weights in the Russian Federation linked to toxic waste, pesticides and radiation. Other studies point to impacts on human health (the incidence of respiratory diseases was high in Czechoslovakia, and allergies in children increased ten-fold during the 1980s, Andrews, *supra* note 37, at 12), life expectancy (life expectancy in Ukraine declined by 5 years for women and 10 years for men in the 1980s, *see* Pamela Bickford Sak, *Environmental Law in Ukraine: From the Roots to the Bud*, 11 UCLA J. ENVTL. L. REV. 203, 212-13 (1993); life expectancy in Czechoslovakia was 3 to 6 years behind its Western neighbors in the late 1980s, see Andrews, *supra* note 37, at 12), and infant mortality.

40. *See Izvestiya Akademii nauk SSSR, Seriya ekonomicheskaya* 3, 22-30 (May-June 1990); *see also JPRS-TEN-90-009*, 2 August 1990, at 21-27, *cited in* ECOCIDE IN THE USSR: HEALTH AND NATURE UNDER SIEGE, *supra* note 36, at 254.

41. *See Izvestiya Akademii nauk SSSR, Seriya ekonomicheskaya* 3, 22-30 (May-June 1990); *see also JPRS-TEN-90-009*, 2 August 1990, at 21-27, *cited in* ECOCIDE IN THE USSR: HEALTH AND NATURE UNDER SIEGE, *supra* note 36, at 254.

Nor have matters changed significantly in large parts of the former Eastern Bloc.[42]

Environmental degradation contributed to a high level of environmental awareness. Sociological studies undertaken in the latter years of Communism found that environmental protection and nature were among the highest concerns of average citizens.[43] In the euphoric aftermath of the revolutions it was generally considered to be the highest priority of new governments, at least for a time.[44] A 1990 survey in the USSR found that environmental issues were at the center of public concerns, even though economic issues had become most

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42. For more recent information on the environment in Central Europe specifically, see THE ENVIRONMENTAL CHALLENGE FOR CENTRAL EUROPEAN ECONOMIES IN TRANSITION, *supra* note 10. SOx emissions per unit of GDP in East Central Europe were still approximately ten times as high as in Western Europe in 1993 (according to 1996 World Bank, *id.* at 10, tbl. 1.3). Figures for NOx and CO_2 emissions per unit of GDP were double Western European levels, according to the same study. In the field of environmental protection, fiscal crises in Central and Eastern Europe have resulted in a sharp drop in the official attention given to the environment. The funds allocated to environmental programs in Ukraine, for example, dropped between 1988 and 1993 from more than 1 percent of GNP to only 0.2 percent. Shemshuchenko, *supra* note 37, at 38. *Accord*, S. Kravchenko, *Environmental Legislation and Enforcement in Ukraine, in* A WORLD SURVEY OF ENVIRONMENTAL LAW 438 (S. Nespor ed., 1996) (special issue of RIVISTA GIURIDICA DELL'AMBIENTE) (noting that some countries outside the region spend up to 5 percent of GNP on environmental protection). Furthermore, between 1986 and 1996 the number of cases in which criminal charges were brought for environmental offenses in Ukraine dropped by three-fourths. *See* Shemshuchenko, *supra* note 37, at 38. This figure must be seen in the light of the re-characterization of many types of "crimes against the state" as civil matters, however. *See* S. Stec, *Manual on Public Participation, in* ENVIRONMENTAL DECISIONMAKING: CURRENT PRACTICE AND FUTURE POSSIBILITIES IN CENTRAL AND EASTERN EUROPE (BALTIC SUPPLEMENT) 17 (1995).

43. *See, e.g.*, Boris Z. Doktorov et al., *Ecological Consciouness in the USSR: Entering the 1990s, in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE., *supra* note 10, at 249-67; ZSUZSA LEHOCZKI & VICTORIA SZIRMAI, MINISTRY FOR ENVTL PROTECTION & WATER MGMT, KORNYEZETALLAPOT ES ERDEKVISZONYOK AJKAN (1988), *cited in* Zsuzsa Lehoczki & Zsuzsanna Balogh, *Hungary, in* THE ENVIRONMENTAL CHALLENGE FOR CENTRAL EUROPEAN ECONOMIES IN TRANSITION, *supra* note 10, at 163. *See also* FESHBACH & FRIENDLY, *supra* note 36.

44. In the first opinion poll taken in the Czech Republic after the Velvet Revolution, in January 1990, more than 80% of Czech citizens surveyed declared that the environment should be the top priority of the new government, ahead of economic issues. *See* Bedich Moldan, *Czech Republic, in* THE ENVIRONMENTAL CHALLENGE FOR CENTRAL EUROPEAN ECONOMIES IN TRANSITION, *supra* note 10, at 118. In early 1990 the poor state of the environment was the number one priority of the public, according to opinion polls in Slovakia. *See* Huba, *supra* note 10, at 257.

pressing.[45] More recent studies show that environmental issues continue to enjoy a high level of passive support.[46]

B. GREEN REVOLUTIONS, 1986—1991

Environmental issues were historically significant in the political transformations in Central and Eastern Europe.[47] The extent of environmental degradation in the region was ever increasing and the concomitant impacts on human health and well-being ever more evident. In the late 1980s the people of Central and Eastern Europe were confronted with a series of events that confirmed the ultimate unsustainability of the system of social and economic development they were living under.[48] While some have stated that the environment provided a politically uncontroversial set of social issues for dissidence to adhere to,[49] this is not entirely true. A closer look reveals a situation in which hard-liners were immovable, but a good many more reasonable authorities were willing to engage

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45. *See* Boris Z. Doktorov et al., *Ecological Consciousness in the USSR: Entering the 1990s, in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE., *supra* note 10, at 250. This study also found these values to be held widely across divisions in society. A difference could be seen among "materialist" and "post-materialist" values primarily based upon generational shift, indicating that changes of behavior to protect the environment would not come until the generational change had come into effect. *Id.*

46. A 1995 public opinion survey conducted in the Russian Federation found a high level of support for environmental protection. *See* OPEN SOCIETY INSTITUTE, PROTECTING EURASIA'S DISPOSSESSED 48 (1996). The assistance organization Charities Aid surveyed 1007 people in Moscow and the surrounding region on public attitudes towards charity and donation and found that, in principle, people gave most support to protection of animals, people with disabilities, the elderly, and the environment. *Id.* at 49. A survey on environmental awareness conducted by the European Commission in 1996 also found a deeply held concern for the environment. This report was a confidential document as of the end of 1997.

47. *See generally* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE, *supra* note 10; DANIEL H. COLE, INSTITUTING ENVIRONMENTAL PROTECTION: FROM RED TO GREEN IN POLAND (1998); BARBARA HICKS, ENVIRONMENTAL POLITICS IN POLAND: A SOCIAL MOVEMENT BETWEEN REGIME AND OPPOSITION (1996); BERND BAUMGARTL, TRANSITION AND SUSTAINABILITY: ACTORS AND INTERESTS IN EASTERN EUROPEAN ENVIRONMENTAL POLICIES (1997) [hereinafter BAUMGARTL I].

48. *See infra* notes 71-73 and accompanying text.

49. *See* French, *supra* note 36 (The region's communist governments initially perceived the movement as relatively benign.); F. J. M. FELDBRUGGE, RUSSIAN LAW: THE END OF THE SOVIET SYSTEM AND THE ROLE OF LAW 295 (1993) (referring to environmental issues as "comparatively harmless politically").

in a debate about the future of the Party,[50] a debate which opened further as environmental movements became popularized.

Under the legal administrative structure of the prior socialist regimes, the "unspecialized" public occupied a social space far from the centers of power. Within a particular segment of society, the upper echelons of the hierarchy resolved conflicts of opinion and presented the results to the central authorities. As a consequence, grassroots initiatives had great difficulty organizing into a movement and gaining access to lines of communication and other structures rigidly controlled by the bureaucracy. Nevertheless, in this century, the environmentalist movement in Central and Eastern Europe struggled within and against authoritarian structures, initially for recognition, and eventually in opposition.

Many signs point to the Chernobyl disaster[51] as a turning point in the history of scientific socialism. After Chernobyl, marginal groups of intellectuals and environmentalists who

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50. In fact, there is evidence that before Chernobyl, authorities took great pains to suppress environmentally-based dissent as well as other forms; there was very little room for toleration of "independent" activity of any kind. French, herself, mentions the imprisonment of a Czech scientist for writing letters and a parody criticizing the environmental situation, and the confiscation in November 1987 of literature and a printing press from an environmental library set up by the Lutheran Church in East Berlin. French, *supra* note 36, at 32. In 1987 in Bulgaria, Communist Party members who tried to form an officially registered environmentalist organization with the intention of starting a dialogue within the Party were expelled from the Party and harassed, and their activities were banned. Moreover, the degree of toleration of Eastern European regimes in the late 1980s varied, from the relatively open Soviet and Hungarian regimes to the conservative and reactionary Czechoslovak, East German, and Romanian regimes. *See id.*

51. The accident involving the Chernobyl nuclear power station north of Kyiv which occurred in April 1986 has an estimated total impact in terms of excess deaths of up to 200,000 in the current generation (there are 400,000 official "victims of Chernobyl" in Ukraine alone), with untold billions in extra health care costs expected. The Chernobyl accident and its aftermath are described in harrowing detail in PIERS PAUL READ, ABLAZE: THE STORY OF THE HEROES AND VICTIMS OF CHERNOBYL (1993). *See also* GRIGORI MEDVEDEV, NO BREATHING ROOM: THE AFTERMATH OF CHERNOBYL (Evelyn Rossiter trans., 1993); GRIGORI MEDVEDEV, THE TRUTH ABOUT CHERNOBYL (Evelyn Rossiter trans., 1992). The cost of just the sarcophagus to stabilize the exploded reactor in the short-term is estimated at $3 billion. The amount necessary to redress the full impact of the catastrophe is beyond imagination. Early estimates ran as high as 250 billion Soviet rubles in 1990. *See* FESHBACH & FRIENDLY, *supra* note 36, at 257.

had trouble filling meeting rooms in 1983-84 suddenly found themselves in the spotlight, leading mass movements.[52] Activism exploded and it was this explosion which posed the greatest challenges to long-standing assumptions.[53] The public was righteously angry, and this anger served to focus the attention of the people on fundamental flaws in their economic and political system, wholly separate from historical ideological arguments that might earlier have been used to squelch dissent. After Chernobyl, *with full knowledge of the potential political outcome,* even the hard-liners had no personal moral choice but to accept the justifiable criticism of the public. Eventually recognition of social groups was offered, but by then forces had been unleashed that would bring governments down throughout the region.[54]

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52. "[E]arly efforts revolved around a small, elite group that was able to exert influence through back channels to those in power. In the words of Russian environmentalist Natalya Yourina, '[i]n the sixties, only individuals protested. A movement didn't exist.' This changed when the Chernobyl disaster in April 1986 combined with *glasnost* to give rise to a widespread movement encompassing diverse segments of society." French, *supra* note 36, at 30. *See also* Elizabeth Darby Junkin, *Green Cries from Red Square*, BUZZWORM (Mar.-Apr. 1990); Ann Sheehy & Sergei Voronitsyn, *Ecological Protest in the USSR, 1986-88, in* RADIO LIBERTY RESEARCH REPORT (May 11, 1988); ERIC GREEN, ECOLOGY AND PERESTROIKA: ENVIRONMENTAL PROTECTION IN THE SOVIET UNION (1990). *See also* Oleg Yanitsky, *Environmental Initiatives in Russia: East-West Comparisons, in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE, *supra* note 10, at 120, 131-32. Yanitsky clearly points out that the *very small first steps* towards civil environmental initiatives developed before 1986, clandestinely in an atmosphere of alienation, disillusion, and "psychological tension." *Id.*

53. "We are especially interested in the process of public participation which began to develop rapidly in Russian cities in the second half of the 1980s." Yanitsky, *supra* note 52, at 120.

54. The process of change in Eastern Europe leading to the revolutions of 1989-91 went through several distinct stages. Yanitsky, in discussing the environmental movement in Russia, divided recent times into two "macro-social contexts"—the context of stagnation (the 1970s and first half of the 1980s) and the context of rapid changes (the second half of the 1980s and the early 1990s). *Id.* In the immediate wake of Chernobyl, there was a release of pent-up social demands focusing on environmentalist expressions, in which dissident elements seized the opportunity of public fear and mistrust to push for greater openness and independence from the center. The authorities at this time retreated in the arena of environmental concerns, but held ground in other areas. In the second stage the authoritarian structures countered with an offer of reforms involving disclosure of information and the establishment of new state-sponsored organizations, while refusing to negotiate on the ultimate issue of power. Such measures were rejected by the bulk of society, which elected to pursue its goals underground, again in the nominal form of environmentalist movements. In the final stage, the state apparatus itself became polarized between conservatives and the dis-

Information played a key role. The environmentalist movement grew by making public, information that previously had circulated clandestinely.[55] In the wake of Chernobyl, the environmental movement was the main conduit for information to the public.[56] Once environmental information became public, the opposition used it as a delegitimizing tool against the government.[57] Thus, the environmentalist movement actually became an alternative, *reliable* source of information even for authorities,[58] contributing to its legitimacy and making it indispensable to the continued proper functioning of the state in the face of new and complex challenges. Moreover, in no field were the symptoms of the decline of monolithic decision-making and the rise of political pluralism more evident than in that of environmental protection.[59] Consequently, environmen-

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illusioned, who undermined the system in sympathy with the public, gradually differentiating into broad-based movements, until key defections on the international stage forced the capitulation of the conservatives. There were variations, country by country, in particular between states in which the Party was internally divided and states where a conservative regime held sway. There was also a particular distinction between the countries of East Central Europe, including the Baltic states, where demands for the creation of a civic sphere became popularized, and the rest of the Soviet Union and Southeastern Europe where they did not. Furthermore, the revolutions themselves took place in complex stages. The two major watersheds of course were the overthrow of communist regimes in the satellite states in 1989, and the dissolution of the Soviet Union and Yugoslavia in 1991. But in the various successor states and in the new, democratic regimes the political pendulums have swung to varying degrees.

55. *See, e.g.*, TOWN COMMITTEE OF BRATISLAVA, BRATISLAVA ALOUD (1987). BRATISLAVA ALOUD was an "environmental political" pamphlet issued by the Town Committee of Bratislava (SZOPK) in 1987. The tradition can be traced to a quintessential *samizdat* publication—an environmentalist tract circulated clandestinely in 1978 which was later published in the U.S. as BORIS KOMAROV, THE DESTRUCTION OF NATURE IN THE SOVIET UNION (1980).

56. By contrast, the first official government report on the environment in the Soviet Union was not issued until 1989. USSR STATE COMMITTEE FOR NATURE PROTECTION, REPORT ON THE STATE OF THE ENVIRONMENT IN THE USSR (1989).

57. *See* Stanley J. Kabala, *Environmental Affairs and the Emergence of Pluralism in Poland, in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE, *supra* note 10, at 62.

58. It was also a phenomenon of the time that the upper echelons of the Communist Party could no longer rely upon the information being passed up to them from below, because of the increasing dichotomy between ideal and reality and the pervading fear of admission of overwhelming failures. This had even occurred in the Chernobyl disaster, as Mikhail Gorbachev was initially sheltered by a chain of subordinates afraid to be the bearers of bad news. *See* READ, *supra* note 51.

59. In Poland, for example, it has been noted that the "communist-dominated polity was transformed by the emergence of a range of environmental interest groups that sprung up to parallel and challenge the country's governmental bodies and officially sanctioned organizations." Kabala, *supra* note 57, at 62. In Bulgaria, "environmental

talism was at the heart of the democratization movement in Central and Eastern Europe in the late 1980s.[60] The environmental movement had become a magnet for dissatisfied people of all stripes, as it offered one of the only legitimate means for expressing alternative views.[61] Throughout the 1980s, but especially after Chernobyl, the scope of what society considered to be legitimate subjects for the environmental movement broadened significantly. Increasingly the authorities were forced to take notice.

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concerns provided the common ground for antitotalitarian opposition." Kristalina Georgieva, *Environmental Policy in a Transition Economy: The Bulgarian Example*, *in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE, *supra* note 10, at 67. Recognition of environmental problems in Czechoslovakia penetrated more deeply from intellectual circles to the general public in the second half of the 1980s. *See* Huba, *supra* note 10, at 255. In Slovakia, "[m]ore than half of the first protagonists of the 'Velvet Revolution' ... were members of the environmental movement.... There was a certain equivalency attributed to environmentalism and revolution." *Id.* at 257.

60. "It was the environmentalist movement which signaled the coming changes in Bulgaria at the end of the eighties." Nikolai Genov, *Environmental Risks in a Society in Transition: Perceptions and Reactions*, *in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE, *supra* note 10, at 280. Moreover, in Bulgaria:

> After decades of totalitarian lethargy, [environmental issues] were the issues which brought to public attention the negative impacts of the so-called socialist industrialization and the enormous price paid for a one-sided industrial development.... This public reaction gave birth to the first dissident movements which in the late 1980s created the drive to overthrow the fossilized Communist structures all over Central and Eastern Europe. In the case of Bulgaria we may declare without reservation that environmental consciousness was at the springs of democratic consciousness.

Emil Minchev, *Introduction*, in BAUMGARTL I, *supra* note 47, at xiii.

As a result of the course of the events in Bulgaria, anyone who describes the history of the revolutionary transformation in Bulgaria typically relates all events to *Ekoglasnost*. In fact, following the 1989 revolution *Ekoglasnost* actually transformed into a political party with the greatest success of any such movement in the region. It maintained its ecological roots to a greater extent than many such umbrella movements as well, finally abandoning political party status, and was one of the last holdouts of the 1980s form of environmental dissident movements. The historical development of the environmentalist movement in Bulgaria during this period is recounted in detail in Bernd Baumgartl, *Environmental Protest as a Vehicle for Transition: The Case of Ekoglasnost in Bulgaria*, *in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE, *supra* note 10, at 162-70, and in BAUMGARTL I, *supra* note 47, at 50-75.

61. *See, e.g.*, Viktoria Szirmai, *The Structural Mechanisms of the Organization of Ecological-Social Movements in Hungary*, in ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE, *supra* note 10, at 152.

