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UNDER THE DANUBE CANOPY: THE FUTURE OF INTERNATIONAL WATERWAY LAW

MICHAEL A. HYMAN*

INTRODUCTION

Regulating the use of international waterways is a source of substantial conflict among a great many nations. The process of creating a uniform set of laws to govern international waterways is stymied by contradictory ideologies of autonomous states. Why is it so important to regulate these waterways? The first and foremost reason is that a river is a "hydrologic unit."¹ This means that water use upstream has a direct effect downstream, and vice versa.² To illustrate this point, consider the effect of substantial irrigation and hydroelectric projects by upstream inhabitants (upper riparians). These projects will reduce the flow to those people living and working downstream (lower riparians).³ Conversely, if lower riparians were to construct a dam to regulate water flow, the rate of water flow upriver would be affected.⁴

To describe this circumstance in economic terms, international water resources are considered to be "common-pool" resources.⁵ Purely public goods are goods that are nonexcludable⁶ and nonrival.⁷ On the other end of the spectrum are private goods, which are fully excludable and rival.⁸ In between purely public and purely private goods, two other types of goods exist: impure public goods, which are nonexcludable yet

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¹ See Jonathan E. Cohen, *International Law and the Water Politics of the Euphrates*, 24 N.Y.U. J. INT'L L. & POL. 502, 505 (1991).

² See *id.*

³ See *id.* at 505-06.

⁴ See *id.* at 506.

⁵ See Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384, 388 (1996).

⁶ See *id.* "They are nonexcludable because it is impossible or prohibitively costly to prevent outsiders from gaining access to them." *Id.*

⁷ See *id.* "They are nonrival because a user's consumption of a unit of that good does not detract from its benefits to others. Thus, the neighbor who cleans the sidewalk provides a public good that each pedestrian enjoys without diminishing the enjoyment of others." *Id.*

⁸ See *id.* "The user may prevent others from using it and the consumption of any part detracts from the whole." *Id.*

rival; and common-pool resources, which are partially excludable and rival.⁹ This note is concerned only with the latter. International rivers and waterways fit within the common-pool resource classification: the benefits of common-pool resources "are partially excludable . . . [N]onriparians have no access to the water resources and cannot benefit from them directly. Their benefits are also rival, since any unit of water diverted or polluted by one riparian reduces the amount available to the other riparians or its quality."¹⁰

In other words, upper riparians may exclude lower riparians from the waterway, and upper riparians also may use the waterway in a manner that is harmful to downstream uses or users.¹¹ Thus, international waterways are susceptible to the "tragedy of the commons"¹² problem, in which each of the users receives direct benefits from its unilateral act, while the costs are spread to all.¹³

The danger that waterway use by one state will have a detrimental effect upon another state is heightened as one considers that as the world population grows, the supply of international river water will be diminished.¹⁴ Increased use of freshwater leaves those downstream with less water to use.¹⁵ In addition, massive industrial growth, especially in developing countries, will lead to an increased danger of pollution.¹⁶ Taken together, these factors demonstrate the importance, and indeed, the necessity, of meaningful regulation of international waterways.¹⁷

This note describes the effects of growing problems, such as

⁹ See *id.*

¹⁰ *Id.*

¹¹ See *id.*

¹² Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968). The "tragedy of the commons" is the economic principle that demonstrates that self-interests overpower community interests in regards to a common area owned by all. See *id.*

¹³ See Benvenisti, *supra* note 5, at 388.

¹⁴ See Gabriel Eckstein, *Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute over Gabčíkovo-Nagymaros*, 19 SUFFOLK TRANSNAT'L L. REV. 67, 68-70 (1995).

¹⁵ See Patricia K. Wouters, *An Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation*, 36 NAT. RESOURCES J. 417, 417-18 (1996).

¹⁶ See David J. Lazerwitz, *The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses*, 1 IND. J. GLOBAL LEGAL STUD. 247, 247 (1993); Niveen Tadros, Comment, *Shrinking Water Resources: The National Security Issue of this Century*, 17 NW. J. INT'L L. & BUS. 1091, 1091 (1997); Eckstein, *supra* note 14, at 68-69.

¹⁷ See Lazerwitz, *supra* note 16, at 248; Tadros, *supra* note 16, at 1092.

population growth, upon the use of shared waterways; describes the problems of enforcement and implementation of environmental international law; analyzes the impacts of the International Court of Justice's recent decision concerning the on-going dispute between Hungary and Slovakia over the common use of the Danube River; and argues that the strict sovereignty-based ideologies of nations, if perpetuated, will prevent efficient resolutions of international disputes regarding waterway usage.

Part I follows the evolution of customary international watercourse law and describes some of the competing ideologies regarding these watercourses. Part I begins with a brief history of international watercourse law beginning with Roman Law. Then, the modern approaches to this subject, namely the sovereignty and integrity theories, are examined and scrutinized. This section then delves into the present leading theory, a theory labeled *sic utere*,¹⁸ and examines the sources that secure *sic utere*'s role in international law.

Part II describes the four prominent methods available to solve international watercourse disputes and identifies the strengths and weaknesses of each approach. The four methods to be discussed are: (1) general/customary international law; (2) multilateral treaties and negotiation; (3) international institutions; and (4) third party settlement. The three principal systems of third party settlement that will be scrutinized are mediation, arbitration, and adjudication.

Part III reviews a recent dispute involving international waterway law, the Gabčíkovo-Nagymaros project dispute between Slovakia and Hungary. This discussion illustrates how well some of the dispute resolution methods addressed in Part II actually work, and what direction international watercourse law is heading in the future.

I. THE EVOLUTION OF INTERNATIONAL WATERWAY LAW

A. *Origins of Customary International Waterway Law*

Roman law showed little interest in the direct management of

¹⁸ *Sic utere tuo ut alienum non laedas* is a common law principle that "one should use his own property in such a manner as not to injure others." Lazerwitz, *supra* note 16, at 251 n.16 (quoting *Chapman v. Bennett*, 169 N.E. 2d 212, 214 (1960)). It generally stands for the proposition that a nation must not use resources within its territory in a fashion that adversely affects the rights of other nations. See Eckstein, *supra* note 14, at 75.

water resources.¹⁹ The role of the state was basically limited to protecting navigation:

Any riparian owner, or anybody who could prove long-standing open use, could use the water of a stream as long as that use did not infringe upon the right of others or impair navigation. The role of the state was limited to protecting navigation, and any use that conflicted with navigation was forbidden.²⁰

"Roman law designated the air, the oceans, the seashore, running water and ocean fish as *res communes*, or as incapable of private ownership but as open to the free use of all."²¹ Thus, under Roman law, the lack of direct regulation of waterway uses left a substantial amount of power to custom in the determination of water use distribution among riparian landowners.²²

English common law did not follow the *res communes* approach of Roman law.²³ The King assumed dominion and control of waterways.²⁴ However, the *jus publicum*, or public's right of use, could not be restricted, even by the King.²⁵ English law advocated an approach that would allow a riparian owner to use the water for "ordinary purposes," such as for the needs of his livestock.²⁶ This approach was without limitation; the upper riparian owner could consume the water supply entirely.²⁷ In addition, the common law permitted water use for "extraordinary purposes" if the use was reasonable and the user restored the water to a level "substantially undiminished in volume and unaltered in character."²⁸

¹⁹ See Ludwik A. Teclaff, *Fiat or Custom: The Checkered Development of International Water Law*, 31 NAT. RESOURCES J. 45, 60 (1991).

