

**COMPENDIUM OF JUDICIAL DECISIONS ON  
MATTERS RELATED TO ENVIRONMENT**

**INTERNATIONAL DECISIONS**

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# INTERNATIONAL DECISIONS

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# INTRODUCTION

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This publication has been developed in pursuance of the aims of Agenda 21 which recognizes, among other things, the need to facilitate information exchange, including the dissemination of information on environmental law.

The compendium of judicial decisions was devised with two objectives. First, it aims to create awareness and enthusiasm among lawyers and non-lawyers alike on the current trends in the jurisprudence related to environmental matters. Second, it aims to provide resource materials for reflecting on specific pieces of court decisions from the point of view of scope and perspective, grounded as they are in the unique legal traditions and circumstances of different countries and legal jurisdictions.

The promotion of sustainable development through legal means at national and international levels has led to recognition of judicial efforts to develop and consolidate environmental law. The intervention of the judiciary is necessary to the development of environmental law, particularly in implementation and enforcement of laws and regulatory provisions dealing with environmental conservation and management. Thus, an understanding of the development of jurisprudence as an element of the development of laws and regulations at national and international levels is essential for long term harmonization, development and consolidation of environmental law, as well as its enforcement. Ultimately, this should promote greater respect for the legal order concerning environmental management.

Indeed, when all else fail, the victims of environmental torts turn to the judiciary for redress. But today's environmental problems are challenging to legislators and judges alike by their novelty, urgency and dispersed effect. Over the last two decades, many countries have witnessed a dramatic increase in the volume of judicial decisions on environmental issues as a result of global and local awareness of the link between damage to human health and to the ecosystem and a whole range of human activities. In many countries, the judiciary has responded to this trend by re-fashioning legal – sometimes age old – tools to meet the demands of the times, with varying degrees of success. But such practices have hardly taken root in Africa where not much judicial intervention has been in evidence.

The complexity of environmental laws and regulations at national and international levels makes it necessary for today's legal practitioners, particularly from Africa, urgently to assimilate and understand the concepts and principles arising from the developing jurisprudence. Only then would they be able to respond appropriately to the growing environmental challenges. In most countries, awareness of the potential of judicial intervention in the environmental field has grown largely because citizens bring proceedings in courts; while in other countries the effectiveness of the judicial mechanisms are still poor because of lack of information and a dearth of human and material resources. This is compounded by the weaknesses of institutions in charge of environmental law enforcement. This Compendium is produced in the belief that this bottleneck can be overcome by the provision of information, such as is contained in the Compendium. The information will be a resource for training and awareness creation.

It is vital today that lawyers in all countries keep abreast of the jurisprudence in other countries, in order to appreciate pertinent changes and trends in their own countries. Comparative study of judicial intervention offers a formidable avenue for the enforcement of environmental law and the vindication of public rights. Courts have to entertain environmental suits and decide on the law in each specific context. As stressed by Raymond Avrilier in *“l'Ecologie à l'épreuve du droit”*, “legal practitioners must understand and tackle questions of current policies, scope of administrative competence and conflicting expert evidence in environmental cases”.

Given the novelty of environmental law, this Compendium is a unique opportunity for practitioners, particularly those from Africa, where case law is still scarce, to raise their level of awareness and sensitivity to ecological concerns and to share their experiences on possible approaches to resolving environmental disputes.

The Compendium is divided into national decisions and international decisions, each numbered Volume 1. It is anticipated that after one year subsequent volumes will be published of either national decisions or international decisions, as the availability of materials and resources permit, and if the response to this Volume indicates that demand for such material exists. The volume on national decisions is itself divided into parts reflecting emerging themes in environmental litigation. However these themes provide only a loose grouping, and the reader would be well advised to read the cases without undue attention to the grouping adopted here, as in many instances, the themes

recur in several cases. Secondly, the first part of the volume contains cases in the English language which are drawn from the common law jurisdictions while the second part contains cases in the French language which are drawn from the civil law system. In both cases the reproduction of the cases is preceded by an overview and analysis of the cases. This is in the English language for both the English language and French language decisions. The decisions at international level contains judgements from the International Court of Justice as well as of arbitral tribunals. No particular thematic division has been attempted for these. The cases are reproduced simply in chronological order.

*For further information or for comments please contact:*

**The Task Manager**

**UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa**

**UNEP - ELI/PAC**

**P.O. Box 30552**

**Nairobi, Kenya**

**tels. 254 2 623815/623923/624256/624236**

**Fax 254 2 623859**

**Email: [charles.okidi@unep.org](mailto:charles.okidi@unep.org)**

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## II. BACKGROUND TO THE INTERNATIONAL JUDICIAL SYSTEM

### The International Court of Justice

A fundamental principle of the Charter of the United Nations is the pacific settlement of disputes between member states. This is dealt with in Chapter VI of the Charter. Article 33(1) provides as follows:

“The parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or other peaceful means of their own choice”.