The second phase of the pre-revolutionary period was illustrated by concessions made by state power structures, which at the same time maintained a strict bottom line on power.[62] The Party tactic of trying to co-opt spontaneous formations was a phenomenon of the period 1987-88 in Central and Eastern Europe.[63] This process was encouraged by the sudden development of a constituency for environmental agencies within the state bureaucracies, which gave such agencies confidence in their dealings with the industrial interests, and in many cases led to their elevation to ministry-level status.[64] But, these attempts were coupled with a lack of basic compromise on civic space. As such they did not address the underlying problems of democratically uncontrolled bureaucratic management, pervasive corruption, lack of participation, and non-identification of the people with the state and its purposes. This was true because underlying the official response was the desire to inhibit spontaneous progressive impulses among the population.

But such state-sponsored structures did not prove flexible enough to embody the bulk of public agitation, as they were

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62. In Hungary, citizens who attempted to form an organization in opposition to the proposed siting of a low-level nuclear waste storage facility in the village of Ofalu were frustrated in their attempts to officially register their organization by administrative and political obstacles. Typically, authorities attempted to channel activism into official organizations. *See* J. Juhasz et al., *Environmental Conflict and Political Change: Public Perception on Low-Level Radioactive Waste Management in Hungary*, *in* ENVIRONMENT AND DEMOCRATIC TRANSITION: POLICIES AND POLITICS IN CENTRAL AND EASTERN EUROPE, *supra* note 10, at 232. The same tactic had been used in 1984 against the Danube Circle (Duna Kor) over the Gabcikovo-Nagymaros Project. *See infra* note 73 and accompanying text.

63. *See supra* note 50. Scientific socialist regimes developed a policy of "normalization" whereby "positive" elements of opposition would be co-opted into state structures in conjunction with crackdowns. *See* Jiri Valenta, *Revolutionary Change, Soviet Intervention and 'Normalization' in East-Central Europe*, 16 COMP. POL. 127-151 (January 1984). In the context of the environmental movement, this phenomenon has been called "official environmentalism," a policy which backfired in Poland. In Poland in 1987, in the face of the growth of the Polski Klub Ekologiczny (Polish Ecological Club) (PKE) following Chernobyl and its increasing independence from state control and influence, the Polish government took the step of establishing an official organization for environmental protection in order to try to co-opt the movement. This was the Ekologiczy Ruch Spoleczny, or Social Movement for Ecology (ERS). *See* HICKS, *supra* note 47, at 135-61 (1996) (providing an in-depth and compelling look at the dynamic interaction among ideology, environmental destruction, and civic opposition in the context of the Poland of the 1980s). With respect to Hungary, see Galambos I, *supra* note 10, at 204.

64. *See* Kabala, *supra* note 57, at 55.

still tempered by and beholden to the state, and increasingly grassroots environmental organizations were formed. The response to such tactics in most cases was for the targeted organization to go underground.[65] Meanwhile, formerly loyal institutions increasingly found the courage to stand up to authority.[66] Authorities were on the defensive. No one wanted to take responsibility for grossly unpopular decisions. On the contrary, environmentalists were appearing in state structures, leaking information to the public. "Official" publications about the extent of environmental degradation also came out.[67]

Regardless of whether it was a root cause, the rise of environmentalism in the Communist Bloc coincided with the fall of communist and socialist governments. During the period of intermittently chaotic transformation that has occurred since, the countries in transition have grappled with problems relating to the essential restructuring of society. Among the characteristics of this period are a break with tradition and an opening to outside concepts. Although the transformation is far from complete, the economic implications of the collapse of the Communist Bloc and the reorientation of its states can be measured to some degree in terms of real wages, unemployment, GDP, black economy, etc..[68] Such developments in an

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65. For example, in Bulgaria the efforts of the government to "legalize" the grassroots Committee for the Ecological Protection of the Town Ruse through its co-opting into the official Fatherland Front drove the organization underground. Most of its members soon resurfaced in Ekoglasnost. *See* BAUMGARTL I, *supra* note 47, at 57.

66. In the Ofalu case, the Hungarian Academy of Sciences played a pivotal role and through a subtle phrasing asserted its independence while reintroducing the notion of scientific relativism. In their ongoing dispute with the public about the siting of the nuclear waste storage facility, the authorities essentially were relying on the Academy of Sciences to close ranks and uphold their determination. The Academy could not offer a clear scientific determination against the siting, so it took public discontent into account in the only way it could—by issuing an ambiguous statement—["t]he site is not inappropriate"—thus sending the signal that this was a political matter and that the Academy refused to take sides, while at the same time giving substantial moral support to the facility's opponents. *See* Juhasz, *supra* note 62, at 233.

67. *E.g.*, ECOLOGICAL SECTION OF THE BIOLOGICAL SOCIETY OF THE CZECHOSLOVAK ACADEMY OF SCIENCES, THE STATE AND DEVELOPMENT OF THE ENVIRONMENT IN CZECHOSLOVAKIA (1989).

68. According to the United Nations, "[t]he difficult restructuring required by the transition to a market economy, which had been carried out during the period 1989-92, had in most countries proved to be extremely harsh, socially costly but fundamentally necessary. The resulting short-term falls in incomes, production, and welfare had been dramatic." UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEV. UNDER

TRANSITION: EUROPE & CIS 9 (May 1997). The U.N. Development Program has identified six major transformations occurring in Central and Eastern Europe that are determining the "potential for sustainability of human settlements in the region." *Id.* at 18. They include: a transformation of human settlement patterns including demographic changes; economic transformations that include breakdown of previous distribution systems, privatization, inflation, expansion of the shadow economy; the transformation of state-civil society relations from authoritarian to democratic modes of governance, with variation from state to state; continuing severe environmental degradation; excess demands on a deteriorating infrastructure; and transformations in social relations including divisions along ethnic lines, breakdown in the family, and increasing social stratification. According to the report, these transformations taken together have a dramatic impact on the well-being of the people living in the region. *Id.*

The impact of economic pressures can be shown by the following figures on trends in the UN Human Development Index (HDI) (an index which measures development by combining indicators of life expectancy, educational attainment and income). *See id.* HDI trends for all countries in Eastern Europe fell progressively in the period 1990 to 1996, except for Romania, which showed a slight recovery in 1996 to 1992 levels. In terms of global ranking, all countries in the region fell throughout the period 1990-95, with Bulgaria, Hungary and Romania showing slight improvements in 1996. In comparison to the countries of the world in 1996, all CIS countries were ranked below the last ranking for the Soviet Union, which was 31 in 1991.

HDI trends, 1990-96

Country	**1990**	**1996**
Albania	0.79	0.633
Belarus	0.92	0.787
Bulgaria	0.918	0.773
Czech Republic	0.92	0.872
Estonia	0.92	0.749
Hungary	0.915	0.855
Latvia	0.92	0.82
Lithuania	0.92	0.719
Moldova	0.92	0.663
Poland	0.91	0.819
Romania	0.762	0.738
Russian Fed	0.92	0.804
Slovak Republic	0.92	0.864
Ukraine	0.92	0.719

Among the noteworthy facts from the figures presented above is the fact that in 1996, 8 out of the 14 countries surveyed had HDIs lower than that of Albania in 1990.

A further gross indicator of the depth of transformation is the incidence of basic needs poverty in Eastern Europe. The figures for nearly all countries, with the exception of the few western-most states, increased dramatically in the period 1987 to 1994. The most dramatic increases have occurred in Moldova and Lithuania, in which basic needs poverty rose from 4% to 65% of the population, and from 1% to 49%, respectively. SETTLEMENTS REPORT, *supra* note 39, at 81, tbl. 7.1. Meanwhile, a fundamental restructuring of ownership and control of the means of production was taking place. Whereas virtually 100% of the Soviet economy was state-controlled as late as 1991, by 1995 more than 70% of the GDP of the Russian Federation was in private hands, comprising 20,000 enterprises and 100,000 small businesses. In the Czech Republic the figure was 65%, and in Estonia and Latvia it was 55%. *See* COMM'N ON SECURITY AND COOPERATION IN EUROPE, BRIEFING ON U.S. ASSISTANCE TO CENTRAL AND EASTERN EUROPE AND THE NIS: AN ASSESSMENT 5 (Washington DC, 17 Feb. 1995) (statement of

area which is an historical crossroads of civilizations[69] may have global implications.

Apart from the basic issue of stability, moreover, the implications of the "maldevelopment" under scientific socialism resonate for both the developing and the developed worlds and provide lessons towards the achievement of sustainable development. For the developing countries, it provides a clear picture of unsustainability. For the developed world, it sheds light on the impact of particular deficits on longer term processes. This universal relevancy invites an examination of the resolution of the interests underlying the complex changes in Central and Eastern Europe, as useful information that might contribute to a better understanding of sustainable development.

In most countries there existed some gigantic and potentially devastating central planning scheme that could be attacked on purely environmental grounds but at the same time would bring the system into question. In Lithuania, Bulgaria, Czechoslovakia and other countries, nuclear power became the focus.[70] In Russia, besides Chernobyl, Lake Baikal became a

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Thomas Dine, U.S. Agency for International Development). At the same time, trading patterns shifted significantly. Between 1984 and 1992, for example, the proportion of exports from CEE countries finding their way to markets in Western Europe doubled. *See* BAUMGARTL I, *supra* note 47, at 25, table. In the mid-1990s more than half of all exports from Poland, Czech Republic, and Hungary were sent to EU countries. Finally, economies shifted their focus from manufacturing to mixed economies. Industrial production, for example, dropped an average of 39% over the period 1989-93 in seven countries in the CEE region. *See* THE ENVIRONMENTAL CHALLENGE FOR CENTRAL EUROPEAN ECONOMIES IN TRANSITION, *supra* note 10, at 5, tbl. 1.2.

69. Looking backward in 1932, John Dos Passos recalled the earlier part of the Century with the words, "the World had started spinning round Sarajevo." JOHN DOS PASSOS, U.S.A. 538 (1966).

70. This gave rise to regionally-based citizen movements such as No More Chernobyls, a project of the Czech NGO, Hnuti Duha (Rainbow Movement). Hnuti Duha has actively protested the construction of the Temelin nuclear power plant in the Czech Republic. For an overview of nuclear issues in the region from the perspective of the No More Chernobyls network of citizens organizations throughout Central and Eastern Europe, see http://www.ecn.cz/private/c10/reactors.html. The Ignalina nuclear power plant in Lithuania and the Kozloduy nuclear power plant in Bulgaria are among the most dangerous in the world, according to a report by the U.S. Department of Energy. *See* OFF. OF ENERGY INTELLIGENCE, U.S. DEP'T OF ENERGY, MOST DANGEROUS REACTORS (May 1995).

rallying point for criticism of the regime.[71] Ukraine, where the Chernobyl disaster took place, had other significant environmental rallying points as well, such as chemical contamination in Dniepropetrovsk. Chemical contamination was the focus of initial protests in Bulgaria as well.[72] A major focal point of these forces in Hungary and Czechoslovakia was the dispute over the Gabcikovo-Nagymaros barrage system.[73]

IV. THE DANUBE DISPUTE BETWEEN HUNGARY AND SLOVAKIA

A. BACKGROUND OF THE DANUBE DISPUTE

The case arose out of a dispute between the two countries over construction and operation of a proposed series of barrages on the Danube River, which forms their common border.[74] With its roots in the Cold War era, the project for a system of

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71. *See* French, *supra* note 36, at 18.

72. Many of the key environmental hotspots were located on international frontiers, or had transboundary impacts. To some extent the scientific socialist notion of friendship among nations was its own undoing. The need to show international socialist unity cut short complaints against neighbors for siting their hazardous facilities along borders. As a result, many of the emerging environmental disputes in the wake of Chernobyl both were centered around transboundary disputes and involved incipient nationalism. In Hungary, it was the Gabcikovo-Nagymaros barrage system. In Bulgaria, it was gas clouds crossing to Ruse from Giurgiu in Romania. In the Baltics it was the Ignalina nuclear power plant, imposed by Moscow. These environmental transboundary disputes fueled the reemergence of ethnic identity and renewed nationalism. The rhetoric of the Gabcikovo-Nagymaros dispute is revealing. After a reformist Hungarian government sought to renegotiate the original 1977 Treaty in June 1989, the existing Czechoslovak hardline government labelled the move anti-socialist and accused Hungary of jeopardizing "good neighborly relations." The Czechoslovak government was dominated by Slovaks at this time. *See* Galambos I, *supra* note 10, at 183.

73. "The fight over the Danube was like a school for politics." Schwabach, *supra* note 3, at 297 n.48 (quoting an unnamed Duna Kor co-founder). Schwabach also quotes Janos Vargha: "People thought that if it is possible to stop this dam, we can change the total system." *Id.* (citation omitted). *See also* Judit Galambos, *Political Aspects of an Environmental Conflict: the Case of the Gabcikovo-Nagymaros Dam System*, *in* J. KAKONEN, PERSPECTIVES ON ENVIRONMENTAL CONFLICT AND INTERNATIONAL POLITICS (1992) [hereinafter Galambos II].

74. Excellent studies of the facts and circumstances leading up to the case include JOHN FITZMAURICE, DAMMING THE DANUBE: GABCIKOVO AND POST-COMMUNIST POLITICS IN EUROPE (1996) and Galambos I, *supra* note 10. Further studies that provide factual overviews include Williams, *supra* note 8, Eckstein, *supra* note 9, and Galambos II, *supra* note 73.

locks to be constructed and operated in two series, one on Czechoslovak territory at Gabcikovo and one on Hungarian territory at Nagymaros,[75] was designed to provide hydroelectric power, employ workers, tame the river against flooding and improve navigation.[76] A Treaty was signed in 1977 between Hungary and Czechoslovakia[77] to carry out the Gabcikovo-Nagymaros Project but the Project soon suffered the same fate as many large and unwieldy public works projects during the latter days of the Soviet Bloc. The financing promised from Moscow did not materialize,[78] scientific consensus broke down resulting in further studies, deadlines were missed, and construction suspended.[79]

In particular, conclusions about the environmental safety of the Project were criticized by a group of dissenting scientists in both countries, beginning with seismologists in Hungary.[80]

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75. The barrage system project which is the subject of the dispute between Hungary and Slovakia is referred to herein as the "Gabcikovo-Nagymaros Project" or the "Project."

76. Navigation has long been an issue in this section of the Danube, the only section that is not fully navigable at all times of year. The general improvement of navigability of the Danube has long been the subject of international agreement. *See, e.g.*, Convention Regarding the Regime of Navigation on the Danube, August 18, 1948, art. 3, 33 U.N.T.S. 197 (in which the parties undertake to carry out works necessary for improvement of navigation conditions). While it was not part of the judgment or the submissions to the Court, it is believed by some that one of the original purposes of the Project was to provide a navigable waterway by which Soviet warships could reach Western Europe in the event of conflict. It is interesting to note that, had the Gabcikovo-Nagymaros works been completed during the Soviet era, a majority of the Danube Commission (consisting of representatives of Bulgaria, Czechoslovakia, Yugoslavia, Romania, Hungary, USSR, and Ukraine) would have had the authority to maintain normal navigation in that section of the Danube, even over Hungarian objections. *See id.* at 198-199, arts. 4, 5.

77. Treaty Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks, Sept. 16 1977, Hung.-Czech. Rep. 1109 U.N.T.S. 236, 32 I.L.M. 1247 (1993) [hereinafter 1977 Treaty]. Slovakia was found by the Court to be the successor state to Czechoslovakia.

78. Hungary proposed to Czechoslovakia that the latter take over full financial responsibility for construction during a period of financial difficulties in 1981. While Czechoslovakia agreed to a delay, Hungary was finally forced to turn to Austria for financing. *See* Galambos II, *supra* note 73, at 80-81. Ultimately, Hungary paid compensation to the Austrian firms involved. *See* Schwabach, *supra* note 3, at 297.

79. By Protocol to the 1977 Treaty signed on Oct. 10 1983, the Parties agreed to postpone construction for four years. *See Judgment*, 37 I.L.M. at 180, para. 30.

80. *Id.* at 180, para. 32. The threat of earthquakes, while not playing a role in Hungary's representations in the case, was part of the rhetoric of citizens organizations in the 1988-1992 period. *See, e.g.*, DANUBE DEFENSE ACTION COMMITTEE, THE DANUBE

While scientific conjectures against the Project were expressed even prior to the signing of the 1977 Treaty, these opinions had been routinely suppressed. However, beginning in 1980, scientific opposition increased and an attempt was made by opposing interests to organize. These attempts were frustrated.[81] Even when the Academy of Sciences joined the scientific opposition, political controls continued to be imposed and restrictions were placed on the Academy of Sciences.[82] In January 1984, an ad hoc group, precursor to the Duna Kor (Danube Circle), was formed.[83] This group attempted to register as a public organization two years later, but registration was refused on the grounds that an official organization for coordinating public opinion on environmental matters already existed.[84]

The persistence of the dissident scientists began to attract public attention. The movement established to oppose the construction of the dam at Nagymaros in Hungary was able to muster 10,000 signatures on a petition in 1984.[85] But in early 1986, with the government's decision to go ahead with construction using Austrian financing, the movement had faltered.[86] One year later, following the Chernobyl nuclear ac-

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BLUES: QUESTIONS AND ANSWERS ABOUT THE BÔS (GABCIKOVO)-NAGYMAROS HYDROELECTRIC STATION SYSTEM 3, 4 (October 1992) [hereinafter "DANUBE BLUES"]. *Compare* Williams, *supra* note 8, at 30 ("scientists and hydrologists").

81. *See, e.g.*, DANUBE BLUES, *supra* note 80, at 5. (noting that any viewpoint other than those in favor of "gigantic technical establishments" was subordinated, and that "the communist dictatorship silenced the protests of its scientists").

82. Scientists at the Slovak Academy of Sciences also spoke out against the dams. *See id.* at 5.

83. *See* Galambos I, *supra* note 10, at 180.

84. The frustration of the dissident scientists by a decision making process that was rigid and inherently skewed towards particular interests may be compared to the "under-critical" model of decision making discussed in DAVID COLLINGRIDGE & COLIN REEVE, SCIENCE SPEAKS TO POWER 33-34 (1986). According to this model, a policy consensus is set by the bureaucracy. Scientific conjecture that threatens the policy consensus is suppressed, while scientific conjecture that fits the policy consensus goes uncriticized. "Science," thus, perpetuates policy in a feedback loop and acts in the service of the bureaucrats. Criticism of the policy inherently must take on "science" as well. When the policy consensus breaks down, however, the scientific consensus is shown to be illusory. The under-critical model of decision making is especially likely in the case of colossal, complex projects relying upon inflexible technological solutions. Such projects cannot proceed without large-scale mobilization, which in turn requires centralization and solid consensus.

85. *See* Galambos I, *supra* note 10, at 180-183.

