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CHAPTER 14

Norms, Standards, and the Elusive Nomenclature of the *Gabčíkovo–Nagymaros* Judgment

Brian McGarry[*]

1 Introduction

The present chapter considers the impact of international environmental law on the terms of the Judgment of the International Court of Justice (ICJ) in the *Gabčíkovo–Nagymaros* case.[1] This landmark text, expertly assessed in other chapters of this volume, cannot be fully appreciated two decades onward without assessing how the Court's decision took into account certain developments in international environmental law. Yet more recent cases have alternately clarified or exploited the malleable semantics of the Court's 1997 decision. Because this Judgment's developments of environmental law rely upon terms open to potentially wide-ranging interpretations, the reasoning can slip away chimerically when the reader tries to pin it down – a characteristic which has, in turn, arguably slowed the progression of this body of law in comparison to the more direct approaches favoured by some Members of the Court.

We might rightly expect clarity from the principal judicial organ of the United Nations as to the nature of protection afforded to an environment long subjugated to the will of men. And yet as scholarly observers accustomed to the Court's caution, we instead grow to expect a certain obfuscation, lest the Court in a single case be accused of leap-frogging a slowly emergent political consensus, thus stoking tensions between the legal and political arms of its parent organization. As the poet Wallace Stevens resignedly observed concerning the individual's role in fulfilling the mandate of the whole:

> And though one says that one is part of everything,

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[1] *Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

> There is a conflict, there is a resistance involved;
> And being part is an exertion that declines […].[2]

In canvassing the Judgment's treatment of developments in international environmental law, Section 2 of the present chapter surveys relevant normative sources prior to *Gabčíkovo–Nagymaros*. Section 3 views the Court's 1997 analysis in comparison to the treatment of these sources in contemporaneous cases, whereafter Section 4 considers the relationship between the Court's reference to 'norms and standards' and specific identifiable principles of environmental law. The chapter concludes following Section 5's broader digression into relevant procedural and methodological aspects of the judicial application of environmental principles.

2 Normative Sources Prior to the *Gabčíkovo–Nagymaros* Judgment

In its 1997 Judgment, the Court measured the growth of international environmental law in two spans of two decades each. It first cited the International Law Commission's (ILC) 1980 finding, on the basis of State practice, that '[i]t is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States'.[3] As the Court recalled in paragraph 92, Hungary had argued during the proceedings that its notification of termination of the 1977 treaty underlying the case was lawful and effective because of, *inter alia*, 'the development of new norms of international environmental law'.[4] Indeed, in paragraph 140 of the Judgment, the Court agreed with the central fact asserted (though not the legal conclusion drawn) by Hungary, summarizing practice subsequent to the ILC's 1980 finding as a period of robust normative development in this area:

> Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new

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2 W Stevens, 'The Course of a Particular' (1951) 4(1) Hudson Review 22.
3 *Gabčíkovo–Nagymaros* (n 1) para 53.
4 ibid para 92.

> norms and standards have been developed, set forth in a great number of instruments during the last two decades.[5]

The 1972 Stockholm Declaration is often cited as the first substantial output of this nascent historical arc.[6] In particular, the Declaration pronounced in Principle 21 a general obligation for each State not to cause environmental damage to neighboring States. This norm would be echoed in Principle 2 of the 1992 Rio Declaration,[7] which followed several milestones advancing the clarification of environmental principles, such as the 1985 Vienna Convention for the Protection of the Ozone Layer[8] and the 1987 Montreal Protocol).[9] Yet the Conference on Environment and Development held in Rio de Janeiro in June 1992 provided substantial momentum in the framing and development of international environmental law. Instruments concluded in parallel, including the Program of Action Agenda 21[10] and the Conventions on Climate Change[11] and Biological Diversity,[12] boldly planted concepts such as sustainable development and the precautionary principle.[13]

However, these progressions recalled divisions between developed and developing States,[14] which had first appeared in the environmental

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5 ibid para 140.

6 On the centrality of the Stockholm Conference to the development of international environmental law, see *Arbitration Regarding the Iron Rhine Railway (Belgium v. Netherlands)*, Award, Permanent Court of Arbitration, 27 RIAA 35 (2005), para 59 ('Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment').

7 31 ILM 874.

8 1513 UNTS 293.

9 1522 UNTS 3.

10 UN Conference on Environment and Development: Agenda 21, UN Doc A/CONF.15/4 (1992).

11 Framework Convention on Climate Change (9 May 1992), 31 ILM 849 (1992).

12 Convention on Biological Diversity (5 June 1992), 31 ILM 849 (1992).

13 While the precautionary principle derives from international environmental law, it can also find application within other regimes over time. See ET Jouannet, *A Short Introduction to International Law* (Cambridge University Press 2014) 60-61.

14 See Report of the UN Conference on the Human Environment, UN Doc A/CONF.48/14 & Corr 1 (1972), 11 ILM 1416 ('Considerable emphasis was placed by speakers from developing countries upon the fact that for two-thirds of the world's population the human environment was dominated by poverty, malnutrition, illiteracy and misery […]. The priority of developing countries was development. Until the gap between the rich and the poor countries was substantially narrowed, little if any progress could be made […]. [S]upport for environmental action must not be an excuse for reducing development').

context during the 1972 Stockholm Conference. It would fall to international courts and tribunals – and notably the ICJ in *Gabčíkovo–Nagymaros* – to address persistent disagreement as to the significance and interaction of principles concerning the environment and economic development.[15] Whereas the Court in paragraph 95 of this Judgment recalled Hungary's assertion that terms in the parties' 1977 framework had crystallized into an 'immutable norm'[16] – and whereas in paragraph 104 it characterized Hungary's position such that 'the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law' had contributed to a fundamental change of circumstances from this normative benchmark[17] – it instead found that such normative developments were 'not of such a nature […] that their effect would radically transform the extent of the obligations' under the 1977 treaty.[18] Rather, the Court considered these evolutions as a bit of a *fait accompli*, underscoring that it 'does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen'.[19]

Beneath the Court's conclusion on matters of treaty law, what remains unclear are the changing normative contours it purports to observe here, as well as in its above stated reference in paragraph 140 of the Judgment to the emergence of 'new norms and standards' in the two decades immediately prior. How might we characterize those trends in the developmental arc of environmental law – particularly those which were perhaps most recent at the time of the Court's Judgment? Indeed, such considerations would appear especially relevant in light of the Court's general observation (in a somewhat different context in the prescriptive portion of the Judgment) that '[w]hat might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997'.[20]

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15 See A Najam, 'The South in International Environmental Negotiations' (1994) 31(4) International Studies 427, 441.