Article 36(3) states that legal disputes should, as a general rule, be referred by the parties to the International Court of Justice (ICJ) in accordance with the provisions of the Statute of the Court. However Article 95 states that this shall not prevent members of the UN from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Chapter XIV deals with the International Court of Justice. Article 92 stipulates that the ICJ shall be the principal judicial organ of the United Nations. Article 93 provides that all members of the United Nations are *ipso facto* parties to the Statute of the ICJ. Article 94(2) deals with the enforcement of decisions of the ICJ. It provides that if any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement.

The Statute of the International Court of Justice is based upon the Statute of its predecessor, the Permanent Court of International Justice. Article 36 of the Statute deals with the jurisdiction of the Court. It gives to the Court compulsory jurisdiction in only those cases in which parties have declared that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court. The kinds of legal disputes with which the Court may deal are set out in Article 36(2) as follows:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

### Arbitration

Promoting peaceful settlement of disputes remains one of the most important and most difficult objectives of the international legal order. Though it is complex in nature, Article 33 of the Charter of the United Nations lists arbitration among the methods of peaceful settlement. A number of interpretations of this method in literature is discernible since some decades. Arbitration is seen as an “*equitable means of settlement of legal disputes by the application of legal rules, principles and techniques*”.

Arbitration as a means of settlement of disputes offers considerable flexibility as to the legal status of the Parties and the legal techniques used.

The development of the inter-State arbitration is often taken as one gauge of the efficacy of the rule of law in the international legal system. Where notification confirms the existence of a conflict of interests, or where affected states request it, consultation and negotiation are required.

### Sources of International Law

Article 38, which is considered as an authoritative statement on the sources of international law, deals with the sources of law which the ICJ is to apply in determining disputes referred to it.

These are:

- (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting parties;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Article 38(2) states that the Court has the power to decide a case *ex aequo et bono*, if the parties agree thereto.

Like the rest of the Statute of the ICJ Article 38 originates from the statute that governed the ICJ's predecessor, the Permanent Court of International Justice. The sources of international law which it sets out are drawn from the traditional sources. It does not ascribe any role to recently emergent "soft law" sources, such as the resolutions and declarations of the United Nations and other international institutions which have come to occupy a position of such prominence in the development of international environmental law.

International conventions, or treaties, are agreements whereby two or more states establish a relationship between themselves governed by international law. In the hierarchy of sources, treaties come first. If there is a treaty between the disputing parties that is relevant to the dispute reference will be made to it before resorting to the other sources.

Treaties have recently overtaken international custom as a source. But prior to the Second World War, international law consisted primarily of doctrines, principles and rules developed through the customary practice of States. Customary international law addresses issues unregulated by treaties and other sources of law, facilitates the interpretation of treaties and paves the way for the codification of doctrines, principles and rules through treaties. International custom is constituted by two elements: state practice and the belief that the practice is obligatory as a matter of law (*opinion juris*).

The phrase "general principles of law recognised by civilised nations" was included in the Statute of the Permanent Court of International Justice to assist in the resolution of cases where neither treaty law nor customary law provides the solution to a dispute. General principles of law therefore provide a residuary source of law, ensuring that there is no gap in the law. The phrase refers not to the rules of law themselves but to the general propositions underlying the various rules of law, such as the principle that no one shall be judge in his own cause.

Judicial decisions, which includes also arbitral awards and decisions on international law in national courts, have only subsidiary value as sources of law. Indeed, Article 59 of the Statute of the ICJ stipulates that decisions of the ICJ in contentious cases have no binding force except as between the parties and in respect of the case under consideration. Nevertheless the ICJ and other tribunals attempt to follow their own previous rulings to ensure a measure of predictability in the development of international law.

Article 38(2) gives the Court power to decide a case *et aequo et bono*, that is, according to what is fair and appropriate, if the parties to the case agree. This provision gives power to reach a just decision given the facts of the case, regardless of whether the decision conforms to the law. For the Court to do this the parties must agree, and this rarely happens.

## The Concept of "Soft Law"

In recent years, declarations and resolutions of the United Nations and other intergovernmental agencies have increasingly been cited as evidence of international law. This has been the case particularly in relation to newly emerging concerns such as human rights and environmental conservation.

Whereas the ICJ is a judicial organ, the other UN bodies, such as the General Assembly and the Security Council are political organs. The extent to which their pronouncements can be seen as contributing to the development of

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international law is therefore controversial.