86. *See id.* at 181.

cident, the picture had rotated 180 degrees.[87] Dam opponents held small demonstrations that were broken up by the police. By 1988, the environmentalist opposition to Nagymaros had reformed in far greater numbers and was able to convince a group of independent legislators (some had been elected in the 1985 elections) to seek a referendum on further construction. Conservative forces prevailed, however, and the Parliament reconfirmed the Project that year. The first mass demonstration against the Gabcikovo-Nagymaros Project occurred in the Fall of 1988, involving 30,000 people, and a petition drive was started.[88]

The growing popularity of the environmental movement played into the hands of intra-Party rivalry. In Hungary, reform communists had battled orthodox communists for years. The rise of popular dissent gave ammunition to the reformists.[89] Hungary, thus, succeeded before many of its neighbors to unseat the conservatives, raising Miklos Nemeth to party leader in November 1988.[90] Such a phenomenon did not occur in countries such as Czechoslovakia, where internal party dissension was almost non-existent and hard-liners remained in power to the end. It was during this time, at the peak of political developments, that Hungary first held that scientific studies on the dam were necessary. During a particularly fluid period, the official positions of the two countries were nearly indeterminable as political hierarchies broke down. The appointment of Nemeth to the post of Prime Minister in December 1988 opened the door to the establishment of a

87. The role of the Chernobyl disaster in activating the public in Hungary is confirmed in Juhasz, *supra* note 62, at 230-231: "In the fall of 1987, news about the siting of a nuclear waste storage facility leaked out. This happened a year after the Chernobyl accident and nuclear danger was very much alive in public opinion." *Id.* Galambos notes: "Starting in 1988 the political climate changed and opposition was revitalized." Galambos I, *supra* note 10, at 181.

88. *But see* GABCIKOVO-NAGYMAROS: ENVIRONMENT AND RIVER DAMS 31-32 (Imre Dosztanyi ed., 1988) (arguing that the public had involvement in "and control over" the project through public discussions beginning in 1976, and giving examples of changes made to the plans in response to public comments).

89. *See* Galambos I, *supra* note 10, at 218.

90. Jackson Diehl, *Hungary Names Economist Premier, He Puts Stress on Role of Legislature*, WASH. POST, Nov. 24, 1988, at A41.

Committee of Independent Experts.[91] Nemeth did succeed in identifying the Gabcikovo-Nagymaros Project with the hard-liners in the popular mind, but this was too little too late. He could not count on the fact that the dissatisfaction of the public went beyond any particular regime but to the moral foundations of the system itself. But Nemeth did not enjoy full loyalty and support within the Party during those chaotic times, and conservative forces in Hungary maneuvered a decision to actually speed up the completion of the project.[92]

By April 1989 a petition of more than 140,000 signatures in opposition to the dam was ready to be presented to the government.[93] As public opinion coalesced into firm opposition to the project, and the prospect of free elections became more real, Hungary's government resolved, on May 13, 1989, to suspend the work at Nagymaros in Hungarian territory pending "further studies."[94] Meanwhile, the works on the Czechoslovak side of the border were well advanced. The Czechoslovak government protested the Hungarian action and attempts at diplomatic settlement proved fruitless. Hungary's position evolved into an offer to renegotiate the 1977 Treaty as a project covering only the Gabcikovo works, with a view towards reducing the ecological risks associated with implementation of the scheme in the Gabcikovo sector.[95] Meanwhile it had additionally suspended the work for the diversion of the Danube at Dunakiliti. Czechoslovakia, for its part, offered to negotiate a comprehensive technical, operational and ecological set of guarantees for the whole Gabcikovo-Nagymaros Project, including the possibility of abandonment of peak power produc-

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91. This Academy of Sciences Commission, led by Peter Hardi, issued the HARDI REPORT in October 1989, calling for reassessment of the project. ACADEMY OF SCIENCE COMM'N, HARDI REPORT (1989).

92. Internal divisions continued to plague Hungary throughout the dispute. *See, e.g.*, OPPORTUNITIES FOR SZIGETKOZ: SUMMARY OF THE RESULTS OF THE RESEARCH DONE BY ISTER IN THE FRAMEWORK OF THE AD HOC COMMITTEE OF THE ACADEMY OF SCIENCE 2 (1992) ("The inconclusive, contradictory foreign-international policy of the Hungarian government—itself divided on the issue—had been unable to prevent [implementation of Variant C.").

93. *See* Galambos I, *supra* note 10, at 183.

94. *See Judgment*, 37 I.L.M. at 26, paras. 31, 33.

95. *See id.* at 181, para 37.

tion,[96] but only if Hungary would resume work for the diversion at Dunakiliti.[97] It was also during these negotiations, in October 1989, that Czechoslovakia threatened for the first time to implement the "provisional solution,"[98] according to which it would unilaterally divert the Danube to its own territory if Hungary failed to fulfill its obligations under the Treaty. On October 27, 1989, Hungary abandoned construction of the barrage at Nagymaros.[99] Early in November Hungary put forward a draft substitute treaty incorporating its proposals for abandonment of the Nagymaros works and completion of Gabcikovo without peak power production.[100] It also offered to re-start construction at Dunakiliti provided the other issues were resolved. Finally, Hungary for the first time made reference to the possibility of recourse to an arbitral tribunal or the International Court of Justice to resolve any continuing disputes.[101] Yet, the government still fell shortly thereafter.[102]

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96. According to the original design the Nagymaros barrage was intended to function as a regulating barrier to modify the effects of operation of the Gabcikovo dam during periods of peak power production. If peak power production were to be given up, Nagymaros would not be necessary. Conversely, without Nagymaros, peak power producton at Gabcikovo would result in intolerable disruption to river flow.

97. *See id.*

98. This plan for completion of the Project is referred to as the "Provisional Solution" or "Variant C." Variant C was included among 8 possible solutions presented by a Slovakian consulting firm and was the only one that did not require Hungarian cooperation. For a discussion of the significance of the terminology, see *infra* notes 153-156 and accompanying text.

99. This was done by a resolution of the government. *See Judgment*, 37 I.L.M. at 181, para. 37. The fact that the parliament was under full government control was reflected by its seesawing on the issue of the dam in lockstep with the government's changes of position. In October 1988 it had confirmed the project, and in June 1989 it accepted the government's proposal to try to renegotiate the 1977 Treaty with Czechoslovakia. The parliament, as well as the government, may have been influenced by growing public confidence. After the October 1988 parliamentary debate on Nagymaros—the first session of parliament televised in Hungary—citizens started to collect signatures to recall representatives who particularly distinguished themselves in *apparatchik* fashion. *See* Galambos I, *supra* note 10, at 204. *See also* DANUBE BLUES, *supra* note 80, at 6 (referring to powerful and influential groups entrenched in the state bureaucracy interested in pursuing the project who obstructed the carrying out of official Hungarian policy both inside and outside Hungary). Note the similarity to events in Hungary in 1997-98 following the ICJ decision, discussed *infra* at notes 235-238 and accompanying text.

100. *See Judgment*, 37 I.L.M. at 181, para. 37.

101. *See id.*

102. This was part of a phenomenon found in other parts of the region as well. In Poland, Solidarity and the PKE sat together at the historic "round table" in early 1989

After 1989, with former oppositions firmly in power in both countries, the national positions became more clear. The Gabcikovo-Nagymaros Project came to symbolize quite different things to the various power structures within each country. The Czechoslovak position became more and more dominated by the Slovaks, while the Czechs distanced themselves. The Czech view was crystallized by Vaclav Havel, then President of the Czech and Slovak Federal Republic, who in 1991 called the project a "totalitarian, gigomaniac monument which is against nature."[103] For Slovakia, however, the project attained exaggerated importance as a symbol of its new independence, and became associated with achievement and solidarity.[104] While across the border in Hungary, Gabcikovo-Nagymaros was a rallying point for the opposition, which considered it to be an ecologically malicious manifestation of foreign domination.[105]

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when negotiations for an end to communist party rule were held, and environmental issues were a part of the demands made. *See* HICKS, *supra* note 47, at 122-34. In Bulgaria, the government crumbled in the face of institutional challenges mounted by Ekoglasnost. *See* BAUMGARTL I, *supra* note 47.

103. *See supra* note10.

104. *See* FITZMAURICE, *supra* note 74, at 73

105. Thus, the dispute involved elements of environmentalism as well as nationalism on all sides. *See supra* note 72. On the link between environmental issues, nationalism, and the rights of minorities, see generally *Human Rights and the Environment*, U.N. Economic and Social Council, Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994). In the context of the present case, some commentators have focused on the ethnic or nationalist elements. For a deep, if disjointed, analysis laying primary blame for the dispute on Hungarian nationalism, see EGIL LEJON, GABCIKOVO-NAGYMAROS: OLD AND NEW SINS (Martin Urbancik & Thomas Grey trans., 1996). For a Slovakian view of Hungarian nationalism surrounding the dam dispute that illustrates the complexity of the problem, see MIROSLAV B. LISKA, HYDROELECTRIC SYSTEM GABCIKOVO-NAGYMAROS: DEVELOPMENT OF THE SLOVAK-HUNGARIAN SECTION OF THE DANUBE (1995). Liska provides food for thought:

> [P]opulistic arguments were "enriched" ... by a national dimension. Nagymaros was said to "spoil the view on the Danube bend at Visegrad," considered to be a "national heritage." Austrians were accused of eco-exploitation of neighbouring countries and Slovaks of an attempt to separate Hungarians living along the Danube and to concretize the borders, i.e., to fix the border definitely in the Danube bed, according to the decision of the Trianon peace treaty of 1920. This is still considered by many Hungarians as forced upon their country, reducing Hungary significantly in size and significance, after the fall of the Austro-Hungarian Empire.
>
> The borderline in a region of mixed-population was drawn so that about an equal number of 400 thousand Slovaks remained in Hungary and Hungarians in Slovakia. After a half-century, during which the Hungarian army occupied the south of Slovakia three times, the number of Slovaks in Hungary fell to about 10 thousand, while the number of Hungarians in Slovakia grew to over 560 thousand. But illogically, the Slovaks were accused of an attempt to

Hungary adopted a resolution in late 1990 calling for negotiation with Czechoslovakia with an end towards termination of the Treaty by mutual consent.[106] Also in 1990 plans for the provisional solution—now called "Variant C"—began to move ahead. In March 1991, when Hungary learned that planning of Variant C had moved substantially ahead, it expressed alarm and began to call for suspension of works on the Czechoslovak side as a condition for further negotiations.[107] Czechoslovakia initially responded by proposing four alternatives, each of which would require Hungarian cooperation, while also calling for establishment of a tripartite commission, together with the European Communities, to examine technical issues.[108] In parallel, the Hungarian Parliament issued a resolution directing the government to enter negotiations for the purpose of terminating the 1977 Treaty and to negotiate a new agreement concerning the consequences of abandonment, including efforts at

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assimilate the Hungarians. As the 1977 Treaty contains a voluntarily signed confirmation of the Trianon border line, some groups of Hungarians (not large but loud) strived to abrogate it by all possible means, cost what cost.

Id. at 5.

It is obvious from the foregoing that Liska considers Hungary's participation in the Warsaw Pact invasion of Czechoslovakia in response to the 1968 "Prague Spring" to be a Hungarian military occupation of Southern Slovakia. *See also* Schwabach, *supra* note 3, at 303 n.92 (pointing to *Czech* nationalism as the root cause of inevitable ethnic conflict between Slovaks and Hungarians in the Danube border region, and contradicting Liska's population figures); Williams, *supra* note 8, at 5-6 (noting that Czechoslovakia settled large numbers of Slovaks in the area around Gabcikovo in the post-War period to deter secessionist tendencies, and that after WWII a one-to-one repatriation of Hungarians and Slovaks took place, but over 750,000 Hungarians remained in Czechoslovakia because there were substantially more Hungarians there than Slovaks in Hungary). For the proposition that the government in Slovakia has routinely blamed internal opposition to the Project on the Hungarian minority, see Schwabach, *supra* note 3, at 304. With respect to Austria's role in the project, see *id.*, at 297, 326 n. 254 (citing LISKA, for the proposition that compensation for environmental damage done by Austria to the Bratislava region was one reason Slovakia felt Variant C was necessary). For a Hungarian pro-dam view that blamed internal Hungarian politics and individual political ambitions for Hungarian official opposition to the dam, see Miklos Kozak, *Gabcikovo as the Trojan Horse for a Change of Power in Hungary*, 4 EUROPA VINCET 28, 29-32 (1993), *cited in* Eckstein, *supra* note 9, at 100-101 n.137; DANUBE BLUES, *supra* note 80, at 8 (warning the public against placing nationalistic interpretations on the dispute).

106. *See Judgment*, 37 I.L.M. at 182, par. 39.

107. In the meantime, Slovakian, Hungarian, Austrian and other environmental activists demonstrated at the construction site, at times bringing construction to a halt. *See* Schwabach, *supra* note 3, at 300.

108. *See Judgment*, 37 I.L.M. at 187, para. 62.

rehabilitation.[109] Shortly thereafter, however, in July, in response to a letter from Hungary to the Prime Minister of the constituent Slovak Republic, the latter informed Hungary that a decision had been made by the Slovak Government and the Czechoslovakian Government to implement the provisional solution, "aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic."[110] Construction of a dam to divert the Danube at Cunovo in Czechoslovak territory commenced in November 1991. In December the parties met and agreed to form an expert committee with participation of the European Communities.[111] But, the parties were in fundamental and irreconcilable disagreement on the timing of events, as Hungary required an immediate suspension of construction on Variant C, while Czechoslovakia offered only to suspend construction after the committee made its findings.[112] This deadlock—in which Slovakia played an increasing role in anticipation of its imminent independence[113]—continued through 1992 as construction on Variant C continued. As the diversion of the Danube loomed—scheduled for October—Hungary attempted to terminate the Treaty unilaterally by Note Verbale, effective 25 May 1992.[114]

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109. *See* Application of Hungary, at 3.

110. *See Judgment*, 37 I.L.M. at 187-188, para. 63.

111. *See id.* at 188, para. 64.

112. *See id.*

113. Most Czechoslovak decisions related to the project were obviously engineered by Slovakian forces. As construction proceeded, Czech opposition increased, until the time of the decision to divert the Danube in October 1992. Three days after the beginning of the diversion of the Danube at a meeting of ministers of Czechoslovakia the ministers split 5-5 strictly along ethnic lines on a resolution to halt diversion of the river pending the outcome of the European Community Commission's study, causing the Czechoslovakian government to come "near to collapse." Schwabach, *supra* note 3 at 301; Eckstein, *supra* note 9, at 100 n.135. Czech and Slovak disagreement over the dam had earlier played a role in the elections in 1992 that led to the inevitability of the dissolution of Czechoslovakia.

114. *See* Declaration of the Government of the Republic of Hungary on the termination of the Treaty Concluded Between the People's Republic of Hungary and the Socialist Republic of Czechoslovakia on the Construction and Joint Operation of the Gabcikovo-Nagymaros Barrage System, May 16 1992, 32 I.L.M. 1259 (1993).

B. PROCEDURAL HISTORY OF THE CASE BEFORE THE INTERNATIONAL COURT OF JUSTICE

On October 23, 1992 the diversion of the Danube began.[115] On the same date Hungary filed a petition before the ICJ, while acknowledging Czechoslovakia had not consented to the jurisdiction of the Court. A last ditch effort by the European Communities to initiate tripartite negotiations and commission a study proved ineffectual. The Parties (with Slovakia substituted for Czechoslovakia) finally submitted the case to the ICJ by mutual agreement in April 1993. On July 2, 1993 by joint notification addressed to the registrar of the ICJ, the two parties submitted a Special Agreement for submission of the dispute to the Court.[116]

The questions presented to the Court included: (1) whether Hungary was entitled in 1989 to suspend and then abandon construction of works it was responsible for under the Treaty; (2) whether Czechoslovakia was entitled to proceed to construct the provisional solution in 1991 and then to implement the provisional solution in October 1992; and (3) what was the effect of Hungary's notice of termination of the Treaty in May 1992. The Court was also requested to determine the legal consequences, including the rights and obligations of the Parties, arising out of its judgment with respect to the questions presented.[117]

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115. *See Judgment*, 37 I.L.M. at 188, para. 65.

116. Special Agreement for Submission to the International Court of Justice of Differences Concerning the Gabcikovo-Nagymaros Project, April 7, 1993, Hung-Slovk., 32 I.L.M. 1293 exchange of instruments of ratification June 28, 1993 [hereinafter Special Agreement].

117. *Id.* art. 2. Article 2 provides in full:

> (1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,
>
> (a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty attributed responsibility to the Republic of Hungary;
>
> (b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the "provisional solution" and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Re-

C. ARGUMENTS PRESENTED BY HUNGARY AND SLOVAKIA[118]

In its pleadings and arguments before the Court, Hungary contended, with respect to the first question, that Czechoslovakia did not respond to Hungary's reasonable environmental concerns, giving rise to a state of "ecological necessity" requiring abandonment of construction at Nagymaros. Furthermore, Hungary contended that the 1977 Treaty was a framework agreement with a general goal of creating a barrage system on the Danube, which did not specifically require the building of a dam at Nagymaros. For this reason, the abandonment may have been contrary to the Joint Contractual Plan[119] according to which the treaty obligations were to be carried out, but not the Treaty itself.

Concerning the construction of Variant C, Hungary contended that the unilateral diversion of the Danube by Czechoslovakia was a violation of Hungarian sovereignty and territorial integrity.[120] Hungary also asserted the applicability of the precautionary principle against the unilateral and unconsidered implementation of Variant C,[121] pointing to Czechoslovakia's obligations under the 1977 Treaty, other legal instru-

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public of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

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

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

118. Not all arguments made by the Parties or discussed by the Court are considered here. For example, the Court discussed the substitution of Slovakia as a Party in place of Czechoslovakia, an issue that was heavily contested by Hungary.

119. The Joint Contractual Plan actually predated the 1977 Treaty, as it was created under the Agreement Between the Government of the Hungarian People's Republic and the Government of the Czechoslovak Socialist Republic Concerning the Drafting of a Joint Contractual Plan for the Gabcikovo-Nagymaros System of Locks. *See* 1977 Treaty, *supra* note 77, art. 1.4, 1109 U.N.T.S. at 237, 32 I.L.M. 1250. Article 4.1 of the 1977 Treaty provides that the project shall be carried out in conformity with the Joint Contractual Plan. *Id.* at 238. The Joint Contractual Plan played an important role in many aspects of the Court's decision. Note that Hungary declined to consider the Joint Contractual Plan as a "related instrument" under the Special Agreement, because it wanted to minimize the Plan's legal effect. *See Judgment*, 37 I.L.M. at 179, para. 26.