16 *Gabčíkovo–Nagymaros* (n 1) para 95.

17 ibid para 104 (acknowledging Article 62 of the Vienna Convention on the Law of Treaties as a codification of relevant rules of customary international law, and citing on this point *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Jurisdiction of the Court, I.C.J. Reports 1973*, p. 49, para 36).

18 *Gabčíkovo–Nagymaros* (n 1) para 104.

19 ibid

20 ibid para 134.

Fittingly for a case with substantial legal dimensions beyond international environmental law, one trend which emerged in the five years between the 1992 Rio Conference and this Judgment was the codification of general principles linking international environmental law to other specialized regimes. For instance, the central principle of equitable and reasonable utilization reflected in the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses[21] may serve to 'operationalize' the principle of sustainable development, which the ICJ in paragraph 140 of the *Gabčíkovo–Nagymaros* Judgment viewed as an expression of the need – in light of 'new norms [which] have to be taken into consideration, and […] new standards given proper weight' – to 'reconcile economic development with protection of the environment'.[22] The Convention provides a framework for the management and protection of shared watercourses by providing general principles and rules that may be tailored to suit the conditions of specific watercourses and the needs of States sharing these watercourses.[23] The *Gabčíkovo–Nagymaros* Judgment confirmed equitable and reasonable utilization as a rule of customary international law.[24] In light of the limited number of accessions the Convention had

[21] Convention on the Law of the Non-Navigational Uses of International Watercourses (New York, 21 May 1997). See, eg, Arts. 7 and 12 of the Convention. The determination of 'equitable use' in practice requires a balance of different interests and a consideration of all relevant factors, including the physical and climatic conditions, the consumptive use of the water in several areas of the watercourse, and the character and rate of return flows. See SC McCaffrey, *The Law of International Watercourses* (Oxford University Press 2007) 387.

[22] *Gabčíkovo–Nagymaros* (n 1) para 140. Judge Weeramantry viewed sustainable development as 'more than a mere concept but as a principle with normative value […] fundamental to the determination of the competing interests' in the case. See ibid, Separate Opinion of Vice-President Weeramantry, 88; cf. the text of the Judgment, ibid paras 176-177. See further PK Wouters & AS Reiu-Clarke, 'The Role of International Water Law in Promoting Sustainable Development' (2001) 12 Water Law 281, 283. The principles of reasonable and equitable use and sustainable development bear some analytical similarities in application, such as a balancing of interests. See M Kroes, 'The Protection of International Watercourses as Sources of Fresh Water in the Interest of Future Generations', in EHP Brans, EJ De Haan, J Rinzema, A Nollkaemper (eds), *The Scarcity of Water: Emerging Legal and Policy Responses* (Kluwer 1997) 80, 83.

[23] See Watercourses Convention, Art. 3. See also MM Mbengue & S Waltman, 'Farmland Investments and Water Rights: The legal regimes at stake', International Institute for Sustainable Development, May 2015, 31 <https://www.iisd.org/sites/default/files/publications/farmland-investments-water-rights-legal-regimes-at-stake.pdf> accessed 22 October 2019.

[24] *Gabčíkovo–Nagymaros* (n 1) paras 78, 85, 147, 150.

attracted since its adoption four months prior, the Court might have more coherently identified this as a general principle of law (as discussed in Section 3 of this chapter).

Cross-regime principles are also evident in instruments codifying the law of the sea. While the 1994 UN Convention on the Law of the Sea (UNCLOS)[25] provides a number of specific rules governing the protection of the marine environment, it also incorporates the broader principle of the common heritage of mankind in its provisions concerning the use of the international seabed.[26] This principle removes that area from the ambit of territorial claims,[27] but encourages environmental preservation and (in the context of UNCLOS) exploitation thereof to the benefit of those States least likely to have the means to do this directly.[28] The principle was recognized by some States well before the adoption of UNCLOS[29] and confirmed in a 1970 UN Resolution,[30] and it continues to

[25] 1833 UNTS 397.

[26] On the diverse application of the principle of the common heritage of mankind in other *res communis* regimes (such as under the Preamble to the 1959 Antarctic Treaty and Article 1 of the 1967 Outer Space Treaty), see MN Shaw, *International Law* (Cambridge University Press 2008) 533; G Oduntan, *Sovereignty and Jurisdiction in the Airspace and Outer Space: Legal Criteria for Spatial Delimitation* (Routledge 2011) 191 ('Analogies of this principle can be found in the legal regime governing virtually all common spaces'). On the role of this and other general principles of law in the law of outer space, see JA Frowein, 'Customary International Law and General Principles Concerning Environmental Protection in Outer Space', in K-H Böckstiegel (ed), *Environmental Aspects of Activities in Outer Space: State of Law and Measures of Protection* (Carl Heymanns Verlag 1990) 163-167; R Jennings, 'Customary Law and General Principles of Law as Sources of Space Law', in ibid 149-152; D Rauschning, 'Customary International Law and General Principles of International Law Concerning the Protection of Outer Space from Pollution?', ibid 181-186.

