

# *STUDENT ARTICLES*

## **THE INTERNATIONAL OBLIGATION TO CONDUCT AN ENVIRONMENTAL IMPACT ASSESSMENT: THE ICJ CASE *CONCERNING THE GABCIKOVO- NAGYMAROS PROJECT***

ERIKA L. PREISS\*

### **INTRODUCTION**

On September 25, 1997, the International Court of Justice (ICJ)<sup>1</sup> decided the *Case Concerning the Gabcikovo-Nagymaros Project*,<sup>2</sup> resolving a long-standing dispute between the countries of Hungary and Slovakia. The case dealt with a 1977 treaty between the two countries that created a joint project to construct a series of dams and barrages on the Danube River, which runs along the countries' border.<sup>3</sup> In the early 1990s, after Slovakia had spent millions of dollars constructing the Gabcikovo dam on its territory, Hungary refused to fulfill its treaty obligations until further studies of the project's impact on the environment could

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\* Law clerk to the Honorable Francis M. McDonald, Jr. and the Honorable Richard N. Palmer, Connecticut Supreme Court; B.A., Biology and Society, 1995, Cornell University; J.D., 1998, New York University School of Law. The author was Co-Editor-in-Chief of the *N.Y.U. Environmental Law Journal* during the 1997-98 academic year and received the Sive, Paget & Riesel Environmental Law Journal Award for her work on this Student Article.

<sup>1</sup> The International Court of Justice is the principal judicial organ of the United Nations. *See International Court of Justice, General Information*, (visited Apr. 28, 1999) <<http://www.icj-cij.org/icjwww/igeneralinformation.htm>>. The Court's role is to settle the legal disputes between States, in accordance with international law, and to assist international organizations by providing advisory opinions on legal questions. *See id.* The Court comprises 15 judges elected to nine-year terms by the United Nations General Assembly and Security Council. *See id.*

<sup>2</sup> Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.) (I.C.J. Sept. 25, 1997) [hereinafter ICJ Judgment], available in <[http://www.icj-cij.org/icjwww/idocket/ihc/ihsg judgement/ihc\\_judgment\\_970925\\_frame.htm](http://www.icj-cij.org/icjwww/idocket/ihc/ihsg judgement/ihc_judgment_970925_frame.htm)> (visited Apr. 28, 1999).

<sup>3</sup> *See Treaty Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks*, Sept. 16, 1977, Czech.-Hung., 1109 U.N.T.S. 211 [hereinafter 1977 Treaty].

be performed. Slovakia argued that both countries already had studied the environmental impacts in detail and that Hungary simply was stalling the project for financial and political reasons. In October 1992, Slovakia unilaterally diverted the Danube into an alternate barrage system in order to counteract the delay and receive some benefits from its enormous expenditures on the Gabčíkovo dam. In response, Hungary purported to officially terminate the 1977 Treaty.<sup>4</sup> The parties then brought this arbitration to the ICJ, asking the Court to decide if Hungary had the right to delay and/or terminate the Treaty based on its environmental concerns, and if Slovakia's unilateral actions were legal under the Treaty and general principles of international law.

While the numerous environmental issues in the case were argued and briefed in detail, the Court's opinion gives them short shrift. The text of the majority opinion barely mentions the environmental implications of this dam and barrage system, focusing instead on the parties' obligations under the twenty-year old treaty. While the case presented the Court with an opportunity to establish clearly and advocate the many emerging doctrines of international environmental law, the majority of the Court declined to utilize it.<sup>5</sup> The long-term effect of the Court's failure to elaborate on such pertinent issues is difficult to predict.

This Article explores the Court's misguided opinion with respect to one environmental issue in the case—the international obligation to conduct an environmental impact assessment (EIA) before implementing projects with potentially adverse effects on the environment. Many scholars now consider this obligation a general custom of international environmental law.<sup>6</sup> Nonethe-

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<sup>4</sup> See ICJ Judgement, *supra* note 2, para. 13, at 11 (describing Hungary's May 19, 1992 declaration terminating the 1977 Treaty).

<sup>5</sup> The concurring opinion of Justice Weeramantry, however, delved deeply into the environmental issues. See discussion *infra* Part V.

<sup>6</sup> See, e.g., Maria C. Holland, *Judicial Review of Compliance with the National Environmental Policy Act: An Opportunity for the Rule of Reason*, 12 B.C. ENVT'L AFF. L. REV. 743, 755-56 (1985); Alexandre S. Timoshenko, *The Problem of Preventing Damage to the Environment in National and International Law: Impact Assessment and International Consultations*, 5 PACE ENVT'L L. REV. 475, 480 (1988) ("In international law, the institution of environmental impact assessment is a basic principle."); David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 629 (1995) ("[A]n international consensus has formed over the utility of . . . 'environmental impact assessment' (EIA) . . ."). In 1986, the Experts Group on Environmental Law of the World Commission on Environment and Development identified environmental impact assessment

less the Court's seventy-one page opinion does not mention the phrase "environmental impact assessment" once. While Hungary and Slovakia planned and developed the original joint project in the 1970s, well before environmental norms became international customs, Slovakia's unilateral diversion of the Danube in 1992 surely warranted an environmental assessment under international customs at that time. The Court's failure to address this issue has hampered the subsequent negotiations between the parties and may have drastic consequences on the future of environmental impact assessment in the international arena.

Part I of this Article describes the environmental impact assessment process, detailing the theory and procedure involved in EIAs. Part II surveys the numerous national and international documents that now encourage and require such assessments, thus establishing the prevalence of EIA requirements internationally. Part III introduces Hungary and Slovakia's dispute, describing the Treaty of 1977, the environmental studies that were conducted by the two countries, and the arguments that each presented to the International Court of Justice. Part IV dissects the ICJ's opinion, demonstrating many ways in which the Court could have addressed the absence of an environmental impact assessment, but declined to do so. Instead, the Court found that, unless EIA is specifically required by a treaty or is the customary international practice at the time the treaty is formed, parties do not have an obligation to undertake environmental impact assessment when implementing that treaty.<sup>7</sup> The Court's holding leaves the concept of environmental impact assessment hopelessly tied to particular documents instead of establishing EIA as an international principle that is required regardless of the language of the treaty at issue. The Court's failure to address the hurried and uninformed manner in which Slovakia implemented its unilateral provision implies that parties may alter or change previously constructed projects without conducting an environmental impact assessment if the project originated before international environmental norms emerged. In addition, under the Court's ruling, countries that are not parties to a specific

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as an "emerging principle of international law," taking the view that states planning to carry out or permit activities which may significantly affect a natural resource or the environment should make or require an assessment of their effects before carrying out or permitting the planned activities. 1 PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 579-95 (1995).

<sup>7</sup> See ICJ Judgement, *supra* note 2, para. 112, at 57-58.

treaty or convention that requires EIA need not perform one—a totally anachronistic and environmentally detrimental conclusion. Part V discusses the concurring opinion of Justice Weeramantry, which addresses the issue of environmental impact assessment in a frank, detailed manner and argues that the Court should have examined this issue. The Article then concludes that the ICJ missed a significant opportunity to firmly establish that EIA is a customary principle of international law and that the parties and the international community would have been better served if Weeramantry's opinion had been the opinion of the court.

## I ENVIRONMENTAL IMPACT ASSESSMENT: CONCEPT, THEORY, AND PROCEDURE

An environmental impact assessment is a systematic and detailed study of the adverse effects that a planned activity may have on the environment.<sup>8</sup> The EIA is meant to ensure consideration of a project's environmental impacts and to influence policymaking by predicting the implications of a project and aiding in the mitigation and alleviation of any harms.<sup>9</sup> There are no clear and defined standards for environmental impact assessments, and different planners and analysts conduct them differently.<sup>10</sup> Due to variation in political regimes, natural systems, and cultural values, it is difficult to generalize one all-purpose procedure for impact assessment.<sup>11</sup>

Nonetheless, to give an overview of the EIA process, some generalizations can be made. An EIA usually begins with preliminary activities which include choosing a decisionmaker, describing the proposed action, and reviewing applicable legislation.<sup>12</sup> The next step is impact identification, or scoping, which requires a selection of the various impacts to be studied—a deci-

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<sup>8</sup> See R.K. JAIN ET AL., ENVIRONMENTAL ASSESSMENT 8 (1993).

<sup>9</sup> See *id.* at 6.

<sup>10</sup> See *id.* at 115-16.

<sup>11</sup> See Timoshenko, *supra* note 6, at 481-82. "The impossibility of establishing a single procedure for implementing [an EIA] is a consequence of the real differences in the nature of the national and regional legal and governmental systems, the subjects of the assessments, the sources of the impacts, and the particulars of individual ecosystems." *Id.*

<sup>12</sup> See YUSUF J. AHMAD & GEORGE K. SAMMY, GUIDELINES TO ENVIRONMENTAL IMPACT ASSESSMENT IN DEVELOPING COUNTRIES 9 (1985).

sion that is generally made with respect to magnitude, extent, significance, and special sensitivity of certain areas to certain harms.<sup>13</sup> Most EIAs cover four broad categories of impacts—ecological, social, technological, and risk or hazard impacts.<sup>14</sup> Next, for purposes of comparison, a baseline study of the area prior to the proposed action must be conducted.<sup>15</sup> Impact evaluation and quantification then occurs. During this stage, various mitigation measures are considered, because alleviating certain harms may make one alternative more appealing than another.<sup>16</sup> Quantification is very difficult because many of the proposed impacts do not have a readily available economic value. In the next stage, the different alternatives and their predicted impacts are then compared.<sup>17</sup> Many EIAs are then reviewed by a government department, agency, or board, and public participation and comment is generally conducted.<sup>18</sup> Lastly, the EIA process includes documentation—which creates a detailed environmental impact statement delineating the comparison of alternatives—and decisionmaking, during which policymakers choose a project alternative based upon the environmental impact assessment.<sup>19</sup>

While environmental impact assessment aims to inform the decisionmaking process by integrating all considerations into one document for analysis, policymakers often encounter problems which hinder their ability to obtain this goal. For example, collecting and analyzing the relevant information is time-consuming and expensive, and important pieces of information often are overlooked.<sup>20</sup> In addition, the high degree of uncertainty and risk involved in future activities is difficult, if not impossible, to quantify.<sup>21</sup> During scoping, EIAs are generally limited to the direct effects of a project, because additive, synergistic, induced,

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<sup>13</sup> See *id.* at 11.

<sup>14</sup> See Michael Clark & John Herington, *Introduction: Environmental Issues, Planning and the Political Process*, in *THE ROLE OF ENVIRONMENTAL IMPACT ASSESSMENT IN THE PLANNING PROCESS* 1, 4 (Michael Clark & John Herington eds., 1988).

<sup>15</sup> See AHMAD & SAMMY, *supra* note 12, at 12-13.

<sup>16</sup> See *id.* at 13-15.

<sup>17</sup> See *id.* at 15-16.

<sup>18</sup> See Brian R. Popiel, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. ENVT'L AFF. L. REV. 447, 462 (1995).

<sup>19</sup> See AHMAD & SAMMY, *supra* note 12, at 9.

<sup>20</sup> See JAIN ET AL., *supra* note 8, at 179.

<sup>21</sup> See AHMAD & SAMMY, *supra* note 12, at 13-14.

and global impacts are difficult to identify and quantify.<sup>22</sup> Lastly, the decisionmaker may have difficulty separating facts and subjective values, while personal preferences may also compromise the impartiality of an EIA procedure.<sup>23</sup> Thus, despite its grand ideals, the potential of an EIA to reflect a thoughtful and anticipatory decisionmaking process rarely is realized fully and, in practice, EIAs are not as interdisciplinary and integrated as their proponents would like.<sup>24</sup>

Nonetheless, environmental impact assessment is a useful tool that forces policymakers to consider the implications of their decisions before the decisions become permanent. A few general guidelines for the EIA process may reduce the uncertainty and malleability of an environmental impact statement, thus improving its overall effectiveness. First, there should be explicit, formal mandates requiring EIA so that officials may be held accountable when the process is not used in decisionmaking.<sup>25</sup> In addition, procedural controls and judicial review are crucial to an effective EIA process.<sup>26</sup> One scholar has identified eight principles for the design of an effective impact assessment process. The principles are: (1) an integrated approach; (2) clear and automatic application of all requirements to all significant undertakings; (3) critical examination of purposes and comparison of alternatives; (4) legal, mandatory, and enforceable requirements; (5) open and participatory process; (6) consideration of implementation issues, including monitoring and compliance enforce-

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<sup>22</sup> See Riki Therivel & Maria Rosario Partidario, *Introduction to The Practice of Strategic Environmental Assessment* 3, 8-9 (Riki Therivel & Maria Rosario Partidario eds., 1996) (stating that additive, synergistic, induced, and global impacts are generally ignored by EIAs).