120. *See* Application of Hungary, at 8.00

121. *See id.* at 10-11.

ments, and customary international law pertaining to transboundary watercourses.

Hungary also argued that its attempt at termination of the 1977 Treaty in 1992 was effective. Hungary's justification for termination lay on several grounds, including impossibility of performance, permanent disappearance or destruction of an "object" indispensable for execution, and fundamental changed circumstances, consisting of political and economic changes,[122] as well as changes in the state of environmental knowledge and environmental law. Hungary also pointed out that its action took place in the face of Czechoslovakia's imminent diversion of the Danube, which was evidence of the latter's bad faith.

Slovakia argued that Hungary's abandonment of construction of the works at Nagymaros was a material breach of the 1977 Treaty. Further, in the face of this material breach and the immense investment made in the Czechoslovakian part of the Project, Czechoslovakia had no choice but to proceed to the Provisional Solution as an approximate application of the Treaty. Alternatively, this action could be justified as a lawful countermeasure brought about by Hungary's breach. With respect to the environmental arguments made by Hungary, Slovakia argued that it had negotiated in good faith based on the Treaty, that the project actually had environmental benefits,[123]

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122. It is interesting to note that the case was begun at a time when the government was led by the Communist-era opposition, but by the time the argument of changed circumstances was made before the ICJ, a government made up of the former reform communists was in power. It is not clear whether the ousting of the former rightist opposition in the Hungarian elections of 1994 had any influence on either the content or the persuasiveness of the part of Hungary's argument based on political and economic changes. However, a government led by the former opposition might more forcefully make the argument that the 1989 transformations were in essence a reattainment of sovereignty after a period of heavy foreign domination. The return of the Socialists to power, thus, coincided with a less convincing and less strongly prosecuted argument of fundamentally changed circumstances as a grounds for abandonment of the treaty that relied more upon economic collapse than upon removal of political domination. In its decision, the ICJ alluded to the inflexible situation at hand at the time of the signing of the treaties in 1977, when it pointed out that "these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners." *Judgment*, 37 I.L.M. at 182, para. 39.

123. *See also* LISKA, *supra* note 105, at 11-16 (propounding the Provisional Solution's positive impacts on erosion, accessibility of the Bratislava harbor, flow of the

and that the only rational means of preventing further environmental damage was to proceed to full implementation of the original scheme.

Both Parties sought declarations from the Court concerning their rights to compensation from the other Party. Hungary, moreover, asked for a declaration by the Court that operation of the Gabcikovo works should be halted and the full volume of the Danube returned to its original course *in integrum restitutio*, while Slovakia asked for the Court to order Hungary to perform its obligations under the original Treaty and to enter into negotiations with Slovakia concerning the modalities thereof.

V. JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE

A. HUNGARY WAS NOT ENTITLED TO SUSPEND AND ABANDON WORKS AT NAGYMAROS

The Court determined, first, that Hungary was not entitled to suspend and abandon construction of the works it was responsible for under the Treaty,[124] upholding the rule of *pacta sunt servanda,*[125] and rejecting Hungary's argument of a "state of ecological necessity." With respect to whether the abandonment might be consistent with the 1977 Treaty, the Court determined that the particular works were an inseparable part of the "single and indivisible" system of works.[126] In examining the law of necessity,[127] the Court had no difficulty determining

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Maly and Mosoni Danubes, agricultural productivity, and conditions of aquatic life and wildlife, while minimizing potential negative impacts on quality of ground and surface waters). Liska further states that "[t]he monitoring results prove that, after implementation of proper measures, the resulting environmental impacts [of the Provisional Solution] are prevailingly beneficial." *Id.* at 18.

124. *Judgment*, 37 I.L.M. at 187, para. 59.

125. *Pacta sunt servanda* is a maxim of customary international law also found in the 1969 Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331. This maxim was applied to the 1977 Treaty as a matter of customary international law, as the parties had not ratified the 1969 Vienna Convention at the time of entry into force of the 1977 Treaty.

126. *Judgment*, 37 I.L.M. at 184, para. 48.

127. The Court was guided by Article 33 of the Draft Articles on the International Responsibility of States, Y.B. INT'L L. C. Vol. II, Part 2, at 34 (1980), which states:

that the ecological dangers complained of related to an essential interest of Hungary.[128] However, the Court held that the danger to the environment was not imminent, and that it was still possible in 1989 for a technical solution, albeit a more costly one, to be arrived at.[129] The Court reached its conclusion that there was no imminent threat to the environment in Hungary, while at the same time abstaining from evaluating the merits of the scientific evidence, determining that "it is not necessary ... for [the Court] to determine which of those points of view is scientifically better founded."[130] Thus, Hungary was found to have been in breach of the 1977 Treaty by suspending and subsequently abandoning construction of the works on the Hungarian side of the border.

B. CZECHOSLOVAKIA'S IMPLEMENTATION OF VARIANT C WAS ILLEGAL

Next the Court considered the provisional solution—Variant C—and determined that it was outside the limits of the Treaty and could not, as Slovakia contended, be an approximate application of the Treaty made justifiable by Hungary's abandonment.[131] The Court again pointed to the provisions in the Treaty which contemplated a joint investment constituting a single and indivisible operational system of works, and found

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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

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

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

Judgment, 37 I.L.M. at 184, para. 50.

128. *See Judgment*, 37 I.L.M. at 183, para. 53.

129. *See id.* at 185, para. 55.

130. *Id.* at 191, para. 54. *See also* Stec & Eckstein, *supra* note 13, at 43.

131. *See id.* at 190, para. 78. The Court has applied the doctrine of approximate application in Admissibility of Hearings in South West Africa Case, 1956 I.C.J. 6.

that Variant C did not meet that requirement. As Variant C was outside the limits of the Treaty, the Court looked to customary international law to assess the consequences of the diversion of the Danube by Slovakia. Applying the equitable use doctrine,[132] the Court held that the unilateral diversion of the Danube was a transgression of international law. The "inalienable right" to an equitable and reasonable sharing of an international watercourse could not be forfeited by Hungary's failure to meet its legal obligations under the 1977 Treaty. The Court further rejected Slovakia's argument that Variant C was a lawful countermeasure for Hungary's material breach, holding that the unilateral diversion of the Danube was not proportional.[133] The Court did not consider the arguments of the Parties as to the balancing of interests in connection with the Project.

C. THE UNDERLYING TREATY IS STILL IN EFFECT

Next, the Court held that Hungary's notification of termination of the Treaty in May 1992 was ineffective and that the Treaty, thus, remained in force.[134] The Court rejected Hungary's various arguments justifying its termination. Articles 15, 19 and 20 of the Treaty[135] played an important role in the Court's decision in this regard. These articles, pertaining to protection of nature, fisheries, and the quality of the Danube, in the Court's words, "actually made available to the parties

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132. *See* discussion, *infra* notes 187-188 and accompanying text.

133. *See Judgment*, 37 I.L.M. at 191, para. 87. Following Hungary's material breach of the 1977 Treaty by suspending and abandoning the works at Nagymaros in 1989, Czechoslovakia might have terminated the Treaty and sought reparations.

134. *See id.* at 197, para. 115.

135. 1977 Treaty, *supra* note 77, arts. 15, 19, 20 at 1109 U.N.T.S. 244-245, 32 I.L.M 1255-1256 [hereinafter the Magic Articles]. Article 15 of the Treaty specifies that the 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." *Id.* 1109 U.N.T.S at 244, 32 I.L.M. at 1255. Article 19 provides that "[t]he Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks." *Id.* 1109 U.N.T.S. at 245, 32 I.L.M. at 1256. Article 20 contains similar provisions relating to protection of fisheries and incorporates by reference the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on Jan. 29, 1958. *Id.* 1109 U.N.T.S. at 245, 32 I.L.M. at 1256. *See Judgment*, 37 I.L.M. at 176, para. 18.

the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives,"[136] through reference to the Joint Contractual Plan, according to which all measures for implementation of the Treaty would be carried out. These articles in the Court's view were designed to accommodate change and reflected the understanding in 1977 that the implementation of the Treaty might need to take into account new developments in the state of environmental knowledge.[137] As to Hungary's argument that these very provisions were violated by Czechoslovakia by not negotiating in good faith to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment, the Court found as a factual matter that there was insufficient evidence to conclude that Czechoslovakia consistently refused to negotiate on this account.[138] On the contrary, the Court found that Hungary's refusal to countenance further construction pending negotiations contributed to the failure of the negotiations. Not even substantial progress towards the implementation of the Provisional Solution was found to be a material breach justifying termination.

Finally, the Court considered Hungary's argument that it could terminate the Treaty based on new developments of international law that rendered impossible the Treaty's performance. Hungary did not contend that new peremptory norms of environmental law had emerged since the entry into force of the Treaty. Nonetheless, the Court specifically noted that "newly developed norms of environmental law are relevant for the implementation of the Treaty."[139] At this point, the Court left open whether this was due only to the operation of the Magic Articles, or to a more general obligation of international environmental law. However, in explaining the rights and obligations of the parties arising out of the Court's judgment, the Court stated more clearly its opinion that "new [environ-

136. *Judgment*, 37 I.L.M. at 194, para. 103.

137. *See id.* at 195, para. 104.

138. *See id.* at 196, para. 107.

139. *Id.* at 196, par. 112. Hungary had argued in its Counter-Memorial that Articles 15 and 19 of the 1977 Treaty imported into the Treaty regime international law rules in force at any time during the whole lifetime of the system of locks. Counter-Memorial of the Republic of Hungary, para. 4.21.

mental] norms have to be taken into consideration, and ... new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."[140] Although the Magic Articles are again referred to in this Paragraph of the Judgment, the Court took pains to point to a different source for this rule — that is, the concept of sustainable development.

Applying the concept of sustainable development to this case, the Court held that the parties should "look afresh" at the environmental impacts of the operation of the Gabcikovo power plant, with particular attention to the quantities of water to be released to the old bed of the Danube and its side-arms. This particular part of the Court's judgment appears to rely heavily on the concept announced in the Separate Opinion of Judge Weeramantry which he calls the "Principle of Continuing Environmental Impact Assessment" (discussed below).

Beyond the suggestion concerning water volume, ultimately the Court refrained from deciding what impact such newly developed norms might have on the project, only acknowledging that the parties had very different ideas about it. The Court urged flexibility and suggested third-party involvement, presumably along the lines of the earlier initiatives in which the European Communities participated.[141]

The Court avoided a deep discussion of fundamental changed circumstances. Relying on Article 62 of the Vienna Convention on the Law of Treaties,[142] it dismissed these argu-

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140. *Judgment*, 37 I.L.M. at 201, para. 140. Thus, it might be concluded that environmental matters have the quality of being by definition evolutionary, in common with the "sacred trust" in the Namibia case. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J 16 (Advisory Opinion).

141. *Judgment*, 37 I.L.M. at 196, para. 113.

142. Vienna Convention on the Law of Treaties, *supra* note 125, art. 62 at 347. Article 62 of the Vienna Convention on the Law of Treaties provides:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

ments on the grounds that a joint investment project such as the Gabcikovo-Nagymaros Project was not sufficiently linked to prevalent political conditions, and that in any event the Magic Articles provided an entry point for relevant changed circumstances.[143] Thus, where the Court stepped outside the Treaty it did so only to provide a more clear understanding of the significance of the environmental concerns so generally referred to in the Magic Articles.

D. THE COURT'S DIRECTIONS TO THE PARTIES

The Court also spelled out the practical implications of its decision. While announcing that the concept of sustainable development required the parties to continually assess environmental impacts of the Project, the Court pointed to the Magic Articles as a means for the parties to take new environmental norms and standards into consideration.[144] Specifically, these articles placed upon the parties a continuing and evolving obligation to maintain water quality and to protect nature. Furthermore, while the parties must negotiate in order to meet the objectives of the 1977 Treaty, the Court noted that the par-

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(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

One commentator made the case for Hungary thusly: "Although the mere change of government does not amount to a fundamental change of circumstances that would justify the termination of a treaty, the circumstances here are such that the entire form of government has been changed from a totalitarian regime based on the principles of Soviet communism to a democratic regime based on the principles of liberal democracy. Williams, *supra* note 8, at 31 n.166. Williams concluded that the new government could not ignore domestic opposition to the project as its predecessor had.

143. *See Judgment*, 37 I.L.M. at 195, para. 104. *See also* Stec & Eckstein, *supra* note 13, at 43 ("[E]ven though the project arose largely out of Cold War interests and the assumptions behind it were profoundly affected by loss of Soviet patronage, the shift to a market economy, democratization, geopolitical developments, and improved environmental awareness, the Court made every effort to resolve the dispute within the confines of the 1977 Treaty and related documents.").

144. *See Judgment*, 37 I.L.M. at 196, 200.

ties acknowledged the specific terms of the Treaty to be negotiable, thereby implying a broad latitude for further negotiations.[145] Because the Treaty contemplated a single integrated project, the Court ordered that all works be jointly operated, including those on Slovakian territory; by involving Hungary in the operation of Gabcikovo and Cunovo, the Court intended Variant C to become a treaty-based regime.[146] Finally, the Court suggested that the various claims of each side for compensation could be satisfied by application of a zero sum solution.[147]

VI. THE ICJ DECISION AND SUSTAINABLE DEVELOPMENT

The Court in the *Gabcikovo-Nagymaros Project Case* reached an uncomfortable compromise. The ICJ may have gone as far as it could have in injecting flexibility into a rigid and perhaps untenable treaty regime. In doing so, it may have opened the door to reinterpretation of treaties on environmental grounds generally. Nevertheless, in its desire to provide legally-based incentives for the Parties to remain within the Treaty regime, the Court may have created more problems than it solved. While the issues between the Parties have substantially narrowed, each Party can find succor in the ICJ decision for its own point of view, a point of view that may remain uncompromisable given the political context. Yet, the case does raise interesting points that have implications for sustainable development and environmental protection.

In this section,[148] some of the implications of the decision will be discussed. In particular, the discussion will consider, first, whether the ICJ decision requires Hungary to build a second dam, a matter of major importance to the current negotiations between the Parties. Then will follow a discussion on the implications of the decision for sustainable development, in

145. *See id.* at 200.

146. *See id.* at 201. *See also* Williams, *supra* note 8, at 46-47 (reaching a similar conclusion in 1994).

147. *See Judgment*, 37 I.L.M. at 202.

148. Parts of this section are adapted from Stec & Eckstein, *supra* note 13.

three parts. The first part involves the extent to which the case upholds or promotes the integration of environment and development. The second part involves the handling of the application of evolving norms of the international law of sustainable development in interpreting treaties, and the third part relates this notion to the balance struck in the judgment between the law of treaties and the law of international watercourses. Finally, in this section, the Court's handling of environmental evidence will be discussed.[149]

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149. Among the matters not discussed in detail here, but which bear further study, are the Court's handling of Hungary's argument that Slovakia did not succeed to the Treaty, and the arguments concerning the impact of the Provisional Solution on international borders. *See* Treaty Concerning the Regime of State Frontiers, Oct. 13 1956, Czech.-Hung. 300 U.N.T.S. 150 (hereinafter "Treaty on Frontiers"). Article 3 (1) of that treaty provides: "On sectors where it runs over water, the frontier line shall vary with the changes brought about by natural causes in the median line of the bed of rivers, stream or canals or in the main navigable channels of navigable rivers. The frontier line *shall not be affected by other changes in the flow of a frontier water course* unless the Parties conclude a separate agreement to that effect." *Id.* at 152 (emphasis added). Article 22 of the 1977 Treaty, *supra* note 77, 1109 U.N.T.S. at 245-246, 32 I.L.M. at 1256-1257, expressly provided that the Gabcikovo-Nagymaros works would not affect the border, which would remain in the centerline of the 1977 main navigation channel of the Danube.

Under Article 3(4) of the Treaty on Frontiers, moreover, a Party may require that water be re-directed into the original bed of a frontier watercourse, where a change in the bed has been brought about by natural causes involving a "change in the character of landed property, constructions, or technical or other installations," unless the Parties agree to transfer the frontier line to the new bed. This right must be exercised within one year of the diversion. 300 U.N.T.S. at 152. Article 13(2) of the treaty states, in pertinent part, "[t]he position of the beds of frontier watercourses shall as far as possible be maintained unchanged." *Id.* at 162. The Final Protocol executed on conclusion of this treaty further provided that Article 13, among others, should be considered in conjunction with the regulations concerning the Danube as an international waterway contained in the Convention Regarding the Regime of Navigation on the Danube, August 18, 1948, 33 U.N.T.S. 181. Article 14 of the Treaty on Frontiers states: "[T]he natural flow of frontier waters in inundated areas may not be altered or obstructed by the erection of installations or structures in the water or on the banks, or by any other works, unless the Parties so agree." 300 U.N.T.S. at 162. Article 19 concerns dams, bridges, dikes and other structures. It states:

> (1) [T]he two Parties shall maintain the existing structures and installations in frontier waters (dams, dykes and the like). No removal or reconstruction of any such structure or installation which is liable to entail a change in the bed or in the level of the water in the territory of the other Party may be carried out except with the consent of both Parties.
>
> (2) New bridges, ferries, dams, dykes, sluices, bank supports and other hydraulic installations shall not be erected in frontier waters except by agreement between the two Parties.

Id. at 164.

A. DOES THE ICJ DECISION REQUIRE HUNGARY TO BUILD A SECOND DAM?

Immediately following the delivery of the decision of the Court, the Delegation of the Republic of Hungary issued a press release, which asserted that as a result of the Court's decision "Hungary is not required to build a second barrage at Nagymaros under the 1977 Treaty."[150] Within weeks, however, the Government of Hungary was putting a wholly different spin on the decision, in effect conceding that a second dam would have to be built, and giving the public the impression that Hungary had "lost" the case. What was going on?

Paragraph 134 of the ICJ decision states:

> [W]hat might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabcikovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Cunovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, *with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.*[151]

This statement must be considered in the context of the previous paragraph of the Court's judgment. There the Court distinguished between changes based on facts which flow from wrongful conduct, which would not be permitted, and changes within the context of "the preserved and developing treaty rela-

150. Press Statement, Delegation of the Republic of Hungary (The Hague, Sept. 25, 1997) (on file with author).

151. *Judgment*, 37 I.L.M. at 200, para. 134 (emphasis added).

tionship,"[152] in order to remedy an irregular state of affairs brought about by the wrongdoing of both Parties.