²⁰ *Id.*

²¹ MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY 1789-1920* 17 (1987).

²² See Teclaff, *supra* note 19, at 63.

²³ See SELVIN, *supra* note 21, at 25.

²⁴ See *id.* The King had the power to order the removal of all nuisances, charter passenger ferries, and authorize construction of port facilities. See *id.* at 25-26.

²⁵ See *id.* at 26.

²⁶ See Teclaff, *supra* note 19, at 64 (citing a 1926 English Court of Chancery decision, *Attwood v. Llay Main Collieries, Ltd.*, Ch. 444, 458 (1926)).

²⁷ See *id.*

²⁸ *Id.*

The English common law doctrine promoted flexibility, but fostered unpredictability and uncertainty, as well.²⁹ In response, states west of the Mississippi River began to get more involved and issue permits to users.³⁰ States east of the Mississippi eventually began to follow suit.³¹ Thus, the common law failed to eliminate the need for administrative authorization and a system of administrative allocation of water replaced the common law.³²

American common law pertaining to the usage of waterways by the public developed from the English common law.³³ By the 1820's, differences between the American and English common law began to emerge.³⁴ One example of American deviation from English common law concerns the denial of private property ownership of rivers.³⁵ Although English law recognized that the public had a right of passage, it also allowed private ownership of river banks and river beds.³⁶ American courts, perhaps due to economic considerations and geographic differences between the U.S. and England, deviated from English common law and ruled that rivers could not be privately owned.³⁷ However, despite this example and similar deviations from English common law, a large portion of American common law and modern customary practices grew from the attitudes and ideologies underlying English common law.³⁸

While this section has dealt with national law, it should be noted that international law has followed a similar development in relation to international waterways.³⁹

²⁹ See *id.*

³⁰ See *id.* at 64-65.

³¹ See *id.*

³² See Teclaff, *supra* note 19, at 65.

³³ See SELVIN, *supra* note 21, at 26-27.

³⁴ See *id.* at 31.

³⁵ See *id.* at 32-36.

³⁶ See *id.* at 33. "The riparian proprietor ... held the exclusive right of fishery to the center of the stream, and was entitled to compensation for damages to the enjoyment of his property caused by construction designed to improve navigation." *Id.*

³⁷ See *id.* at 32-36.

³⁸ See *id.* at 38.

³⁹ See Albert E. Utton, *International Water Quality Law*, in *INTERNATIONAL ENVIRONMENTAL LAW* 154, 158 (Ludwik A. Teclaff & Albert E. Utton eds., 1974).

B. *Modern Waterway Law: Balancing the Tension Between Absolute Sovereignty and Absolute Territorial Integrity*

Modern international waterway law stems from the consideration of two divergent theories of waterway usage, absolute territorial sovereignty and absolute territorial integrity.⁴⁰

Absolute territorial sovereignty theory, often asserted by upper riparian states, insists that the state is the "master of its own territory," and may use the watercourse as necessary without regard for any other riparian state.⁴¹

This theory is often referred to as the Harmon Doctrine.⁴² The Harmon Doctrine emanates from a U.S.-Mexico dispute over the Rio Grande.⁴³ The controversy arose in the late nineteenth century, when Mexico alerted the United States that several Mexican communities were on the brink of annihilation because of the United States' practice of seizing water from the Rio Grande.⁴⁴ U.S. Attorney General Judson Harmon was called upon by the U.S. Secretary of State, Richard Olney, to determine the legal rights of the United States.⁴⁵ His conclusion was that "the rules, principles and precedents of international law impose no liability or obligation on the United States" to allow the river to flow unhindered into Mexico.⁴⁶ Thus, it is understandable that Harmon's opinion, declaring the United States' right of territorial sovereignty entitled it to use the water resources within its territory without limitation, became intertwined with absolute sovereignty.⁴⁷

This theory of absolute sovereignty has, for the most part, been

⁴⁰ See Eckstein, *supra* note 14, at 73-75.

⁴¹ See Cohen, *supra* note 1, at 522. See also, Tadros, *supra* note 16, at 1101-02.

⁴² See Stephen C. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RESOURCES J. 965, 967 ("This opinion has become so synonymous with the doctrine of absolute territorial sovereignty that it now stands as the doctrine's cornerstone, if not its entire foundation"). For a general history of the origin of the Harmon Doctrine, see *id.* at 968-97.

⁴³ The Rio Grande flows roughly 1,885 miles, 1,240 of which form the border between the United States and Mexico. See *id.* at 968 (citing 24 ENCYCLOPEDIA BRITANNICA 1023 (1987)).

⁴⁴ See *id.* at 969.

⁴⁵ See *id.* at 973.

⁴⁶ 21 Op. Att'y Gen. 274, 283 (1895). See Cohen, *supra* note 1, at 522; McCaffrey, *supra* note 42, at 984; Clyde Haberman, *Sanliurfa Journal: Dam is Watering Hope for a New Fertile Crescent*, N.Y. TIMES, Mar. 30, 1990, at A4.

⁴⁷ See McCaffrey, *supra* note 42, at 979.

rejected as impractical, given its potential effect upon other nations.⁴⁸ One possible explanation for the softening of sovereignty is that the “traditional ability of national governments to control events within their territorial boundaries is being challenged by major new transboundary forces such as transnational corporations, economic globalization and trade, international crime and the rise of global communications and other technologies.”⁴⁹ In any case, the general perception of river management has clearly shifted from exploitation of the water to sustainable development.⁵⁰

Directly opposed to the absolute sovereignty ideology is the theory of absolute territorial integrity. This theory advocates the belief that a riparian state may not utilize an international river in a way that will harm another riparian state.⁵¹ One can easily see why this is the favored theory among lower riparians. Like absolute sovereignty, absolute integrity “fail[s] to recognize reciprocal sovereign rights or shared interests.”⁵² Accordingly, this theory has also received a great deal of scholarly criticism and has been rejected due to its inequitable distribution of responsibility and benefits.⁵³

C. Compromise: Limited Territorial Sovereignty and Limited Integrity of the River (Sic Utere)

Modern international waterway law centers around a compromise between the absolute sovereignty and absolute territorial integrity theorems.⁵⁴ This compromise falls under the legal principle of *sic utere*.⁵⁵ Under this principle, a state is obligated not to use, or allow the use of, its

⁴⁸ See *id.* at 1007 (“States do not, and cannot, exist in isolation”); Tadros, *supra* note 16, at 1102.