<sup>23</sup> See Clark & Herington, *supra* note 14, at 10 (stating that "we do not accept that EIA can be a value-free scientific method").

<sup>24</sup> See Therivel and Partidario, *supra* note 22, at 8. In response to such criticisms, some scholars have proposed a more integrated process for evaluating projects that may significantly affect the environment. "Strategic environmental assessment" (SEA) is defined as "the formalized, systematic and comprehensive process of evaluating the environmental affects of a policy, plan or programme and its alternatives, including the preparation of a written report on the findings of that evaluation, and using the findings in publicly accountable decision-making." *Id.* at 4. SEAs differ from EIAs because they are not site and project specific, and they seek to evaluate the numerous effects that a policy will have on a certain area. *See id.*

<sup>25</sup> See Robert V. Bartlett, *Integrated Impact Assessment: The New Zealand Experiment*, in *ENVIRONMENTAL POLICY: TRANSNATIONAL ISSUES AND NATIONAL TRENDS* 157, 166 (Lynton K. Caldwell & Robert V. Bartlett eds., 1997).

<sup>26</sup> *See id.*

ment; (7) practical and efficient execution; and (8) links to broad policy concerns, such as the economy, agriculture, transportation, and urban development.<sup>27</sup> Following these guidelines, EIA can be performed effectively and have the potential to influence environmental policy worldwide.

## II THE NATIONAL AND INTERNATIONAL OBLIGATION TO CONDUCT AN EIA

Since its development in the 1970s, many countries have adopted the concept of environmental impact assessment into their domestic legislation, treaties, and agreements. The United States' National Environmental Policy Act of 1969 (NEPA)<sup>28</sup> was the first legislation to mandate an EIA, and many other countries have used NEPA as a model for their requirements. NEPA requires federal agencies to prepare an environmental impact statement (EIS) for every recommendation or report on legislative proposals and other major federal actions significantly affecting the quality of the human environment.<sup>29</sup> The EIS must cover the following elements: the environmental impact of the proposed actions; any unavoidably adverse environmental effects of implementation; alternatives to the proposed action; the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity; and any irreversible and ir retrievable commitments of resources that would be involved in the proposed action.<sup>30</sup> NEPA is limited in that it only applies to projects and activities that are sponsored or significantly funded by the federal government.<sup>31</sup> Since many state-run projects also affect the environment, states have developed their own EIS requirements, affectionately termed "little

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<sup>27</sup> See *id.*

<sup>28</sup> 42 U.S.C. §§ 4321-4370d (1994 & Supp. II 1996).

<sup>29</sup> See *id.* § 4332(2)(C).

<sup>30</sup> See JAIN ET AL., *supra* note 8, at 44-45. The President's Council on Environmental Quality (CEQ) has promulgated regulations that contain even more detailed requirements for environmental impact assessment under NEPA. See 40 C.F.R. §§ 1500-1508 (1998).

<sup>31</sup> See JAIN ET AL., *supra* note 8, at 47 (noting that while the Act itself only refers to federal actions, CEQ regulations implementing NEPA state that a private action may become a federal action for NEPA purposes if: (1) the project is funded by a federal agency or (2) it involves an activity which legally requires a permit, license, or other federal approval as a precondition).

NEPAs.”<sup>32</sup> Some large municipalities, such as New York City, have also adopted such requirements.<sup>33</sup> By 1990, nineteen states, the District of Columbia, and Puerto Rico had all adopted NEPA-like systems.<sup>34</sup>

NEPA has been met with both praise and criticism. Many environmentalists believe that NEPA has been instrumental in requiring the assessment of federal programs and informing the decisionmaking process.<sup>35</sup> The failure to prepare a sufficiently comprehensive EIS has halted many environmentally detrimental projects. In addition, the assessments themselves have reshaped projects such that these projects affect the environment less drastically than they would have as originally proposed.<sup>36</sup> Indeed, one administrative study found that the broad analysis of project alternatives, typical of the EIS approach, consistently led to the discovery and adoption of cost-effective mitigation measures.<sup>37</sup>

There are many critics of NEPA, however, who point to its high costs and limited effect on the environment.<sup>38</sup> Critics contend that EISs are prepared in mechanical compliance with NEPA and that the agencies do not really consider the results of the statements in their decisionmaking processes.<sup>39</sup> Adding to this criticism is the Supreme Court’s ruling that NEPA contains no substantive provisions;<sup>40</sup> thus, the judiciary cannot require an agency to consider certain alternatives or choose a particular program based on the EIS.<sup>41</sup> NEPA merely requires the creation of

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<sup>32</sup> See, e.g., N.Y. ENVTL. CONSERV. LAW § 8-0103 (McKinney 1997) (EIS requirement under New York’s State Environmental Quality Review Act).

<sup>33</sup> See Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 NAT. RES. & ENV’T 3, 71 (1995).

<sup>34</sup> See *id.*; JAIN ET AL., *supra* note 8, at 54.

<sup>35</sup> See Tom Turner, *The Legal Eagles*, AMICUS J., Winter 1988, at 25, 30.

<sup>36</sup> See, e.g., Tennessee Valley Auth. v. Hill, 437 U.S. 153, 158-59 (1978) (blocking dam project due to environmental impact on snail darter fish).

<sup>37</sup> See SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 251 (1984).

<sup>38</sup> See Stanley Millan, *Wanted: NEPA, Dead or Alive, Reward: Our Global Environment*, [Analysis & Perspective] 22 Env’t Rep. (BNA) 2081, 2083 (Dec. 21, 1991); Antonio Rossman, *NEPA: Not So Well at Twenty*, [1990] 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,174 (May 1990).

<sup>39</sup> See Bartlett, *supra* note 25, at 160.

<sup>40</sup> See Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

<sup>41</sup> See, e.g., Calvert Cliffs’ Coordinating Comm., Inc. v. United States Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971) (holding that while a

an EIS. What the agency chooses to do with the EIS is left to the agency's discretion and cannot be challenged. A final criticism is that EISs require too many economic resources, cause project delays, and stifle economic development.<sup>42</sup> In a somewhat perverse twist, industry groups have supported the EIS requirement and used it to their own advantage by claiming procedural deficiencies in order to delay the implementation of new environmental policies.<sup>43</sup>

Despite this debate over the success of environmental impact assessment in NEPA, many countries, treaties, and international development organizations have followed the lead of the United States and now require EIAs for any major activity.<sup>44</sup> On a national level, developed countries such as Canada and the countries of Western Europe have the most comprehensive systems of EIA.<sup>45</sup> Albeit on a smaller scale, developing countries also have initiated EIA procedures within their borders.<sup>46</sup> For example, the Philippines established a national environmental

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court cannot overturn a substantive decision under NEPA, it can remand to the agency if the procedural requirements of full consideration and balancing of environmental factors have not been met).

<sup>42</sup> See JAIN ET AL., *supra* note 8, at 50. Commenting on the NEPA experience, one policy analyst stated:

Many environmental impact statements (EISs) are too long, take too long to prepare, cost too much, and many times do too little to protect the environment. Some EISs are prepared to justify decisions already made, many agencies fail to monitor during and after the project, some agencies do not provide adequate public involvement, and few agencies assess the cumulative effects of an action.

Bartlett, *supra* note 25, at 160 (quoting Ray Clark, *The National Environmental Policy Act and the Role of the President's Council on Environmental Quality*, 15 ENVTL. PROF. 4 (1993)).

<sup>43</sup> Cf. WALTER A. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY 80-81 (1998) (noting the general increase in effectiveness of legal opposition to environmental policy by regulated industries).

<sup>44</sup> In 1995, it was estimated that about 86 countries had adopted variants on NEPA's environmental impact assessment process. See Bear, *supra* note 33, at 71. EIA exists in Argentina, Australia, Belgium, Brazil, Canada, China, Columbia, Costa Rica, Denmark, France, Germany, Greece, Hong Kong, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Kuwait, Luxemborg, Malaysia, the Netherlands, New Zealand, Norway, Pakistan, Papua New Guinea, Peru, the Philippines, Portugal, Sri Lanka, South Africa, Spain, Taiwan, Thailand, Turkey, the United Kingdom, the Soviet Union, and Uruguay. See Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591, 597 (1992).

<sup>45</sup> See JAIN ET AL., *supra* note 8, at 181.

<sup>46</sup> See *id.* at 178-79.

policy, with a requirement for EIA, in 1977.<sup>47</sup> Korea adopted legislation requiring EIA in 1980.<sup>48</sup> Additionally, Brazil passed its National Environmental Policy Law requiring EIA in 1981.<sup>49</sup>

On a regional level, in 1988, the Commission of the European Communities (CEC) passed a directive<sup>50</sup> requiring environmental impact assessment for both public and private projects, divided into two categories: (1) projects which require a mandatory EIA<sup>51</sup> and (2) other projects which need an EIA only if the "Member States consider that their characteristics so require."<sup>52</sup> The Directive specifies that an EIA shall identify the direct and indirect effects of a project on the following factors: human beings, fauna, and flora; soil, water, air, climate, and the landscape; the interaction between the above factors; and material assets and cultural heritage.<sup>53</sup> By passing the Directive, the CEC did not intend to displace the EIA requirements of the individual countries—instead, it hoped to harmonize the countries' environmental procedures to reduce competition and misallocation of resources.<sup>54</sup> While the Directive establishes very comprehen-

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<sup>47</sup> See *id.* at 178.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See Council Directive No. 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L175) 40 [hereinafter CEC Directive]. The Directive was first proposed in 1980 and underwent 21 revisions, building on the EIA provisions already existing in many Member States and in the United States. See Paul D. McHugh, *The European Community Directive—An Alternative Environmental Impact Assessment Procedure?*, 34 NAT. RES. J. 589, 605 (1994).

<sup>51</sup> See CEC Directive, *supra* note 50, art. 4, at 41-42. The projects for which EIA is mandatory include: crude-oil refineries, coal gasification and liquefaction plants, large thermal power stations, radioactive and toxic waste disposal sites and facilities, integrated steelwork facilities, asbestos plants, integrated chemical plants, motorways, railways, major airports, and ports and canals. See *id.* Annex I, at 44.

<sup>52</sup> *Id.* art. 4.2, at 41-42 (stating that Member States may specify certain types of projects as being subject to an assessment or may establish criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are subject to an assessment). Annex II then lists the following classes: agriculture, extractive industry, energy industry, manufacture of glass, chemical industry, food industry, textile, leather, wood, and paper industries, rubber industry, infrastructure projects, and other projects. See *id.* Annex II, at 45-47. As further guidance for when an assessment must be made, Article 2.1 states that "projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects." *Id.* art. 2.1, at 41.

<sup>53</sup> See *id.* art. 3, at 41.

<sup>54</sup> See JAIN ET AL., *supra* note 8, at 181.

hensive procedures for EIA, critics argue that it merely formalizes procedures that were already being undertaken in the individual countries.<sup>55</sup>

On the international level, the roots of environmental impact assessment can be found in the 1972 Stockholm Declaration, which resulted from the first international meeting on the environment. The Declaration acknowledges "the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment."<sup>56</sup> The Stockholm Declaration recognizes the need for environmental "planning" in seven of its twenty-six principles.<sup>57</sup> Twenty years later, at the second international conference on the environment, the Rio Declaration on Environment and Development recognized that the concept of "planning" had become a concrete obligation to undertake environmental impact assessment. In Principle 17, the Rio Declaration states that "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse effect on the environment and are subject to a decision of a competent national authority."<sup>58</sup>

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<sup>55</sup> See *id.* at 182-83. For example, the Netherlands has a very comprehensive EIA procedure that requires analysis of legislation, plans, and projects at the national, provincial, and municipal levels. *See id.*

<sup>56</sup> Declaration of the United Nations Conference on the Human Environment, June 16, 1972, Prologue, 11 I.L.M. 1416.