[27] See further US President Lyndon Johnson's address to the UN regarding non-appropriation of the international seabed, UN Doc A/C.1/PV.1514, para 30.

[28] See further *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, 10.

[29] See, eg, Statement made by the Belgian delegate during the 1,788th meeting of the First Commission of the General Assembly during its 25th session in 1970, discussing the report of the Seabed Committee, para 56, as reprinted in *The Law of the Sea: Concept of the Common Heritage of Mankind: Legislative History of Articles 133 to 150 and 311(6) of the United Nations Convention on the Law of the Sea*, UN Division for Ocean Affairs and the Law of the Sea (United Nations 1996) 186. On the potential application of this principle to high seas fisheries, see Judge Oda's perspectives during early and late stages of the negotiations, see, respectively, S Oda, 'New Directions in the International Law of Fisheries' (1973) 17 Japanese Annual of International Law 89; S Oda, 'Sharing of Ocean Resources:

be refined in light of judicial development. This includes both direct reference[31] and ICJ dicta prior to the *Gabčíkovo–Nagymaros* Judgment, such as its pronouncement in *Nuclear Weapons* that 'the environment is not an abstraction', but rather 'represents the very health of human beings, including generations unborn'.[32]

3 Normative Elaborations in Contemporaneous Cases

Given this range of sources and terminologies, it is worth assessing how one can use a normative perspective to understand the concept of 'norms and standards' itself. For this purpose, we may look beyond the ICJ to bodies which have exhibited more candid tendencies than the Court in laying bare the debatable status of norms and standards in the environmental context. Just as international environmental law has in practice been the subject of some confusion as to the legal character and weight of its sources (given its significant reliance upon applicable general principles),[33] the *Iron Rhine* Award admirably acknowledges the

Unresolved Issues in the Law of the Sea' (1981) 3 Journal of International and Comparative Law 12.

30 UNGA Resolution 2749 (XXV), Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (12 December 1970). See further D Tladi, 'The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas beyond National Jurisdiction: The Choice between Pragmatism and Sustainability' (2015) 25(1) YIEL 113, 114; R Wolfrum, 'Common Heritage of Mankind', in R. Bernhardt (ed), *Comparative Law. Encyclopedia of Public International Law* (Elsevier Science 1989) 68 ('the common heritage principle has its main impact with respect to the establishment of an international administration for areas open to the use of all states (international commons)').

31 See *Activities in the Area* (n 28), paras 76, 159, 222, 226.

32 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para 29. Nevertheless, it may be seen that no general principle requires States to protect and preserve the environment *per se*. See C Redgwell, 'Transboundary Pollution: Principles, Policy and Practice', in S Jayakumar, T Koh, R Beckman, HD Phan (eds), *Transboundary Pollution: Evolving Issues of International Law and Policy* (Edward Elgar 2015) 11.

33 On these terminological distinctions in environmental law, see further D Bodansky, 'Rules vs. Standards in International Environmental Law' (2004) 98 ASIL Proceedings 275, 276-277 ('Rules define in advance what conduct is permissible and impermissible. Standards, in contrast, set forth more open-ended tests, whose application depends on the exercise of judgment or discretion […]'). On the broader development of fundamental values in the international order, see L Henkin, *International Law: Politics and Value* (Brill 1995) 39.

difficulty of systematizing these sources and assigning them a coherent nomenclature – while nevertheless elaborating upon their normative content beyond the pronouncements of *Gabčíkovo–Nagymaros*. After addressing rules applicable to the parties' dispute by virtue of treaties in force, the tribunal observed:

> Further, international environmental law has relevance to the relations between the Parties. There is considerable debate as to what, within the field of environmental law, constitutes 'rules' or 'principles'; what is 'soft law'; and which environmental treaty law or principles have contributed to the development of customary international law. Without entering further into those controversies, the Tribunal notes that in all of these categories 'environment' is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate. The emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations.[34]

Such uncertainty is perhaps fitting in light of nearly a century of debate as to the definition of 'general principles of law'.[35] According to one school of thought, general principles – as opposed to the classical understanding of customary international law – may be seen to direct, rather than emerge from, State practice.[36] Nevertheless, as observed by

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[34] *Iron Rhine* (n 6) para 58. On the distinction between the ICJ's treatment of sustainable development as a 'concept' in *Gabčíkovo–Nagymaros* and the *Iron Rhine* tribunal's treatment thereof as a legal principle, see C Dominicé, 'The Iron Rhine Arbitration and the Emergence of a Principle of General International Law', in TM Ndiaye & R Wolfrum, *Law of the Sea, Environmental Law and Settlement of Disputes* (Brill 2007) 1067, 1073-1074.

[35] See, eg, G Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' (1957) 92 RCADI 1; G Herczegh, *General Principles of Law and the International Legal Order* (Akadémiai Kiadó 1969); B Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 2nd ed. (Grotius Publications 1987); F Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Brill 2007); G Gaja, 'General Principles of Law', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2007).

[36] See R Kolb, *Theory of International Law* (Hart 2016) 128. See further D Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010) 99 ('To some degree, custom focuses on the actual behavior of states, whereas general principles find their basis in logic and reason. In practice,

Sir Humphrey Waldock, 'there will always be a tendency for a general principle of national law recognized in international law to crystallize into customary law'.[37] In practice, however, some norms which appear to satisfy the requirements of customary international law might be better understood as general principles of law.[38]

Of particular note when assessing *Gabčíkovo–Nagymaros* alongside *Iron Rhine* is the latter's construction of the former to support the tribunal's inclination to adopt an evolutionary approach to environmental treaty interpretation. The tribunal, citing both the 1997 Judgment and Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT),[39] found support for the proposition that 'an evolutive interpretation, which would ensure any application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule'.[40] The same reasoning would be adopted by the Court of Arbitration in the *Indus Waters Kishenganga Arbitration*:

> It is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law. The *Iron Rhine* Tribunal applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century, when principles of environmental protection were rarely if ever considered in international agreements and did

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however, the distinction between customary norms and general principles is often blurred').