The General Assembly does not have law making powers. Its resolutions and declarations are not legally binding. However, they carry considerable moral and political authority which can be characterised as a “soft law” effect. They can also influence the creation of new international law. For instance they may enunciate principles or rules which subsequent state practice adopts as customary law, or which are subsequently incorporated into treaties. They may constitute evidence of state practice to which reference can be made in judicial pronouncements. It has also been argued that, in exceptional cases, such as of unanimity, they may have the effect of creating law. That positions articulated by States in the General Assembly can lead to binding legal obligations has been put beyond doubt by the **Nuclear Tests Cases**. Whether this can be extended to cover positions adopted by states in voting in the General Assembly is still disputed.

The conceptual dispute notwithstanding it is impossible to ignore the “soft law” effect of resolutions and declarations of international fora, particularly in the environmental conservation and human rights fields. Examples of declarations with this “soft law” effect include the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development, whose principles of sustainable development (relied on by Judge Weeramantry in his dissent in the **Gabcikovo-Nagymaros Case**), impact assessment, participation, precaution, and polluter pays have become reference points.

## SELECTED DECISIONS

In this Compendium, the following decisions have been selected as illustrating principles of international environmental law:

1. **Trail Smelter Case**, United States of America versus Canada (1938 and 1941)
2. **Affaire du Lac Lanoux**, Espagne versus France, (1957) [in French].
3. **Nuclear Test Cases**, Australia versus France and New Zealand versus France, (1974)
4. **Fisheries Jurisdiction Cases**, United Kingdom of Great Britain and Northern Ireland versus Iceland and Federal Republic of Germany versus Iceland (1974)
5. **Case Concerning the Gabcikovo-Nagymaros Project**, Hungary versus Slovakia (1997)
6. **Stichting Greenpeace Council v Commission of European Communities (1998)**

### III. OVERVIEW AND ANALYSIS OF SELECTED INTERNATIONAL DECISIONS

#### 1. Trail Smelter Case

##### (i) Background

The case commenced with a special agreement referred to as the Convention for settlement of difficulties arising from operation of smelter at Trail, B.C., signed between the US and Canada on 15 April 1935. In Articles II and III of the Convention the parties agree to constitute a tribunal to decide:

- (a) whether damage caused by the Trail Smelter has occurred since 1 January 1932, and if so, what indemnity should be paid therefore?
- (b) if so, whether the Trail Smelter should be required to refrain from causing damage in the future and, if so, to what extent?
- (c) if so, what measures or regime should be adopted or maintained by the Trail Smelter?
- (d) what indemnity or compensation should be paid on account of any decisions rendered by the Tribunal?

Article IV provided that the Tribunal was to apply the law and practice followed in the USA as well as international law and practice.

The dispute arose as a result of damage occurring in the territory of the US due to activity of a smelter situated in Canada. The damage arose from sulphur dioxide fumes which were emitted from the smelter. It was claimed that the height of stacks increased the area of damage in the US. In 1927 the US proposed that the matter be referred to the International Joint Commission for investigation. Its report was presented in 1931. It determined that up to 1 January 1932 the damages incurred by the US should be compensated in the sum of US \$350,000. Two years after this Report the US indicated to Canada that damage was still occurring and negotiations were renewed leading to the signing of the Convention.

##### (ii) The Award

On 16 April 1938 the Tribunal gave its decision in the first and fourth questions. It found that damage had been caused in US territory by the Trail Smelter since 1 January 1932 up to 1 October 1937 and that the indemnity to be paid for the damage was US \$78,000 as the complete and final indemnity and compensation for all damage which occurred between such dates. The Tribunal postponed a final decision on the remaining questions, and on the existence of damage, if any, and the indemnity to be paid occurring after 1 October 1937 to a later date to enable further studies to be conducted to determine an appropriate regime to be set up.

On 11 March 1941 the Tribunal gave its final decision on the remaining questions. The Tribunal needed to determine whether the Trail Smelter should be required to refrain from causing damage in the US in the future. It observed that no case of air or water pollution dealt with by an international tribunal had been brought to its attention. It therefore would rely on decisions of the Supreme Court of the United States which could be taken as a guide in the field of international law in so far as they had dealt with controversies between the various federal states of the US. The Tribunal held that these decisions provided an adequate basis for holding that under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The Tribunal found therefore that Canada was responsible in international law for the conduct of the Trail Smelter. It had a duty to see to it that conduct was in conformity with Canada's obligations under international law. Accordingly the Trail smelter would be required to refrain from causing any damage through fumes in the US. The Tribunal decided, finally, that, to prevent future damage, a regime of control, which it stipulated, would be applied to the operations of the Smelter.

## 2. Lac Lanoux Case

The *Lac Lanoux* arbitration case involving France and Spain shows how the process of prior consultation and negotiation has been interpreted by an international arbitral tribunal, not only as a treaty stipulation, (specifically the Bayonne Treaty of 1866 between France and Spain), but more generally as a principle of customary law.

### Background

The Lac Lanoux negotiations began in 1917. The case was put to arbitration in 1956.