⁴⁹ William R. Moomaw, *International Environmental Policy and the Softening of Sovereignty*, 21 FLETCHER F. WORLD AFF. 7, 7 (1997).

⁵⁰ See Joanne Linnerooth-Bayer & Susan Murcott, *The Danube River Basin: International Cooperation or Sustainable Development*, 36 NAT. RESOURCES J. 521, 522 (1996) (referring specifically to the Danube River).

⁵¹ See Cohen, *supra* note 1, at 523.

⁵² Melanne Andromecca Civic, *A New Conceptual Framework for Jordan River Basin Management: A Proposal for a Trusteeship Commission*, 9 COLO. J. INT’L ENVTL. L. & POL’Y 285, 295 (1998) (citing D. CAPONERA, *THE LAW OF INTERNATIONAL WATER RESOURCES* 7 (1980)).

⁵³ See *id.* See generally, William L. Griffin, *The Use of Waters of International Drainage Basins Under Customary International Law*, 53 AM. J. INT’L L. 50, 70 (1959).

⁵⁴ See Eckstein, *supra* note 14, at 75.

⁵⁵ See *supra* note 18 and accompanying text.

territory for acts contrary to the rights of other states.⁵⁶

If interpreted literally, *sic utere* would seem to advocate the absolute integrity approach. However, in practice, *sic utere* has not been applied in such an inflexible manner.⁵⁷ Instead, the common law recognizes *sic utere* as a broad principle that demands that the user must balance the negative effects of his actions against the benefits obtained.⁵⁸ In other words, the substance of *sic utere* is a delicate conflict between the "equitable utilization" and "no harm" rules.

"Equitable utilization" can be considered as a utilitarian cost-benefit analysis—each riparian is entitled to a reasonable and equitable share in the beneficial uses of an international water resource.⁵⁹ Thus, equitable utilization allows detrimental use of water resources so long as the benefits of the activity outweigh the harm caused by the activity.⁶⁰ The "no harm" rule, on the other hand, is a *per se* rule that obligates each state not to cause harm to another.⁶¹

The two principles generate conflict because under equitable utilization, a use that causes significant harm may be permitted in certain instances, whereas the no harm rule disallows any use that significantly harms another.⁶² The role of international law is to clear up this conflict and provide guidance for state planning regarding the use of international waterways.⁶³

Notwithstanding the great burden of integrating these two principles, both the International Law Association (ILA)⁶⁴ and the

⁵⁶ See Eckstein, *supra* note 14, at 75.

⁵⁷ See Utton, *supra* note 39, at 158.

⁵⁸ See *id.*

⁵⁹ See Eckstein, *supra* note 14, at 78-79.

⁶⁰ See *id.*

⁶¹ See Julio Barberis, *The Development of International Law of Transboundary Groundwater* 31 NAT. RESOURCES J. 167, 170, n.5 (1991).

⁶² See Wouters, *supra* note 15, at 420.

⁶³ See generally Charlotte Elizabeth Glinka, Note, *Global Imperative—An Effective System of Resolution Techniques for International Environmental Disputes: The Canadian-U.S. Example*, 14 SUFFOLK TRANSNAT'L L. REV. 127 (1990).

⁶⁴ Established in 1873, the ILA is a non-governmental organization of legal experts. See Michelle R. Sergeant, *Comparison of the Helsinki Rules to the 1994 U.N. Draft Articles: Will the Progression of International Watercourse Law Be Dammed?*, 8 VILL. ENVTL. L.J. 435, 447 (1997). In 1954, the ILA formed a committee to study the law regarding transboundary water resources, which led to the adoption of the Helsinki Rules. See *id.*

International Law Commission (ILC)⁶⁵ have attempted to codify the *sic utere* rule.

The ILA's Helsinki Rules⁶⁶ require states to "take all appropriate measures to prevent, control and reduce any transboundary impact."⁶⁷ The term "transboundary impact" is defined broadly.⁶⁸ The ILC's Draft Articles⁶⁹ attempt to integrate the "equitable utilization" and "no harm" principles through two separate articles.⁷⁰ Article 5 maintains that states shall "utilize an international watercourse in an equitable and reasonable manner."⁷¹ Article 7 contains the "no harm" provision: "Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States."⁷² Although these Articles seem to conflict, Article 7 appears to control,⁷³ rendering equitable utilization merely a factor to be considered in

⁶⁵ The ILC was established in 1947 by the United Nations General Assembly to serve the purpose of "encouraging the progressive development of international law and its codification." Stephen McCaffrey, *Is Codification in Decline?*, 20 HASTINGS INT'L & COMP. L. REV. 639, 640 (1997) (citing G.A. Res. 174(II), U.N. Doc. A/519 (1948) and quoting U.N. Charter art. 13, para. 1).

⁶⁶ See United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312 [hereinafter Helsinki Rules].

⁶⁷ *Id.* at 1315.

⁶⁸ See *id.* at 1314-15. "Transboundary impact" is defined as:

[A]ny significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity, the physical origin of which is situated wholly or in part within an area under the jurisdiction of a Party, within an area under the jurisdiction of another Party. Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors.

Id.

⁶⁹ See Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 197, U.N. Doc. A/49/10 (1994) [hereinafter Draft Articles].

⁷⁰ See Wouters, *supra* note 15, at 421-23.

⁷¹ Draft Articles, *supra* note 69, art. 5(1).

⁷² *Id.* art. 7(1).

⁷³ See Wouters, *supra* note 15, at 423. Violation of due diligence occurs if the State knows or ought to know that the "particular use of an international watercourse would cause significant harm to other watercourse States." *Id.*

consultations where significant harm has occurred.⁷⁴ Thus, under the Draft Articles, a state may utilize a waterway only if it knows or ought to know that such use will not cause significant harm to another state.⁷⁵ Other multi-lateral agreements also recognize the principle of *sic utere*, including Principle 21 of the Stockholm Declaration⁷⁶ and Principle 2 of the Rio Declaration.⁷⁷

This notion of *sic utere* has been recognized and upheld in many international adjudication and arbitration cases, such as the *Island of Palmas* case,⁷⁸ the *Trail Smelter* case,⁷⁹ and the *Corfu Channel* case.⁸⁰ In *Trail Smelter*, the United States brought suit against Canada for damage to U.S. crops resulting from air pollution from a Canadian smelting operation in British Columbia.⁸¹ By agreement of the parties, the case was submitted to an arbitration tribunal, which found that:

[U]nder the principles of international law . . . 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

⁷⁴ See *id.* at 423-24.

⁷⁵ See *id.* at 423.

⁷⁶ The Stockholm Declaration notes:

States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416, 1420 [hereinafter Stockholm Declaration].

⁷⁷ United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874, 876 [hereinafter Rio Declaration].

⁷⁸ *Island of Palmas* (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829, 839 (1928).

⁷⁹ *Trail Smelter* (U.S. v. Canada), 3 R. Int'l Arb. Awards 1905, 1965 (1938 and 1941).