37 H Waldock, 'General Course on Public International Law' (1962-II) RCADI 1, 62. See further A Pellet, 'Article 38', in A Zimmermann, K Oellers-Frahm, C Tomuschat, CJ Tams (eds), *The Statute of the International Court of Justice: A Commentary*, 2nd ed. (Oxford University Press 2012), para 300 (considering general principles of law as 'transitory' insofar as their repeated use at the international level transmutes them into custom, thus rendering unnecessary any recourse to the underlying general principles).

38 See generally B Simma & P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988-89) 12 Australian Yearbook of International Law 82-108 (referring to the field of human rights law).

39 Cf. generally, D Reichert-Facilides, 'Down the Danube: The Vienna Convention on the Law of Treaties and the Case Concerning the Gabčíkovo-Nagymaros Project' (1998) 47(4) ICLQ 837.

40 *Iron Rhine* (n 6) para 80. See also para 59 (citing *Gabčíkovo–Nagymaros* for the premise that environment and development are 'mutually reinforcing, integral concepts').

> not form any part of customary international law. Similarly, the International Court of Justice in *Gabčíkovo–Nagymaros* ruled that, whenever necessary for the application of a treaty, 'new norms have to be taken into consideration, and […] new standards given proper weight'. It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today.[41]

The approach of these courts and tribunals is consistent with the gap-filling function of general principles, as a treaty cannot through silence preclude the potential application of subsequently emergent principles.[42] The ICJ has at times in the years since its *Gabčíkovo–Nagymaros* Judgment elaborated upon the need to seek compatibility between treaty rules and evolving environmental principles, such as in *Pulp Mills*:

> [The 1975 Statute of the River Uruguay] distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ('con adecuación') with those guidelines and recommendations.[43]

These approaches pursued by the ICJ and the aforementioned tribunals have, in turn, informed the legal conclusions adopted by the WTO in a number of relevant cases. For example, the WTO Dispute Settlement Body has had occasion to assess precautionary measures in the context of other WTO covered agreements, such as the Agreement on Technical Barriers to Trade[44] and, in particular, the Agreement on the

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41 *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award, Permanent Court of Arbitration, 31 RIAA 1 (2013), para 452.

42 See further A Boyle, 'Gabčíkovo–Nagymaros Case: New Law in Old Bottles' (1997) 8(1) YIEL 13, 15.

43 *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, para 62.

44 See, eg, *EC—Trade Description of Sardines*, AB-2002-3.

Application of Sanitary and Phytosanitary Measures. The Appellate Body in the *Hormones* case followed the work of the ICJ in *Gabčíkovo–Nagymaros*, and as such did not take a stance on the customary status of the precautionary principle. In particular, the Appellate Body observed that 'the Court did not identify the precautionary principle as one of those recently developed norms. It also declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary of 16 September 1977 […]'.[45] Notably, while the Appellate Body indicated that the precautionary principle had not yet become clearly identifiable as 'a part of general customary law,' it might have nevertheless 'crystallized into a general principle of customary environmental law'.[46]

The Panel in this case had found that only once the precautionary principle achieved customary status could it be utilized in the interpretation of Articles 5.1 and 5.2 of the Agreement, and even then only to the extent that it would not do violence to the express content of those Articles.[47] Notably, the Appellate Body would recognize that the precautionary principle 'finds reflection' in Article 5.7 of the SPS Agreement.[48] The Appellate Body also observed that in some circumstances qualitative, rather than traditional quantitative, methods must be utilized in assessing risk and scientific evidence under the SPS Agreement.[49] Moreover, it found that a WTO member may take into account the arguments of the scientific minority during risk assessment under Article 5.1 of the Agreement.[50]

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[45] *EC—Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS48/AB/R, 16 January 1998, para 123, n. 93.

[46] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission'. UN Doc. A/CN.4/L.682 (2006), pp. 34, 73. See further CB Seelarbokus, 'International Environmental Law', International Studies, Oxford Research Encyclopedias (March 2010) (section on 'International Environmental Jurisprudence').

[47] *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada – Report of the Panel, 18 August 1997, WT/DS48/R/CAN, para 8.160-8.161, 8.252. EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States, Report of the Panel, 18 August 1997, WT/DS26/R/USA, para 8.157-8.158, 8.249.

[48] *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para 124.

[49] ibid para 186 ('[W]e note that imposition of such a quantitative requirement finds no basis in the SPS Agreement').

[50] ibid para 194 (linking precaution and prevention insofar as 'the very existence of divergent views presented by qualified scientists who have investigated the

Stepping back to synthesize this body of case law, we may observe that – regardless of their origins – general principles of international environmental law have often been treated in practice within a normative matrix, rather than as discretely applicable customs. In particular, a number of such principles have been shown to demonstrate links between substantive and procedural obligations. For example, the obligations of equitable and reasonable utilization and prevention of transboundary harm are closely related to procedural duties concerning notification, consultation and negotiation, and the exchange of information.[51] The significance of these duties of cooperation was identified by the ICJ in *Gabčíkovo–Nagymaros* [52] and *Pulp Mills*,[53] and their status as general principles has also been the subject of attention by investment arbitration tribunals.[54]

Such judicial elaboration – as discussed in the following Section on the identification of specific 'norms and standards' in the 1997 Judgment – is essential to the identification and development of general principles of law, particularly within international environmental law. Indeed, Article 38 of the ICJ Statute arguably requires an inferential link from 'norms and standards' to general principles, if not to treaty or custom. By including general principles of law in the (similarly phrased) applicable law provisions of the PCIJ Statute, the Advisory Committee of Jurists had

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particular issue at hand may indicate a state of scientific uncertainty').