Is the Project as unilaterally implemented by Slovakia a "Provisional Solution" or a "Variant"? For not immediately apparent reasons, this question is relevant to the question of whether a second dam need be built. The particular factual change relied upon by the Court to find that a second dam need not be built is Slovakia's "effective discarding" of peak power operation, which is inferred from changes to the original plan unilaterally undertaken by Czechoslovakia in order to implement the *Provisional Solution*. Thus, what was declared by Slovakia to be a necessary, temporary measure (a "provisional solution")[153] has achieved the status of permanence. Slovakia gets to keep Variant C, but at the cost of any hope of forcing Hungary to go back to the original plans. This reading of the Court's decision is confirmed in Paragraph 150, concerning the implications to the Parties, where the direction of the course of negotiations suggested by the Court is indicated. The Court there stated:

> What it is *possible* for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is *open to them to agree* to maintain the works at Cunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.[154]

While not prescriptive, it is evident that this solution is part of the Court's scheme for comprehensive resolution of conflicting claims.

The Court distinguished between obligations of conduct, obligations of performance, and obligations of result.[155] To adhere blindly to obligations of performance would require not

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152. *Id.* at 150, para. 133.

153. *See id.* at 187, para. 61 (referring to Variant C as a variant "presented as a provisional solution.").

154. *Id.* at 202, para. 150 (emphasis added).

155. *See id.* at 200, para. 135.

only the building of Nagymaros, but also the demolition of the works at Cunovo, which would be absurd "when the objectives of the Treaty can be adequately served by the existing structures."[156] Moreover, the obligations of performance under the 1977 Treaty regime were determined primarily through the Joint Contractual Plan, which had frequently been amended by the Parties to reflect changing conditions and circumstances.[157] Thus, the Court determined that the proper shaping of the treaty regime should be done by negotiation of the Parties through the Joint Contractual Plan.[158]

The declaration that Nagymaros *need not be* built is relevant both as direct guidance to the Parties as to the question of the second dam, as well as to the question of compensation. Because the obligations of performance are not sacrosanct, Slovakia bears equal responsibility for the abandonment of peak power production, and cannot make a claim against Hungary for compensation based on the reduced economic benefits of the current regime. This is at the root of the "zero sum" resolution of conflicting compensation claims.[159]

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156. *Judgment*, 37 I.L.M. at 200, para. 136.

157. *See id.* at 200, para. 137.

158. The Court also dealt with the fact that a system of locks at Nagymaros was specifically mentioned in the 1977 Treaty itself by pointing to numerous statements made by Czechoslovakia that it was willing to consider limitation or exclusion of peak power operation. *Id.* at 200, para. 138. Arguably, however, the building of a system of locks at Nagymaros is an obligation of result under the 1977 Treaty regime, since only the *main dimensions* of the works of the System of Locks are to be determined under the Joint Contractual Plan. *See* 1977 Treaty, *supra* note 77, art 4.2(a), 1109 U.N.T.S. at 238, 32 I.L.M. at 1251. Dams both at Dunakiliti and Nagymaros are parts of the principal works of the System of Locks as defined under the Treaty. *Id.* art 1.2, 1109 U.N.T.S. at 236-237, 32 I.L.M. at 1249. It would have been perhaps more straightforward for the Court to determine that Variant C had rendered moot the specific components of the term "System of Locks" found in Article 1.2, but that would have opened the door too far towards frustration of the entire treaty regime. Preservation of the treaty regime was fundamental to the Court's decision since it allowed the Court to find that Hungary had joint control over all works constructed pursuant to Variant C.

159. The Court did, however, separate these claims from claims based on the shared costs of construction and operation of the Project.

B. THE ICJ'S INTEGRATION OF ENVIRONMENT AND DEVELOPMENT

The concept of sustainable development is one of the linchpins of the Court's decision. Its operation, according to the Court, is to require the Parties to "look afresh at the effects on the environment of the operation of the Gabcikovo power plant."[160] The central position of environmental considerations at the heart of sustainable development was thus upheld by the Court. Elsewhere in the decision, the Court simply and straightforwardly held that the protection of the natural environment is an "essential interest" of a state.[161] Yet the concept of sustainable development was not considered or applied in connection with many other parts of the Court's judgment where further shape could have been given to it. For example, the Court applied an overly simple cost-benefit approach when it took note of the immense investment that Czechoslovakia had made in the Gabcikovo works.[162] Nowhere in the Court's decision is it stated that this immense investment should be considered in the light of potential environmental costs, and that this consideration should include a proper dose of precaution.

Both Hungary and Czechoslovakia committed transgressions of international law. In attempting to justify their actions, the states asserted different interests. For Hungary, it was primarily the protection of the natural environment; for Czechoslovakia, it was the immense economic investment in

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160. *Judgment*, 37 I.L.M. at 201, para. 140.

161. *Id.* at 184, para. 53.

162. The investment argument was used by Slovakia to assert its position that Czechoslovakia had no choice but to implement Variant C as an approximate application. *See id.* at 189, para. 68. The Court particularly took note of this in Paragraph 72, as follows:

> [T]he Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabcikovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal ... [N]ot using the system would have led to considerable financial losses, and ... could have given rise to serious problems for the environment.

Id. at 182, para. 72.

the Project. While both were viewed sympathetically by the Court, the Court missed an opportunity to see the two sets of interests as two sides of the same coin. The Court might have more clearly connected the viability of the immense investment, especially in the context of the implications of present uncertainty for future generations, to the proper consideration of environmental protection.

Underlying the Court's decision is a proceed-at-all-costs approach. At the same time that the Court is calling for application of the concept of sustainable development by constant reconsideration of the environmental consequences of a project, it does not seem to consider the possibility that this reconsideration might result in a complete abandonment of the Project.[163] The consideration of alternatives is a well accepted element of environmental impact assessment.[164] It is equally well accepted that the "no action" alternative must be given equal standing to both the original proposal and to other alternatives presented.[165] Yet, the Court found Hungary's defense of the "no action" alternative to be "not conducive to negotiations."[166] The logical inference of the Court's analysis is that environmental considerations must continually be taken into account, but only to *modify* and not to *justify termination* of a treaty regime. This view may arise from the notion of at least some of the judges that technological, end-of-pipe solutions could be applied to address significant environmental problems.[167] Thus, the

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163. *See generally* EDWARD GOLDSMITH & NICHOLAS HILDYARD, THE SOCIAL AND ENVIRONMENTAL EFFECTS OF LARGE DAMS (1985) (discussing the environmental consequences of barrage systems).

164. *See, e.g.*, Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25 1991, 30 I.L.M. 800 (1991) [hereinafter Espoo Convention]. Appendix II, point (b), "[A] description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative." *Id.* at 814.

165. *See, e.g., id.*

166. *Judgment*, 37 I.L.M. at 195, para. 107.

167. *See id.* at 185. *See also* Stec & Eckstein, *supra* note 13, at 48 n.8, which states:

> [E]ven Judge Weeramantry's enlightened opinion takes only the first steps towards a truly integrated approach to environment and development. The principle of sustainable development, according to Judge Weeramantry, enables the Court to balance environmental considerations *against* developmental considerations. Unfamiliarity with the concept of integration reached a peak in Judge Oda's dissent, in which the judge took the view that economic development and preservation of the environment are more or less contradic-

attitude of the ICJ to the arguments made by the Parties, and its implicit balancing of interests, seems to indicate that it gave insufficient consideration to the "no action" alternative and placed too much faith in technical solutions. In so doing, the Court gave little support to the precautionary principle and missed the opportunity to give further definition to the concept of sustainable development.

C. APPLICATION OF THE LEGAL PRINCIPAL OF SUSTAINABLE DEVELOPMENT IN THE INTERPRETATION OF TREATIES

The Court may not have fully integrated environment and development in its own analysis, but it certainly opened the door to better integration of environment and development in treaty-based regimes in the future. It did so through the simple statement that "newly developed norms of environmental law are relevant for the implementation of the Treaty."[168] Again, the Magic Articles played a role in the Court's determination. These treaty provisions were found to have expressly allowed for the continuous application of environmental norms as they developed. The Magic Articles alone may have been legally sufficient to resolve that aspect of the dispute. But, after considering the meaning of the Magic Articles, the Court then stated:

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

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tory. He contends that "modern technology would, I am sure, be able to provide some acceptable ways of balancing the *two conflicting interests.*"
(citing Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162, 224 (dissenting opinion of Judge Oda)) (emphasis added).

168. *Judgment*, 37 I.L.M. at 196, para. 112.

> kind—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.[169]

Hereby, the Court went beyond the Magic Articles as the basis of its ruling and stated a general principle of international law applicable to the interpretation of treaties generally, based on the concept of sustainable development. This ruling is a major clarification of the law of sustainable development and the manner in which it can be applied to reform treaty-based regimes. In the context of the judgment in *Gabcikovo-Nagymaros Project Case*, moreover, it provides a basis for fundamental restructuring of the original project in a manner quite different from that envisioned at the time of the signing of the 1977 Treaty. The Court thus indicates that application of the concept of sustainable development in similar cases would require that environmental risks be assessed on a continuous basis, even for projects started long ago.[170]

1. Judge Weeramantry's Opinion

From the separate opinion of Vice President Weeramantry we may find a name for this new emerging legal norm — the Principle of Continuing Environmental Impact Assessment (EIA).[171] Judge Weeramantry's opinion gives a much deeper background to some of the issues at the heart of the Court's decision, in particular with respect to sustainable development. He advocates examination of traditional principles from the world's vast cultural heritage for elaboration of the principle of

169. *Id.* at 201, para. 140 (emphasis added).
170. *Id.* at 58, para. 119.
171. *Weeramantry*, 37 I.L.M. at 214.

sustainable development,[172] and calls for the "harmonization of human developmental work with respect for the natural environment."[173] Among his proposals in furtherance of these objectives are two international legal principles. Besides the Principle of Continuing Environmental Impact Assessment, he also sets forth the Principle of Contemporaneity in the Application of Environmental Norms. Furthermore, he advocates resort to *erga omnes*[174] analysis in the resolution of traditionally *inter partes* disputes with sustainable development issues.[175]

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172. *Id.* at 207. By way of example, he points to Sri Lanka, which was "developed" in order to be conquered for agriculture, in a way that protected the environment. But, his characterization of an ancient form of sustainable development raises more questions than it answers. He points in particular to the reconstruction work of King Parakrama Bahu (1153-1186) and to the philosophy of conservation based on the sermon of the Buddhist Arahat Mahinda to King Devanampiya Tissa around 223 B.C. But King Bahu was driven by the notion that not a drop of rain would enter the ocean without being made useful to man. This extreme anthropocentrism—basically this is rational utilization—is difficult to reconcile with the enormously long reach of the Buddhist concept of duty beyond man himself to the natural order. Yet, Weeramantry cites these together as a case of sustainable development. *Id.* at 209-210.

173. *Weeramantry*, 37 I.L.M. at 212. He goes on to cite GOLDSMITH & HILDYARD, *supra* note 163, for the proposition that traditional irrigation systems demonstrate a much higher success rate than modern irrigation systems because of a better fit between the traditional methods and nature. *See id.* at 213. Such a proposition goes hand in hand with Collingridge and Reeve's notion of flexibility in investments, and the efficacy of trial and error decisionmaking. *See* COLLINGRIDGE & REEVE, *supra* note 84. Judge Weeramantry takes the first steps, but does not go far enough in examining the basic differences between a flexible process gradually achieving stasis, and a rigid, all-or-nothing gargantuan that provides no easy means for adjustments when present-day uncertainties become tomorrow's realities. The principle of trusteeship of earth resources is called by Weeramantry a "traditional principle" that can assist in the development of modern environmental law. *Weeramantry*, 37 I.L.M. at 213. This is a duty that requires express protection of flora and fauna, since they have a niche in the ecological system. Nature must be afforded an opportunity to replenish itself. But a collectivist anthropocentric approach can still be detected in Judge Weeramantry's view that natural resources are "collectively" owned for the maximum service of people. He concludes that sustainable development is "one of the most ancient of ideas in the human heritage." *Id.*

174. *Erga omnes* (toward all) is used in international human rights law to refer to obligations which are owed to the international community independently of specific obligations owed through treaties or conventions. *See e.g.*, East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102. The term has also been used to indicate that a particular judicial decision applies to all similarly situated persons, not only to the parties to the particular case. *See, e.g.*, Villalobos v. Costa Rica, Case 9328, 9239, 9742, 9884, 10.131, 10.193, 10.230, 10.429, 10.469, Report No. 24./92, Inter-Am. C.H.R. 74, OEA/Ser.L/V/II.83 Doc. 14 (1993); <http://www.1.umn.edu.humanrts/cases/24-92-COSTA-RICA.htm>.

175. *Weeramantry*, 37 I.L.M at 266; *See infra* note 185 and accompanying text.

As a preliminary matter, Slovakia's submissions that sustainable development was not an operative norm of customary international law[176] had to be countered. In its pleadings and arguments before the Court, however, Slovakia had reversed the usual formulation and contended that sustainable development includes the principle that "*developmental needs are to be taken into account in interpreting and applying environmental obligations.*"[177] This statement, in Judge Weeramantry's opinion, indicated acceptance of sustainable development as the principle that harmonizes two vital and developing areas of law. For Slovakia to deny the applicability of sustainable development precepts, therefore, would be to condone a state of "normative anarchy." To further support the view that sustainable development was nothing new, even as between the parties, Judge Weeramantry found substantial evidence in the record that the Magic Articles, which inserted in the treaty an element of dynamism in relation to environmental considerations, arose out of an early notion of sustainable development.

The Principle of Continuing EIA is derived from the duty to continuously monitor the environmental impacts of development projects as facts and knowledge progress. However, it goes further in requiring an exchange of information so that continuing environmental impact assessment[178] can be accomplished in a cooperative way. According to Judge Weeramantry, this is more than a mere concept, it is a principle with

176. *See* Counter-Memorial Submitted by the Slovak Republic, The Hague (Dec. 5, 1994) (SCM), Vol. I, par. 9.80-82.

177. SCM, *supra* note 176, para. 9.53, *quoted in Weeramantry*, 37 I.L.M. at 205 (emphasis added).

178. Through the understanding that EIA can never be expected to anticipate every possible environmental danger, Judge Weeramantry in effect expresses a preference for a particular model of "biosphere reflection"—that is, the consideration of impacts of actions on the biosphere (a term chosen as a broad category that includes both EIA and other procedures designed for the same purpose, such as "ecological expertise"). The kind of flexible decisionmaking assumed by Judge Weeramantry when he states that EIA is a dynamic principle "not confined to a pre-project evaluation of possible environmental consequences," *Weeramantry*, 37 I.L.M. at 214, is somewhat lacking in ecological expertise procedures. *See* Stephen Stec, *EIA and EE in CEE and CIS: Convergence or Evolution? in* A WORLD SURVEY OF ENVIRONMENTAL LAW, *supra* note 42, at 343-358.

normative value, with potential application to a broad range of projects on the national and international level.[179]

Behind the Principle of Continuing EIA is the Principle of Contemporaneity in the Application of Environmental Norms.[180] Judge Weeramantry proposes that, as the understanding of human rights evolves,[181] evolving norms must be applied accordingly; "the ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standards of yesterday."[182] The Principle of Continuing EIA may be considered to be just one example of the kinds of evolving environmental norms that are to be applied. The Principle of Contemporaneity in the Application of Environmental Norms is, thus, the operative principle from which the totality of sustainable development as outlined by the Court emanates.

The Weeramantry opinion does not stop with a theoretical discussion of principles but goes on to consider the implications of sustainable development for the question of whether, in environmental cases, *inter partes* principles ought to be applied. This question is of obvious importance to the operation of the law of treaties – in particular the sanctity of *pacta sunt servanda* – on disputes with potential environmental consequences. He concludes that environmental issues by their fluid and transboundary nature generally have *erga omnes* quality. Thus, where such issues are of sufficient importance, estoppel and other *inter partes* arguments should not be applied. He states the point as follows:

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179. *Weeramantry*, 37 I.L.M. at 214-215.

180. A general term for the contemporary application of evolving norms of law is "inter-temporal law." *See* Martin Dixon, Case and Comment: *The Danube Dams and International Law*, 57 CAMBRIDGE L. J. 4 (1998).

181. And "environmental rights are human rights." *Weeramantry*, 37 I.L.M. at 215.

182. *Id.* at 215. One implication of these two principles would be that the Czech Republic's argument against holding an EIA with respect to the Temelin nuclear power plant would be invalidated. The Czech Republic holds that the Temelin plant construction is not subject to an EIA because its construction was started prior to the effective date of the EIA law.

> We have entered an era of international law in which international law not only subserves the interests of individual states but also looks beyond them and their parochial concerns to the greater interests of humanity and to planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating states, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation.[183]

The possibility opened by the decision of the Court to reform treaty-based regimes implicitly recognized the *erga omnes* nature of environmental impacts alluded to by Judge Weeramantry. The practical effect of greater recognition of environmental concerns in the service of sustainable development might logically be primarily in the realm of fashioning remedies. While the wider interest in avoidance of harm would not necessarily affect the fact of obligations, it might work against expectations of specific performance and might introduce an element of flexibility in remedies. Thus, a party to a treaty, the object of which may reasonably found to result in devastating consequences for the environment, could not necessarily be compelled under the law of treaties to specific performance, and could justifiably terminate the treaty.

The above principles and approaches aid in the clarification of the compromise reached by the majority of the Court. Full application of the Principle of Contemporaneity in Application of Environmental Norms as envisioned by Judge Weeramantry might require, in the present case, further procedures and processes based on, for example, the Principle of Continuing EIA. It cannot be excluded that application of the Principle of Continuing EIA in the past might have led to a conclusion that the optimal implementation of the Gabcikovo-Nagymaros works would have been the "no action" alternative.[184] This further brings into question the Court's failure to respect a *status quo ante* based upon prior physical and ecological values in favor of

183. *Id.* at 216.

184. For a discussion of how these concepts might be applied post-decision, see discussion, *infra* notes 244-264 and accompanying text.

a *fait accompli* in the form of Variant C, and its negative attitude towards Hungary's stand in favor of preserving the "no action" alternative in the face of Czechoslovakia's advance.