Lake Lanoux is located on the French side of the Pyrenees mountain chain. It is fed by many streams rising in France and running only in the French territory. However, its waters also run into the headwaters of the river Carol which, some 25 kilometres from the lake, do cross the Spanish frontier at Puigcerda, having previously fed the Canal of Puigcerda, which is the private property of that town. After some 6 kilometres in Spanish territory, the Carol joins the Segre, which ultimately flows into the Ebro. The frontier between France and Spain was fixed by the Treaty of Bayonne, 1866 and an additional Act thereto, whereby regulations were made for the joint use of the water resources.

Spain alleged that certain plans proposed by France would adversely affect Spanish rights and interests contrary to the Treaty, and could only be undertaken with prior consent of both Parties.

### Award

In the light of the agreement between the two countries (treaty of Bayonne, 1866, and Additional Act), the tribunal found that the conflicting interests aroused by the industrial use of international rivers must be reconciled by mutual concessions embodied in the agreements which needed to be interpreted. In the present case, the Tribunal was of the opinion that “the French scheme complied with the obligations of Article 11....In carrying out without prior agreement between the two Governments, works for the utilization of the waters of Lake Lanoux...and brought to the notice of the representatives of Spain...., the French Government was not committing a breach of the provisions of the Treaty of Bayonne...or of the Additional Act”.

The Tribunal said that, because the question before it related uniquely to a treaty of 1866, the tribunal would apply the treaty if it was clear. But if interpretation was necessary, the tribunal would turn to international law, allowing it in this case to take account of the “*spirit*” of the *Pyrenées treaties* and “*des règles du droit international commun*”, and also consider certain rules of customary international law in order to proceed to the interpretation of the Treaty and the Act.

### Commentary

The tribunal discussed the applicable law because the Parties (France and Spain) disagreed on this issue of international rights and obligations of States sharing common natural resources such as water. Consultations and negotiation in good faith are necessary not only as a mere formality, but as an attempt to conclude an agreement for the prevention of conflicts.

## 3. Nuclear Tests Cases

Like the **Fisheries Jurisdiction Cases** the **Nuclear Tests Cases** were two, with the facts being the same in all material respects. The first case was between Australia and France while the second was between New Zealand and France.

### (i) Background

Between 1966 and 1972 France had conducted atmospheric tests of nuclear weapons in the territory of French Polynesia in the South Pacific Ocean. This had released into the atmosphere radioactive matter. France created “prohibited zones” for aircraft and “dangerous zones” for aircraft and shipping, in order to exclude aircraft and shipping from the area. These zones had been put into effect during the period of testing in each year in which the tests had been carried out.

The tests released into the atmosphere radioactive matter. The main firing site was Mururoa atoll, 6000 kilometres east of Australia. Australia asserted that the tests caused some fallout of radioactive matter to be deposited on its territory. France maintained that the radioactive matter produced by the tests were so infinitesimal that it was negligible, and that it did not constitute a danger to the health of Australian population.

In May 1993 Australia instituted proceedings against in the ICJ. It asked for a declaration that the carrying out of further atmospheric nuclear weapon tests was not consistent with the applicable rules of international law, and an order that France not carry out further tests. Australia asked for, and obtained, interim orders that France should avoid further tests. France declined to accept the Court's jurisdiction and did not participate in the proceedings. The Court ruled however that it had jurisdiction to hear the case.

Australia claimed that France had violated the following rights:

- (a) a right possessed by every state to be free from atmospheric nuclear tests conducted by any state arising from what is now a generally accepted rule of customary international law prohibiting all such tests;
- (b) a right inherent in Australia's own territorial sovereignty to be free from the deposit on her territory and dispersion in her air space, without her consent, of radioactive fall-out from the nuclear tests. The mere fact of the trespass from the fall-out, the harmful effects which flow from such fall-out and the impairment of her independent right to determine what acts shall take place within her territory are all violations of this right; (c) a right derived from the character of the high seas as *res communis*, and possessed by Australia in common with all other maritime states to have freedom of the high seas respected by France and, in particular, to require her to refrain from (1) interference with the ships and air craft of other states on the high seas and superadjacent air space and (2) pollution of the high seas by radioactive fall-out.

**(ii) The legality of atmospheric nuclear weapons tests**

The Court held that before deciding on the legality of the tests it needed to examine, as a preliminary matter, whether or not there was a dispute between the parties. The Court therefore had to consider whether Australia requested a judgement which would only state the legal relationship between it and France with regard to the matters in issue or a judgement which required one or both of the parties to take, or to refrain from taking, some action. In other words, the Court had to decide the true object and purpose of the claim.