51 See O McIntyre, 'The Proceduralisation and Growing Maturity of International Water Law. *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, International Court of Justice, 20 April 2010' (2010) 22(3) Journal of Environmental Law 488-489. See generally C Leb, *Cooperation in the Law of Transboundary Water Resources* (Cambridge University Press 2013).

52 *Gabčíkovo–Nagymaros* (n 1) para 140. See also ibid, Separate Opinion of Vice-President Weeramantry, 88, Part A.

53 See *Pulp Mills* (n 43) paras 75-77, 81, 101-102, 113, 145, 147, 164, 281. Stressing the role of institutional arrangements in accordance with 'the principle of speciality', see ibid para 89. See further T Franck, *Fairness in International Law and Institutions* (Clarendon 1995), 81-82 (referring to equitable and reasonable utilization as among 'sophist principles [… which] usually require an effective, credible, institutionalized, and legitimate interpreter of the rule's meaning in various instances').

54 See, eg, *Grand River Enterprises Six Nations v. United States of America*, ICSID Award of 12 January 2011 (acknowledging that a customary principle may exist which requires governments to consult indigenous peoples on government actions significantly affecting their use of their territory). See further L Boisson de Chazournes & B McGarry, 'Constitutional Law and the Settlement of Investor-State Disputes: Some Interplays', in CC Jalloh & O Elias (eds), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (Brill 2015) 230, 236-238.

sought to not only avoid a finding of *non liquet*, but to also restrain the new Court from reaching arbitrary decisions *ex aequo et bono*:

> The President added that far from giving too much liberty to judges' decision, his proposal […] would limit it. As a matter of fact it would impose on the judges a duty which would prevent them from relying too much on their own subjective opinion it would be incumbent on them to consider whether the dictates of their conscience were in agreement with the conception of justice of civilized nations.[55]

4 Links to Specific Identifiable Principles

The elusiveness with which the Court approached 'new norms and standards [that] have been developed' leaves it for the reader to infer the individual principles which the Court may have had in mind when deliberating, and ultimately adopting, this phrasing in paragraph 140 of the Judgment. Such inferences help us to distinguish the phrase's legal content, and enable us to gauge how the Court's case law has evolved since.

The constitutional and adaptive qualities of general principles are evidenced in a broad range of the Court's case law, such as its expansive interpretation of the principle of good faith to justify its finding in *Nuclear Tests* that France's unilateral declaration was legally binding and dispositive of the case at hand.[56] Similarly, even when UN General Assembly Resolutions are framed as general principles, they may serve as a mechanism for the progressive development of the law, and

[55] See Procés-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with Annexes, Permanent Court of international Justice (ser.D), 311. See also ibid 318-319, 322 ('[D]irectly we try to create rules of this kind [ie, principles] to define and at the same time limit the powers of judges […]'), 323. See further G Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' (1957) 92 Recueil des Cours 56 ('[I]nternational tribunals have seldom if ever pronounced a non liquet, or had recourse to a barren residual rule of the kind mentioned above; but, rather, have decided the case by reference to, or with the help of analogies drawn from, general and natural law principles').

[56] See, eg, *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253. See further R Kolb, 'General Principles of Procedural Law', in A Zimmermann, K Oellers-Frahm, C Tomuschat, CJ Tams (eds), *The Statute of the International Court of Justice*, 3rd ed (Oxford University Press 2012) 873, n 4.

potentially as well for the crystallization of customary rules.[57] The ICJ notably relied as well on ILC draft articles for this purpose in paragraphs 141 and 147 of the *Gabčíkovo–Nagymaros* Judgment,[58] as well as in later environmental cases, such as *Pulp Mills*.[59]

Despite being the first ICJ case to comprehensively concern international environmental law – and notwithstanding the Court's use of this opportunity to clarify aspects of sustainable development and ecological necessity[60] – the 1997 Judgment also showed fairly conservative restraint in this context, insofar as many of its holdings rested upon the laws of treaties and State responsibility (rather than evolving principles of international environmental law).[61] Similarly, while the Judgment is notable in part for explaining that the obligation to conduct an environmental impact assessment arises from the principle of prevention, the Court procedurally links this obligation to the principle of equitable and reasonable utilization,[62] rather than staking out the legal status of such principles with real clarity (much less boldness).

We approach the apocryphal 'new norms and standards' of the Judgment in this light, hoping to ascertain some of their contours, and to query more generally whether the Court is open to integrating these applicable norms and standards in a broad manner.

Certainly, the Court expressly holds up sustainable development as an expression of this point, two sentences onward in paragraph 140. And in

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57 See JR Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford University Press 2012) 42

58 *Gabčíkovo–Nagymaros* (Judgment) (n 1) paras 141, 147 (addressing the draft articles on State responsibility).

59 *Pulp Mills* (n 43) para 145.

60 See L Boisson de Chazournes & MM Mbengue, '*Gabčíkovo–Nagymaros Project* (Hungary/Slovakia) (1997)', in E Bjorge & C Miles (eds), *Landmark Cases in Public International Law* (Bloomsbury 2017) 435, 452. On the obligation to take into account environmental considerations when assessing a state of necessity, see JE Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) 32(1) Fordham International Law Journal 232, 253.

61 See J Klabbers, 'The Substance of Form: The Case Concerning the *Gabčíkovo–Nagymaros* Project, Environmental Law, and the Law of Treaties' (1997) 8 YIEL 32, 34. See further the contributions in sections II and III of the present volume.