D. BALANCE BETWEEN LAW OF TREATIES AND LAW OF INTERNATIONAL WATERCOURSES

The holding concerning Variant C presented an important opportunity for environmental values to be raised in relation to a certain category of projects under a treaty-based regime — ones involving shared natural resources. Applying sustainable development notions, the Court struck a balance between the law of treaties and the law of international watercourses. Yet, it was a difficult compromise for the Court, as shown by the judges' voting. The Court distinguished between the *construction* of Variant C, which was not internationally wrongful, and the *implementation* of that scheme, which constituted a transgression of international law.[185] With respect to implementation there was general agreement that Czechoslovakia's unilateral diversion of the Danube was in violation of Hungary's right to an equitable and reasonable sharing of an international watercourse under customary international law.[186] The Court was more divided on the construction issue.

The Court emphasized the notion of an equitable and reasonable sharing of an international watercourse underlying the Treaty. The equitable use doctrine has found expression in the recently adopted United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses,[187] art. 5:

> 1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable

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185. This is evident from the votes on the Court concerning "proceeding to" the "Provisional Solution" on the one hand and "putting it into operation" on the other. *Judgment*, 37 I.L.M. at 191, para. 88.

186. *See id.* at 191, para. 85.

187. *Supra* note 12. Note that the Permanent Court of International Justice went beyond equitable use to a concept of "perfect equality" of riparian states. *See* Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No. 23, at 27 (noting that all riparian states enjoy a "perfect equality" in the use of the waters of shared rivers).

> and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.
>
> 2. Watercourse States shall participate in these, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.[188]

The equitable use doctrine also finds expression in article 2, para. 2 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes,[189] which states, in relevant part:

> The Parties shall ... take all appropriate measures ... [t]o ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact ....[190]

Factors relevant to equitable and reasonable use are set forth in Article 6 of the Non-Navigational Uses Convention and include the natural character of the watercourse, actual and potential uses, social and economic needs of riparian states, costs of conservation and protection measures, and comparative costs and availability of alternative uses.[191] Factors are also expressed in the Helsinki Rules on the Uses of the Waters

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188. Non-Navigational Uses Convention, *supra* note 12,.
189. March 17, 1992, 31 I. L. M. 1312.
190. *Id.* para. 2(c).
191. *Supra* note 12. *See also* Stec & Eckstein, supra note 13, at 45.

of International Rivers.[192] The list includes "climate, geography and hydrology of the basin, past and existing uses of the waters, the economic and social needs of each state, the population dependent on the waters of the basin, the availability and cost of alternatives, the practicability of resolving the conflict through compensation, and the degree to which waste and unnecessary injury can be avoided."[193]

The Court had no trouble determining that a unilateral diversion of an international watercourse could, under no circumstances, be considered equitable and reasonable to downstream users.[194] While the Court's judgment discussed the equitable use doctrine as a generally applicable principle of customary international law, at least one commentator has noted that the 1977 Treaty regime appears to follow this doctrine,[195] while establishing a regime for the mitigation of environmental degradation in protection of the interests of downstream riparian users.[196] Slovakia could not convince the Court that the implementation of Variant C was justified as an approximate application of the 1977 Treaty.[197] This aspect of the Court's decision was based essentially on Hungary's lack of participation in Variant C, which was sufficient to invalidate it as a joint project. The implication, therefore, is that Czechoslovakia did not respect the Treaty's mechanisms for attaining equitable use when it sought to impose its own view of the Project's costs and benefits. The diversion was rendered unilateral because it was outside the confines of the 1977 Treaty.

Approximate application, thus, cannot be used for one party to extract its benefits from a failed joint project, at least where it involves an international watercourse. The decision also appears to foreclose the possibility that a state might argue for approximate application whether or not it attempts to take into

192. August 20, 1966, art. V, 52 I.L.A. 484.

193. Schwabach, *supra* note 3, at 331 (citations omitted).

194. *See Judgment*, 37 I.L.M. at 190-191, paras. 78, 85.

195. *See* Williams, *supra* note 8, at 46 (referring to Articles 5 and 9 of the 1977 Treaty, which provide for sharing of both the costs and benefits arising from the project).

196. *See id.* (referring to Articles 18-20 of the 1977 Treaty).

197. *Judgment*, 37 I.L.M. at 190, paras 75-78.

account the interests of the other state, on the grounds that each state has the right to determine within appropriate limits the balance of its own interests with respect to a shared natural resource. This means that if one party balks due to environmental concerns, a treaty relating to such a joint project ought never to be unilaterally executed. Where new environmental considerations are raised by one party to a regime for a project related to certain shared natural resources in the future, it would seem to be exceedingly difficult for construction to proceed to completion. This amounts to a type of environmental veto power by one state. Moreover, it would appear that such environmental concerns could be raised at any time, and that, in accordance with Judge Weeramantry's view, the other state could not succeed with *inter partes* arguments, such as estoppel, to limit a people's right to an equitable and reasonable sharing of an international watercourse.

The theoretical crack in the sanctity of treaties might, however, be too small to be of much use. Even if the right of one state to prevent another from implementing a maverick solution provides some measure of relief from the Court's strained reasoning, exercising the veto power could not be done except at substantial risk. Czechoslovakia was not found to have refused to consult with Hungary concerning possible environmental protection measures, even though it refused to stop work on Variant C.[198] Moreover, the Court did not indicate under what conditions a state might legitimately abandon work on account of sustainable development concerns. Rather, suspension of work in the Court's view might be considered "not conducive to negotiations."[199] The finding that Hungary contributed to the failure of negotiations under the Magic Articles would seem to make it exceedingly difficult for a state to abandon construction of any project, no matter how clearly its environmental impacts outweighed other considerations and regardless of irreversible harm. The Court preferred a status quo based on an existing legal regime—in this case for construction

198. For an argument that Czechoslovakia's refusal to stop construction of Variant C may be a violation of the principle of good faith negotiations, see Eckstein, *supra* note 9, at 113.

199. *Judgment*, 37 I.L.M. at 195.

of the barrage system—to a status quo based on physical and environmental conditions (the usual starting point for environmental impact assessment).[200] Thus, the Court allowed for the continuation of profound activities with uncertain, but potentially devastating environmental effects, making it rather difficult for a state to reasonably hold forth the "no action" alternative for a project with its conception at a time in the past when environmental values were less perfectly formed. An attempt by a state to apply the precautionary principle is, therefore, rather risky.

The Court's handling of Slovakia's defenses is reasonably clear.[201] The Court's view of the interaction between the law of treaties and the law of international watercourses on the question of the preparatory acts by Czechoslovakia is less clear. Because of the basic split on the bench between those who found Variant C justifiable completely, and those who found even its construction to be a violation of Czechoslovakia's international obligations, only four judges were in the majority on both issues.[202] The distinction between preparatory acts and executory acts made by the Court, whatever its basis, was dispositive in dismissing Hungary's argument that its purported termination of the 1977 Treaty was lawful and effective. It has been pointed out that this distinction can be linked to considerations of sovereignty where the preparatory acts took place solely on the territory of Czechoslovakia.[203] Yet, this is not a wholly satisfactory explanation, where the acts in question were justified on the basis of a treaty and involved an international watercourse.

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200. Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162, 236-237, paras. 6-9. (dissenting opinion of Parra-Aranguren, J.). The starting point for an EIA (or EIS as required under the National Environmental Policy (NEPA), 102(2)(C)(iii) and 102(2)(E), 42 U.S.C. 4342(2)(C)(iii) and 4342(2)(E) may be inferred from the Council on Environmental Quality's regulations on Environmental Impact Statements, which require consideration of a "no action" alternative. *See* 40 C.F.R. § 1502.14.

201. Neither was the Court persuaded by Slovakia's other defenses. While confirming that the proper analysis of the diversion was in the context of the law of counter-measures, the Court established that the unilateral diversion of a transboundary watercourse is presumptively disproportionate as a countermeasure to a breach of a treaty. *See* Dixon, *supra* note 180, at 3.

202. These were Judges Weeramantry, Guillaume, Shi and Kooijmans.

203. *See* Dixon, *supra* note 180, at 3.

In the largest expression of disunity on the bench, six judges concluded that Czechoslovakia had no right to proceed to the provisional solution. In particular, the dissenters felt unable to distinguish between the substantial work that had been done to complete Variant C and its being put into operation.[204] While a diversion of an international watercourse had not taken place, and, therefore, the law of international watercourses was not relevant, nevertheless Czechoslovakia's progress towards Variant C had implicitly belied its good faith towards Hungary's concerns and, in the opinion of four of the dissenters, had justifiably prompted Hungary's termination of the treaty. The dissenters did not accept the opinion of the majority that Czechoslovakia's immense investment should be considered in its favor.[205]

While conceding that the implementation of Variant C was an internationally wrongful act, the Court held that construction of that Variant, at great expense, *even up to the very point of flicking the switch,* was not a breach of Czechoslovakia's obligation of good faith dealing.[206] In the view of the dissenters, however, the Court might well have distinguished between an "immense investment" in something, which upon execution would be a violation of international law, and an immense investment in good faith execution of a treaty.[207] If Czechoslovakia had been held not to have acted in good faith, the validity of Hungary's termination would be bolstered. It was critical to reaching the Court's intended result that Hungary's attempt at termination of the 1977 Treaty be ineffectual. Otherwise, the Court would have difficulty in achieving its intended aim — maintaining a treaty regime based on the current situation, in

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204. *See, e.g.* Declaration of President Schwebel, 37 I.L.M. 204 ("I view the construction of 'Variant C,' the 'provisional solution,' as inseparable from its being put into operation"); *see also* the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162, 228-229 (dissenting opinion of Fleischhauer, J.) [hereinafter *Fleischhauer*].

205. *E.g., Fleischhauer*, at 37 I.L.M. at 230.

206. Czechoslovakia's good faith, or lack thereof, played a major role in Judge Fleishhauer's opinion.

207. A fuller analysis of this question would require the separation of those investments which were consistent with the Project as revised in accordance with the Court's judgment, and those investments which were not consistent with the revised regime – that is, those investments which were "inside" or "outside" the scope of the reformed Treaty.

which Hungary has joint control over the works. By confirming Hungary's joint control over the Gabcikovo works, the decision confers benefits on Hungary from the continued operation of the works in the future that might give Hungary an interest in accepting the Court's decision.

But, couldn't Hungary have terminated the treaty at any time following the *implementation* of Variant C since that was a material breach of the Treaty? Realizing this possibility, the Court did not depend only on incentives; rather, it went further to apply a legal rule that prevented Hungary from ever terminating the 1977 Treaty based on the implementation of Variant C. Hungary was declared to have prejudiced its right to terminate the Treaty because of its own prior wrongful conduct.[208] The Court pointed to a "generally accepted" principle that one party to an agreement may not take advantage of another's failure to fulfill an obligation or make use of a means of redress if that party prevented the other from doing so through an illegal act.[209] Yet, there is an illogic to the Court's pronouncement. The Court declares that Czechoslovakia had no legal basis for implementation of Variant C, implying that it was not a legal consequence of Hungary's abandonment of works at Nagymaros. At the same time, it finds that there are *legal consequences laid upon Hungary* because there may be a factual or political basis for Czechoslovakia's implementation of Variant C.[210]

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208. *See Judgment*, 37 I.L.M. at 196, para. 10.

209. *Id.* at 196, para. 110, citing Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927 P.C.I.J. (ser. A) No. 9, at 31. While the language of the Permanent Court of International Justice in that case speaks only of an "obligation," this term should generally be considered to refer to obligations under the subject agreement or those arising under the agreement itself. Whereas the obligation violated by Czechoslovakia in the implementation of Variant C was based on customary international law rules relating to international and boundary waters, the Court is implicitly declaring that Hungary's violation of the 1977 Treaty prevented Czechoslovakia from observing these customary international rules, thus *compelling* Czechoslovakia to implement Variant C. It is difficult to square this with the Court's decision that Variant C was not a lawful countermeasure. *See id.* at 190-191, paras. 82-87.

210. Compare this result with the Court's statement elsewhere: "[T]his does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the

The rule declared by the Court would seem to create more problems than it solves. In the first place, it weakens the potential use of legal arguments to prevent a second internationally wrongful act. States which have committed prior wrongful acts may thereby have lost their ability to refer to the law to deter wrongful conduct by those States they have harmed.[211] Considering the fact that environmental wrongs may have *erga omnes* effects, weakening of the subject of international law most likely to challenge such wrongs opens the door to further environmental degradation. Of equal significance, it establishes a category of instances where a State may benefit from its own commission of an internationally wrongful act, thus condoning and indirectly encouraging illegal behavior by States.[212] If one party to a treaty may prejudice its right to terminate the treaty *on any grounds*,[213] the harmed party not only may insist on performance of the treaty obligations, but may do so while itself frustrating the object or purpose of the treaty—even while not acting in good faith. While such consequences may in theory cause States to hesitate before committing a first wrongful act, in reality the legal situation is often clear only in hindsight. Intended perhaps as one piece of a comprehensive solution that might, in the eyes of the Court, satisfy both parties, the rule is a harsh one with unforeseeable consequences.

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legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct." *Judgment*, 37 I.L.M. at 200, para. 133.

211. While the Court's decision refers specifically to the right to terminate a treaty, there is nothing in the decision that would distinguish between the forfeiture of this right and of other rights of states under international law.

212. Even in the most limited reading of the rule, it confers a legal advantage on States that carry out disproportionate countermeasures. However, in this case the countermeasure is disproportionate because in itself it violates customary international law.

213. This is the implication of the statement that Hungary's prior breach had prejudiced its right to terminate the Treaty, even in the case that Czechoslovakia "had violated a provision essential to the accomplishment of the object or purpose of the Treaty." *Judgment*, 37 I.L.M. at 196, para. 110.

E. THE ICJ'S CONSIDERATION OF ENVIRONMENTAL EVIDENCE

Before the ICJ issued its decision, the outcome of the case was expected to depend on the Court's assessment of the evidence presented by the Parties of environmental degradation or risk.[214] The proper role of evidence, scientific evidence in particular, in the *Gabcikovo-Nagymaros Project Case* is emphasized by the fact that in this case the ICJ exercised for the first time in its history the possibility under its rules to actually visit a site pertaining to a case before it.[215] The Parties placed great emphasis on their respective views of the scientific evidence, both in the pleadings and in oral argument.[216] Disappointingly for those hoping for guidance from the Court,[217] the ICJ failed both to adequately evaluate the scientific evidence presented,[218] and to pronounce on the evidentiary standard.[219]

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214. *See* Gaetan Verhoosel, *Gabcikovo-Nagymaros: The Evidentiary Regime on Environmental Degradation and the World Court*, 6 EUR. ENVTL. L. REV. 247 (1997); Williams, *supra* note 8, at 57 ("The environmental evidence will play a key role.").

215. The site visit was undertaken under Article 66 of the Rules of Court pursuant to the Court's functions with regard to the obtaining of evidence. *See Judgment*, 37 I.L.M. at 172, para. 10. As a result, the ICJ shares with the former Permanent Court of International Justice the fact that its only site visit was in connection with a case involving a transboundary watercourse. The latter court exercised this function in Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70. *See* Peter Tomka & Samuel S. Wordsworth, *Current Developments: The First Site Visit of the International Court of Justice in Fulfillment of Its Judicial Function*, 92 AM. J. INT'L L. 133, 134 (1998). The two Parties executed a Joint Protocol which served as a formal proposal to the Court to exercise its functions. *See id.* at 136. The site visit sets an interesting precedent for particularly technical disputes. *See id.* at 140. *See also* Verhoosel, *supra* note 214, at 248.

216. Memorial of the Republic of Hungary, The Hague (2 May 1994) Vol. V; Memorial submitted by the Slovak Republic, The Hague (2 May 1994) Vol. III.

217. One commentator asserted that "the Court's pronouncements on the environment are necessarily more recommendatory than prescriptive." P.H.F. Bekker, *Gabcikovo-Nagymaros Project*, 92 AM. J. INT'L L. 273, 278 (1998).

218. Hungary's assertions included: the role of the banks of the river in filtration of drinking water and the more general consideration that the complex system of tributaries in the Szigetkoz reduces overall pollution of the Danube; the stretch of the Danube in the area of the barrage system is extremely diverse in flora and fauna, *see* Williams, *supra* note 8, at 16 n.82 (and sources cited therein); this area is on top of a geologically young fault, *see id.* at 17 n.89 (and sources cited therein); the project is not economically viable, *see id.* at 17-18 nn.94-96 (and accompanying text.) On the other hand, Slovakia contended that, far from the project being environmentally disastrous, it would actually have environmental benefits in reduced erosion and flood control. *See*

Without passing on the evidence, the Court nevertheless made use of it to support its conclusions at several turns. While it may be beyond the Court's abilities to resolve differences of scientific opinion, the Court must have engaged in some weighing of the evidence in order to determine that the environmental threat claimed by Hungary was not "imminent." In discussing the proportionality of the diversion as a countermeasure, the Court must have done some weighing when it referred to "the continuing effects of the diversion of these waters on the ecology of the riparian area of Szigetkoz."[220] But, there is little indication of the Court's assessment of particular facts alleged or scientific conclusions reached. By the handling of the argument of necessity and the lack of attention paid to environmental impacts of the Danube diversion, it might be concluded that the Court gave relatively little weight to the environmental evidence it heard.

Although it did not sustain Hungary's argument for a state of necessity, the ICJ did acknowledge environmental protection as an essential state interest and left the door open to the possibility that, in an appropriate case, the threat of imminent harm *could* give rise to a state of necessity. It also acknowledged that a central legal pillar, such as *pacta sunt servanda*, might, in some circumstances, have to yield to environmental concerns. Given the Court's acceptance of a safe and balanced ecology as an "essential" state interest and its acknowledgment of actual harm, the absence of a more extensive treatment was surprising to some.[221] What the Court could have done, however, was to give some guidance as to the evidentiary standard that should be applied in such a case. The imminence of harm and the establishment of the harm are inherently linked. Under international watercourse law, a corollary to the principle

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id. at 18-20 nn.99-112 and accompanying text. A good sampling of various statements on all sides can be found in Eckstein, *supra* note 9, at 137-64.

219. Nor did the Court discuss the extent to which potential or future environmental harm could be taken into account. *See* Verhoosel, *supra* note 214, at 250 n.33 and accompanying text (arguing that in any case the Special Agreement explicitly empowers the Court to take into account future consequences) citing Special Agreement, *supra* note 116, art. 2 (1)(b).

220. *Judgment*, 37 I.L.M. at 191, 200-201, paras. 85, 140.

221. Stec & Eckstein, *supra* note 13, at 46.

of equitable and reasonable use is the obligation of states not to cause significant harm to other states in their use of a transboundary watercourse. In the *Trail Smelter case,* the arbitration tribunal established the evidentiary standard to be applied in a case of transboundary environmental harm.[222] The tribunal held that no state has the right to use or permit the use of its territory in a manner that causes environmental injury where the consequences are serious and "the injury is established by clear and convincing evidence."[223] In environmental cases, which often involve complex interactions of multitudes of factors, problems of proof are rampant. A "clear and convincing" standard of proof would seem to be in opposition to the precautionary principle.