The Court observed that Australia's objective was to bring about the termination of the French atmospheric nuclear tests. It had repeatedly sought to obtain from France a permanent undertaking to refrain from further atmospheric tests but France had refused to give one. The Court held that it was clear that if France had given a firm, explicit and binding undertaking to refrain from further atmospheric tests, Australia would have regarded its objective as having been achieved. Therefore, Australia's claim could not be regarded as a claim for a declaratory judgement since such a declaration would only be a means to an end, which was the cessation of the French nuclear tests.

The Court observed that, in the months following the commencement of the proceedings, France had made public its intention to cease the conduct of atmospheric nuclear tests at the end of the 1974 series of tests, and move on to underground tests. This was stated by, among others, France's President at a press conference, its Minister for Defence on television and its Minister for Foreign Affairs in the UN General Assembly.

The Court held that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Further, that when it was the intention of the State making the declaration that it should become bound according to its terms, that intention conferred on the declaration the character of a legal undertaking, the state being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with the intention to be bound, was binding without the need for any acceptance or reply from other States. And that whether the statement was written or oral made no difference.

The Court held therefore that, in announcing that the 1974 series of tests would be the last, the French Government conveyed to the world at large its intention to terminate the tests. In light of this development Australia's objective had in effect been accomplished in as much as France had undertaken to hold no further atmospheric tests. These declarations had caused the dispute between the parties to disappear. Therefore, no further judicial action was required as there was nothing on which to give judgement.

**(iii) Minority opinions**

A number of minority opinions remarked on the fact that the Court had not ruled on the lawfulness or otherwise of France's atmospheric nuclear tests which, in their view, was the gist of the dispute.

Several judges pointed out that in order to succeed Australia would have had to show that its claim for prohibition of further tests was based on conduct by the French government which was contrary to the rules of international law. In other words, what Australia would have had to show was that there existed a rule of customary international law whereby states were prohibited from causing, through atmospheric nuclear tests, the deposit of radioactive fall-out on the territory of other states. In order to be able to determine the dispute it would have been necessary for the Court to consider, at the outset, whether such a rule of customary law existed.

To ascertain whether such a rule did exist the attitude of states towards these tests had to be examined. There was no evidence that a sufficient number of states, economically and technically capable of manufacturing nuclear weapons, refrained from carrying out atmospheric nuclear tests because they considered that customary international law forbade it. Further, states on whose territory radioactive fall-out from atmospheric tests had been deposited had not protested on the basis that this was a breach of customary international law. Australia itself had given support to the United Kingdom and the United States whenever these countries conducted atmospheric nuclear tests. This was an admission by Australia that such tests were not contrary to international law since, according to Judge Gros, "what is laudable on the part of some states [cannot be considered] execrable on the part of others." Thus, it could not be said that a rule of customary international law forbidding such tests existed.

A second weakness in Australia's case related to whether Australia possessed the standing to institute the proceedings. Any nuclear explosion in the atmosphere gives rise to radioactive fallout over the whole of the hemisphere where it takes place. Australia was only one of the many territories on whose territory France's tests had given rise to the deposit of radioactive fall-out. This raised the question whether, in the case of a right possessed by the international community as a whole, an individual state, independent of material damage to itself, was entitled to seek the respect of that right by another state. This question would also have needed to be determined at the outset.

**(iv) Commentary**

It is clear that the Court side stepped the real dispute between the parties, perhaps because of an acute consciousness of the fact that, France having declined to participate in the proceedings would not comply with an adverse ruling. Therefore, whereas the case raised important questions of international environmental law, these were not substantively dealt with.

**4. Fisheries Jurisdiction Cases**

There are two cases concerning fisheries jurisdiction, one between the UK and Iceland, and the other between Germany and Iceland. The cases were determined separately but are on all fours in all material respects.

**(i) Background**

In 1948 Iceland passed a law called "Law concerning the scientific conservation of the Continental Shelf Fisheries." This gave the Ministry of Fisheries power to establish conservation zones within Iceland's continental shelf and to issue regulations for the protection of fishing grounds within those zones. This move was prompted by the "progressive impoverishment" of the fishing grounds arising out of the increased efficiency of fishing gear used. Iceland therefore sought to establish an exclusive fishing zone around its coastline, reserved for its nationals only, as a way of conserving the fisheries.

In 1952 Iceland established a fishery zone extending to 4 miles from its coastline. The UK, who traditionally fished in the area, protested the establishment of the zones. In 1958 Iceland extended the fishery limits to 12 miles and prohibited all fishing activities by foreign vessels within the 12 mile zone. The UK refused to accept the 12 mile limit and its vessels continued to fish within the zone. The UK and Iceland commenced negotiations in order to resolve

their differences. In 1961 they reached an agreement which provided that (a) the UK would no longer object to the 12 mile zone; (b) UK vessels would continue to fish within the zone for three years; and (c) Iceland would continue to work for the extension of its fisheries jurisdiction but would give the UK six months notice of such extension, and in case of dispute, the matter would be referred to the ICJ.

