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# THE INTERNATIONAL COURT OF JUSTICE'S TREATMENT OF "SUSTAINABLE DEVELOPMENT" AND IMPLICATIONS FOR ARGENTINA V. URUGUAY

by Lauren Trevisan\*

The International Court of Justice ("ICJ") gave the concept of "sustainable development" its first thorough airing in 1997 in its decision concerning the Gabcikovo-Nagymaros Project.<sup>1</sup> In this decision and all others to date, however, the ICJ has stopped short of treating sustainable development as a core adjudicatory norm.<sup>2</sup> The pending *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*<sup>3</sup> case provides the court an opportunity to refine and further develop its treatment of the concept of sustainable development.

Though the ICJ included the concept of sustainable development in an Advisory Opinion in 1996,<sup>4</sup> the Gabcikovo-Nagymaros case was the ICJ's first use of sustainable development in its jurisprudence. At dispute in the case was the development of a system of locks on the Danube River pursuant to a 1977 treaty between Hungary and Czechoslovakia.<sup>5</sup> The purposes of the project, which began in 1978,<sup>6</sup> were to produce hydroelectricity, improve navigation, and protect against flooding.<sup>7</sup> In 1989 Hungary decided to abandon the project, largely due to intense criticism from Hungarian scientists and environmentalists centering on threats to groundwater and wetlands.<sup>8</sup> In response, Slovakia attempted to continue the project by unilaterally diverting the river to serve a power station on its territory.<sup>9</sup>

The parties took their dispute to the ICJ and requested that the court consider their rights and obligations under the 1977 treaty.<sup>10</sup> In making its determination, the ICJ looked beyond the parties' treaty relationship and referred to other relevant conventions to which the States were a party, as well as to rules of customary international law.<sup>11</sup> It also considered sustainable development as a concept central to the resolution of the dispute:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind . . . new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects

on the environment of the operation of the [Slovakian] power plant.<sup>12</sup>

While in this case the ICJ recommended use of the concept of sustainable development in sovereign decision-making,<sup>13</sup> it "stopped short of declaring or referring to sustainable development as a norm of customary international law."<sup>14</sup>

Currently pending is another case that will call on the panel to consider issues of sustainable development, specifically giving the court the opportunity to resolve the questions of international environmental law and the legal implications of sustainable development that it left open in the Gabcikovo-Nagymaros decision.<sup>15</sup> On October 2, 2009 the Court heard final oral arguments in *Pulp Mills on the River Uruguay*.<sup>16</sup> In 2003 and 2005 Uruguay authorized two pulp mills to be built on its portion of the River Uruguay, which constitutes the border between Uruguay and Argentina.<sup>17</sup> Argentina alleged that the mills threatened the health of the river and local residents and were in violation of the Statute of the River Uruguay, a 1975 agreement between the two nations to govern the river's management.

Argentina claimed that the Statute of the River Uruguay incorporated international environmental standards, and that its right to protect the environment of the river is derived from both the letter of the statute and the "principles and rules of international law."<sup>18</sup> Uruguay contends that its duty is not to prevent all pollution, but rather to follow appropriate rules and measures to prevent it in the context of development.<sup>19</sup> Uruguay claims it is subject to an "obligation of conduct, not an obligation of result" which is "consistent with the principles of general international law."<sup>20</sup>

Both parties in this case frame their rights and obligations to protect the environment of the River Uruguay as complying with "general international law." This case, therefore, is an opportunity for the ICJ to delineate what it considers international environmental standards to be.<sup>21</sup> In its Gabcikovo-Nagymaros decision, the ICJ "missed the opportunity to give further definition to the concept of sustainable development."<sup>22</sup> Over ten years later, in a world where sustainable development is arguably an even greater concern, the court should take this opportunity to set a basis for the enforceability of international environmental norms,<sup>23</sup> including sustainable development.