62 *Gabčíkovo–Nagymaros* (n 1) para 177 ('[S]uch utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared recourse and the environmental protection of the latter were not taken into account'). See JH Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment' (2002) 96 AJIL 291, 293.

more expository phrasing before providing that example, the Court refers in the prior paragraph to the requirement of 'vigilance and prevention' to prevent irreversible environmental damage. '[V]igilance' in this sense may be read – in the Court's somewhat ironically precautious way – as an allusion to the principle of precaution, owing both to the connotations of the term and to two earlier references in the Judgment: Hungary's arguments on the status of the 'precautionary principle' in paragraph 97, and the Court's characterization of the parties' positions in paragraph 113 as agreeing 'on the need to take […] the required precautionary measures' to avoid certain environmental harms. Yet while the Court's reference to obligations of 'vigilance and prevention' took note of the appearance of normative developments which must be taken into account for the purpose of environmental protection,[63] it did not base its decision in the case upon the express recognition of the precautionary principle's legal character.[64]

Nevertheless, given the hindsight of over 20 years of development of the principles of precaution and prevention, we may assess their growth in light of the Judgment, and moreover consider them together due to the strong (indeed, 'vigilant') link between them. As treated in this case, the principle of prevention requires States to account for the impact of activities conducted within their territories, including in respect of the environment.[65] The importance of this principle was emphasized in the 1991 Espoo Convention and Principle 17 of the Rio Declaration, the latter of which envisages risk evaluation through environmental impact assessments. In *Gabčíkovo–Nagymaros*, Hungary connected this principle to that of precaution.[66] As reflected in Principle 15 of the Rio Declaration,

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63 *Gabčíkovo–Nagymaros* (n 1) para 140 ('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').

64 Cf. generally JM Van Dyke, 'The Evolution and International Acceptance of the Pre-Cautionary Principle', in RK Dixit & C Jayaraj, *Dynamics of International Law in the New Millennium* (Indian Society of International Law 2004) 317.

65 See further L Boisson de Chazournes & S Maljean-Dubois, 'Principes du Droit International de l'Environnement', *Jurisclasseur Environnement et Développement Durable* (LexisNexis 2011) 60.

66 *Gabčíkovo–Nagymaros* (n 1) para 97 (arguing that '[t]he previously existing obligation not to cause substantive damage to the territory of another State had […] evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle"'). See further MM Mbengue, *Essai sur une théorie du risqué en droit international: L'anticipation du risqué environnemental et sanitaire*

> in order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[67]

Both the principles of prevention and precaution are closely related to the requirement under customary international law to conduct environmental impact assessments.[68] In this case, the Court was guided by the principle of prevention when stating 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'.[69]

Returning to the concept that the Court most clearly highlighted in the context of 'new norms and standards', it is worth recalling that the Court does little to advance upon or even expressly endorse the general definition of sustainable development beyond the parameters adopted five years prior in Rio de Janeiro, where delegates affirmed a principle of development that meets present needs without compromising future generations' ability to meet theirs.[70] The Court in *Gabčíkovo–Nagymaros* appeared to leave space for a more explicit recognition of this point in the future, insofar as it emphasized sustainable development as

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(Pedone 2009); L Boisson de Chazournes, 'Precaution in International Law: Reflection on its Composite Nature', in TM Ndiaye & R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (Brill 2007) 21-34.

67 The principle is also found in the 1985 Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol (referring to precautionary measures), the Convention on Biodiversity and its Cartagena Protocol (Articles 9 and 10), the 1992 Convention on Climate Change, and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

68 See further M Fitzmaurice, DM Ong, P Merkouris, *Research Handbook on International Law* (Edward Elgar 2010) 187 ('[F]rom a legal point of view, the question is whether precaution could become a principle of customary law in international law, on one hand, and a general principle of environmental law at the national level on the other hand').

69 *Gabčíkovo–Nagymaros* (n 1) para 140. See J Brunnée, 'Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection' (2004) 53 ICLQ 351.

70 See Principles 3 and 4 of the Rio Declaration on Environment and Development. See further V Lowe, 'Sustainable Development and Unsustainable Arguments', in A Boyle & D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999).

encompassing the 'need to reconcile economic development with protection of the environment'.[71] The Court's treatment of sustainable development in this manner demonstrated the principle's utility in reconciling distinct interests and creating links between different regulatory areas,[72] as well as the Court's own inclination to interpret treaties in light of evolving environmental principles.[73] As it observed in paragraph 112 regarding the parties' bilateral treaty, '[t]he awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the treaty's conclusion'.[74]

Certain Members of the Court stepped boldly into the vacuum created by the Court's pithy treatment of sustainable development in this crucial portion of the Judgment. In particular, Judge Weeramantry emphasized the need to take into account *erga omnes* obligations in international adjudication, and in so doing implied questions as to how an *erga omnes* conception of sustainable development might be legally actionable:[75]

> We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond

[71] *Gabčíkovo–Nagymaros* (n 1) para 140. See generally P Sands & J Peel, *Principles of International Environmental Law* (Cambridge University Press 2012); S Bell & D McGillivray, *Environmental Law*, 7th ed (Oxford University Press 2008).

[72] See P Sands, 'International Courts and the Application of the Concept of "Sustainable Development"' (1999) 3 Max Planck Yearbook of United Nations Law 363.

[73] Cf. generally V Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) EJIL Law 377.

[74] *Gabčíkovo–Nagymaros* (n 1) para 112. See further *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I.C.J. Reports 1995*, Dissenting Opinion of Judge Weeramantry, 341. See also ibid, Dissenting Opinion of Judge Ad Hoc Palmer, para 80 (citing, as a sign of the ICJ's willingness to contribute to the development of principles of international environmental law, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240).

[75] See generally A Koe, 'Damming the Danube: The International Court of Justice and the *Gabčíkovo–Nagymaros* Project (Hungary v Slovakia)' (1998) 20(4) Sydney Law Review 612.