As described above, the precautionary principle employs a comparatively skeptical approach to the capabilities of science to determine solutions to complex problems. The precautionary concept governs the application of science, technology, and economics to environmental protection in a way that assumes that science alone is ill-equipped to determine the efficient allocation of resources to address issues of risk and uncertainty.[224] Moreover, it implies a more careful evaluation of potential costs by factoring in uncertainty in a way that takes into account cumulative unintended effects. The application of evolving norms of environmental law might therefore require revision of the evidentiary standard to be applied in cases of transboundary harm.

As might have been expected, Hungary, relying upon the precautionary principle, argued in favor of a much lower evidentiary standard than "clear and convincing." In fact, in its brief to the ICJ, Hungary even argued for what essentially amounted to a presumption of harm and a shift in the burden of proof onto the proponent of potentially harmful activities to demonstrate that the proposed activity would *not* have such effects.[225] The Court was reluctant, however, to define the cir-

222. (U.S. v. Can.), 3 U.N.R.I.A.A. 1938 (1949).
223. *Id.*
224. *See* Freestone & Hey, *supra* note 29, at 12.
225. Memorial of the Republic of Hungary, para. 6.69.

cumstances under which environmental concerns might override or modify treaty obligations. This may have amounted to the imposition of an almost insurmountable burden to establish the sufficiency of environmental interests in the face of "substantial investments." This reluctance to weigh the impact of the "preparatory acts" ironically required the Court to look beyond the four corners of the treaty to the law of international watercourses in order to find that the implementation of Variant C had been illegal.

Ultimately, the Court properly left the determination of scientific questions (including the factoring of uncertainty) to the States.[226] While essentially leaving it up to the Parties to negotiate based on the principles of the law on international watercourses, the Court did not elaborate on these principles.[227] Presumably, Hungary and Slovakia must determine such questions on a national or bilateral level in a manner determined by domestic and international law. In this case, that would include environmental impact assessment including the transboundary participation of interested members of the public, based both on the domestic legislation of each country,[228] as well as international law.

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226. *Judgment*, 37 I.L.M. at 200, para 140. The Court further suggested that recourse to a third party such as the European Commission might be a useful way to resolve scientific differences. *Id.* at 201, para. 143.

227. For detailed discussions of the law on international watercourses and how it could have been applied in the instant case, see Williams, *supra* note 8; Schwabach, *supra* note 3; Eckstein, *supra* note 9; Gabriel E. Eckstein & Yoram Eckstein, *International Water Law, Groundwater Resources and the Danube Dam Case, in* PROCEEDINGS, INTERNATIONAL ASSOCIATION OF HYDROLOGISTS XXVII CONGRESS AND ANNUAL MEETING OF THE AMERICAN INSTITUTE OF HYDROLOGY 243-248 (Las Vegas, Sept. 27 – Oct. 2, 1998). Those who have considered the equitable use doctrine have concluded that most of the factors listed under the Helsinki Rules on the Uses of the Waters of International Rivers, *supra* note 192, tend to weigh on the side of Hungary in the dispute. *See* Schwabach, *supra* note 3, at 331; Eckstein, *supra* note 9, at 111 n.184.

228. In Hungary, the relevant domestic legislation is the Act on Enviromental Protection, Law LIII of May 30, 1995, *translated in* 6 HUNGARIAN RULES OF LAW IN FORCE 1137 (1995); Gov. Decree No. 152/95 on Activities Requiring the Completion of an Environmental Impact Assessment and on the Detailed Rules of the Connected Administrative Procedure. In Slovakia, the relevant domestic legislation is the Act on Environmental Impact Assessment, No. 127/94 (1994). For a discussion of these laws, *see* Stephen Stec, *Ecological Rights Advancing the Rule of Law in Eastern Europe*, 13 J. ENVTL. L. & LITIG. 137-43, 151-54 (1998).

VII. CONCLUSIONS

The *Gabcikovo-Nagymaros Project (Hungary/Slovakia) Case* bears witness to the critical role of environmental and sustainable development issues in the kinds of deep transformations arising out of the dynamism in Central and Eastern Europe. Through the process of discrediting a hyper-scientific, positivistic paradigm, Central and Eastern Europe has directly felt the effects of the failure to take a precautionary approach in decision-making. It is there that an important role was played by the devastated environment in the dissident movement during the latter days of communism, demonstrating the connection between the environment and basic rights, democratization and the rise of voluntary organizations. And it is there that an intense dialogue continues to take place in the face of the profound impacts of historical change as to the future course of human development in the region, with global implications. Central and Eastern European developments in environmental legislation, in basic concepts relating to rights, and in how the law is used and enforced to protect the environment, bear witness to an intense struggle, the result of which could be a basic social reordering. Given the factors present in the region, it is significant, though not surprising, that the first case in which the ICJ had to grapple with the concept of sustainable development arose there.[229]

In abstract terms, therefore, the *Gabcikovo-Nagymaros Project Case* may be considered to be a contribution of the region of Central and Eastern Europe to the future course of sustainable development, in discharge of common but differentiated responsibilities under Principle 7 of the Rio Declaration. In this context, the government of Hungary, while not entirely consistent in the whole of its pleadings, presentations before

229. The existence of a case such as *Gabcikovo-Nagymaros Project* on the international level ought to lead one to look at national courts for decisions relating to progressive development of environmental law. One such case is the Protected Forests Case decided in 1995 by the Constitutional Court of Hungary. *See* Court Decision No. 28/1994 (basic right to a healthy environment prohibits the state, having once established a certain level of protection, from reducing it).

the Court, and actions either before or after the case, [230] did the better job in bringing forward sustainable development concepts. While Hungary could do no more than bring these concepts to the attention of the Court, it was up to the Court to do something with them. Judged against albeit unrealistic expectations and the opportunities presented to integrate environment and development, the results of the decision must be considered to be a mixed bag.

Further events have demonstrated that at least some of the "changed circumstances" argued by Hungary are still open questions, involving ongoing political processes, bearing out the Court's wisdom in dismissing this argument as a justification for termination of the Treaty.[231] The ICJ's discussion of sustainable development has improved chances of resort to environmental arguments. Furthermore, the sanctity of *pacta sunta servanda* has been eroded somewhat, at least in terms of blind adherence without interpretation in the light of evolving precepts of international law. If a similar dispute were to arise in the future, the issue of suspension of application of a treaty on environmental grounds ought, therefore, to be the first issue submitted to the type of process of third-party involvement characterized by the Court as evidence of good faith in negotiations.[232] Ultimately, given the extent to which the Court has declared its terms to be negotiable, the value of the 1977 Treaty at present is unclear. Why should it be preserved? Its only function now appears to be to corral Hungary and Slovakia and prevent them from taking extra-legal steps. Yet the fact that this could only be done through a treaty regime is the

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230. The struggle within Hungary over integrating environment and development versus defense of particular development interests is evident from the difficulties Hungary has had in maintaining a consistent position over the long course of the dispute. In a sense this struggle is a microcosm of the struggle over sustainable development in the international context and, therefore, bears further scrutiny.

231. *See* next section.

232. *Judgment*, 37 I.L.M. at 200-201. *But see* Eckstein, *supra* note 9, at 83-84 (citing Dante A. Caponera, *Patterns of Cooperation in International Water Law: Principles and Institutions*, 25 NAT. RESOURCES J. 563, 569 (1985)) (Where there is a dispute as to the harm that might arise from activities involving a transboundary watercourse, an "indispensable facet of good faith negotiations requires the notifying state not to proceed with the planned activity, or to suspend progress of the activity, until such time as the dispute is resolved.").

starkest evidence of the undeveloped state of the law of sustainable development. The fact of "negotiability" also does not address the question as to the operation of evolving precepts themselves in a particular case. Where precepts are evolving, they are often the subject of disagreement. It will still be difficult, even after the ICJ decision, for one Party to an agreement to insist on specific changes to a negotiated regime by appealing to newly evolving norms of environmental law. As the precautionary principle develops, its impact on the assessment of potential harm might well put pressure on existing, rigid treaties. Following the *Gabcikovo-Nagymaros Project Case*, therefore, states entering into treaties for the implementation of joint projects with the potential for significant impact on the environment should take care to ensure that the treaties contain provisions guaranteeing that the parties will be able to take into account and react flexibly to emerging norms of environmental law.

On the other hand, the Court's failure to put the "no action" alternative on the same level as modifications to an existing regime belies its full appreciation of sustainable development. The Court seems to have been so intent on preserving the treaty regime as the only means of avoiding uncontrolled conflict between the parties that it forced hazy sustainable development concepts to fit the result. Its hesitancy to pass on the evidence may have effectively disabled it from looking to the merits of certain arguments, in spite of the fact that it obviously made judgments based on that evidence. The Court's failure to accept Hungary's interpretation of the precautionary principle left unchanged an almost insurmountable burden of showing clear and convincing evidence of the likelihood of significant harm. These matters taken together, especially the implicit perpetuation of an environment/development dichotomy, have given insufficient direction to the parties. Judge Weeramantry's concepts perhaps open the door to improved judgments in the future, whether in the current dispute or in subsequent cases before the ICJ. In fact, the Court might very soon have another chance to elaborate on the matters in the *Gabcikovo-Nagymaros Project* decision, as discussed in the postscript below.

VIII. POSTSCRIPT: PROSPECTS FOR "GABCIKOVO II"

A. EVENTS FOLLOWING THE ICJ DECISION

On September 3, 1998, Slovakia turned back to the ICJ.[233] The immediate justification for Slovakia's submission was the allegation that Hungary had not fulfilled its obligations under the Court's judgment to reach a settlement within six months.[234] To understand how this came about, it is necessary to review events following the issuance of the ICJ decision, especially in Hungary, where the dam issue had been an irritant in domestic politics for many years. Somewhat ironically, when the ICJ decision was finally issued after years of negotiations and legal proceedings, Hungary was being governed by the Socialists, many of whom had links to the pre-transition regime. Thus, while the first official Hungarian reaction to the decision, coming in statements from the legal team, emphasized the holding that Nagymaros need not be built, quite different statements from the government of Prime Minister Gyula Horn soon appeared.[235] As the negotiations between the parties mandated by the Court's judgment approached, it became more and more clear that the government intended to agree to the building of a second dam.236 The positions taken by the Horn government led to its being embroiled in a public debate over the interpretation of the ICJ decision, in which members of the government's own legal representation team took part, often weighing in against the government. [237] The debate heated up

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233. *See* ICJ Press Communique: *Gabcikovo-Nagymaros Project (Hungary/ Slovakia): Slovakia requests an additional Judgment* (Sept. 3, 1998) <http://www.icj-cij.org/idocket/ihs/ihsframe.htm>) (hereinafter "ICJ Press Communique"). If Slovakia's request is considered to be a request for the interpretation of "Gabcikovo I," this would give rise to a new case under ICJ rules. *See* Request For Interpretation Of The Judgment Of 11 June 1998 *in* The Case Concerning The Land And Maritime Boundary Between Cameroon And Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nig. v. Cameroon) General List No. 101 ICJ, 1998. *See* Boldizsar Nagy & Katalin Gyroffy, *Iranytc Nelku* [*Without a Compass*], 3 BESZELC 26-42 (May 1998).

234. ICJ Press Communique, *supra* note 233.

235. E.g. Zoltan otvos, "Mit mondott ki Hga s mit nem?" ["What did the Hague say and what didn't it say?"].

236. *See* Boldizsar Nagy & Katalin Gyrffy, *Iranytu Nelkul* [*Without a Compass*], BESZL, vol. 3, no.5 (May 1998), at 28 (box).

237. For the text of the Nemcsok Agreement, see NEPSZAVA, March 11, 1998. *See, e.g.*, Boldizsar Nagy, *Lehetsegeink Haga utan* [*Our possibilities after the Hague*], NEPSZABADSAG (Nov. 17, 1997); Hajnalka Cseke, *A hagai itelet nem ir elc epitesi kotel-*

in anticipation of elections in April 1998. Meanwhile, Janos Nemcsok represented Hungary in negotiations in which he made assertions strangely in opposition to the parts of the Court's decision favorable to the positions Hungary had taken in the proceedings.[238]

While this was going on, Slovakia couldn't believe its luck. According to reliable reports, it had anticipated the Hungarian negotiating position to be focused on the amount of water to be returned to the original course of the Danube. Slovakia pressed its advantage, while Hungarian society was arguing whether Nemcsok's statements properly represented Hungarian interests and whether he was properly authorized to negotiate. As a result of the negotiations a Framework Agreement (the "Nemcsok Agreement") was drafted in which Hungary agreed to the building of a second dam. This draft agreement was initialed by Nemcsok.[239] Further criticism in the press of the Nemcsok Agreement led to a split between the Hungarian Socialist Party (MSZP) and its junior coalition partner, the Free Democrats (SZDSZ). As a result the agreement was not signed by the Horn government and debate over it was postponed until after the April elections. In parallel, citizens started a drive for a referendum on the question of whether

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ezettseget [*The Hague Decision Doesn't Call For the Obligation to Build*], MAGYAR NEMZET (Feb. 16, 1998) (interview with Boldizsar Nagy). For a pro vs. con discussion, see Zoltan Otvos, *Mit mondott ki Haga es mit nem?* [*What did the Hague say and what didn't it say?*], NEPSZABADSAG (Jan. 26, 1998). Members of Hungary's legal representation team continued to interpret the decision in a way that would not require the building of a second dam. *See, e.g*, Boldizsar Nagy, *A Bos-Nagymarosi Ercmcrendszerrel Kapcsolatos Nemzetkozi Jogi Problemak*, [*The International Legal Problems Connected With the Bos (Gabcikovo)-Nagymaros Barrage System*], PROCEEDINGS OF THE XI MEETING OF THE HUNGARIAN LAWYERS ASSOCIATION, Gyula, Hungary (Oct. 1997).

238. For an examination of the differences between statements made by Nemcsok and the ICJ decision, see *Nemcsok Kontra Hagai Nemzetkozi Birosag* [*Nemcsok Against the International Court of the Hague*], *in* A DUNA VEDELMEBEN A HAGAI DONTES UTAN 137- 41 (Batthyany Lajos Alapitvany ed., 1998); Boldizsar Nagy & Katalin Gyroffy, *Iranytc Nelku* [*Without a Compass*], 3 BESZELC 26-42 (May 1998), (also containing allegations of Nemcsok's links to special interests in favor of construction of a second dam). For an earlier accounting of the battle of experts between environmentalist and "hydropower lobby" forces, see OPPORTUNITIES FOR SZIGETKOZ, *supra* note 92.

239. For the text of the Nemcsok Agreement, see Nepszaua, March 11, 1998. For a discussion of the consistency of the draft settlement agreement with the ICJ decision and with international law, and the legal effect of the initialling of the agreement by Nemcsok, see Boldizsar Nagy, *Zsebszerzodes?* [*Pocket Agreement?*], ELET ES IRODALOM (Feb. 23, 1998).

Hungary should build a second dam. The results of the elections, which the MSZP lost (underestimation of the public's opposition may have played a significant role in the defeat),[240] rendered the referendum moot when the new government declared itself opposed to construction.

After the new government disavowed the Nemcsok Agreement, Slovakia announced that it would return the dispute to the ICJ for further guidance. In its submission, Slovakia referred to the initialed Nemcsok Agreement, which had been approved by the Government of Slovakia on March 10, 1998.241 Slovakia, thus, now contends that "on 5 March 1998, Hungary postponed its approval and, upon the accession of its new Government following the May elections, it has proceeded to disavow the draft Framework Agreement and now further delays implementing the Judgment."[242] Hungary filed a re-

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240. Note the parallel to events in 1989-90. In April 1990, during a time when the dam project was an issue in the elections, the Socialists won only 8.5% of the seats in the parliament. In contrast with the situation in 1998, however, the Socialists had voted 186 to 7, with 74 abstentions, to abandon the works at Nagymaros just before the election. *See* Schwabach, *supra* note 3, at 299 n.60 and accompanying text.

241. *See id. See also*, Nagy and Gyorffy, *supra* note 236, at 29 (box).

242. Slovakia, relying on Article 5 of the Special Agreement, which provides that either Party may request the Court to determine the modalities for executing the Judgment if negotiations are unsuccessful for six months following the judgment, requested the Court to adjudge and declare:

> 1. That Hungary bears responsibility for the failure of the Parties so far to agree on the modalities for executing the Judgment of 25 September 1997;
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> 2. That in accordance with the Court's Judgment of 25 September 1997, the obligation of the Parties to take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977 (by which they agreed to build the Gabcikovo-Nagymaros Project) applies to the whole geographical area and the whole range of relationships covered by that Treaty;
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> 3. That, in order to ensure compliance with the Court's Judgment of 25 September 1997, and given that the 1977 Treaty remains in force and that the Parties must take all necessary measures to ensure the achievement of the objectives of that Treaty:
>
> (a) With immediate effect, the two Parties shall resume their negotiations in good faith so as to expedite their agreement on the modalities for achieving the objectives of the Treaty of 16 September 1977;
>
> (b) In particular, Hungary is bound to appoint forthwith its Plenipotentiary as required under Article 3 of the Treaty, and to utilize all mechanisms for joint studies and cooperation established by the Treaty, and generally to conduct its relations with Slovakia on the basis of the Treaty;
>
> (c) The Parties shall proceed by way of a Framework Agreement leading to a Treaty providing for any necessary amendments to the 1977 Treaty;
>
> (d) In order to achieve this result, the Parties shall conclude a binding Framework Agreement not later than 1 January 1999;

sponse on December 7, 1998, in which it objected to Slovakia's submission on the grounds that the Nemcsok Agreement was not binding, failure of negotiations was not final, and the parties were still under an obligation to negotiate.[243]

Whether there will be a "*Gabcikovo II*" before the ICJ depends on the success of the continuing settlement negotiations between the Parties. These negotiations were ongoing as of early 1999, with the ICJ apparently taking a "wait-and-see" attitude. However, there were no indications of a breakthrough on key issues such as the building of a second dam and the amount of compensation. Thus, it appeared likely that the ICJ would be compelled to elaborate on its decision in "*Gabcikovo I.*" While Slovakia has asked the Court to consider the narrow issues of the legal effect of the initialed Nemcsok Agreement, and whether Hungary has violated the Court's order by not reaching agreement within the specified time, it can be expected that additional issues will be raised in further proceedings. Among the issues that the Court is likely to be asked to decide are: (1) the specific meaning of the Court's pronouncements concerning the need to build a second dam and the zero sum solution;[244] (2) what evolving norms of the international law of sustainable development the Parties should take note of in their negotiations; and (3) specifically whether procedures such as EIA with transboundary public participation are necessary. The Court may also be asked to elaborate further on some parts of its ruling which appear not to be wholly consistent with one another – for example, the holding that the im-

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(e) The Parties shall reach a final agreement on the necessary measures to ensure the achievement of the objectives of the 1977 Treaty in a treaty to enter into force by 30 June 2000;

4. That, should the Parties fail to conclude a Framework Agreement or a final agreement by the dates specified at sub-paragraphs 3 (d) and (e) above:

(a) The 1977 Treaty must be complied with in accordance with its spirit and terms; and

(b) Either party may request the Court to proceed with the allocation of responsibility for any breaches of the Treaty and reparation for such breaches.