⁸⁰ *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9); see Martin D. Gelfand, Note, *Practical Application of International Environmental Law: Does it Work Atoll?*, 29 CASE W. RES. J. INT'L L. 73, 77 (1997).

⁸¹ See Farah Khakee, Comment, *The North American Free Trade Agreement: The Need to Protect Transboundary Water Resources*, 16 FORDHAM INT'L L.J. 848, 852 (1992-1993).

established by clear and convincing evidence.⁸²

This decision has been read as an acknowledgement of the obligation between nations to protect transboundary resources.⁸³

Trail Smelter also demonstrates another facet of *sic utere*, the requirement that the harm caused must be “significant”⁸⁴ or “substantial,”⁸⁵ meaning that the “injury must have a significant and consequential effect upon public health, economic productivity, or the environment of another state.”⁸⁶ The relevant language in *Trail Smelter* requires a case of “serious consequence” and that “the injury [be] established by clear and convincing evidence.”⁸⁷

The *Island of Palmas* case also evinces the acceptance of the *sic utere* principle in customary international law. This case arose out of a dispute between the United States and the Netherlands regarding the sovereign rights over the island of Palmas, off the Philippine coast.⁸⁸

The *Corfu Channel* case involved a dispute between Great Britain and Albania over Albania’s placement of mines in the Corfu Channel.⁸⁹ The International Court of Justice (ICJ) held that customary international law dictates that ships of all nations have the right to navigate “through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, *provided that the passage is innocent*.”⁹⁰ The italicized portion of the excerpt demonstrates that the ICJ took the ‘no harm’ rule into account while balancing the asserted interests of the parties.

⁸² *Trail Smelter*, 3 R. Int’l Arb. Awards at 1965.

⁸³ See Khakee, *supra* note 81, at 852.

⁸⁴ Draft Articles, *supra* note 69, at 236.

⁸⁵ Eckstein, *supra* note 14, at 77-78, n.33 (noting the comment to Article Ten of the Helsinki Rules provides “an injury is considered ‘substantial’ if it materially interferes with or prevents a reasonable use of the water”).

⁸⁶ *Id.* at 78.

⁸⁷ *Trail Smelter*, 3 R. Int’l Arb. Awards at 1965.

⁸⁸ See Benjamin K. Sibbett, Note, *Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea*, 21 FORDHAM INT’L L.J. 1606, 1625 (1998).

⁸⁹ See *Corfu Channel*, 1949 I.C.J. 4, 4-12 (Apr. 9); Craig J. Capon, *The Threat of Oil Pollution in the Malacca Strait: Arguing for a Broad Interpretation of the United Nations Convention on the Law of the Sea*, 7 PAC. RIM L. & POL’Y J. 117, 128 (1998).

⁹⁰ *Corfu Channel*, 1949 I.C.J. 4, 28 (Apr. 9) (emphasis added). See Capon, *supra* note 89, at 127.

In the *Lake Lanoux*⁹¹ arbitration decision, the court upheld "the sovereignty in its own territory of a State desirous of carrying out hydroelectric developments" but acknowledged "the correlative duty not to injure the interests of a neighboring state,"⁹² thus firmly establishing the principle of *sic utere* in case law.⁹³

II. SOLVING INTERNATIONAL WATERWAY DISPUTES

This section describes the four modern resolution methods available for international disputes, provides examples of modern usage of these methods, and reveals the problems and criticisms associated with these schemes.

A. Customary International Law

General or customary international law as illustrated above is an essential part of solving international waterway disputes. However, standing alone, custom is not binding on states.⁹⁴ For international custom to reach the level of law, it must satisfy the requirement of *opinio juris*, which occurs when all nations agree to be bound legally to that custom.⁹⁵ Therefore, even though *sic utere* is a widely accepted theory, the persistence of some countries in clinging to the principles of absolute sovereignty and absolute territorial integrity, among other theories, prevents this principle from becoming binding international law.⁹⁶

B. Multilateral Treaties and Negotiation

As noted above, many multilateral treaties have promoted the use

⁹¹ Lake Lanoux Arbitration (Spain v. Fr.), 24 I.L.R. 101 (Arbitral Trib. 1957) [hereinafter Lake Lanoux].

⁹² *Id.* at 111-12.

⁹³ See Lazerwitz, *supra* note 16, at 251-52.

⁹⁴ See David Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, Or Vice Versa?*, 29 GA. L. REV. 599, 603, 649 (1995).

⁹⁵ See Khakee, *supra* note 81, at 875. Implicit in the notion of *opinio juris* are two conditions: The collective actions amount to a settled practice and that they are carried out in a manner that evidences a belief that the practice is obligatory by existing laws requiring it. See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 64 (1st ed. 1980).

⁹⁶ See Khakee, *supra* note 81, at 875.

of *sic utere*.⁹⁷ However, unless all affected parties join the agreement, its effect may be limited. For example, the ILA's status as an unofficial organization undermines the enforceability of the Helsinki Rules.⁹⁸ The ILA's status renders its resolutions legally unenforceable in international law unless they are adopted in the form of multilateral convention or become the domestic law in the particular state.⁹⁹ The same is true for the ILC's Draft Articles.¹⁰⁰ Unlike the Helsinki Rules, however, the attention that the Draft Articles have received in the international community, "as well as the fact that they were prepared by a respected United Nations expert commission, will make it more difficult for states to ignore [the rules] or challenge their existence."¹⁰¹

Generally, the Helsinki Rules and Draft Articles "provide no binding enforcement mechanism but instead are designed to show mutual awareness of environmental concerns and to express good faith efforts to control and contain environmental damage between countries."¹⁰² States are hesitant to enter into strict binding agreements, because, in doing so, they surrender a very significant asset, discretion.¹⁰³ States are accustomed to an enormous degree of discretion, and therefore tend to avoid the risk of subverting their interests to the benefit of another state's interests.¹⁰⁴

Nonetheless, negotiations in the form of multilateral treaties or bilateral agreements are central to promote stable cohabitation among states sharing a specific resource.¹⁰⁵ It is important for the countries involved to reach an agreement that allows them to coexist peacefully.¹⁰⁶ Because of the need to coexist, an all-or-nothing ruling, even if the most

⁹⁷ See *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1496-98 (1991).

⁹⁸ See Lazerwitz, *supra* note 16, at 253.

⁹⁹ See *id.*

¹⁰⁰ See Devereaux F. McClatchey, Note, *Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters*, 25 GA. J. INT'L & COMP. L. 659, 666, 678 (1996); Astrid Boos-Hersberger, *Transboundary Water Pollution and State Responsibility: The Sandoz Spill*, 4 ANN. SURV. INT'L & COMP. L. 103, 124-25 (1997).

¹⁰¹ Stephen C. McCaffrey, *The Coming Fresh Water Crisis: International Legal and Institutional Responses*, 21 VT. L. REV. 803, 818 (1997). See also HENKIN ET AL., *supra* note 95, at 72 ("The drafts of the International Law Commission carry weight because of the high reputation of that body and of the jurists that make it up.").