<sup>57</sup> See *id.*, princ. 2, 4, 12-15, 17. Principle 14 states: "Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment." *Id.* Similarly, Principle 15 says that "[p]lanning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect projects which are designed for colonialist and racist domination must be abandoned." *Id.*

<sup>58</sup> United Nations Conference on the Environment and Development: The Rio Declaration on Environment and Development, June 13, 1992, princ. 17, 31 I.L.M. 874, 879. The meaning of the phrase "as a national instrument"—and whether it limits the use of environmental impact assessment to domestic impacts and precludes truly international assessments—has been debated. Such a limiting reading would be ironic since the Rio Declaration was intended to be an international accord. Along these lines, one scholar reads the phrase to imply the use of a universal standard, applicable to undertakings strictly within domestic jurisdiction as well as those that would be more prone to rise to the level of international concern. *See Wirth, supra* note 6, at 633. A full discussion of the meaning of Rio Declaration Principle 17 is beyond the scope of this Article.

This statement firmly establishes the need for environmental impact assessment on an international scale.<sup>59</sup>

In addition to the Rio Declaration, many other international environmental agreements and treaties promulgated both before and after the Rio Declaration mention, discuss, and require environmental impact assessment on an international level.<sup>60</sup> For example, Paragraph 11(c) of the World Charter for Nature states that “[a]ctivities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects.”<sup>61</sup> Article 14 of the 1985 Agreement of the Association of South-East Asian Nations (ASEAN) on Conservation of Nature and Natural Resources states that any proposed activities which may have significant effects on the environment shall be assessed before they are adopted.<sup>62</sup> The results of such an assessment must be taken into account in the decisionmaking process.<sup>63</sup> Article 206 of the 1982 United Nations Convention on the Law of the Sea also requires environmental impact assessment of any activity likely to cause pollution of or significant and harmful

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<sup>59</sup> In addition to the Rio Declaration, two other documents signed at the Rio Convention—Agenda 21 and the Biodiversity Convention—include references to environmental impact assessment. See *Report of the United Nations Conference on Environment and Development*, U.N. GAOR, 47th Sess., Annex II, Agenda Item 21, paras. 7.41(b), 8.4, U.N. Doc. A/CONF.151/26 (1992); United Nations Convention on Environment and Development: Convention on Biological Diversity, June 5, 1992, art. 14, 31 I.L.M. 818, 827-28 (requiring parties to identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity).

<sup>60</sup> In addition to the many environmental treaties and agreements that refer to environmental impact assessment, some international documents that do not focus on the environment have also required or encouraged EIAs. For example, the 1975 Helsinki Final Act of Conference and Security and Cooperation in Europe, which details efforts to minimize the effects that security and other cooperative efforts have on the environment, encourages cooperation, protection of resources, and the use of environmental impact assessment. See Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, art. III.5, 14 I.L.M. 1292, 1308 (1975).

<sup>61</sup> *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, para. 11(c), at 17, U.N. Doc. A/RES/37/7 (1982).

<sup>62</sup> See *Association of South East Asian Nations Agreement on the Conservation of Nature and Natural Resources*, 15 ENVTL. POL’Y & L. 64 (1985).

<sup>63</sup> See *id.*; see also *World Charter for Nature*, *supra* note 61, arts. 19-20, at 18.

changes to the sea.<sup>64</sup> The Protocol on Environmental Protection to the Antarctic Treaty requires prior assessment of the impacts of activities on the Antarctic environment or on dependent or associated ecosystems.<sup>65</sup> Annex I of the Protocol contains a detailed procedure for carrying out the EIA.<sup>66</sup> The United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Article 3 requires parties to adopt and implement legal, administrative, economic, financial, and technical measures to ensure that environmental impact assessment and other means of assessment are applied.<sup>67</sup> Most recently, the Convention on the Law of the Non-navigational Uses of International Watercourses refers directly to environmental impact assessment.<sup>68</sup> This list is only a small sampling of the many documents which mention environmental impact assessment on an international scale.<sup>69</sup>

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<sup>64</sup> Third United Nations Conference on the Law of the Sea: Final Act, Oct. 21, 1982, art. 206, 21 I.L.M. 1245, 1309, 11th Sess., at 86, U.N. Doc. A/Conf.62/122 (1982). Article 206 states that

[w]hen states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the maritime environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

*Id.* Article 205 provides that reports be communicated “at appropriate intervals to the competent international organizations, which should make them available to all states.” *Id.* art. 205, 21 I.L.M. at 1309.

<sup>65</sup> See Protocol on Environmental Protection to the Antarctic Treaty, *opened for signature* Oct. 4, 1991, art. 8, 30 I.L.M. 1455, 1464.

<sup>66</sup> See *id.*, Annex I, 30 I.L.M. at 1473-76.

<sup>67</sup> See United Nations: Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, art. 3, 31 I.L.M. 1312, 1316-17.

<sup>68</sup> United Nations: Convention on the Law of the Non-Navigational Uses of International Watercourses, *opened for signature* May 21, 1997, 36 I.L.M. 700. Article 12 states that

[b]efore a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.

*Id.* art. 12, 36 I.L.M. at 1320.

<sup>69</sup> For example, the following documents also mention EIAs: Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, *done* Nov. 25, 1986, art. 16, 26 I.L.M. 38, 48; Convention on the Protection and Development of the Marine Environment of the Wider Carib-

Perhaps the most significant recent advance in international environmental impact assessment is the 1991 United Nations Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).<sup>70</sup> The Convention defines environmental impact assessment as "a national procedure for evaluating the likely impact of a proposed activity on the environment."<sup>71</sup> Article 2 of the Convention states that an environmental impact assessment shall be undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.<sup>72</sup> Environmental impact assessments may also be required for activities that are not listed in Appendix I by agreement of the parties, and depending upon the size, location, and potential effects of the project.<sup>73</sup> Appendix II contains detailed procedures for creating the required EIA, which must include, at a minimum, a description of the proposed activity and its purpose;

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bean Region, *done* Mar. 24, 1983, art. 12, 22 I.L.M. 227, 230; *Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment*, *done* Feb. 14, 1982, 9 ENVTL. POL'Y & L. 56, 60-61 (1982); Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, *done* Mar. 23, 1981, art. 13, 20 I.L.M. 746, 750; Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, *done* Apr. 24, 1978, art. 11, 1140 U.N.T.S. 133, 158.

<sup>70</sup> United Nations Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 [hereinafter Espoo Convention]. As of June 11, 1991, the following states had signed the Convention: Albania, Austria, Belgium, Bulgaria, the Byelorussian Soviet Socialist Republic, Canada, Denmark, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxemborg, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, the Ukrainian Soviet Socialist Republic, the United Kingdom, and the United States. See Laura Carlan Battle, *A Transnational Perspective on Extending NEPA: The Convention on Environmental Impact Assessment in a Transboundary Context*, 5 DUKE ENVTL. L. & POL'Y F. 1, 2 n.4 (1995).

<sup>71</sup> Espoo Convention, *supra* note 70, art. 1(vi), 30 I.L.M. at 803.

<sup>72</sup> See *id.* art. 2, 30 I.L.M. at 803-04. The activities listed in Appendix I are: crude oil refineries; thermal power stations; nuclear fuel production or enrichment facilities; steel and cast-iron smelting installations; asbestos processing or extraction facilities; integrated chemical installations; motorways; large diameter oil and gas pipelines; trading ports and inland waterways; waste disposal installations for the incineration, chemical treatment, or landfill of toxic and dangerous wastes; large dams and reservoirs; groundwater abstraction activities; pulp and paper manufacturing; major mining; on-sire extraction and processing of metal ores or coal; offshore hydrocarbon production; major petroleum, petrochemical, or chemical storage facilities; and deforestation of large areas. See *id.* app. I, 30 I.L.M. at 812-13.

<sup>73</sup> See *id.* art. 2, app. III, 30 I.L.M. at 803-04, 814-15.

a description, where appropriate, of reasonable alternatives, the environment likely to be significantly affected, the potential environmental impact of the proposed activity and its alternatives, and mitigation measures; an explicit indication of predictive methods, underlying assumptions, and the relevant environmental data used, as well as an identification of gaps in knowledge, uncertainties, and an outline for monitoring and management systems; and a non-technical summary.<sup>74</sup> Significantly, the Convention also requires States to notify other States of projects with potential environmental effects,<sup>75</sup> provides for the participation of the public that may be affected,<sup>76</sup> and establishes a system of post-project monitoring and analysis.<sup>77</sup> Similar to NEPA, the Convention does not require proponents of projects to choose the least environmentally harmful alternative so long as the environmental assessment has been completed.<sup>78</sup>

In addition to this list of treaties and documents that include EIA, many international organizations also support EIA procedures. In May 1978, the United Nations Environment Programme (UNEP) Governing Council promulgated Draft Principles of Conduct, which serve as nonbinding guidelines for international conduct.<sup>79</sup> Principle 4 reads: "States should make environmental assessment before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another State or States sharing that resource."<sup>80</sup> In addition, UNEP promulgated goals

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<sup>74</sup> See *id.* app. II, 30 I.L.M. at 814.

<sup>75</sup> See *id.* art. 3, 30 I.L.M. at 804-06.

<sup>76</sup> See *id.* art. 2.6, 30 I.L.M. at 804.

<sup>77</sup> See *id.* art. 7, app. IV, 30 I.L.M. at 807, 815-16.

<sup>78</sup> See *id.* art. 6, 30 I.L.M. at 806-07.

<sup>79</sup> United Nations Environment Program: Draft Principles of Conduct in the Field of the Environment for Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, May 19, 1978, 17 I.L.M. 1097.

<sup>80</sup> *Id.* princ. 4, 17 I.L.M. at 1098. The Principle goes on to state that EIA should include, at a minimum: a description of the proposed activity; a description of the potentially affected environment; a description of practical alternatives; an assessment of the likely or potential environmental impacts of the proposed activity and alternatives; an identification of the measures available to mitigate adverse environmental impacts; an identification of gaps in knowledge and uncertainties; an indication of whether the environment of any other State or areas beyond national jurisdiction is likely to be affected; and a brief, non-technical summary of the above information. See *id.*

and principles of environmental impact assessment in 1987.<sup>81</sup> The UNEP document defines environmental impact assessment as “[a]n assessment of the likely or potential environmental impacts of [a] proposed activity” and encourages the use of comprehensive environmental impact assessment.<sup>82</sup> The principles also provide for participation of all interested groups.<sup>83</sup> While these principles are nonbinding documents that are merely meant to guide countries, the detailed guidelines demonstrate that EIA is becoming a prominent feature in international law.<sup>84</sup>

In addition, many international aid organizations have developed their own EIA procedures with which countries must comply before receiving any project or development funding.<sup>85</sup> Many bilateral aid agencies may require EIA in the recipient country as a prerequisite to receiving funds.<sup>86</sup> The World Bank currently has regulations for comprehensive environmental evaluation of proposed projects.<sup>87</sup> The Asian Development Bank also established procedures for EIA in the early 1980s.<sup>88</sup> The World Health Organization encourages member states to develop EIA procedures, and it presents courses and seminars to

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<sup>81</sup> *Annex III Goals and Principles of Environmental Impact Assessment*, 17 ENVTL. POL’Y & L. 36 (1987). The document includes three goals: (1) ensuring that environmental effects are taken into account before decisions allowing activities to take place are made; (2) promoting the implementation of national environmental impact assessment procedures; and (3) encouraging reciprocal procedures for notification, information exchange, and consultation on activities likely to have significant transboundary effects. See generally *id.* princs. 1, 11, 17 ENVTL. POL’Y & L. at 36, 37

<sup>82</sup> *Id.* princ. 4, 17 ENVTL. POL’Y & L. at 36.

<sup>83</sup> See *id.* princ. 7, 17 ENVTL. POL’Y & L. at 36 (“Before a decision on the activity is made, government agencies, members of the public, experts in relevant disciplines and interested groups should be allowed appropriate opportunity to comment on the EIA.”).

<sup>84</sup> Other organizations have followed the lead of UNEP and encouraged environmental impact assessment and/or developed guidelines for its effective methodology. See, e.g., Recommendation on the Assessment of Projects with Significant Impact on the Environment, adopted May 8, 1979, O.E.C.D. Doc. C(79)116.