ICJ Press Communique, *supra* note 233.

243. Interview with Boldizsar Nagy, Assistant Professor, Eotvos Lorand University, Budapest, January 1999. *See also Hungary Wants More Time Before Deciding On Dam,* 2 RFE/RL NEWSLINE, Part II (Dec. 1998) 4.

244. As to the specific meaning of the Court's pronouncements concerning the need to build a second dam and the zero sum solution. *See* Nagy & Gyroffy, *supra* note 238, at 29.

plementation of Variant C was an internationally wrongful act, while the substantial progress towards its implementation did *not* indicate bad faith. These questions will be considered so long as the Court does not hold the Nemcsok Agreement to be binding on Hungary.

B. THE ROLE OF SUSTAINABLE DEVELOPMENT LEGAL NORMS IN THE COURT ORDERED NEGOTIATIONS

Do the concepts in Judge Weeramantry's opinion offer a possible solution? Would his view require the Court to do more with respect to the scientific evidence, the evidentiary standard, or the burden of proof? The concurring opinion of Judge Weeramantry pointed to a customary international norm of environmental impact assessment. Certainly EIA is the most common mechanism for taking into account environmental considerations in decision-making, consistent both with the Magic Articles, as interpreted, and the sustainable development formula for integrating environment and development. Judge Weeramantry's view was indicated in another case involving environmental issues, the Nuclear Tests (New Zealand v. France) Case.[245] In connection with that dispute, he said, "[i]t is clear that on an issue of the magnitude of that which brings New Zealand before this Court the principle of Environmental Impact Assessment would prima facie be applicable in terms of the current state of international environmental law."[246]

Yet in the present case, it is important to go beyond the simple declaration that EIA is applicable as a principle. If EIA is to be used by the Parties simply to promote their own views as to the scientific evidence, it will not be useful. It is, thus, necessary also to establish particular standards and parameters for EIA to be applied in a manner that will assist in the resolution of underlying issues of disagreement on the interpretation of facts. While it is difficult to speak of global standards on EIA, there is clearly a highly developed set of norms

245. 1995 I.C.J. 288.
246. *Id.* at 345 (opinion of D.O.Weeramantry).

pertaining to EIA on a regional level in Europe, based upon domestic legislation and the legislation of the European Union.[247] It is also true that these standards are already reflected to a great extent in the domestic legislation of Hungary and Slovakia. Thus, to give shape to the principle, one could look to regional, i.e., European, norms in order to provide particular content as to the application of a norm of customary international law. The notion that regional customary norms could be applied as a matter of customary international law is held by some scholars to be an implication of the notion of "special customary rules" applicable to particular states.[248] It is also apparent from the notion in Article 38 (1)(c) of the ICJ Statute that a legal principle need not be accepted globally in order to become international law, as discussed below.

With respect to transboundary issues, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context[249] may be looked to for guidance as to the content of emerging norms of customary sustainable development law.[250] As of July 18, 1998, Hungary had ratified the Convention and Slovakia was a signatory.[251] The Espoo Convention imposes a general obligation on States Parties to "take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from pro-

247. European Commission Directive 85/337 on Environmental Impact Assessment, 1985 O.J. (L 175, 5.7) 40.

248. *See, e.g.*, M.E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 33 (1985), *cited in* Verhoosel, *supra* note 214, at 251. There should not be any jurisdictional obstacle to the ICJ's recognition of an international norm that operates among particular states rather than on a global level. In any case, regional norms will be more significant in the course of negotiations between the Parties than they would be in a theoretical "Gabcikovo II."

249. *Supra* note 164. The Convention came into force in 1997.

250. Judge Weeramantry mentioned the Espoo Convention along with several other international documents recognizing the principle of EIA. *Weeramantry*, 37 I.L.M. at 214 n.81.

251. It is settled that conventions may be evidence of customary international law expressing norms that might apply even to states that are not parties to the subject convention. This rule was applied in the present case in respect of the Vienna Convention on the Law of Treaties. It may even be applied in the case of conventions that have not yet come into force. See discussion of the 1982 Law of the Sea Treaty in NANCY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW (1994).

posed activities."[252] Specifically, it requires a country to undertake an EIA proceeding, according to specified standards including transboundary participation, in the approval process for specific[253] activities.[254]

A significant standard for EIA that is found in the Espoo Convention, as well as the domestic EIA legislation of Hungary and Slovakia, is the inclusion of participation of the public in decision-making and the taking into account of the public's comments.[255] Emerging norms of environmental law concerning the substance and procedure of public participation in environmental decision-making are found in the recently adopted Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters.[256] It is evident from the facts and circumstances of the *Gabcikovo-Nagymaros Project Case* that such matters are essential to this case, and decision-making relating to the Project must be based on a participatory process in order to be successful. As the norms relating to Rio Principle 10[257] have developed since 1992, it is increasingly clear that, no matter whether the governments of the respective countries agree to build something, they are no longer the final arbiters. A

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252. *Supra* note 164, art. 2.1.

253. These activities are listed in an annex to the convention. For activities not listed, there is a procedure for negotiation between parties as to the application of the convention to other activities likiely to cause a significant adverse transboundary impact. *See id.* art. 2.5, Annex III.

254. *Id.* art 3.

255. *Id.* arts. 2.6, 3.8, 4.2.

256. June 25, 1998, U.N. Doc. ECE/CEP/43 [hereinafter Aarhus Convention]. Hungary is a signatory to this convention. The Slovakian government issued a decision to sign the convention, but did not do so by the deadline. Among the 25 countries which are either members of the European Union or which have accession agreements with the EU, only Slovakia has not signed the Aarhus Convention. While the Convention is not yet in force, the signatories have agreed to take steps towards the early implementation of its provisions.

257. *Supra* note 2. Principle 10 states:

> [E]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

broad, inclusive process taking into account various interests must take place without the presupposition of results, including the "no action" alternative. Hungary is also a party to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.[258] As of May 1997, Slovakia was not a party to this convention. This convention calls for regular, "joint or coordinated assessments of the conditions of transboundary waters and the effectiveness of measures taken for the prevention, control and reduction of transboundary impact," the results of which are to be made accessible to the public.[259]

In addition to the above-mentioned conventions, the Parties might also take note of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[260] which has been interpreted by the European Court of Human Rights in a manner that essentially guarantees the right to a healthy environment by placing upon authorities the obligation to protect the environment.[261] Authorities have been found to have violated Article 8 in cases where they failed to provide adequate environmental information[262] or to enforce domestic environmental law.[263] This Article, by extension, applies to the consideration of environmental impacts before decision-making as a means of protecting basic rights. Both Hun-

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258. *Supra* note 189.

259. *Id.* art. 11.3.

260. Nov. 4, 1950, 213 U.N.T.S. 222, as amended. Article 8, titled "Right to Respect for Private and Family Life," states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id. at 230.

261. *See, e.g.* Guerra & Others v. Italy, XX Eur. Ct. H.R. (ser. X) (116/1996/735/932); Lopez Ostra v. Spain, XX Eur. Ct. H.R. (ser. A) Judgment of 9 Dec. 1994, series A No. 303-C, p. 55, § 55 (1994).

262. *Guerra*, XX Eur. Ct. H.R. (ser. X) (116/1996/735/932).

263. *Lopez Ostra*, XX Eur. Ct. H.R. (ser. A) Judgment of 9 Dec. 1994, series A No. 303-C, p. 55, § 55

gary and Slovakia have ratified this convention as members of the Council of Europe.

While application of a norm of EIA with public participation is fairly straightforward, that of another key consideration – the precautionary principle – is not. As alluded to above, it is arguable whether a principle such as the precautionary principle has become fully enough developed on a global level to be considered a norm of customary international law.[264] Yet, if it is sufficiently developed on a regional level, it might enter into negotiations through other means. While domestic acceptance of such a principle might not be relevant to the dispute before the ICJ, it is interesting to note that Czechoslovakia had accepted the precautionary principle in federal legislation.[265] Application of the theory on compatibility of international and national environmental law would, however, mandate its consideration.[266] It has also been argued that the fact of expression of the intention of accession to the EU should color the applicability of the precautionary principle found in art. 130r(2) of the Maastricht Treaty[267] to the dispute.[268]

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264. Positions both pro and con find some support in the literature. *E.g.*, C. Tinker, *State Responsibility and the Precautionary Principle*, *in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION, *supra* note 29, at 53 (The precautionary principle is not such a clear obligation as to trigger state responsibility); James Cameron & J. Abouchar, *The Status of the Precautionary Principle in International Law*, *in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION, *supra* note 29, at 30-31 (Sufficient state practice has developed so as to justify the argument that the principle is customary international law). But note that "continuous EIA" is one application of the precautionary principle identified by Hohmann. *See supra* note 15.

265. *See* Verhoosel, *supra* note 214, at n.45.

266. *See supra* notes 30-33 and accompanying text.

267. Feb. 7, 1992, 1992 O.J. (C 224/1) *reprinted in* 31 I.L.M. 247 <http://europa.eu.int/abc/obj/treaties/en/entoc01.htm>.

268. Verhoosel, *supra* note 214, at 251. The precautionary principle is thus an element of the *environmental acquis communautaire* of EU membership applicable to Hungary and Slovakia. Verhoosel proceeds to offer counter-arguments to this supposition. *Id.* (First, the unreported case of R v Secretary of State for Trade and Industry ex parte Duddridge et al., Oct. 3, 1994, which held that art. 130r is binding on the Community, but not the individual Member States, and, second, the presumed extension of temporary exemptions towards new Member States) (citation omitted). Equally successful might be pointing to the March 10, 1993 resolution of the European Parliament calling for creation of an international wetlands preservation area in the Szigetkoz, which some scientists contend would be impossible if the original barrage system were put into operation. *See* OPPORTUNITIES FOR SZIGETKOZ, *supra* note 92. However, one

With respect to the Danube, the notion of a "Law of the River" has been suggested,[269] on the grounds that a possible source of norms of particular application to a unique feature of the natural environment could be the practice of neighboring states which share the feature. Applying a Law of the River regime would require examination of agreements and customary norms relating to other sections of the Danube, including the Iron Gate dam project (on the border between Federal Yugoslavia and Romania), the Danube-Black Sea Canal, and the Rhine-Main-Danube Waterway.[270] Also relevant would be instruments dealing with the international administration of the Danube, or those determining rights in settlement of conflicts, such as the Treaty of Trianon which settled borders at the end of WWI,[271] which established an international Hydraulic System Commission, or the Convention Regarding the Regime of Navigation on the Danube,[272] establishing an international Danube Commission, whether or not Hungary or Czechoslovakia were parties to such agreements. Note, however, that the converse of the argument in favor of the Law of the River would be that customary international law relating to a particular watercourse would not necessarily be applicable to a future dispute involving a different watercourse.[273]

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commentator contends that the resolution, while valid, was passed late on a Friday afternoon by a vote of 11-1 with one abstention, out of 524 deputies. *See* EGIL LEJON, GABCIKOVO-NAGYMAROS: OLD AND NEW SINS 20 (Martin Urbancik & Thomas Grey trans., 1996).

269. *See* Schwabach, *supra* note 3, at 340-41. Schwabach has argued that, in the same manner that treaties concerning transboundary watercourses must take into account the peculiarities of the particular river system, so the development of customary international law with respect to transboundary watercourses must also take such peculiarities into account.

270. *See id.* at 304-11.

271. Treaty of Peace between the Allied and Associated Powers and Hungary, June 4, 1920, United States Senate: Treaties, Conventions, International Acts, Protocols, & Agreements 3539. Schwabach points out that art. 282 of the Trianon Treaty set up a hierarchy of interests in the River, according to which "irrigation, water-power, fisheries, and other national interests" had priority over navigation. Schwabach, *supra* note 3, at 319 n.198.

272. *Supra* note 76.

273. A Law of the River might also give rise to a Law of a Part of the River, for example the Danube border region between Hungary and Slovakia. In this case the Agreement Concerning the Establishment of a River Administration in the Rajka-Gonyu Sector of the Danube, Feb. 27 1968, Czech.-Hung. 640 U.N.T.S. 66, and Annex II to the Convention Regarding the Regime of Navigation on the Danube, *supra* note

Article 38 of the Statute of the ICJ[274] specifies:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto....

In *Frontier Dispute, Judgment (Burkina Faso/Republic of Mali),*[275] the Court considered whether the practice of a particular state could be applied against it as a matter of customary international law.[276] The Court there stated:

> [I]t is on the basis of international law that the Chamber will have to fix the frontier line, weighing for that

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76, at 219 (agreeing to further discussion concerning whether a special river administration should be set up for the Gabcikovo-Gonyu sector of the Danube, or whether the application of article 4 and another article would be sufficient), would be relevant, not only for purposes of interpretation of a subsequent agreement between the same parties, but as evidence of a customary regime related to a particular geographical feature.

274. Statute of the International Court of Justice, 59 Stat. 1055 (1945), T.S. No. 993, 3 Bevans 1153, 1976 Y.B.UNITED NATIONS 1052.

275. 1986 I.C.J. 554 (Judgment).

276. *Id.*

> purpose the legal force of the respective evidence submitted by the Parties for its appraisal. It is therefore of little significance whether Mali adopted a particular approach, either in the course of negotiations on frontier questions, or with respect to the conclusions of the Legal Sub-Commission of the Organization of African Unity Mediation Commission, and whether that approach may or may not be construed to reflect a specific position, or indeed to signify acquiescence, towards the principles and rules, including those which determine the respective weight of the various kinds of evidence applicable to the dispute. If these principles and rules are applicable as elements of law in the present case, they remain so whatever Mali's attitude. If the reverse is true, the Chamber could only take account of them if the two Parties had requested it to do so, or had given such principles and rules a special place in the Special Agreement, as "rules expressly recognized by the contesting States."[277]

If the practice of a *particular state* cannot be applied against it as a matter of customary international law, it is hard to see how the practice of neighboring states could be. There appears to be no justification for a "Law of the River" to be applied to the dispute between Hungary and Slovakia, either on the basis of the ICJ Statute or the Special Agreement.

Might Hungary's mugwumpery in the face of political turmoil engendered by the dam case prevent the Court from expressing for a second time sympathy for Hungary's difficulty in forming an integrated position? The answer might depend on the approach taken in Hungary's further submissions. Certainly, recent events have confirmed the wisdom of the Court's approach to the "changed circumstances" argument. Hungary's

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277. *Id.* at 575 (citing Statute, *supra* note 274, art. 38, para. 1 (a), of the Statute)." *See also* Case Concerning Continental Shelf (Tunisia /Libyan Arab-Jamhiriya) 1982 I.C.J. 37, para. 23 ("[W]hile the Court is... bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute... it is also bound, in accordance with paragraph 1(a), of that Article, to apply the provisions of the Special Agreement."), *cited in Frontier Dispute, supra* note 275, at 575.

continuing internal struggle demonstrates that the shift in political assumptions, competing paradigms and regimes that is called the process of "transition" cannot be pinpointed to a single momentary event, nor can it be placed wholly in the past. It would also be a mistake to characterize the process of transition solely as a matter of reviving national identity through the throwing off of blanket foreign domination, since the Horn government was a freely-elected political continuation of the "pre-Revolutionary" reform socialist government. This emphasizes that the processes are at least in substantial part internal ones, involving a struggle of systems of interests with strong domestic support. At this stage, however, the struggle has taken an important step through the popular referendum in the form of elections on the policies of the reform socialists. It would also be extremely difficult and perhaps alienating to reopen certain issues, such as the succession argument. Furthermore, the Court has expressed its firm intention to preserve the 1977 Treaty as the chosen mechanism for resolution. Yet the Court should continue to take note of the "unprecedented challenge" facing the countries in transition, as recognized in Agenda 21,[278] a challenge which has proven by this very case to be extraordinarily complex.

Because the questions at the root of the dispute between Hungary and Slovakia are not entirely of a legal nature, the Court's decision has not managed to achieve a full settlement.[279] Moreover, the uncomfortable compromise that is the ICJ decision has not aided the chances of settlement of the dispute between the parties as much as it possibly could. Each side can draw upon parts of the judgment in support of its own position. At the same time, the principles that the Court used can be applied to interpret the decision's contrary points as being at least partly mistaken — Hungary with respect to its purported termination, Slovakia with respect to the legality of Variant C. Perhaps a more courageous and internally consistent decision in "*Gabcikovo II*" would be useful. But, the changing position of Hungary shows that beneath the dispute

278. *See supra* note 5.

279. For a discussion of the decision from a Hungarian point of view, see A HAGAI DONTES (Janos Vargha ed., 1997).

other factors of a more profound nature that are possibly not solvable by a court of law are at work. Contrary to "reducing or eliminating one source of friction"[280] in a troublesome region, the ICJ decision may have merely shifted the debate,[281] and as the Parties are so far apart on their understanding of sustainable development, the Gabcikovo-Nagymaros dispute shows no signs of ending soon.

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280. Schwabach, *supra* note 3, at 341.

281. *See* Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105-20 (Fall 1995).

> [C]ourts and arbitral tribunals currently play only a relatively minor role in addressing international environmental issues. Third-party dispute resolution has resolved few environmental problems.... The establishment of an environmental chamber of the International Court of Justice and the recent cases between Nauru and Australia and between Hungary and Slovakia may signal the emergence of a great judicial role. But, at present, legal discourse that presupposes a judicial audience plays to a largely empty house.

Id. (footnotes omitted).

Bodansky contends that customary international law, rather than truly reflecting state practice, reflects statements of what state practice ought to be, and its value, if any, is to inform bilateral or multilateral negotiations over mechanisms for environmental control.