> procedural rules fashioned for purely *inter partes* litigation. When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.[76]

Indeed, Judge Weeramantry's judicial opinions also staked out progressive legal views on related environmental principles, such as his *Nuclear Weapons* dissent that 'the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations'.[77] This statement elaborates upon the Court's recognition in the same Advisory Opinion of the interests of 'generations unborn'.[78] Nevertheless, the Court's pronouncement in this decision that States are obligated 'to ensure that activities within their jurisdiction and control respect the environment of other states' may be seen to dilute to some extent—in its usage of the term 'respect'—the more rigid formulation of this obligation as codified in Principle 21 of the Stockholm Declaration.[79]

Among the legal concepts which the Court may have borne in mind when drafting paragraph 140 of the *Gabčíkovo–Nagymaros* Judgment, this principle of intergenerational equity is notable for solidifying notions

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76 *Gabčíkovo–Nagymaros* (n 1) Separate Opinion of Vice-President Weeramantry, 88, 118-119. For a critical examination of Judge Weeramantry's approach that questions the legal force of the principle of sustainable development vis-à-vis State responsibility, see SA Atapattu, *Emerging Principles of International Environmental Law* (Transnational 2006) 159-160.

77 *Nuclear Weapons* (n 32), Dissenting Opinion of Judge Weeramantry, 455. For Judge Weeramantry's views on equity more generally, see *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark/Norway), I.C.J. Reports 1993*, Separate Opinion of Judge Weeramantry, 38.

78 *Nuclear Weapons* (n 32) para 29.

79 See E Brown Weiss, 'Opening the Door to the Environment and to Future Generations', in L Boisson de Chazournes & P Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999) 338, 340.

of distributive justice within international environmental law,[80] and found early expression in Principles 2 and 5 of the 1972 Stockholm Declaration. As noted by the Brundtland Commission, intergenerational equity is a component principle of sustainable development,[81] illustrating overlaps in both the conceptual definition and practical application of environmental principles – a malleability well-suited to the Court's preferred approach to enigmatic 'norms and standards' in *Gabčíkovo–Nagymaros*.

5 Procedural and Methodological Considerations

In the spirit of Judge Weeramantry's concern for the actual legal process of applying environmental principles, a final point of consideration is the Court's treatment of the scientific data that invariably underlie the disputes in which those same 'norms and standards' find application. In this context, the transparency concerns later raised by Judges Al-Khasawneh and Simma in *Pulp Mills* (regarding the ICJ's use of '*experts fantômes*') are noteworthy.[82] Yet the Court would have a clearer opportunity to revisit the contours of norms and standards linked to environmental science when deciding *Whaling in the Antarctic*.[83]

While the Court in that 2014 Judgment made no express reference to the 'norms and standards' of paragraph 140 of the *Gabčíkovo–Nagymaros* Judgment – nor any reference to the case at all, in fact – it did make an important contribution to the corpus of case law on intertemporal treaty interpretation, viewing the International Convention for the Regulation of Whaling as 'an evolving instrument'.[84] It reached this conclusion by virtue of the specific functions the

80 See generally D Shelton, 'Intergenerational Equity', in R Wolfrum & C Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer 2010).

81 *The World Commission on Environment and Development, Our Common Future* (Oxford University Press 1987) 43 ('Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'). This was further defined by the 2002 UN Johannesburg Declaration as 'economic development, social development and environmental protection'.

82 See generally *Pulp Mills* (n 43) Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, 108.

83 *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

84 ibid para 45 (addressing arguments concerning obligations of 'sustainable exploitation' under the Whaling Convention).

Convention conferred on its treaty body, the International Whaling Commission, such as the adoption of amendments to the Schedule regulating the management of the whaling industry (and thus the conservation of whale stocks).[85] As such, while the Court's characterization of this particular treaty as a living instrument recalls its case-specific endorsement of an intertemporal treaty interpretation in the 2009 Judgment in *Navigational and Related Rights*,[86] the use of changing scientific data and perspectives in effecting this evolutionary treaty meaning bears closer kinship with the aforementioned arbitral decisions in *Iron Rhine*[87] and *Kishenganga*.[88] As discussed above, those decisions expressly relied on the ICJ's incremental progress in *Gabčíkovo–Nagymaros* to an extent that the Court itself has shown some reluctance to do.

As with Judge Weeramantry in 1997, however, this reluctance does not necessarily extend to the individual Members of the Court. In his Separate Opinion appended to *Whaling*, Judge Cançado Trindade similarly cast the Court's evolutive interpretation of the Whaling Convention as supported by a lineage of cases from various courts and tribunals,[89] in this regard notably pairing its approach in paragraph 112 of *Gabčíkovo–Nagymaros* (in particular the mantra-like affirmation of 'newly developed norms', 'new environmental norms', and 'emerging norms' in this context)[90] with its stipulation in the *Namibia* Advisory Opinion that 'viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law'.[91] For her part, Judge Ad Hoc Charlesworth would go further, echoing Australia's position in the case by forcefully declaring, on the basis of both paragraph 140 of *Gabčíkovo–Nagymaros* as well as elements of the *Pulp Mills* Judgment,[92] that 'treaties dealing with the environment should be interpreted

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85 See ibid.

86 *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213.

87 See *Iron Rhine* (n 6) para 80.

88 See *Kishenganga* (n 41) para 452.

89 See, eg, *Whaling in the Antarctic* (n 83) Separate Opinion of Judge Cançado Trindade, 348, paras 29-30.

90 *Gabčíkovo–Nagymaros* (n 1) para 112.

91 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, para 53.