<sup>85</sup> See generally Carole Klein-Chesivoir, *Avoiding Environmental Injury: The Case for Widespread Use of Environmental Impact Assessments in International Development Projects*, 30 VA. J. INT’L L. 517, 531 (1990).

<sup>86</sup> See JAIN ET AL., *supra* note 8, at 184.

<sup>87</sup> See WORLD BANK, OPERATIONAL DIRECTIVE NO. 4.01: ENVIRONMENTAL ASSESSMENT (1991) (establishing World Bank policy and procedure for environmental assessment).

<sup>88</sup> See generally ASIAN DEV. BANK, ENVIRONMENTAL ASSESSMENT REQUIREMENTS AND ENVIRONMENTAL REVIEW PROCEDURES (1993).

assist and improve on existing procedures.<sup>89</sup> The Organization for Economic Cooperation and Development (OECD) also encourages the use of EIA by states that aid developing countries.<sup>90</sup> Other organizations that require or promote EIA include the Inter-American Development Bank, the Organization of American States, the United Nations Development Programme, the European Commission, the African Development Bank, and the European Investment Bank.<sup>91</sup>

In full, the principles and methodology of environmental impact assessment are used widely throughout the world. Whether an EIA is directly required by a country, treaty, international organization, or aid agency, or is merely a means of achieving a broader environmental goal,<sup>92</sup> the process of environmental impact assessment is rapidly becoming a major presence in the international environmental arena.<sup>93</sup>

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<sup>89</sup> See JAIN ET AL., *supra* note 8, at 183.

<sup>90</sup> See Recommendation on Measures Required to Facilitate the Environmental Assessment of Development Assistance Projects and Programs, *adopted* Oct. 23, 1986, O.E.C.D. Doc. C(86)26 (recommending that development assistance programs formally adopt an environmental assessment policy); Recommendation on Environmental Assessment of Development Assistance Projects and Programs, *adopted* June 20, 1985, O.E.C.D. Doc. C(85)104.

<sup>91</sup> See JAIN ET AL., *supra* note 8, at 184.

<sup>92</sup> Even where it is not required per se, EIA can be a useful tool through which other environmental objectives may be satisfied. See, e.g., James Cameron & Will Wade-Gery, *Addressing Uncertainty: Law, Policy and the Development of the Precautionary Principle*, in ENVIRONMENTAL POLICY IN SEARCH OF NEW INSTRUMENTS 95 (Bruno Dente ed., 1995) (discussing the use of environmental impact assessment to implement the precautionary principle); Gunther Handl, *The Environment: International Rights and Responsibilities*, 74 PROC. AM. SOC'Y INT'L L. 223, 226 (1980) (arguing that substantive suits to mitigate pollution might imply "a duty on the part of states to devise domestically a general environmental assessment procedure"); Popiel, *supra* note 18, at 474-75 (discussing how environmental impact assessment is a proactive method for implementing the customary principles of *sic utere tuo ut alienum non laedas*, which means that one should not use one's property so as to injure that of another).

<sup>93</sup> See also *supra* note 6.

### III ENVIRONMENTAL IMPACT ASSESSMENT IN THE GABCICOVO/NAGYMAROS DISPUTE

On September 16, 1977, Slovakia and Hungary<sup>94</sup> entered into a treaty<sup>95</sup> for the construction of a series of barrages along the Danube River, the second longest river in Europe. The Treaty required the construction of two series of locks, one at Gabcikovo (in Slovakian territory) and one at Nagymaros (in Hungarian territory), which together would constitute "a single and indivisible operational system of works."<sup>96</sup> The goals of the development were to decrease flooding on the Danube, improve navigation, and increase energy production for both countries.<sup>97</sup> The Treaty contemplated that a joint contractual plan, to be agreed upon at a later date, would guide the technical specifications of the system. Each party would have equal footing with respect to financing, construction, and operation of the system.<sup>98</sup> In particular, Hungary would control the parts of the operation on Hungarian territory, whereas Slovakia would operate the barrages on Slovakian property.<sup>99</sup>

On May 13, 1989, after Slovakia had built the dam at Gabcikovo, Hungary suspended work at Nagymaros, citing as its justification the uncertainty of the environmental impacts and a need for further study.<sup>100</sup> By October 27, 1989, negotiations between the parties over the evidence of environmental harm had broken down, and Hungary abandoned work on the project altogether.<sup>101</sup> Not wanting to waste the money, time, and labor that it had invested in the construction of the Gabcikovo dam, Slovakia then constructed and implemented "Variant C." Variant C was a unilateral attempt by Slovakia to complete the project and divert the Danube into a reservoir different from the one originally contemplated.<sup>102</sup> According to the ICJ, "Variant C in-

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<sup>94</sup> The parties have been known by different names and have been governed by different regimes over the years since the Treaty was established. See ICJ Judgment, *supra* note 2, para. 15, at 13-14. This Article will refer to them as Hungary and Slovakia throughout.

<sup>95</sup> See *supra* note 3.

<sup>96</sup> 1977 Treaty, *supra* note 3, art 1.1, 1109 U.N.T.S. at 236.

<sup>97</sup> See *id.* pre., 1109 U.N.T.S. at 236.

<sup>98</sup> See *id.* ch. III, 1109 U.N.T.S. at 238-41.

<sup>99</sup> See *id.*

<sup>100</sup> See ICJ Judgment, *supra* note 2, para. 22, at 20.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.* para. 23, at 20-22.

cluded the construction at Cunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was to have a smaller surface area and provide approximately 30 per cent less storage than the reservoir initially contemplated.”<sup>103</sup> After Slovakia made clear its intention to implement this “provisional solution,” Hungary purported to terminate the Treaty, effective May 19, 1992.<sup>104</sup>

In July 1993, Hungary and Slovakia appealed to the International Court of Justice to resolve this dispute. The Special Agreement of the parties<sup>105</sup> asked the Court to decide: (1) whether Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project in 1989; (2) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the “provisional solution” and to put this system into operation from October 1992; and (3) what the legal effects of the May 19, 1992 notification of Hungary’s termination of the Treaty were.<sup>106</sup> In addition, the parties asked the Court to determine the legal consequences arising from the opinion, including the rights and obligations of the parties.<sup>107</sup>

The Court found that Hungary was not entitled to suspend works in 1989<sup>108</sup> and that Slovakia was not entitled to construct and implement Variant C.<sup>109</sup> Hungary’s termination of the Treaty was not effective; therefore, the parties were still bound by the Treaty and were ordered to reach an agreement on the proper disposition of the development project.<sup>110</sup>

Surprisingly, both parties conceded before the Court that an environmental impact assessment was required for the Project.<sup>111</sup>

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<sup>103</sup> *Id.* para. 23, at 20.

<sup>104</sup> *See id.*

<sup>105</sup> Special agreements are one method through which the ICJ obtains jurisdiction to resolve a matter over which it otherwise would have no power. *See* International Court of Justice, *supra* note 1.

<sup>106</sup> *See* Special Agreement Between Hungary and Slovakia, July 2, 1993, art. 2, reprinted in ICJ Judgment, *supra* note 2, para. 2, at 6-7.

<sup>107</sup> *See id.*

<sup>108</sup> *See* ICJ Judgment, *supra* note 2, para. 59, at 39.

<sup>109</sup> *See id.* para. 88, at 48.

<sup>110</sup> *See id.* para. 139, at 66.

<sup>111</sup> When the original project was contemplated in 1977, there were no international environmental norms. The parties therefore did not have a concrete obligation under international law to prevent harm to the environment or conduct an environmental impact assessment. However, the Treaty itself did incorporate some environmental standards that appear to create an EIA obligation. First, Article 15 of the Treaty states that the parties “shall ensure, by the means

The parties therefore focused their arguments on whether such a study had taken place prior to Hungary's abandonment of the Project. During oral arguments, there was intense disagreement over whether the scientific studies that both Hungary and Slovakia had conducted with respect to the project were comprehensive and complete enough to be considered an EIA.<sup>112</sup>

Hungary's main argument before the Court was that a proper environmental impact assessment of the project never was conducted.<sup>113</sup> Hungary defined an environmental impact assessment as "a consideration of potential impacts on all environ-

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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." 1977 Treaty, *supra* note 3, art. 15.1, 1109 U.N.T.S. at 244. According to Article 19, "[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.* art 19, 1109 U.N.T.S. at 245. Similarly, Article 20 requires the parties to take appropriate measures for the protection of fishing interests. *See id.* art. 20, 1109 U.N.T.S. at 245. These environmental treaty obligations, which were somewhat ahead of their time in a 1977 treaty, demonstrate that both parties expected that comprehensive studies of the project would be performed—otherwise, the parties would be unable to avoid the harms indicated in Articles 15, 19, and 20. Thus, even though there was no explicit statement that an EIA must be prepared, a clear interpretation of the Treaty creates such an obligation for each of the parties. Hungary was responsible for studying the effects the project would have on Hungarian property and waters, and Slovakia was obliged to study the impacts on Slovakian territory. *See Counter-Reply of Slovakia, Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.)* (I.C.J. Mar. 24, 1997), at 48 [hereinafter 3/24/97 Slovakia Counter-Reply].

<sup>112</sup> Environmental impact assessment currently plays a role in both parties' domestic legislation. *See* EUROPEAN BANK FOR RECONSTRUCTION AND DEV., ENVIRONMENTAL IMPACT ASSESSMENT LEGISLATION 1, 85 (1994). Slovakia's General Environmental Protection Law requires an EIA before the initiation of any construction activity, use of natural resources, or production of goods. *See* Act Concerning the Environment, CSFR Act No. 17/1992, art. 1 (Dec. 5, 1991), reprinted in EUROPEAN BANK FOR RECONSTRUCTION AND DEV., *supra*, at 41; *see also* Note, *Air Pollution Regulation in the Czech Republic: Environmental Protection in the Context of Political and Economic Transition*, 13 WIS. INT'L. L.J. 565, 568 (1995). Hungary's Government Decree No. 86/1993 on the Provisional Regulations of the Environmental Impact of Certain Activities, passed in 1993, requires EIA for certain listed projects. *See* EUROPEAN BANK FOR RECONSTRUCTION AND DEV., *supra*, at 96. It is unclear whether, at the time of the dispute, Hungary's EIA legislation was still in effect; Slovakia claimed that Hungary had repealed the EIA Decree in order to strengthen its position before the ICJ. *See infra* text accompanying notes 118-119.

<sup>113</sup> *See* Counter-Reply of Hungary, Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.) (I.C.J. Mar. 4, 1997), at 60 [hereinafter 3/4/97 Hungary Counter-Reply].

mental resources, including water and biodiversity, in an integrated manner," and stressed that an EIA must consider "different alternatives."<sup>114</sup> According to Hungary, the studies conducted before 1989 "did not reach even the minimum standards for an environmental impact assessment."<sup>115</sup> Hungary focused on both the poor quality of the studies themselves and the lack of cost-benefit analysis with respect to the Project and its alternatives. Hungary concluded that the purported benefits of the Project, flood control, navigation, and energy production, were not so great that the Project should proceed despite its environmental consequences.<sup>116</sup>

Slovakia's main argument before the Court was that Hungary's claim that there was a "lack of study" was a mere pretense for avoiding its Treaty obligations. Slovakia supported this argument by showing that many studies of the Project had been conducted and that together they constituted a full consideration of the environmental consequences.<sup>117</sup> Slovakia also tried to show that the call for further environmental study was a sham because Hungary itself did not recognize EIA as a domestic procedure.<sup>118</sup> Slovakia argued that Hungary could not honestly be interested in conducting an EIA since the Hungarian government had repealed its domestic legislation regarding environmental impact assessments that same year.<sup>119</sup> In addition, Slovakia pointed out that Hungary did not undertake an environmental assessment after its abandonment of the Project, and it did not indicate its intention to do so.<sup>120</sup> Lastly, Slovakia focused on the timing of the May 1989 abandonment and the fact that it followed so closely on the heels of the February 1989 protocol, signed by both par-

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See *id.* at 66-74. "[A]ll calculations made prior to 1989 indicated [that] the costs exceeded [the] benefits" of the Project. *Id.* at 73.

<sup>117</sup> See Counter-Reply of Slovakia, Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.) (I.C.J. Mar. 25, 1997), at 37 [hereinafter 3/25/97 Slovakia Counter-Reply] (stating that "there is no magic to the three words" environmental impact assessment).