¹⁰² Glinka, *supra* note 63, at 130-31.

¹⁰³ See *id.* at 131-32.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at 135-36.

¹⁰⁶ See *id.*

equitable solution, may not be the best solution for the countries involved.¹⁰⁷ After all, an unsatisfied participant may turn to war before accepting an unfavorable decision.¹⁰⁸ In addition, negotiations open channels for communication between the states involved.¹⁰⁹

Multilateral agreements promote solutions to international disputes by establishing flexible guidelines that permit states to reach an agreement themselves instead of facing the risks involved with unpredictable litigation.¹¹⁰

C. *International Institutions*

Another method of international dispute resolution to be discussed is the formation of international institutions. International institutions are comprised of representatives of the states involved in the dispute.¹¹¹ These institutions are often made up of a team of scientists and low-level politicians of the affected states.¹¹² The interaction between the individuals of the separate states, standing alone, is a possible benefit.¹¹³ This interaction may "depoliticize cooperation and break down political barriers to it."¹¹⁴

The problem of state reluctance to concede its sovereign powers is not an issue for international institutions. The true effectiveness of international institutions lies in the establishment of communication, mutual monitoring, and interaction between the states.¹¹⁵ These institutions can also provide a benefit by disseminating information to the public.¹¹⁶ This process allows public pressure to become a key factor in domestic decision making.¹¹⁷ While the addition of more public involvement may seem to be a desirable end, in practice it may be an impediment to governmental endorsement of international institutions. This presents problems similar to those surrounding strict enforcement

¹⁰⁷ *See id.*

¹⁰⁸ *See Glinka, supra* note 63, at 135, 136 n.48.

¹⁰⁹ *See id.* at 136; Benvenisti, *supra* note 5, at 400-01.

¹¹⁰ *See Benvenisti, supra* note 5, at 402.

¹¹¹ *See id.* at 411.

¹¹² *See id.* at 412.

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *See id.*

mechanisms: the government would be sacrificing one of its critical powers, the power to decide what information the public needs and does not need to know.

D. *Third Party Settlement*

The *Trail Smelter* and *Lake Lanoux* Arbitration cases¹¹⁸ are examples of the contribution third party settlements have advanced. This note discusses three main forms of third party international dispute resolution techniques: (1) mediation; (2) arbitration; and (3) adjudication.

1. *Mediation*

Mediation is similar to negotiation, but includes an “independent and objective third party who guides the parties toward agreement.”¹¹⁹ The purpose of mediation is to bring the parties to a consensus on crucial and significant issues.¹²⁰ Because the mediator is independent and objective, communications can be more open.¹²¹ However, communications may break down because states will be reluctant to reveal all relevant information unless the state is certain the information cannot be used against it in later proceedings.¹²² Another drawback of mediation is that it is not binding.¹²³ The parties cannot be forced to agree on a specific issue.¹²⁴

2. *Arbitration*

Arbitration may facilitate a dispute resolution if negotiation or mediation fail to bring about an agreement.¹²⁵ Arbitration is very similar to mediation in that a third party is introduced to facilitate agreement between the parties.¹²⁶ However, an arbiter’s decision is binding upon the

¹¹⁸ See *supra* notes 79-87, 91-93 and accompanying text.

¹¹⁹ Glinka, *supra* note 63, at 138.

¹²⁰ See *id.* at 138-39.

¹²¹ See *id.* at 139.

¹²² See Michael F. Hoellering, *World Trade to Arbitrate or Mediate—That is the Question*, DISP. RESOL. J., Mar. 1994, at 67, 68.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See Glinka, *supra* note 63, at 140.

¹²⁶ See BLACK’S LAW DICTIONARY 105 (6th ed. 1990).

parties.¹²⁷

The arbiter is normally a member of an official institution that offers its services to businesses (and countries).¹²⁸ These institutions can be categorized into different groups: public and private; national and international; and general and specialized institutions.¹²⁹ The success of these arbitration institutions has varied.¹³⁰

Arbitration has a key advantage in that if it is used often, the resulting decisions establish a source of legal principles and precedents.¹³¹ Other advantages include: enforceability of arbitral awards,¹³² impartiality of decision maker,¹³³ confidentiality,¹³⁴ technical expertise,¹³⁵ discovery,¹³⁶ expense,¹³⁷ familiarity,¹³⁸ predictability,¹³⁹ and party participation.¹⁴⁰ However, arbitration does have two notable disadvantages. One

¹²⁷ See *id.*

¹²⁸ See RENE DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 38 (1985).

¹²⁹ See *id.* at 40-48.

¹³⁰ See *id.*

¹³¹ See Glinka, *supra* note 63, at 143; Jean Heilman Grier, *Providing for Arbitration in International Business Transactions*, in *THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT*, at 9, 11 (PLI Corporate Law and Practice Course Handbook Series No. 863, 1994).

¹³² See Grier, *supra* note 131, at 11 ("Arbitration awards can be challenged under very limited circumstances."); James H. Carter, *Dispute Resolution and International Agreements*, in *INTERNATIONAL COMMERCIAL AGREEMENTS*, at 405, 409 (PLI Commercial Law and Practice Course Handbook Series No. 703, 1994) ("The resulting award will be subject to relatively little risk of being set aside or altered by a court.").

¹³³ See Grier, *supra* note 131, at 11.

¹³⁴ See *id.* ("Arbitrations and awards are normally private; court proceedings and judgments are public.").

¹³⁵ See *id.* ("Parties may choose arbitrators with technical backgrounds."); *cf.* Carter, *supra* note 132, at 409 ("[A]t least in theory, the arbitrators will have applicable specialized commercial and legal expertise.").

¹³⁶ See Grier, *supra* note 131, at 11 ("Because discovery is limited in an arbitration, it is less burdensome.").

¹³⁷ See *id.* ("Arbitration is usually less expensive than litigation"); *cf.* Carter, *supra* note 132, at 410 ("There are usually no costly depositions in arbitration, reducing costs somewhat, but since arbitrators must be paid, the cost may be ultimately as high as litigation (or even higher).").

¹³⁸ See Grier, *supra* note 131, at 12 ("Parties are often unfamiliar with foreign legal systems.").

¹³⁹ See Carter, *supra* note 132, at 409 ("The dispute will be resolved in one place and not by a race to judgement in the courts of two nations.").