92 *Pulp Mills* (n 43) paras 164, 204.

wherever possible in light of the precautionary approach, regardless of their date of adoption'.[93]

To the discussion of cases since *Gabčíkovo–Nagymaros* that have afforded an opportunity to advance the precautionary principle's role in the interpretation of treaties, we may add the significant and constructive role that this principle has played in the law of the sea since the earliest cases under the UN Convention on the Law of the Sea (UNCLOS). In particular, the International Tribunal for the Law of the Sea (ITLOS) Order on Provisional Measures in *Southern Bluefin Tuna* may be seen to have staked a progressive stance in the development of the precautionary principle. In light of scientific uncertainty concerning the appropriate fisheries conservation measures to be taken, the Tribunal ruled that the parties should 'act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna'.[94] In its unanimous Advisory Opinion in *Activities in the Area*, the Seabed Disputes Chamber of ITLOS incorporated the precautionary principle (by reference to Article 31(3)(c) of the VCLT) into UNCLOS implementing regulations concerning exploitation of the international seabed, citing Principle 15 of the Rio Declaration and the ICJ's *Pulp Mills* Judgment.[95]

A more recent UNCLOS case, the *South China Sea* arbitration, dealt in significant part with allegations of environmental degradation, including the Philippines' assertion that China had harmed the marine environment through its construction activities and fishing practices. Stressing that it was 'particularly troubled' by such concerns, the arbitral tribunal applied the principle of due diligence in especially strict terms.[96] The tribunal interpreted the rules found in Part XII of UNCLOS in light of the broader 'corpus of international law relating to the environment', imputing to Article 192 'a due diligence obligation to prevent the

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[93] *Whaling in the Antarctic* (n 83) Separate Opinion of Judge *ad hoc* Charlesworth, 453, para 9.

[94] *Southern Bluefin Tuna (New Zealand/Japan; Australia/Japan)*, Award, 23 RIAA 1, para 77. See further N de Sadeleer, 'The Effect of Uncertainty on the Threshold Levels to Which the Precautionary Principle Appears to be Subject', in M Sheridan & L Lavrysen (eds), *Environmental Law Principles in Practice* (Bruylant 2002) 23.

[95] See *Activities in the Area* (n 28) para 135.

[96] *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, PCA Case No 2013-19, para 957. See further MM Mbengue, 'The South China Sea Arbitration: Innovations in Marine Environmental Fact-Finding and Due Diligence Obligations' (2016) 110 AJIL Unbound: Symposium on the South China Sea Arbitration 285, 285-287.

harvesting of species that are recognized internationally as being at risk of extinction and requiring international protection'.[97]

Returning to the theme of the adjudicative treatment of scientific data in the application of legal principles, it may be tempting to consider that the *South China Sea* tribunal would have been well-served by on-site access to observe facts 'on the ground' in that disputed area.[98] In *Gabčíkovo–Nagymaros* as well, arrangements were made for a site visit by the Court between the first and second rounds of oral proceedings, in which setting the Court received 'technical explanations given by the representatives who had been designated for the purpose by the parties'[99] in the ICJ's first-ever site visit by the Members of the Court.[100] Yet despite adding this site visit to what it viewed as an impressive amount of scientific material placed on record by the parties – and stating that it had given careful attention thereto – the Court referenced this evidence only briefly in its Judgment.[101] It concluded that there was no need for it to determine which of the parties' scientific perspectives was better founded.[102] It may thus be worth reflecting on whether the experience of *Gabčíkovo–Nagymaros* should serve as an endorsement or an indictment of the value of ICJ site visits (a practice not adopted in *Pulp Mills*), inasmuch as one's answer to this question may reflect his or her view on the judicial treatment of scientific observations more broadly.

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97 *South China Sea* (n 96) para 956. However, this treatment of the principle of due diligence may be contrasted with the Final Award's omission of the precautionary principle.

98 For a pre-*South China Sea* analysis of such issues with reference to *Gabčíkovo–Nagymaros*, see CE Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011) 107, 132.

99 *Gabčíkovo–Nagymaros* (n 1) para 10.

100 In *Corfu Channel*, the site visit was conducted by the Court's appointed experts. See *Corfu Channel (United Kingdom v. Albania*), *I.C.J. Reports 1949*, p. 2, 142, Annex 2, Experts' Report of 8 January 1949. For the PCIJ's experience in this regard, see *Diversion of Water from the Meuse (Netherlands v. Belgium)*, Judgment of 28 June 1927, PCIJ *Series A/B No 70*, 9.

101 See *Gabčíkovo–Nagymaros* (n 1) para 35.

102 ibid para 54.

6 **Conclusion**

From the foregoing discussion of prior codifications and subsequent cases, we may surmise that the terminologies of the *Gabčíkovo–Nagymaros* Judgment have – if not slowed – then at least failed to accelerate the clarification of general international environmental law. Certainly the Court is not obliged to make legal pronouncements beyond the resolution of the case before it (though one should note in this context that even the case itself remains technically unresolved, as it remains atop the Court's docket). Yet there is perhaps much to be learned from this instance of choosing to make pronouncements with deliberate obscurity.

Indeed, one may draw a direct line from the ambiguous 'new norms and standards' heralded in paragraph 140 of the Judgment to the General Assembly's subsequent decision to address perceived lacunae in international environmental law and environment-related instruments. The adoption of that 2018 resolution demonstrates the lingering lack of clarity on the status and scope of these norms and standards.[103] Such developments within UN political bodies underscore that the Court, with each new case, retains the power to set down its pronouncements in the plainest of terms – or, to return to Wallace Stevens, '[i]n the absence of fantasia […] in the thing Itself'.[104]

[103] See UN General Assembly resolution 72/277, *Towards a Global Pact for the Environment*, A/RES/72/277 (10 May 2018), paras 1-2. On the potential value of such an instrument in clarifying a particular corpus of environmental norms, see B McGarry, 'The Global Pact for the Environment: Freshwater and Economic Law Synergies' (2018) 21 Journal of International Economic Law 745.

[104] Stevens (n 2).