In 1971 Iceland decided to extend its fisheries jurisdiction to 50 miles with effect from 1st September 1972. The UK protested. In the talks that followed the UK proposed that Iceland's objectives of conserving the fisheries in issue could be achieved by a catch limitation agreement. The UK expressed readiness to recognise Iceland's preferential requirements on account of its dependence on the fisheries. Iceland rejected the catch limitation approach.

The UK referred the dispute to the ICJ in accordance with the 1961 Agreement. Iceland declined to recognise the Court's jurisdiction but the Court held that it had jurisdiction under the 1961 Agreement and proceeded to determine the case. The UK asked the Court to declare that the claim by Iceland to a zone of exclusive fisheries jurisdiction extending to 50 miles is without foundation in international law, and that as against the UK, Iceland was not entitled unilaterally to assert exclusive fisheries jurisdiction beyond the limits agreed to in 1961.

### **(ii) The law on fisheries conservation**

The Court observed that two concepts had crystallised as customary law in recent years. The first was the concept of the fishery zone, the area in which a state may claim exclusive fishery jurisdiction independently of its territorial sea, which had now been extended by general consensus to 12 miles. The second was the concept of preferential rights of fishing in adjacent waters in favour of the coastal state in a situation of special dependence on its coastal fisheries. The concept was particularly applicable in situations where, in spite of adequate fisheries conservation measures, the yield ceased to be sufficient to satisfy the requirements of all those who were interested in fishing in a given area. In such a case, where intensification in the exploitation of fisheries resources makes it imperative to introduce some system of catch limitation and sharing of the resources, special consideration is to be given to the coastal state whose population is overwhelmingly dependent on the fishing resources in its adjacent waters.

The Court observed further that the concept of a 12 mile fishery zone had been accepted by the parties in the 1961 Agreement, as had the concept of preferential rights. At the same time the UK's historic fishing rights in these same waters had been acknowledged. The Icelandic regulations, on their part, were issued as a claim to exclusive rights, going beyond the concept of preferential rights and seeking to establish an exclusive fishery zone in which all foreign fishing vessels would be prohibited.

The Court held that the concept of preferential rights was not compatible with the exclusion of all fishing activities of other states. The concept implied a certain priority, but not the extinction of the concurrent rights of other states, and particularly of a State which, like the UK, had for many years fished in the waters in question. Therefore the fact that Iceland was entitled to claim preferential rights did not justify its claim unilaterally to exclude the UK's fishing vessels in the waters beyond the 12 mile limit. Indeed, given the UK's own dependence on the fishing in these waters, the conservation and efficient exploitation of the fish stocks in issue were of importance to both the parties. Consequently, the Icelandic regulations establishing a zone of exclusive fisheries jurisdiction extending to 50 miles could not be applied to UK fishing in the area.

An equitable solution required that Iceland's preferential fishing rights be reconciled with the UK's traditional rights. This could not be achieved through the extinction of the UK's fishing rights. The parties should therefore negotiate in order to define the extent of each other's rights.

### **(iii) Minority opinions**

A number of members of the Court observed that the Court's decision had focused on specifying the conditions for the exercise of preferential rights, for conservation of fish species, and historic rights, rather than on answering the question whether Iceland's claims were in accordance with the rules of international law. The judgement was based on the circumstances and special characteristics of the case in dispute. It did not rule on the UK's main contention, i.e. that there was a customary rule of international law prohibiting extensions by states of their exclusive fisheries jurisdiction beyond 12 miles. In the view of these members of the Court, such a rule did not exist.

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## 5. Gabčíkovo-Nagymaros Case

### (i) The Background

This is the most recent of the international environmental law decisions to be handed down by the International Court of Justice. It is also the case which most directly raises issues relating to sustainable development and the equitable sharing of natural resources.

The case arose out of a treaty signed in 1977 between Hungary and Czechoslovakia. Following the partition of Czechoslovakia in 1993 Slovakia took the place of Czechoslovakia under the Treaty.

The Treaty provided for the construction and operation of a barrage system on the section of the Danube River within the two countries. This was to be a joint investment to produce hydroelectricity, improve navigation on the relevant section of the Danube and protect areas along the banks against flooding. The Parties undertook to ensure that the Project did not impair the quality of the water in the Danube, and that nature would be protected in the course of the construction and operation of the system.

The Treaty provided for the building of two series of locks, one at Gabčíkovo (in Slovak territory) and the other at Nagymaros (in Hungarian territory). The two locks were to constitute “a single and indivisible operational system of works.” The cost of the joint investment was to be borne by the two parties in equal measure and parties were to participate in equal measure in the use of the system.