<sup>118</sup> *See id.*

<sup>119</sup> See Counter-Reply of Slovakia, Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.) (I.C.J. Apr. 14, 1997), at 36 [hereinafter 4/14/97 Slovakia Counter-Reply]; see also *supra* note 113.

<sup>120</sup> See 4/14/97 Slovakia Counter-Reply, *supra* note 119, at 36; see also 3/25/97 Slovakia Counter-Reply, *supra* note 117, at 10 (claiming that Hungary made no request in 1989, the year of abandonment, that an EIA be done).

ties, that called for an acceleration of the project.<sup>121</sup> Slovakia argued that the timing of Hungary's claims of environmental uncertainty demonstrated that these concerns were merely pretextual, and that Hungary was trying to stop the project for reasons other than its environmental impact.<sup>122</sup>

#### A. Pre-Abandonment Scientific Studies

Because the stated reason for Hungary's suspension and abandonment of the Project was the uncertainty of its environmental impacts, many of the arguments before the Court concentrated on the quality and adequacy of the studies that each side had conducted. To further describe the arguments, this Part will delineate the various studies that both Slovakia and Hungary conducted, as well as their results.

##### 1. The "Joint List"

Slovakia's brief and arguments repeatedly referred to a "joint list" of 364 research papers on the Gabčíkovo-Nagymaros project that were created before 1973.<sup>123</sup> Slovakia stressed that this was a *joint* list and that many of the studies were conducted by Hungarian institutions and agencies.<sup>124</sup> According to Slovakia, "[t]he fact that a huge number of studies were carried out is clearly indicative of an attention to research and a concern for the identification of possible impacts."<sup>125</sup>

In response to Slovakia's argument, Hungary asserted that the number of studies completed is irrelevant—it is the quality and comprehensiveness of the studies that matters.<sup>126</sup> Numerous deficiencies and gaps in data and monitoring capabilities rendered the studies insufficient regardless of their number and size.<sup>127</sup> Hungary claimed that each of the papers on the "joint

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<sup>121</sup> See 4/14/97 Slovakia Counter-Reply, *supra* note 119, at 36.

<sup>122</sup> See 3/25/97 Slovakia Counter-Reply, *supra* note 117, at 17.

<sup>123</sup> See *id.* at 40.

<sup>124</sup> See *id.*

<sup>125</sup> *Id.* at 41 (emphasis in original omitted). Wordsworth, arguing for Slovakia, continued: "Of course, if Hungary had submitted a gram of evidence to the contrary, if it had examined some of the studies and showed them to be somehow valueless, then there might be some reason to doubt the value of this list. But Hungary has submitted no such evidence." *Id.*

<sup>126</sup> See Counter-Reply of Hungary, Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.) (I.C.J. Apr. 10, 1997), at 31 [hereinafter 4/10/97 Hungary Counter-Reply].

<sup>127</sup> See *id.*

list" dealt with a discrete subject matter, and that none of them considered all the impacts of the Project in a comprehensive and holistic fashion, as an EIA should.<sup>128</sup> In addition, Hungary argued that while many papers did study the Project, only a small number of studies actually were devoted to environmental issues.<sup>129</sup>

Hungary also questioned the studies' reliability due to their age. In the early planning stages of the Project, the joint contractual plan changed many times, and the parties altered different portions of the plan from time to time. Thus, Hungary argued that the pre-1977 studies covered a version of the project different from that which ultimately was implemented.<sup>130</sup> In addition, Hungary argued that the Communist regimes that existed in both Hungary and Slovakia at that time tainted the results of the studies, because, often, government-funded scientists were dictated the results of their experiments before they even began the study.<sup>131</sup>

## 2. *The "Bioproject"*

Slovakia also argued that its "Bioproject" studied all the environmental impacts of the Project in a comprehensive and integrated fashion. The Bioproject was a year-long study conducted in 1975-76 by the Slovak Academy of Sciences.<sup>132</sup> According to

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<sup>128</sup> See *id.* at 33, 36.

<sup>129</sup> Hungary argued that, of the approximately 100 pre-1974 studies on the joint list that relate to environmental issues, only 16 addressed the subjects of water quality, biology, and nature protection. See 3/24/97 Slovakia Counter-Reply, *supra* note 111, at 42 (citing Hungary's Reply Brief). In response to this contention, Slovakia stated that

in addition to the 16 studies to which [Hungary] refers, at least 21 studies in the list address the topic of ground water—which is perhaps the most important topic in terms of environmental impact. . . . [A] further seven studies in the list address the issue of channel dredging downstream of Nagymaros . . . . [A]nother 12 studies focused on riverbed morphology in the old Danube section.

*Id.*

<sup>130</sup> See 4/10/97 Hungary Counter-Reply, *supra* note 126, at 28 ("First, there was a planned discharge of 50 m<sup>3</sup>/s per second during the vegetation period and 0 m<sup>3</sup>/s during the winter months. Second, a very substantial regime of peak power was envisaged . . . . All the pre-1977 studies focused on this version of the Project, a version which Slovakia has never attempted to defend. Thus, it is surprising that Slovakia considers the pre-1977 research to be 'the most thorough.'") (footnote omitted).

<sup>131</sup> See *id.* at 37.

<sup>132</sup> See 3/24/97 Slovakia Counter-Reply, *supra* note 111, at 43.

Slovakia, the study's report comprised fifteen closing reports, twenty-one published volumes, seventy-two articles published in journals, and seventeen non-published works.<sup>133</sup> Slovakia asserted that the Bioproject did not "rubber stamp" the Gabčíkovo/Nagymaros system, but that, similar to an EIA, it "established a series of proposals that enabled important modifications to be made, modifications which aimed at guaranteeing the Danube's water quality, ensuring the purity of the upstream aquifer and protecting the environment."<sup>134</sup>

Hungary claimed, however, that it never received a copy of the "Bioproject" and therefore could not even be sure of its existence.<sup>135</sup> The document never was produced throughout the entire arbitration process, despite Hungary's frequent demands for it.

### 3. UNDP/WHO Study

From 1972 to 1976, Hungary, the United Nations Development Programme, and the World Health Organization undertook a joint study (hereinafter UNDP/WHO Study) on the water quality in the Danube River.<sup>136</sup> Slovakia argued that the joint study had considered "the most important water quality problems" concerning the Project.<sup>137</sup> The study's report concluded that "the Nagymaros barrage would not greatly alter flow conditions in the relevant stretch and that, consequently, the processes of sedimentation and biological conditions would not change greatly either."<sup>138</sup> Slovakia interpreted this report as evidence that Hungarian scientists had conducted a comprehensive, in-depth study of the Project and that Hungary could not claim ignorance of the environmental impacts of the Project prior to 1989.<sup>139</sup>

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<sup>133</sup> See *id.*

<sup>134</sup> *Id.*

<sup>135</sup> See 4/10/97 Hungary Counter-Reply, *supra* note 126, at 29 ("And, what do we know of the Bioproject? Its name, but not its content. Since it has not been produced, its merits cannot be evaluated. Slovakia stated 'it would be difficult to imagine a more complex or complete examination of the effect of the Project on the environment.' Well, I can only say that it is impossible to imagine anything about a Bioproject no one has ever seen.").

<sup>136</sup> The UNDP/WHO study was a five-year, \$5 million project. See 3/24/97 Slovakia Counter-Reply, *supra* note 111, at 46.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (citation omitted).

<sup>139</sup> See *id.*

According to Hungary, however, the UNDP/WHO Study did not assess the Project itself, and only a few pages of the final document alluded to the Gabcikovo-Nagymaros barrage system at all.<sup>140</sup> The researchers reported that there was no plan to evaluate the effect of the Project on water quality and no detailed studies on the expected effects of the Project,<sup>141</sup> thus strengthening Hungary's assertion that the proper research was not being performed. Hungary also argued that the study was less than complete because Slovakia had refused to participate and the researchers could not get access to their data.<sup>142</sup> Thus, according to Hungary, the study was conducted with insufficient, one-sided data, and could not possibly have addressed all the environmental consequences of the Project.<sup>143</sup>

#### 4. *Hungarian Academy of Sciences's "EIA"*

The Hungarian Academy of Sciences also conducted a large study of the Project in 1985, and referred to this study as an "EIA" numerous times.<sup>144</sup> The study concluded that the Project would have no significant harm on the Danube's water, and that the real environmental problem in the area was pollution from industry and agriculture, which had nothing to do with the Project.<sup>145</sup> Despite the alleged comprehensiveness of this "EIA," Hungary later asserted that the study was not conducted properly. A group of independent reviewers rated it a "D" on a scale of "A" to "F," pointing out that the study "did not discuss the issues in an integrated manner; gave no basis for the interpretation of the data; did not describe the standards, assumptions, or values used; and did not address the impacts of the Project on ecosystems."<sup>146</sup> In addition, Hungary claimed that the study was not entirely impartial since the scientists conducting it were dependent on state support and therefore inclined to make findings amenable to the Communist government.<sup>147</sup> The "EIA" also ig-

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<sup>140</sup> See 4/10/97 Hungary Counter-Reply, *supra* note 126, at 30 ("The Report devotes 4 1/2 pages, 4 1/2 pages to the Project, as well as 3 further pages of pictures.").

<sup>141</sup> See *id.*

<sup>142</sup> See *id.* at 31.

<sup>143</sup> See *id.*

<sup>144</sup> See 3/25/97 Slovakia Counter-Reply, *supra* note 117, at 12-17.

<sup>145</sup> See *id.* at 14.

<sup>146</sup> 3/4/97 Hungary Counter-Reply, *supra* note 113, at 61.

<sup>147</sup> See 4/10/97 Hungary Counter-Reply, *supra* note 126, at 37 (describing how secrecy laws forced many of the scientists to work in isolation, without

nored important effects or gave them little consideration. For example, only one sentence in the report addressed seismic activity and large reservoir impacts, even though seismologists acknowledged the existence of an earthquake source zone in a town only twenty kilometers away from Gabcikovo.<sup>148</sup>

Slovakia contended that the EIA was accurate as well as complete and that Hungary was discrediting and ignoring it in order to downplay the results, which were not favorable to the current Hungarian position.<sup>149</sup> Slovakia also argued that the expert review, which Hungary asserted gave the "EIA" a grade of "D," was not really as critical as Hungary portrayed it to be.<sup>150</sup> According to Slovakia, the investigation of the Project's impacts on "human beings, flora and fauna, soil, water, air, climate, landscape, [and] material assets" was classed as "A," meaning that it was generally well-performed, with no important tasks left incomplete.<sup>151</sup> Slovakia said that the "D" grade stressed by Hungary had to do with the form of the study, not its substance.<sup>152</sup>

With respect to the effects the Project might have on the Budapest water supply, Slovakia asserted that the 1985 study showed that Hungarian dredging of the riverbed prior to 1980—which was unrelated to the Project—would have detrimental effects on the Budapest waterworks system.<sup>153</sup> Slovakia added that the damage caused by previous dredging could easily be reversed by replacing the gravel to the riverbed.<sup>154</sup> Thus, there was no reason to abandon work at Nagymaros due to potential damage to the Budapest water system, because any damage to the system

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access to background contributions from other fields, and that the results of many of the studies were considered "top secret" and were not publishable).

<sup>148</sup> See 3/4/97 Hungary Counter-Reply, *supra* note 113, at 63-64.

<sup>149</sup> See 3/25/97 Slovakia Counter-Reply, *supra* note 117, at 13. In response to Hungary's contentions about the Academy of Sciences EIA, Slovakia stated:

This is very strange. For Hungary's 1985 EIA did in fact call itself an EIA, it was annexed to Hungary's Memorial as an EIA, and it was completed under a 1984 Hungarian Governmental Decree, which made the completion of an EIA, an environmental impact assessment, *mandatory* for the continuation of the investment. Hungary has submitted no evidence to suggest that the 1985 EIA was not carried out in conformity with this Decree.

*Id.*

<sup>150</sup> See *id.* at 13.

<sup>151</sup> *Id.*

<sup>152</sup> See *id.*

<sup>153</sup> See 4/14/97 Slovakia Counter-Reply, *supra* note 119, at 38.