¹⁴⁰ See *id.* ("The procedures often are shaped by the parties as well as the arbitrators, rather than dictated by detailed rules as in litigation."). See also Hoellering, *supra* note 122, at 67.

disadvantage is that the process may be slow because the parties must agree on the specific focus of the debate and on the arbitrators themselves.¹⁴¹ The second problem has been mentioned above: states are reluctant to surrender their sovereign powers to have a third party settle a dispute.¹⁴²

3. *Adjudication*

The third major form of third party dispute settlement is adjudication. The International Court of Justice (ICJ) was designed to adjudicate international disputes.¹⁴³ The ICJ is the principle judicial organ of the United Nations.¹⁴⁴ The court has jurisdiction in two possible cases.¹⁴⁵ The first type of case that the Court has jurisdiction over is "incidental matters."¹⁴⁶ This jurisdiction is derived by statute—once a country becomes a member of the United Nations or a party to the statute, that state agrees to the exercise of jurisdiction in accordance with the statute.¹⁴⁷

The second type of jurisdiction that the ICJ possesses is quite different and generates much criticism of both the Court's importance and its ability to settle disputes. This jurisdiction is called "mainline jurisdiction,"¹⁴⁸ and it differs from "incidental jurisdiction"¹⁴⁹ in that the parties involved must give their consent to ICJ jurisdiction.¹⁵⁰ In other words, the parties must agree to be bound by the Court's decision. The fact that the parties must agree to a binding decision raises the same concerns addressed above: states do not want to sacrifice their sovereignty to the "win-lose" nature of third party resolution or, in this case, the

¹⁴¹ See Glinka, *supra* note 63, at 142-43; Carter, *supra* note 132, at 411.

¹⁴² See *supra* notes 71-72, 87 and accompanying text.

¹⁴³ See Glinka, *supra* note 63, at 146.

¹⁴⁴ See Alison Raina Ferrante, *The Dolphin/Tuna Controversy and Environmental Issues: Will the World Trade Organization's "Arbitration Court" and the International Court of Justice's Chamber for Environmental Matters Assist the United States and the World in Furthering Environmental Goals?* 5 J. TRANSNAT'L L. & POL'Y 279, 306-07 (1996).

¹⁴⁵ See *id.* at 308.

¹⁴⁶ See *id.*

¹⁴⁷ See SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 21 (1995).

¹⁴⁸ Ferrante, *supra* note 144, at 308.

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* at 309.

adjudicative process.¹⁵¹

"Litigation is not designed to produce a mutually acceptable solution to the parties involved."¹⁵² Hence, most states prefer diplomatic negotiation to the risk of losing everything in one decision.¹⁵³ There are, however, several advantages to bringing a dispute before the ICJ:

Disputes can be removed from the political arena where negotiations often become bogged down. A decision by the ICJ also promises finality to the disputed issue and deflects some of the criticism from governments for unpopular or unfavorable solutions. Further, it establishes legal standards and precedents that become part of a body of international environmental law.¹⁵⁴

The first and third points of this excerpt are greatly, if not completely, correct. The first point is certainly true. The ICJ may be an excellent alternative to negotiation when the parties cannot settle their differences. The third point concerning the establishment of precedent, although not strictly accurate, may be deemed accurate through practice.¹⁵⁵ The Court is not bound by precedent, due to Article 59 of the Statute of the ICJ.¹⁵⁶ However, the Court is "likely to draw on its previous jurisprudence."¹⁵⁷

On the other hand, the assertion that "[a] decision by the ICJ also promises finality to the disputed issue and deflects some of the criticism from governments for unpopular or unfavorable solutions,"¹⁵⁸ can be attacked on both counts. Seemingly, the "deflection of criticism" aspect of the excerpt is not accurate, as the government could still be criticized for

¹⁵¹ See Glinka, *supra* note 63, at 147. See also Ferrante, *supra* note 144, at 311 ("[N]ations have been unwilling to limit their sovereignty to the compulsory jurisdiction of the Court. Nations are unwilling to consume time and resources adjudicating matters that are of secondary importance. Nor are they willing to risk adjudicating matters of primary importance in a non-domestic court.").

¹⁵² Ferrante, *supra* note 144, at 311.

¹⁵³ See *id.*

¹⁵⁴ Glinka, *supra* note 63, at 147-48.

¹⁵⁵ See Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323, 332 (1994).

¹⁵⁶ See 59 Stat. 1031, 1062; Simpson, *supra* note 155, at 332.

¹⁵⁷ Simpson, *supra* note 155, at 333.

¹⁵⁸ Glinka, *supra* note 63, at 148.

entering into an unfavorable binding third party dispute decision.¹⁵⁹ The “finality of the disputed issue” may be questioned as well.¹⁶⁰ An implied obligation that the ICJ’s decisions will be followed in good faith exists.¹⁶¹ Further, if a nation fails to comply with the decision of the Court, the matter may be referred to the UN Security Council, which will decide how to handle the matter.¹⁶²

However, this type of enforcement of ICJ decisions is not foolproof, as demonstrated in a case between Nicaragua and the United States, in which “[t]he United States refused to acknowledge the jurisdiction of the Court or to accept the decisions in the case. When the matter was referred to the Security Council, a negative vote by the United States prevented the adoption of any resolution by the Security Council.”¹⁶³ Thus, although the ICJ’s decisions are “binding” and “final,” enforcement problems exist, and states may be able to avoid compliance.¹⁶⁴ This occurrence also demonstrates another problem of enforcement. Many observers of the Court believe that the credibility of the Court is “threatened by the possibility of nonenforcement or judicial partiality.”¹⁶⁵ Thus, developing countries, for example, would seem less likely to enter into the Court’s jurisdiction for fear that the Court may be in some way partial to the developed country, and vice versa. Hence, in practice, “political factors have often determined what matters are deemed justiciable by the Court . . . [and] some issues are simply too political for resolution at the I.C.J.”¹⁶⁶

Certain limitations on the ICJ have led some to comment that “the ICJ is not well suited to resolve environmental and natural resource disputes.”¹⁶⁷ Appearances before the International Court of Justice are limited to nations, even though the groups that are the most willing and best equipped to do so may be various other agencies or international

¹⁵⁹ See Ferrante, *supra* note 144, at 311.

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at 310.

¹⁶² See *id.*

¹⁶³ *Id.*

¹⁶⁴ See *id.*

¹⁶⁵ Simpson, *supra* note 155, at 330. See, e.g., THOMAS M. FRANCK, *JUDGING THE WORLD COURT* (1986).

¹⁶⁶ Simpson, *supra* note 155, at 330.

¹⁶⁷ Paul R. Williams, *Can International Legal Principles Play a Positive Role in Resolving Central and East European Transboundary Environmental Disputes?*, 7 GEO. INT’L ENVTL. L. REV. 421, 457 (1995) [hereinafter Williams, *International Legal Principles*].

forums.¹⁶⁸ Also among the problems facing the ICJ are the complex issues concerning indispensable third parties.¹⁶⁹ Generally, the ICJ, like most judicial bodies, is hesitant to decide the merits of a case that will compromise the rights and obligations of a state whose interests are not represented in the proceedings.¹⁷⁰

In addition, the time consuming decision making process involved is especially dangerous in an environmental case, as the resource in question may be ruined in the years that it takes for the Court to reach a decision.¹⁷¹

Other alleged problems facing the Court in environmental litigation include the Court's lack of the necessary expertise to significantly resolve the issues,¹⁷² and its poor fact-finding capabilities.¹⁷³ The Court does have a legitimate concern in "opening the floodgates to participation by every individual and association interested in its proceedings."¹⁷⁴ However, environmental cases in particular involve many interests affected by the Court's decisions that are not represented by the states included in the action.¹⁷⁵ Hence, some argue that the ICJ must be more receptive to receiving information available through nongovernmental organizations and public interest groups in order to possess the full information and to "preserve the rational evolution of the law."¹⁷⁶

To illustrate the benefits and drawbacks involved in environmental litigation in the ICJ, the next section examines the Court's first major environmental dispute resolution,¹⁷⁷ a case involving a contract between Hungary and Slovakia concerning the Gabčíkovo-Nagymaros dam project.