Work on the project started in 1978. Due to domestic criticism focusing on the economic and environmental implications of the project, Hungary suspended the works at Nagymaros in May 1989 pending the completion of various studies. Later, in October 1989 it abandoned the works altogether. By this time work on the Gabčíkovo sector was well advanced, with the most advanced sections being 95% complete while the least advanced were up to 60% complete. On the Nagymaros sector, on the other hand, very little work had been done.

Czechoslovakia protested Hungary’s suspension, and subsequent abandonment, of the works. Prior to Hungary’s abandonment of the works negotiations to find a solution commenced. These eventually proved fruitless and, in May 1992, Hungary terminated the Treaty.

While negotiations were ongoing, Czechoslovakia started investigating alternative solutions. One of them, “Variant C”, entailed a diversion of the Danube by Czechoslovakia on its territory and the construction, also on its territory, of a reservoir with a storage capacity about 30% less than that of the one initially contemplated. Work on Variant C began in November 1991 and, in October 1992, Czechoslovakia put it into operation without the involvement of Hungary.

In April 1993 the parties agreed to submit the dispute to the ICJ. They requested the Court to decide, first, “whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary.” Secondly, the parties asked the court to decide whether “the Czech and Slovak Republic was entitled to proceed, in November 1989, to the provisional solution, and put it into operation in October 1992.” The Court was also asked to determine the legal consequences of its judgement on these questions.

### (ii) Hungary’s termination of the treaty

Hungary relied on a “state of ecological necessity” as justifying its termination of the treaty in 1989. It saw several ecological dangers from the works: the quality of the water would be impaired due to erosion and silting, there were risks of eutrophication and the fluvial fauna and flora would become extinct. Slovakia, on the other hand, denied the existence of a “state of ecological necessity.” It argued that whatever ecological problems might have arisen could have been remedied.

The “state of necessity” is “the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another state.”

The Court stated that the state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. For it to be successfully invoked the following conditions must be satisfied;

- (a) it must have been occasioned by an essential interest of the State which has committed the act conflicting with one of its international obligations;
- (b) that interest must have been threatened by a grave and imminent peril;
- (c) the act being challenged must have been the only means of safeguarding that interest;
- (d) that act must not have seriously impaired an essential interest of the State towards which the obligation existed; and
- (e) the state which has committed the act must not have contributed to the occurrence of the state of necessity.

The Court accepted that Hungary's concerns about the effects of the project on its natural environment related to its essential interest: safeguarding the ecological balance has come, in the last two decades, to be considered an essential interest of all states. It held, however, that Hungary's uncertainties as to the ecological impact of the project could not, alone, establish the objective existence of a peril that could justify invoking state of necessity. The existence of a peril must be established at the relevant point in time, and the mere apprehension of a possible peril will not suffice since such peril must be grave and imminent. The environmental dangers highlighted by Hungary were mostly of a long term nature, and remained uncertain. Even if it could have been established that the project would ultimately have constituted a grave peril for the environment in the area, the peril was not imminent in 1989, the time when Hungary suspended and then abandoned the works. In any case, Hungary had means other than abandonment of the works, of responding to any such peril, for instance the adoption of mitigatory measures.

Therefore, on the first question, the Court held that Hungary was not entitled to suspend and subsequently abandon the project, and that its notification of termination of the Treaty did not have the legal effect of terminating it.

### **(iii) Czechoslovakia's implementation of an alternative solution**

Hungary considered that Variant C was a contravention of the 1977 Treaty, the convention ratified in 1976 regarding the water management of boundary waters, the principles of sovereignty, territorial integrity, the inviolability of state borders, as well as the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention. For its part, Czechoslovakia considered that recourse to Variant C had been rendered inevitable for economic, ecological and navigational reasons because of the unlawful suspension and abandonment of the works by Hungary.

Slovakia maintained that implementing Variant C did not constitute an internationally wrongful act. It argued that it had a right, in the face of Hungary's abandonment of the project, to implement a solution as close as possible to the original project, ie, the "principle of approximate application." Also, that it had a duty to mitigate the damage to itself resulting from Hungary's unlawful actions. Given the advanced state of the works on the Slovak side at the time of Hungary's termination of the Treaty, the economic loss and environmental prejudice arising out of a failure to put the system into operation would have been immense.

The Court, while acknowledging the serious problems facing Czechoslovakia on account of Hungary's actions, held that Variant C failed to meet the cardinal condition of the 1977 Treaty, that the project was to be a "joint investment constituting a single and indivisible operational system of works." This could not be carried out by unilateral action, such as Slovakia's. Moreover, the operation of Variant C led Slovakia to appropriate for its own use and benefit between 80 and 90% of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river. The Court held that the implementation of Variant C by Slovakia was an internationally wrongful act.