**Endnotes:** The International Court of Justice's . . . Implications for Argentina v. Uruguay *continued on page 85*

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**ENDNOTES: THE INTERNATIONAL COURT OF JUSTICE’S TREATMENT OF “SUSTAINABLE DEVELOPMENT” AND IMPLICATIONS FOR ARGENTINA V. URUGUAY** *continued from page 40*

- <sup>1</sup> See Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. ¶ 140 (Sept. 25, 1997) [hereinafter Gabcikovo-Nagymaros Project], available at <http://www.icj-cij.org/docket/files/92/7375.pdf>. See also John Martin Gillroy, *Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Statute of “Environmental Sustainability” in International Jurisprudence*, 42 STAN. J. INT’L L. 1, 27-30 (describing the ICJ’s recognition of sustainable development as a concept in international law that had to be taken into account by both states in their resolution of the Gabcikovo-Nagymaros case); see also Phillipe Sands, *International Courts and the Concept of “Sustainable Development”*, in 3 MAX PLANK YEARBOOK OF UNITED NATIONS LAW 389 (Armin von Bogdandy & Rudiger Wolfrum eds.) (1999), available at [http://www.mpil.de/shared/data/pdf/pdfmpunyb/sands\\_3.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunyb/sands_3.pdf).
- <sup>2</sup> KLAUS BOSSELMANN, *THE PRINCIPLE OF SUSTAINABILITY: TRANSFORMING LAW AND GOVERNANCE* 69 (Ashgate Publishing Ltd. 1988).
- <sup>3</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.) (Arg. Application Instituting Proceedings) 3 (May 4, 2006), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=0>.
- <sup>4</sup> See Legality of the Use by a State of Nuclear Weapons in an Armed Conflict, Advisory Opinion, 1996 I.C.J. 67 (July 8), available at <http://www.icj-cij.org/docket/files/93/7407.pdf>.
- <sup>5</sup> See Gabcikovo-Nagymaros Dam Case, 1997 I.C.J. at ¶ 18.
- <sup>6</sup> See *id.* at ¶ 21.
- <sup>7</sup> See *id.* at ¶ 17.
- <sup>8</sup> See *id.* at ¶ 22.
- <sup>9</sup> See *id.* at ¶ 23..
- <sup>10</sup> See *id.* at ¶ 24 (noting that on October 28, 1992, the parties agreed to submit the dispute to the ICJ).

- <sup>11</sup> See Prue Taylor, *Case concerning the Gabcikovo-Nagymaros Project: A Message from the Hague on Sustainable Development*, 3 N.Z. J. ENVTL. L. 109, 114 (1999).
- <sup>12</sup> See Gabcikovo-Nagymaros Dam Case, 1997 I.C.J. at ¶ 140.
- <sup>13</sup> Gillroy, *supra* note 1, at 29.
- <sup>14</sup> Taylor, *supra* note 11, at 110.
- <sup>15</sup> Jorge E. Viñuales, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment*, 32 FORDHAM INT’L L.J. 232, 254 (2008).
- <sup>16</sup> Press Release, International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay.): Conclusion of the public hearings: Court begins its deliberations, U.N. Doc. 2009/28 (Oct. 2, 2009), available at <http://www.icj-cij.org/docket/files/135/15507.pdf>.
- <sup>17</sup> See Fernando Cabrera Diaz, *Oral arguments held in ICJ dispute over pulp mills on the River Uruguay*, INVESTMENT TREATY NEWS, October 2, 2009, available at <http://www.investmenttreatynews.org/cms/news/archive/2009/09/28/oral-arguments-held-in-icj-dispute-over-pulp-mills-on-the-river-uruguay.aspx>.
- <sup>18</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.), 4 (Summary of the Order of July 13, 2006), available at <http://www.icj-cij.org/docket/files/135/11237.pdf>.
- <sup>19</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.), 55 (Counter-Memorial of Uru. of July 20, 2007), available at <http://www.icj-cij.org/docket/files/135/15427.pdf>.
- <sup>20</sup> See *id.*
- <sup>21</sup> See Viñuales, *supra* note 15, at 254.
- <sup>22</sup> See Adriana Koe, *Damming the Danube: The International Court of Justice and the Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, 20 SYD. L. REV. 612 (1998).
- <sup>23</sup> See Viñuales, *supra* note 15, at 254.