¹⁶⁸ See Khakee, *supra* note 81, at 888; Tadros, *supra* note 16, at 1129.

¹⁶⁹ See Simpson, *supra* note 155, at 344.

¹⁷⁰ See *id.*

¹⁷¹ See Ferrante, *supra* note 144, at 312.

¹⁷² See Tadros, *supra* note 16, at 1129.

¹⁷³ See Ferrante, *supra* note 144, at 312.

¹⁷⁴ Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 624 (1994).

¹⁷⁵ See *id.* at 626.

¹⁷⁶ *Id.*

¹⁷⁷ See Andrew Kelly, *U.N. Court Decides Its First Major Case on the Environment*, HOUS. CHRON., Sept. 26, 1997, available in 1997 WL 13063359.

III. ICJ DETERMINATION OF THE DISPUTE CONCERNING THE GABCIKOVO-NAGYMAROS PROJECT

A. *Background on the Danube River and the Gabčíkovo-Nagymaros Project*

The Danube River, like all rivers, provides a valuable resource for many competing uses.¹⁷⁸ It is the major source of drinking water in all its bordering countries except Bulgaria.¹⁷⁹ It is also used for irrigation, fishing, tourism, and industry.¹⁸⁰ Its importance in industry is growing as East-West European trade booms.¹⁸¹ In addition to these uses, the Danube is in many ways, a unique aquatic ecosystem.¹⁸²

In the 1950s, Czechoslovakia and Hungary began developing a large-scale hydropower project to demonstrate the fruits of socialist cooperation.¹⁸³ The Gabčíkovo-Nagymaros Project ("G-N Project" or "project"), as it was called, was "basically a plan to divert the Danube River from its natural watercourse into a navigable artificial waterway located within the borders of Czechoslovakia."¹⁸⁴ Three dams were to be built. One would be "located at the mouth of the canal, to divert the Danube into the canal"; the second "in the mid region of the canal, to regulate water level and generate hydroelectric power"; and the third "downstream of the canal, to return the water levels to run-of-the-river and to generate additional hydroelectric power."¹⁸⁵

Czechoslovakia and Hungary signed an agreement in 1977 to go forward with the project.¹⁸⁶ However, political change in Hungary doomed the project, as Hungarian environmental groups, concerned about the

¹⁷⁸ See Linnerooth-Bayer & Murcott, *supra* note 50, at 524.

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *See id.* at 524-25.

¹⁸³ *See id.* at 526-27.

¹⁸⁴ Paul R. Williams, *International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary Concerning Construction of the Gabčíkovo and Nagymaros Dams*, 19 COLUM. J. ENVTL. L. 1, 6 (1994) [hereinafter Williams, *International Environmental Dispute Resolution*].

¹⁸⁵ *Id.*

¹⁸⁶ *See Treaty Between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks*, Sept. 16, 1977, Hung.-Czech. Rep., 1109 U.N.T.S. 236. *See also* Linnerooth-Bayer & Murcott, *supra* note 50, at 527.

project's effects, generated democratic opposition.¹⁸⁷ Hungary stopped work on its own dam in 1989 and the country's first freely elected Parliament repudiated the project altogether in 1992.¹⁸⁸ Political change was ensuing on the other side of the border as well, as Czechoslovakia divided into the Czech Republic and Slovakia.¹⁸⁹

The Slovakian government refused to accept Hungary's repudiation and went on with the project, diverting the river to feed the Gabčíkovo dam reservoir.¹⁹⁰ As a result of this action, "over a 30 mile stretch of the Danube River, which formed the border between Slovakia and Hungary, is now located in Slovakia."¹⁹¹ The effects of the diversion on the river are severe:

The Danube, which once coursed through a forest, now flows in a concrete canal. The section of the river that once marked the frontier has shriveled into a pathetic creek; water flow, the Hungarians claim, has been reduced by more than 90 percent, the fish harvest in the region has declined by 60 percent and the quality of the downstream water supply available to Hungary's farmland has been degraded by increasing concentrations of toxins in a decreasing amount of water.¹⁹²

The Hungarians claimed that Slovakia disregarded their territorial sovereignty, that their constituents' rights were jeopardized, and that the environmental damage caused by the diversion could not be tolerated.¹⁹³ The Slovaks, on the other hand, argued that the environmental damages could be mitigated by the completion of the G-N Project and other engineering methods,¹⁹⁴ and that the project was vital to Slovakia's security and self-sufficiency.¹⁹⁵ In addition, the costs would be outweighed by the gains in energy production, flood control and enhanced navigability

¹⁸⁷ See Linnerooth-Bayer & Murcott, *supra* note 50, at 527.

¹⁸⁸ See Mark Schapiro, *Unquiet Flows the Danube (Hungary Sues Slovakia Over Hydroelectric Project)*, THE NATION, Mar. 10, 1997, available in 1997 WL 8866249.

¹⁸⁹ See *id.*

¹⁹⁰ See Linnerooth-Bayer & Murcott, *supra* note 50, at 527.

¹⁹¹ *Id.*

¹⁹² Schapiro, *supra* note 188.

¹⁹³ See Linnerooth-Bayer & Murcott, *supra* note 50, at 527.

¹⁹⁴ See *id.*

¹⁹⁵ See Schapiro, *supra* note 188.

of the river.¹⁹⁶

Tensions were at their highest as Hungary and Slovakia began a “nerve-racking set of military maneuvers along the border in the fall of 1992.”¹⁹⁷ The European Union intervened and demanded that Hungary and Slovakia consent to ICJ jurisdiction over this matter.¹⁹⁸ Both States agreed to allow the Court to settle the matter due to pressure by the Union.¹⁹⁹ Without the persuasion of the Union, it is quite doubtful that Hungary and Slovakia would have agreed to consent to ICJ jurisdiction.²⁰⁰

The near-armed conflict over this matter demonstrates the length to which Hungary and Slovakia would go to defend their sovereignty. Thus, this case reinforces the point raised above that a state’s fear of diminished sovereignty will deter it from consenting to the binding jurisdiction of the ICJ.²⁰¹

B. *The ICJ and the Gabčíkovo-Nagymaros Project*

When the dispute between Slovakia and Hungary came before the ICJ, the Slovaks maintained the stance that Hungary had breached the 1977 agreement and that Slovakia was justified in going through with its provisional solution, diverting the river.²⁰² Hungary’s legal argument focused on the legality of Slovakia’s provisional solution, not on the question of breach of contract.²⁰³ Specifically, Hungary argued that Slovakia breached several treaties.²⁰⁴ Furthermore, Hungary contended that Slovakia violated Hungary’s sovereignty and territorial integrity under customary international law.²⁰⁵

¹⁹⁶ See Linnerooth-Bayer & Murcott, *supra* note 50, at 527.