The Court considered whether the wrongfulness could be precluded on the ground that the measure was in response to Hungary's prior failure to comply with its obligations. It observed that for wrongfulness to be so precluded the countermeasure adopted must be commensurate with the injury suffered. The Court held that Czechoslovakia, by

unilaterally assuming control of a shared resource, thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube failed to respect the proportionality which is required by international law. Czechoslovakia's diversion of the river was therefore not a justified countermeasure.

Therefore the Court held, on the second question, that whereas Czechoslovakia was entitled to proceed with the preparatory works for variant C it was not entitled to implement it.

#### **(iv) Consequences of the Court's judgement**

On the issue of the consequences of the Court's findings the Court held that, as the 1977 Treaty was still in force it would continue to govern the relationship between the Parties. Therefore, the Parties should negotiate on how the Treaty's multiple objectives could still be fulfilled. The Court observed that the Project's impact upon, and implications for, the environment were a key issue and that the parties should look afresh at the effects on the environment of the operation of the power plant. Whatever solution is found by the parties must take account of the objectives of the Treaty, the norms of international environmental law and the principles of the law of international watercourses.

The Court suggested that one way in which the Parties could achieve these multiple objectives would be for them to re-establish the joint regime by making Variant C conform to the Treaty through the joint operation of the current works, and its modification to satisfy Hungary's environmental concerns. The Court stated further that the re-establishment of the joint regime would reflect the concept of common utilization of shared water resources in accordance with the Convention on the Law of the Non-Navigable Uses of International Watercourses, and would constitute the best solution in this instance.

#### **(v) Minority Opinions**

The Court's decision was not unanimous: there were both separate, but concurring, opinions and dissenting opinions.

Judge Weeramantry gave a separate opinion focusing on the role played by the principle of sustainable development in balancing the competing demands of development and environmental protection, the principle of continuing environmental impact assessment and the use of principles such as estoppel for the resolution of *erga omnes* problems such as environmental damage.

Judge Weeramantry observed that had the possibility of environmental harm been the only consideration to be taken into account Hungary's contentions would have proved conclusive. But there were other factors to be taken into account, not least the developmental aspect. The Project was important to Slovakia from the point of view of development. Therefore the Court had to balance between the environmental and developmental considerations, which it could only do through the principle of sustainable development, which Judge Weeramantry considered to be an integral part of modern international law. This case marked the first occasion on which it had received attention in the jurisprudence of the Court.

On the principle of continuing environmental impact assessment Judge Weeramantry observed that this referred not merely to an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project was in operation. In this instance the principle of EIA was incorporated into the Treaty. Environmental law would read into treaties which may be considered to have significant impact on the environment, such as this one, a duty of monitoring the environmental impacts of the project during its operation since there has been growing international recognition of the concept of continuous monitoring as part of EIA.

On the issue of estoppel Judge Weeramantry suggested that *inter partes* adversarial procedures might not be suitable in resolving a case involving imminent serious or catastrophic environmental danger. He observed that international environmental law would need to proceed beyond weighing the rights and obligations of the parties within a closed compartment of individual state self-interest, unrelated to the global concerns of humanity as a whole. This case presented an opportunity for such reconsideration.

#### **(iv) Commentary**

This judgement marks an important milestone in the development of the ICJ's jurisprudence on international environmental law.

In the **Gabcikovo-Nagymaros Case** the Court held that Slovakia had committed an internationally wrongful act by implementing Variant C, though not in carrying out the preparatory works. The Court equated Slovakia's act with Hungary's act in terminating the Treaty. This set the stage for the it's direction to the parties to negotiate a settlement on an equal footing, both having been found at fault. However the ruling has justifiably been criticised as not support-able on the facts. Clearly, there would not have been any point in Slovakia carrying out works which it could not put into operation. In his seperate opinion, Judge Koroma expressed dissatisfaction with this aspect of the Court's judge-ment and observed that "justice would have been enhanced had the Court taken account of the special circumstances [justifying Slovakia's actions]." Other members of the Court also dissented from this aspect of the judgement.

## **6. Stichting Greenpeace Council v. Commission of the European Communities**

By this case Greenpeace challenged the Commission's decision to disburse funds to Spain to construct two power stations in the Canary islands. The basis of the challenge was the alleged failure to carry out an environmental impact assessment study in accordance with European Community requirements. Greenpeace relied on the provisions gov-erning the disbursement of structural funds which provides that "Measures financed by the Funds or receiving assist-ance from the European Investment Bank or from other existing financial instruments shall be in keeping with the provisions of the Treaties, with instruments adopted thereto and without Community policies, including those con-cerning ... environmental protection."

The Commission objected to the challenge on the basis of, inter alia, the *locus standi* of Greenpeace to bring the action. The Court upheld the challenge, pointing out that under Community law required that a party coming to Court must be affected by an act in manner which differentiated him from all other persons.