<sup>154</sup> See *id.* at 39.

resulted from previous dredging unrelated to the Project and could be remedied easily.<sup>155</sup>

##### 5. *Hungarian Accademy of Sciences Position Paper*

Slovakia asserted that a 1983 position paper by the Hungarian Academy of Sciences concluded that “the real or supposed environmental damage coming from the [Project] can be decreased with a great probability or can be avoided.”<sup>156</sup> According to Slovakia, this paper demonstrated that Hungary had acknowledged that the Project would have adverse environmental impacts, yet chose to continue with the construction while mitigating the potential effects. Hungary argued that the 1983 report actually recommended abandonment or significant postponement of the Project due to the high cost of such environmental mitigation measures.<sup>157</sup> Abandonment was only one of the many policy options delineated in the report, however.

##### B. *Post-Abandonment Scientific Studies*

In addition to the above arguments concerning the studies conducted prior to Hungary’s abandonment of the Project, there is also the issue of Variant C, which Slovakia implemented in 1992 without proper study of its environmental consequences. Variant C was a unilateral diversion of the Danube River involving the construction of an overflow dam at Cunovo, a levee linking that dam to the south bank of the bypass canal, and a corresponding reservoir smaller than the one contemplated in the original Project.<sup>158</sup> Once Hungary suspended work on the Project in 1989, asking for further study, there was very little investigation into the potential impacts of the Project. Slovakia conducted almost no analysis of the unilateral provisions it proposed, including Variant C, which it eventually implemented.

The one study Slovakia conducted was done in 1995—after Variant C had already been implemented. The study was a computer model that attempted to simulate the impacts that Variant C would have on Slovak territory. While Slovakia asserted that this study was accurate and sufficient, Hungary argued that this study cannot be considered an EIA because it only looked at im-

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<sup>155</sup> See *id.*

<sup>156</sup> *Id.*

<sup>157</sup> See *id.*

<sup>158</sup> See ICJ Judgment, *supra* note 2, para. 23, at 20-22.

pacts on one side of the River. In addition, Hungary noted that the study came too late to be of use during the decisionmaking process.<sup>159</sup>

### C. Summary of the Scientific Studies

While there were a good number of studies with respect to the original Project, it is not clear that they were comprehensive and accurate enough to qualify as environmental impact assessments. In concluding its discussion of the scientific studies, Slovakia stated that

as of 1977, all the potential adverse impacts of the Project were well known to the Parties. . . . [B]etween 1977 and 1989, the Treaty parties continued their detailed investigations into potential Project impacts, and the weight of the evidence did *not* support Project suspension or abandonment. . . . [B]oth Parties commissioned impartial, outside reports in 1989-1990. . . . [T]here was—and is—no evidence of adverse impact to the Budapest water wells.<sup>160</sup>

In contrast, Hungary summarized:

If it can be shown that in 1989 Hungary was reasonable in its belief that there was a probability of significant risk from carrying out further work on Nagymaros, or in its belief that closing the Danube could cause significant and irreversible harm, it is not relevant that in 1977 the risks had been envisaged as possible. In 1989 they were real. Must Hungary build a destructive barrage in 1989 or 1997 because of the inaccuracies and deficiencies of studies in the 1960s? That would be “enforcing outmoded science” with a vengeance.<sup>161</sup>

Thus, the Court received the case with many scientific issues to consider, the resolution of which most likely would directly affect the outcome of the case itself.

## IV THE JUDGMENT OF THE COURT

The Court’s ruling deals with the rights and responsibilities of the parties with respect to three main areas: (1) the original project; (2) Variant C; and (3) the future. The opinion does not mention environmental impact assessments in its discussion of

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<sup>159</sup> See 3/4/97 Hungary Counter-Reply, *supra* note 113, at 62.

<sup>160</sup> 4/14/97 Slovakia Counter-Reply, *supra* note 119, at 40.

<sup>161</sup> 4/10/97 Hungary Counter-Reply, *supra* note 126, at 32.

these three areas. The absence of any EIA language in the Court's decision has varying consequences for each of the three areas delineated. This Part, therefore, will discuss the implications of the Court's oversight with regard to each of these three areas.

#### A. *The Original Project*

While the parties spent a great deal of time arguing over whether the many studies fulfilled the requirement for an environmental impact assessment, the opinion of the Court makes no mention of these studies or their adequacy as EIAs. The Court dealt with the studies in a cursory fashion, stating:

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.<sup>162</sup>

While avoiding a direct discussion of the scientific studies, the Court instead based its decision that Hungary was not entitled to abandon the works at Nagymaros on the doctrine of treaty law. Under treaty law, suspension of a treaty is justified if it is the only means of safeguarding an essential interest that in grave an imminent peril.<sup>163</sup> Applying this standard, the Court found that Hungary's purported "environmental necessity" did not entitle it to suspend work on the Project because the potential environmental harms were not grave and imminent, but were uncertain and long-term.<sup>164</sup>

While refusing to address the scientific studies directly, the Court apparently agreed with Slovakia's version of the facts. If

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<sup>162</sup> ICJ Judgment, *supra* note 2, para. 54, at 36.

<sup>163</sup> See *id.* para. 52, at 34.

<sup>164</sup> See *id.* para. 54, at 35 ("[A] state of necessity could not exist without a 'peril' duly established at the relevant point in time; the mere apprehension of a possible 'peril' could not suffice in this respect."). The Court continued: "[T]he peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it apprehended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed." *Id.* para. 56, at 37.

the judges truly believed that the scientific studies had been inadequate and that more assessment was needed, they could have characterized this lack of information as “grave and imminent peril.” The Court’s failure to find Hungary’s purported lack of information compelling implies that it agreed with Slovakia’s view that the studies were sufficient and that Hungary’s claim of environmental necessity was a pretense for breaching an otherwise valid treaty. Indeed, it can be implied that the Court found Slovakia’s scientific arguments more persuasive in stating that “Hungary could . . . have resorted to other means in order to respond to the dangers that it apprehended.”<sup>165</sup> Ironically, the Court used the number of studies performed as evidence that Hungary knew about the potential harms of the Project when it signed the Treaty in 1977.<sup>166</sup>

The Court most likely focused on the treaty issue of the case out of concern that justifying Hungary’s suspension of the Treaty would set dangerous precedent. Parties could use this precedent to break treaties simply because of disagreement or uncertainty over the consequences of such action. The danger of this “slippery slope” scenario appears to have influenced the Court’s decision greatly. While this concern may have some merit, the Court’s holding clearly goes too far. Since its interpretation of “grave and imminent peril” requires certainty and inevitability before necessity can be invoked, the Court effectively shuts the door on all parties seeking to use environmental necessity in the future, even as a legitimate precautionary measure. Alternatively, the Court could have based its decision on the available science, and it could have created clear standards and guidelines, based on accurate scientific evaluations, that would justify a party’s suspension of a treaty due to environmental impact. By avoiding the scientific issue altogether, the ICJ picked a far less-principled jurisprudential course—one that may ultimately exacerbate the environmental harms of other international agreements.

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<sup>165</sup> *Id.* para. 56, at 37.

<sup>166</sup> See *id.* para. 57, at 38 (“As can be seen from the material before the Court, a great many studies of scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty.”).

### B. Variant C

The Court continued along this ill-chosen path in its complete failure to address the lack of any scientific study—let alone an entire environmental impact assessment—with respect to Slovakia’s unilateral implementation of the Treaty through Variant C. While the Court found that Slovakia was wrong to implement Variant C, it focused on the fact that the Treaty contemplated a joint operation in which the parties shared both responsibility and benefits—a project that clearly could not be fulfilled through a unilateral provision.<sup>167</sup> Rejecting Slovakia’s argument of “approximate application” of the Treaty, the Court argued that such a doctrine, if it exists in international law, could only take place within the confines of the Treaty itself.<sup>168</sup> Since Variant C did not fulfill the 1977 Treaty’s objectives, it could not be an “approximate application” of that agreement.<sup>169</sup> Thus, the Court concluded, when Slovakia put Variant C into operation, it committed an “internationally wrongful act.”<sup>170</sup>

The Court also discarded Slovakia’s contention that Variant C was a justifiable countermeasure to Hungary’s wrongful act of suspending and abandoning works at Nagymaros. While a countermeasure to an internationally wrongful act can be justified under certain conditions, the Court noted that the “countermeasure must be commensurate with the injury suffered.”<sup>171</sup> Variant C was not a proportional response to Hungary’s actions and, therefore, was not a justifiable countermeasure.<sup>172</sup>

After rejecting Slovakia’s justifications for Variant C, the Court ironically separated the *construction* of the alternative from its ultimate *implementation*. The Court concluded that Slovakia “was entitled to proceed . . . to Variant C in so far as it . . . confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand,

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<sup>167</sup> See *id.* para. 77, at 45.

<sup>168</sup> See *id.* para. 76, at 45.

<sup>169</sup> See *id.* para. 78, at 45.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* para. 85 at 47.

<sup>172</sup> See *id.* (“[B]y unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—[Slovakia] failed to respect the proportionality which is required by international law.”).

[Slovakia] was *not entitled to put that Variant into operation.*”<sup>173</sup> This distinction ignores the reality that Slovakia most likely made its final decision to implement Variant C before it ever began planning and constructing the infrastructure necessary for the proposal. The thought that a country would “proceed” to the planning and construction phases of a project of this magnitude without being sure that it would reap benefits from its labor is implausible at best. This “construction”/“implementation” dichotomy creates a conundrum for countries in Slovakia’s position in the future, for it allows them to spend money constructing a system of dams and weirs without the assurance that they will be able to implement such a system.

The ICJ’s most egregious omission, however, was its failure to discuss the lack of scientific study of the environmental consequences of either the construction or the implementation phases of Variant C. The Court ultimately held that the *construction* of Variant C was justified, *even though the environmental effects of such construction were unknown.* However, by 1991, environmental impact assessment was widely accepted within many countries and in international treaties,<sup>174</sup> and Slovakia should have conducted such a study before proceeding with Variant C.<sup>175</sup> Even if the customs of international law did not require such a study, full compliance with Treaty Articles 15, 19, and 20 certainly required Slovakia to study the effects of Variant C fully before proceeding.<sup>176</sup> An EIA would facilitate Slovakia’s efforts to protect the water of the Danube, the fisheries industries, and

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<sup>173</sup> *Id.* para. 88, at 48 (emphasis added).

<sup>174</sup> See *supra* Part II.

<sup>175</sup> For example, under U.S. standards, Variant C would certainly require a supplemental environmental impact statement, since the project differed greatly from its original contemplation. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) (“If there remains ‘major federal actio[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.”); *see also supra* notes 28-31 and accompanying text (discussing NEPA and the U.S. standards for environmental assessment).

<sup>176</sup> *See* discussion *supra* note 111. If EIA was required solely as an international norm, Slovakia might argue that Hungary waived its right to an EIA by suspending work on the Project. This argument assumes that the obligation to conduct EIA is to the other party of the Treaty, when, in reality, the obligation is owed to any party who may be injured by the activity—namely, any country along the Danube or in Europe as a whole that may feel the effects of pollution and environmental degradation. Thus, the obligation to create an EIA cannot be waived by one country. The argument that Hungary did not waive its right

nature, as the Treaty requires. In addition, Slovakia could use an EIA to weigh the costs and benefits of Variant C and to compare it with other proposed alternatives before proceeding.

While ignoring the lack of scientific study, the Court did acknowledge that Variant C was significantly different from the original Project.<sup>177</sup> Because Variant C was so different, the earlier studies could not be used to predict the environmental impacts of Variant C. If EIA was required by either international norms or the Treaty itself, Variant C clearly needed new scientific analyses before it could be implemented. The Court's empathy for Slovakia's financial distress caused by Hungary's suspension of the Treaty may have colored its analysis of the science—surprisingly, the opinion even speculated that Variant C might *improve* environmental conditions. The Court stated that "not using the system would have led to considerable financial losses, and that it could have given rise to serious problems for the environment."<sup>178</sup> This statement was total speculation, however, and the Court did not cite to any studies with the conclusion that failing to construct Variant C would harm the environment. In fact, the opinion does not refer to a single study of the environmental impacts of Variant C at all.<sup>179</sup>

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to an EIA is further bolstered by the fact that such study was clearly required as part of the 1977 Treaty itself.