¹⁹⁷ Schapiro, *supra* note 188.

¹⁹⁸ *See id.*

¹⁹⁹ *See id.* (explaining that unwillingness to consent would render the state ineligible to join the European Community and NATO).

²⁰⁰ *See id.*

²⁰¹ *See supra* notes 71-72, 87, 107 and accompanying text.

²⁰² *See Williams, International Environmental Dispute Resolution, supra* note 184, at 20.

²⁰³ *See id.*

²⁰⁴ *See id.* at 21 (relating Hungary’s contention that Slovakia “violate[d] the 1947 Paris Peace Treaty, the Danube River Convention, and a number of bilateral treaties between the former Czechoslovakia and Hungary”); Gabčíkovo-Nagymaros Project (Hung. v. Slov.), No. 92 (Sept. 25, 1997) (visited Feb. 18, 1999) <http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgment/his_ijudgment_970925_frame.htm>.

²⁰⁵ *See Williams, International Environmental Dispute Resolution, supra* note 184, at 20-21.

On September 25, 1997, the ICJ delivered its ruling.²⁰⁶ The Court found that "Hungary had not been entitled to suspend and subsequently abandon in 1989 its part of the works in the dam project laid down in the treaty."²⁰⁷ However, the Court also found that although "Czechoslovakia had been entitled to proceed in November 1991 to [prepare its plan to divert the river] as an alternative provisional solution," it was not "entitled to put [the provisional solution] into operation from October 1992."²⁰⁸ Furthermore, the ICJ also decided that unless the parties agreed otherwise, Hungary was required to compensate Slovakia for the damages sustained by Czechoslovakia and Slovakia due to the suspension and abandonment of the project; and Slovakia was required to compensate Hungary for damages sustained due to Slovakia's "provisional solution."²⁰⁹

The Court ordered Hungary and Slovakia to negotiate in good faith and take all measures to ensure the achievement of the objectives of the treaty.²¹⁰ New norms and standards, developed over the two decades after the agreement, must be taken into account.²¹¹ Thus, the States must look afresh at the effects on the environment and devise a solution that will be amicable to Hungary, Slovakia, as well as the environment.²¹²

The Court's ruling essentially places the duty back on Hungary and Slovakia to negotiate a settlement, a process that has failed once before.²¹³ These negotiations differ quite a bit from the previous attempt, for the Court's ruling cleared up many issues of disagreement between the parties and made certain legal determinations binding.²¹⁴

However, this does not mean that Hungary and Slovakia will easily reach an agreement. In fact, indications are that the parties remain "far apart" after three rounds of talks.²¹⁵ In any case, a settlement to this

²⁰⁶ See Kelly, *supra* note 177.

²⁰⁷ *Modern Environmental Law Applicable to 1977 Treaty*, TIMES (London), Oct. 31, 1997, at 37, available in 1997 WL 9239616. See *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), *supra* note 204.

²⁰⁸ *Modern Environmental Law Applicable to 1977 Treaty*, *supra* note 207.

²⁰⁹ See *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), *supra* note 204.

²¹⁰ *Modern Environmental Law Applicable to 1977 Treaty*, *supra* note 207.

²¹¹ See *id.*

²¹² See *id.*

²¹³ See Linnerooth-Bayer & Murcott, *supra* note 50, at 527; *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), *supra* note 204.

²¹⁴ See *Modern Environmental Law Applicable to 1977 Treaty*, *supra* note 207.

²¹⁵ See *Another Round of Talks on Gabcikovo Fails*, CZECH NEWS AGENCY, Mar. 10, 1999, available in 1999 WL 5472945 (relating that Slovakia and Hungary have completely different interpretations of the Court's ruling).

dispute does not appear to be in the near future.²¹⁶ This fact exemplifies the criticism of the time consuming nature of the Court: a significant chance exists that substantial damage will occur before the dispute is resolved.²¹⁷

Although the problems alluded to above persist, many encouraging signs have emerged from this case. The Court demonstrated its resourcefulness, namely by sifting through court filings exceeding 500 volumes²¹⁸ and executing its first "site visit" ever.²¹⁹ The Court gave weight to the ILC's development of international waterway law by recognizing some of the Commission's draft articles on state responsibility.²²⁰

The Court potentially made itself a more attractive solution for disputing states by accepting the Court's special role in Hungary and Slovakia's agreement.²²¹ The Court continued its development of its role as a "partner in preventive diplomacy" as well as its more well-known role of a judicial "last resort."²²² In other words, the Court resolved the legal aspects of the dispute, yet allowed Hungary and Slovakia the space to negotiate and therefore retain some of the sovereignty states so dearly crave.²²³

IV. CONCLUSION

One of the many important lessons to take from the Gabčíkovo-Nagymaros case is that the role of negotiation is still the principal system used to solve international disputes. States rigorously assert their sovereignty. While forums for third party resolution such as arbitration and adjudication are developing and growing in popularity, states remain reluctant to use these tools because they involve the sacrifice of a great deal of state autonomy.

²¹⁶ See *id.*

²¹⁷ See Williams, *International Legal Principles*, *supra* note 167, at 457.

²¹⁸ See UN: *Budget, Staff Cuts Put Strain on Int'l Court of Justice, Court President Tells General Assembly*, M2 PRESSWIRE, Oct. 28, 1997, available in 1997 WL 15141216 (explaining that sifting through the volumes "placed a considerable burden on the Court's tiny translation services").

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ See *id.*

²²² *Id.*

²²³ See *id.*

International laws, such as those regarding waterways, reinforce the predominance of negotiation because they are "soft," or in other words, they are general in such a way that encourages settlement between the parties involved. Strict, or "hard," law would frustrate negotiation as the law would be clearly defined.

In the international setting, a mutually beneficial decision between two sovereign states is much more desirable than hard rules that leave one state sulking. The goal is to foster peace between nations as well as solving the dispute itself. States that are unhappy with the outcome of hard rules may more be tempted to resist compliance, and the strife would continue.

Negotiations will break down at times. They are far from the "answer." However, the International Court of Justice demonstrated its flexibility in the Gabčíkovo-Nagymaros case by acting essentially as a tool of negotiation. The Court in reality solved pressing legal disagreements, but left the "decision" itself to be worked out by Slovakia and Hungary. It remains to be seen whether this case will be settled amicably and in time to avoid permanent damage to the fragile ecosystem and the overall environment of the Danube region.

Until states relax their claims to sovereignty in order to attain some specific international goal, such as universal rules governing international waterways, negotiation will dominate international dispute resolutions. The ICJ, recognizing a chance to make a difference, did what it could to promote this process.