<sup>177</sup> In the original project, two dams were to be built—one at Gabcikovo and one at Nagymaros. Variant C required a new dam at Cunovo, where both banks of the Danube are on Slovak territory, as well as numerous weirs to control the flow of water along the river. *See, e.g.*, ICJ Judgment, *supra* note 2, paras. 64-66, at 41-43 (describing the construction of Variant C). The Court also recognized that the project was different, both physically and legally, from the earlier proposed construction. *See id.* para. 77, at 45 ("In spite of having a certain physical similarity with the original Project, Variant C thus differed sharply from it in legal characteristics.").

<sup>178</sup> *Id.* para. 72, at 44; *see also* Case Concerning the Gabcikovo-Nagymaros Project: Dissenting Opinion of Judge Vereshchetin (Hung. v. Slovk.), (I.C.J. Sept. 25, 1997), at 5 [hereinafter Vereshchetin Dissent], available in <[http://www.icj-cij.org/icjwww/idocket/ih5/ih5judgement/ih5\\_judgment\\_970925\\_frame.htm](http://www.icj-cij.org/icjwww/idocket/ih5/ih5judgement/ih5_judgment_970925_frame.htm)> (visited Apr. 28, 1999) ("In terms of comparative environmental effects, Variant C could be seen as advantageous against the originally agreed project, due to a smaller reservoir and the exclusion of peak mode operation. On the other hand, in the event of total abandonment of the project, the waterless bypass canal and other completed but idle structures would have presented a great and long-lasting danger for the environment of the whole region.").

<sup>179</sup> The Court does not cite to a study of Variant C because no such study existed. Even the parties acknowledged this fact when they focused their oral arguments on the studies that had been conducted before 1989. *See* discussion

By ignoring the fact that Slovakia proceeded with Variant C—a significantly different project—without proper study, the Court undermined the requirement of EIA that was emerging as a norm of international law in the early 1990s. The Court also overlooked the fact that Slovakia disregarded its own obligations under Articles 15, 19, and 20. The absence of any discussion of the environmental consequences of Slovakia’s unilateral actions was the Court’s most egregious oversight.

### C. *The Future*

Turning to the future conduct of the Parties, the Court stressed that Hungary and Slovakia must move forward and fulfill the Treaty obligations.<sup>180</sup> The Court acknowledged that neither Party had adhered fully to the 1977 Treaty, and, therefore, held that the “factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible.”<sup>181</sup> The Court clearly stressed that the objectives of the Treaty “shall be fulfilled,”<sup>182</sup> without even considering the possibility that the costs of the Project might outweigh its benefits and, thus, that the parties might decide not to proceed. According to the Court, the Treaty lives on, and therefore the Project (in whatever new form the parties agree to) must be constructed.

With respect to the environmental impacts of any future construction on the Danube, the Court said that “current standards must be taken into consideration.”<sup>183</sup> The Court based its

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*supra* Part III. The studies that occurred in the early 1990s still dealt with the original project, as conceived in the joint contractual plan, and they did not address the possible impacts of Variant C. A preliminary list of alternatives—which included Variant C—was developed in September 1990, less than a year before construction began on the variant in July 1991; certainly, there was not enough time between the alternative’s proposal and its construction and implementation to adequately study the potential environmental consequences. No studies were conducted with respect to Variant C—a fact which the Court’s judgment readily ignores.

<sup>180</sup> See ICJ Judgment, *supra* note 2, para. 131, at 65 (“The Parties will have to seek agreement on the modalities of the execution of the Judgment in light of this determination, as they agreed to do in Article 5 if the Special Agreement.”).

<sup>181</sup> *Id.* para. 133, at 65.

<sup>182</sup> *Id.* para. 139, at 66.

<sup>183</sup> *Id.* para. 140, at 66.

conclusion on the wording of Articles 15 and 19<sup>184</sup> and the Treaty's continuing obligation to maintain the quality of the water of the Danube and to protect nature.<sup>185</sup> The Court did not hold that current environmental standards can be applied to any existing treaty as it evolves; instead, the application of evolving environmental standards is linked specifically to the provisions of the 1977 Treaty at hand.<sup>186</sup> As a result, the Court left open the possibility that early treaties that do not contain any language concerning the environment may be implemented in the present without proper consideration of environmental consequences, even if such consequences might be dire. Presumably, the Court did not address this difficult question because of the principle of *pacta sunt servada*, which gives treaties between parties the force of law.<sup>187</sup> While it is indeed crucial to preserve the sanctity of treaty law, allowing environmentally detrimental activities to continue because they are governed by an older treaty that did not consider environmental implications would be anachronistic and illogical in an era that recognizes the irreplaceable nature of Earth's precious resources.

While requiring the consideration of "current standards," the Court notably omitted any description of what those standards might include. This Article argues that current international standards include the obligation to conduct an environmental impact assessment.<sup>188</sup> Even if an EIA is not a *jus cogens* of international environmental law—and some might argue that it is not—certainly, the parties must conduct an EIA in order to follow the precautionary principle or to adhere to the principle that one should not use one's resources to harm an-

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<sup>184</sup> 1977 Treaty, *supra* note 3, arts. 15, 19, at 244-45.

<sup>185</sup> See, e.g., ICJ Judgment, *supra* note 2, para. 140, at 66 (stating that the consideration of current standards is "not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing—and thus necessarily evolving—obligation on the parties to maintain the quality of the water of the Danube and to protect nature"); *id.* para. 112, at 58 ("By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.").

<sup>186</sup> See *id.* para 140, at 66.

<sup>187</sup> See Philippe Couvreur, *The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes*, in THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 105 (A.S. Muller et al. eds., 1997).

<sup>188</sup> See discussion *supra* Part II.

other (*sic utere tuo ut alienum non laedas*).<sup>189</sup> Either directly as its own international obligation or indirectly to effectuate other environmental norms, environmental impact assessment is a necessary component of any future project related to the Treaty that the parties agree to implement.

The Court's opinion, however, did not require the parties to conduct studies with respect to their future compromise solution. Instead, it vaguely required the parties to "look afresh at the effects on the environment of the operation of the Gabčíkovo power plant."<sup>190</sup> The Court continued: "In particular [the Parties] must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river."<sup>191</sup> While recognizing that some environmental assessment must be made, the Court deferred to the parties to conduct future studies and analyses as they see fit.<sup>192</sup> According to the Court, "[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as *the norms of international environmental law* and the principles of the law of international watercourses."<sup>193</sup> With these cryptic allusions to international environmental norms and "looking afresh" at the impacts of the project, the Court gave the parties little guidance in tailoring their future behavior with respect to the Treaty.

The possible reasons for the Court's reluctance to delve into the environmental matters are numerous. First, the Court has limited jurisdiction and is bound to answer only those questions posed to it by the special agreement of the parties.<sup>194</sup> Since the

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<sup>189</sup> See, e.g., ICJ Judgment, *supra* note 2, para. 140, at 67 ("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.").

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See *id.* para. 141, at 67 ("It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties.").

<sup>193</sup> *Id.* (emphasis added).

<sup>194</sup> See NAGENDRA SINGH, THE ROLE & RECORD OF THE INTERNATIONAL COURT OF JUSTICE 12 (1989) (stating that "the Court has jurisdiction over a sovereign State only if, and to the extent that, the State has agreed that it shall have such jurisdiction").

Court's rulings are binding only on the parties themselves,<sup>195</sup> the Court may have thought it superfluous to develop tenets of international law that would not decide the case at hand directly.<sup>196</sup> Because the judges knew that the treaty and state responsibility issues would resolve this dispute, they may have felt it unnecessary to discuss the scientific studies and obligations of environmental impact assessment.<sup>197</sup>

A second possible reason for the Court's opinion is the role of the ICJ in international law. Principles of state sovereignty counsel the Court against ordering the parties to take actions or to fulfill obligations in a certain way.<sup>198</sup> The Court has very limited jurisdiction, and it is empowered to answer only the narrow question posed directly by the parties.<sup>199</sup> Due to its narrow jurisdiction and inability to enforce its judgments against sovereign states, the Court may find it preferable to allow parties to work through their differences in negotiations rather than mandating that they resolve the issues in a certain way. Thus, the Court left the final arbitration of the environmental impacts to the parties themselves.

Third, the Court may have been afraid of the aforementioned "slippery slope" argument.<sup>200</sup> Allowing parties to break treaties in consideration of nebulous concepts such as environmental uncertainty might open a Pandora's Box for the Court,

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<sup>195</sup> See Couvreur, *supra* note 187, at 100 (explaining that the ICJ's decisions are only binding on the parties before it in that particular case).

<sup>196</sup> See Robert Y. Jennings, *The Proper Work and Purposes of the International Court of Justice*, in THE INTERNATIONAL COURT OF JUSTICE, *supra* note 187, at 35 ("All courts everywhere lean towards avoiding passing upon matters which prove in the event to be otiose to the necessitation of a final decision of the case.").

<sup>197</sup> See, e.g., ICJ Judgment, *supra* note 2, para. 54, at 35-36 ("[I]t is not necessary in order to respond to the questions put to [the Court] in the Special Agreement for it to determine which of those points of view is better scientifically founded.").

<sup>198</sup> See *id.* para. 141, at 67 ("It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses.").

<sup>199</sup> See JON MARTIN TROLLDALEN, INTERNATIONAL ENVIRONMENTAL CONFLICT RESOLUTION: THE ROLE OF THE UNITED NATIONS 19 (1992) ("In matters of international conflict resolution, the ICJ's role is weak . . . . The ICJ also lacks effective procedures to ensure compliance with its judgments and has no direct application to private entities.").

<sup>200</sup> See *supra* Part IV.A.

unleashing numerous claims that a project needed further environmental study before implementation. While decisions of the Court are not binding on future parties, the Court's decisions on previous arguments are nonetheless revisited in future disputes as precedent for certain concepts.<sup>201</sup> The judges may have feared that allowing Hungary to avoid its treaty obligations would denigrate the status of treaties as binding law, thus setting a very dangerous precedent for future treaty disputes.

Fourth, the vagueness in the Court's opinion with respect to the parties' environmental obligations may also be explained by the need to ensure that a large majority of the judges would join the opinion.<sup>202</sup> In order to garner wide support, a ruling of the Court often must be drafted in broad terms, leaving the individual judges to elaborate on other matters in separate opinions.<sup>203</sup>

Lastly, the Court's opinion may have suffered from the lack of environmental cases on its docket and, therefore, a lack of expertise in deciding cases in this area.<sup>204</sup> Environmental cases are heavily-laden with factual and scientific determinations that require a certain amount of expertise or technical knowledge. The Court's lack of experience with these issues could hamper its ability to address them thoroughly and adequately.<sup>205</sup> On one hand, the Court could have sought guidance from international

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<sup>201</sup> See Couvreur, *supra* note 187, at 100.

<sup>202</sup> See, e.g., Jennings, *supra* note 196, at 35.

<sup>203</sup> See *id.*

<sup>204</sup> See SINGH, *supra* note 194, at 164-65 (discussing the need for the Court to develop international environmental principles, and arguing for the establishment of a special chamber of the Court to deal with disputes concerning the protection of the environment). Due to its lack of competence in environmental issues, the Court recently created a special Chamber for Environmental Matters, to which environmental cases would be directed. See Malgosia Fitzmaurice, *Environmental Protection and the International Court of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 293, 295 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996). The Special Chamber has never been used, however, and the Court declined to send the Gabčíkovo/Nagymaros case to this chamber. *See id.* Unfortunately, the Court's failure to delegate the case—and subsequent superficial treatment of the EIA issue—does not inspire confidence in its future ability to handle complex scientific matters affecting the environment.

<sup>205</sup> The Court's ability to deal with ever-changing, current, and complex issues such as those in environmental law may also be hampered by the composition of the Court: the Justices to the Gabčíkovo dispute consisted mostly of white male octogenarians, whose legal training and background presumably did not include environmental concerns.

scholars or environmental treaties already in existence.<sup>206</sup> On the other hand, the institutional barriers that preclude the ICJ from coherently deciding issues of science and international environmental law may be so insurmountable as to make this Court an improper forum for the arbitration of environmental disputes in general.<sup>207</sup>

Regardless of the reasons for the Court's failure to mention EIA and give the parties guidance on the applicable environmental standards, the Court in this case missed an opportunity to delineate and define the "norms of international environmental law" in a clear and concise manner. By choosing to mention environmental considerations only vaguely and by leaving it to the parties to define what exactly those norms may or may not include, the opinion does not alleviate the uncertainty and fluctuation surrounding the norms of international environmental law. Since the laws of each country vary greatly, and since international environmental norms evolve slowly and gradually over time, it would have been tremendously beneficial for the Court to clarify what practices the parties must use in their future negotiations over this Treaty. Such clarification would have made the Court's opinion stronger and would have established useful precedent for future environmental disputes. The ambiguity and vagueness in the Court's opinion can only reduce its usefulness during the parties' future negotiations and its potential as guidance for negotiating potentially harmful future projects.<sup>208</sup>

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<sup>206</sup> See discussion *supra* Part II for potential sources of guidance to which the Court could have referred.

<sup>207</sup> See SINGH, *supra* note 194, at 165. An environmental special chamber has since been instituted, but it has never been used. See *supra* note 204 and accompanying text; see also Fitzmaurice, *supra* note 204, at 301 ("It may be accepted that, in its capacity as a tribunal to hear contentious issues between states, the ICJ may not be the appropriate forum for the decision of disputes relating directly to the liability of states to the environment itself.").

<sup>208</sup> In fact, the Court's vagueness has already created practical problems for the parties in developing a workable solution for the Danube River's future. On September 3, 1998, Slovakia filed a request for an additional judgment with the International Court of Justice, stating that Hungary has been uncooperative and unwilling to implement the Court's September 25, 1997 Judgment. See International Court of Justice, *Press Communiqué* 98/28 (Sept. 3, 1998) <<http://www.icj-cij.org/icj/presscom/press1998/9828.htm>>. To reduce these problems, Slovakia maintains that it now wants the Court to determine the modalities for executing the Judgment. See *id.* Hungary is expected to file a written statement of its position on Slovakia's request by December 7, 1998. See International Court of Justice, *Press Communiqué* 98/31 (Oct. 7, 1998) <<http://www.icj-cij.org/icj/presscom/press1998/9831.htm>>.

Since the judgment, Hungary and Slovakia have agreed to construct a dam on the Danube River in order to fulfill the obligations of the 1977 Treaty.<sup>209</sup> On February 27, 1998, the parties signed a protocol for agreement in principle to build a hydroelectric project at Gabcikovo, which would require Hungary to construct a dam either at Nagymaros or Pilismarot within eight years.<sup>210</sup> The protocol was met with staunch opposition from environmentalists, who claimed that there were other options available besides building another dam.<sup>211</sup> The protocol was signed a mere seven months after the ICJ's judgment in this case, and the parties could not have adequately studied the environmental consequences of this new endeavor in that short time period. The lack of an environmental impact assessment on this new dam system will severely alter the future of the Danube, and the lack of acknowledgment of the project's impacts may once again sour relations between the parties down the road. Thus, this new negotiated settlement has not advanced the parties, or the potential to protect the environment, significantly beyond where they were with the 1977 Treaty, specifically because the Court did not present them with the proper guidance and tools to address the future environmental consequences of damming the Danube River.

## V

### JUSTICE WEERAMANTRY'S CONCURRING OPINION

In contrast to the Court's opinion, Justice Weeramantry's concurring opinion directly addressed the issues of international environmental law, and delineated guidelines for the parties to follow in future negotiations. In particular, Weeramantry discussed environmental impact assessment in detail and stressed that any future version of the Project must be preceded by a complete EIA.<sup>212</sup> While purporting to recap what the Court itself already had stated, Weeramantry actually added significantly

<sup>209</sup> See, e.g., *Accord Signed to Dam Danube*, N.Y. TIMES, Mar. 1, 1998, § 1, at 12.

<sup>210</sup> See *id.*

<sup>211</sup> See *id.* (stating that, upon confirmation of Hungary and Slovakia's plan to build a large hydroelectric dam on the Danube, 10,000 environmental protesters rallied against the project).

<sup>212</sup> See also Vereshchetin Dissent, *supra* note 178, at 21 ("A continuous monitoring of the scheme [agreed upon by the Parties] for its environmental impacts will accord with the principles outlined, and be a part of that operational scheme.").

to the Court's opinion. After discussing Weeramantry's concurrence in detail, this Part will conclude that the *Case Concerning the Gabčíkovo-Nagymaros Project* would have provided better guidance to the parties and the state of international environmental law if Weeramantry's opinion had been the opinion of the Court.

Weeramantry began his discussion with a very different view of science than that adopted by the Court. While the Court's opinion evaded the scientific arguments, resolving the questions in the special agreement without deciding the scientific issues, Weeramantry's opinion addressed the science directly. Weeramantry clearly found Hungary's arguments of uncertainty persuasive, and stated that, "[h]ad the possibility of environmental harm been the only consideration to be taken into account in this regard, the contentions of Hungary could well have proved conclusive."<sup>213</sup> However, Weeramantry acknowledged that science was not the only issue in this case, and that the Treaty and Slovakia's expenditures had to be taken into account as well.<sup>214</sup> Thus, while Weeramantry was concerned about the environmental risks of the Project, he ultimately agreed with the Court that treaty law governed this case.

While concurring in the ultimate decision, however, Weeramantry's discussion of international environmental obligations—especially environmental impact assessment—was much richer than that attempted by the Court. Weeramantry's opinion began with a lengthy discussion of sustainable development as a principle of international law.<sup>215</sup> He described the concept of sustainable development, using historical examples of sustainability in ancient civilizations.<sup>216</sup> In concluding his discussion of sustainable development, Weeramantry asserted that modern environmental law should "take account of the perspectives and principles of traditional systems, not merely in a general way, but with respect to specific principles, concepts, and aspirational

<sup>213</sup> Case Concerning the Gabčíkovo-Nagymaros Project: Separate Opinion of Justice Weeramantry (Hung. v. Slovk.), (I.C.J. Sept. 25, 1997), at 1 [hereinafter Weeramantry Opinion], available in <[http://www.icj-cij.org/icjwww/idocket/ihss/ihsjudgement/ihss\\_judgment\\_970925\\_frame.htm](http://www.icj-cij.org/icjwww/idocket/ihss/ihsjudgement/ihss_judgment_970925_frame.htm)> (visited Apr. 28, 1999).

<sup>214</sup> See *id.*

<sup>215</sup> See *id.* at 19.

<sup>216</sup> See *id.* at 9-10 (discussing environmentalism in the ancient irrigation-based civilization on Sri Lanka), 16 (detailing the irrigation systems of China and the Inca civilizations).

standards.”<sup>217</sup> He then cited the “principle of trusteeship of the earth’s resources, the principle of intergenerational rights, the principle that development and environmental conservation must go hand in hand,” arguing that most of these principles have relevance in the present case.<sup>218</sup> Weeramantry also asserted that environmental protection is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.<sup>219</sup> Weeramantry concluded that “[w]hile . . . all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.”<sup>220</sup> The use of such “environmentally-friendly” language supported Hungary’s stance that further study must be done before the Project is completed.

Weeramantry then turned to a discussion of environmental impact assessment, agreeing with the Court that an EIA was required under the 1977 Treaty due to the incorporation of Articles 15 and 19.<sup>221</sup> However, Weeramantry did not ground his entire argument in Articles 15 and 19. Instead, he asserted that international environmental law also calls for an EIA, because

[e]nvironmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme.<sup>222</sup>

Whereas the Court’s decision looked only at the norms of 1977 in determining the parties’ obligations and stated that the parties must affirmatively agree to incorporate evolving norms into an existing Treaty,<sup>223</sup> Weeramantry interpreted the parties’ duties against the background of present-day environmental law, regardless of the date on which the Treaty was signed.<sup>224</sup> Such an

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<sup>217</sup> *Id.* at 19.

<sup>218</sup> *Id.*

<sup>219</sup> See *id.* at 4.

<sup>220</sup> *Id.*

<sup>221</sup> See *id.* at 20 (stating that “the principle of EIA was built into the Treaty”).

<sup>222</sup> *Id.*

<sup>223</sup> See ICJ Judgment, *supra* note 2, para. 139-40, at 66-67.

<sup>224</sup> See Weeramantry Opinion, *supra* note 213, at 22 (“If the Treaty was to operate for decades into the future, it could not operate on the basis of environmental norms as though they were frozen in time when the Treaty was entered into.”).

assumption is much more protective of the environment than the solution the Court posits. Under the Court's reasoning, a new environmental obligation, such as EIA, could be ignored by parties that signed a treaty to construct a nuclear reactor or some other environmentally detrimental project before current international environmental norms developed. The parties to such an agreement would need to agree to incorporate the new duty into their existing obligations. This would be very unlikely to happen in the case of a costly environmental impact assessment. Weeramantry clearly rejected this premise, holding that emerging doctrines of environmental law must apply to all projects and treaties, regardless of the date on which the agreement to create them was made.<sup>225</sup>

After establishing that EIA was and is required before the Project can continue, Weeramantry clarified the meaning of the term "EIA." He stated that "environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation."<sup>226</sup> Weeramantry cited numerous cases and treaties that require continual monitoring of environmental effects<sup>227</sup> and concluded that "[t]here has thus been growing international recognition of the concept of continuing monitoring as part of EIA."<sup>228</sup> Weeramantry then stated that, in the case at hand, the joint operational regime that must be established in accordance with the Treaty carries with it an obligation of continuous monitoring of the environmental impacts of the Project.<sup>229</sup>

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<sup>225</sup> See *id.* at 22-23.

<sup>226</sup> *Id.* at 20.

<sup>227</sup> See *id.* at 21. For example, Justice Weeramantry cited the Trail Smelter Arbitration between the United States and Canada, which directed the installation of observation stations, equipment necessary to give information of gas conditions and sulfur dioxide recorders, and the rendering of regular reports which the Tribunal would consider at a future meeting. *See id.* In addition, Weeramantry cited the Co-operative Program for the Monitoring and Evaluation of Long-Range Transmission of Air Pollutants in Europe and the Vienna Convention for the Protection of the Ozone Layer as examples of the concept of information exchange and monitoring in international practice. *See id.*

<sup>228</sup> *Id.*

<sup>229</sup> *See id.*

## CONCLUSION

This Article has demonstrated that the obligation to create an environmental impact assessment before engaging in activities that might damage the environment is growing in both recognition and acceptance on an international level. The great number of treaties that incorporate this obligation, and the growing number of countries that have adopted their own domestic regulations concerning EIA, demonstrate that EIA is becoming an established principle of international environmental law. With this background, the *Case Concerning the Gabčíkovo-Nagymaros Project* provided the International Court of Justice with an appropriate vehicle for clarifying the requirement for an EIA, thus making substantive and lasting precedent on an international scale. The Court, however, declined to use this opportunity.

The Court's majority opinion gives short shrift to environmental concerns in general, and fails to mention EIA once. Moreover, the Court did not chastise Slovakia for implementing Variant C without appropriate analysis of the environmental effects. Moreover, the Court based its requirement that the parties "look afresh" at the environmental consequences of their actions on the inclusion of Articles 15 and 19 in the 1977 Treaty itself. Thus, this opinion provided little instruction on the incorporation of current environmental norms into existing treaties that did not expressly provide for environmental monitoring. Because the Court did not clearly establish the usefulness of conducting EIA before proceeding to large projects, the *Case Concerning the Gabčíkovo-Nagymaros Project* does not bode well as a precedent for future disputes over the environmental effects of development.

While the Court's opinion did require the parties to "look afresh" at the environmental consequences of their future actions with respect to this Project, this vague requirement will be difficult to administer, as the parties' post-judgment negotiations aptly portend. In addition, "looking afresh" does not reach the level of full environmental impact assessment. The quickness with which the parties decided to dam the Danube River, a mere six months following the ICJ's opinion, strongly suggests that the environmental impacts of such a measure have not been—and may never be—adequately studied.

In his concurring opinion, Justice Weeramantry established the continuing obligation to create an environmental impact as-

essment as an international custom. From an environmental perspective, Weeramantry's opinion is much stronger than the decision of the Court. Principles of international environmental law would have been confirmed and promoted had Weeramantry's discussion been the Court's majority opinion. At one point, Weeramantry stated that the "principle [of environmental impact assessment is] gathering strength and international acceptance, and [has] reached the level of general recognition at which this Court should take notice of it."<sup>230</sup> The failure of the ICJ to take notice of this rapidly evolving principle may have detrimental consequences for both the Danube River and the development of international environmental law.

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<sup>230</sup> *Id.* at 20 (citing his previous opinion in the 1995 Nuclear Tests Case).