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International Courts versus Compliance Mechanisms through the Lens of the *Gabčíkovo–Nagymaros* and *Bystroe Canal* Cases

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4.1 Introduction

Recent developments in international environmental law are increasingly characterized not only by the concern to ensure the effectiveness of existing international environmental obligations, but also by a growing awareness of the need to adopt a comprehensive and integrated approach to the management of natural resources. The latter implies the consideration of environmental protection as a collective interest, having due regard to the interdependence between local and global ecosystems, on the one hand, and to the integration of community legal interests into the management of natural resources shared by two or more States, on the other.

Non-compliance mechanisms (NCMs) are generally assumed to be a better mechanism than judicial settlements for achieving both the abovementioned aims. This chapter intends to assess the correctness of this assumption through the analysis and comparison of two cases, which are characterized by some common features: the *Gabčíkovo–Nagymaros* (*G/N*) and the *Bystroe Canal* cases. Both relate to the planning of great infrastructure projects (the construction of a dam and a canal, respectively) with a possible environmental impact on the same water system (the River Danube and the Danube Delta, respectively). Both gave rise to international disputes, that, despite a judgment of the International Court of Justice (ICJ) (in the *G/N* case)[1] and the triggering of

[1] ICJ, Case concerning the *Gabčíkovo–Nagymaros Project* (*Hungary v Slovakia*), judgment of 25 September 1997 (hereinafter: ICJ Judgment), ICJ Reports 1997, 7.

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non-compliance procedures (NCPs) under the Espoo[2] and the Aarhus Conventions[3] (in the *Bystroe Canal* case),[4] are still pending or have remained substantially unsettled. Accordingly, certain lessons may be learned from an analysis of these proceedings.

This chapter will compare the approaches adopted by the ICJ in the *G/N* case and by competent monitoring bodies dealing with the *Bystroe Canal* case, with the aim of evaluating their respective contributions to: balancing the Parties' conflicting interests; stimulating a meaningful and fruitful co-operation of the Parties towards an agreed solution; and integrating the interests of the Parties concerned with the interests of other States, individuals or group of individuals and the global environment. Some remarks will follow on the lessons learned from the two cases, drawing some general conclusions on the effective advantages of the mechanisms employed in each case.

4.2 The *Gabčíkovo–Nagymaros* Case

The ICJ judgment on the *G/N* case is one of the ICJ's decisions most quoted and debated by international environmental scholars. Suffice here to recall that the Parties to the dispute – Hungary and Slovakia – strongly disagreed on the implementation of a bilateral treaty, concluded by Czechoslovakia and Hungary in 1977, that provided for a joint investment for the construction of 'a single and indivisible' barrage system on the Danube River[5] consisting of two systems of locks: one at Gabčíkovo (on the Czech side) and one at Nagymaros (on the Hungarian territory).[6]

Divergences of the Parties in the implementation of the 1977 Treaty emerged from the very beginning. While Czechoslovakia was determined to pursue the project, Hungary was very reluctant. In particular, the latter contended that the aquatic environment of the Danube, the water volume and quality and the biodiversity of the region risked being severely jeopardized by the project.[7] After the suspension (and subsequently, the abandonment) of the works by Hungary in 1989 and the undertaking

[2] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, entered into force 10 September 1997, 1989 UNTS 309.

[3] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, entered into force 30 October 2001, 2161 UNTS 447.

[4] See Section 4.3.

[5] The Danube flows across ten European States (Germany, Austria, Slovakia, Hungary, Croatia, Serbia, Bulgaria, Romania, Moldova and Ukraine) for about 2,850 km.

[6] Treaty Concerning the Construction and Operation of the Gabčíkovo–Nagymaros System of Locks, Budapest, 16 September 1977 (1993) 32 International Legal Materials 1247, Article 1.1.

[7] ICJ Judgment, para 40.

of an alternative solution by Czechoslovakia (including the so-called 'Variant C', entailing a unilateral diversion of the Danube on its territory),[8] on 7 April 1993, Hungary and Slovakia[9] turned to the ICJ, acknowledging that 'differences have arisen' regarding the implementation and termination of the 1977 Treaty and that the Parties 'have been unable to settle these differences by negotiation'.[10]

The ICJ ruled in 1997 that Hungary was not entitled to unilaterally suspend the 1977 Treaty; the Treaty was still in force and the joint regime for its implementation was a basic element of the agreement. The Parties were thus required to 'negotiate in good faith in the light of the prevailing situation and . . . to take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977'.[11] In particular, Hungary and Slovakia had 'to find an agreed solution within the co-operative context of the Treaty',[12] taking into account, on the one hand, 'the objectives of the Treaty, which must be pursued in a joint and integrated way' and, on the other hand, 'the norms of international environmental law and the principles of the law of international watercourses'.[13]

Nearly a quarter of a century after the judgment, the negotiations between Hungary and Slovakia are pending[14] and no agreed solution is expected in the short term.[15]

[8] Ibid., para 23.

[9] Slovakia succeeded to Czechoslovakia as a contracting party to the bilateral Treaty of 1977, after its dissolution in 1992.

[10] ICJ Judgment, paras 1 and 2.

[11] Ibid., para 155.

[12] Ibid., para 142.

[13] Ibid., para 141.

[14] On the negotiations between Hungary and Slovakia, see e.g., H Fürst, *The Hungarian–Slovakian Conflict over the Gabčíkovo–Nagymaros Dams: An Analysis* (Institute for Peace Research and Security Policy 2003); S Deets, 'Constitutional Interests and Identities in a Two-Level Game: Understanding the Gabčíkovo–Nagymaros Dam Conflict' (2009) 5 *Foreign Policy Analysis* 37; M Szabó, 'Gabčíkovo–Nagymaros Dispute: Implementation of ICJ Judgment' (2009) 39 *Environmental Policy and Law* 97; M Szabó, 'The Implementation of the Judgment of the ICJ in the Gabčíkovo–Nagymaros Dispute' (2009) 1 *Iustum, Aequum Salutare* 15; M Szabó, 'The Implementation of the Judgment of the ICJ in the Gabčíkovo–Nagymaros Dispute' (2009) 1 *Iustum, Aequum Salutare* 15; G Baranyai and G Bartus, 'Anatomy of a Deadlock: A Systemic Analysis of Why the Gabčíkovo–Nagymaros Dam Dispute Is Still Unresolved' (2016) 18 *Water Policy* 39; B Nagy, 'The ICJ Judgment in the Gabčíkovo–Nagymaros Project Case and Its Aftermath: Success or Failure?' in H Ruiz-Fabri, E Franck, M Benatar and T Meshel (eds), *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill Nijhoff 2021) 21.

[15] '[T]he two sides cannot even agree on what the decision said.' Deets (n 14) 37 at 38.

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4.2.1 *Balancing Conflicting Interests and Supporting the Parties' Co-operation*

The ICJ judgment in the *G/N* case is considered a 'balanced solution' by some scholars. Looking more closely, however, this expression has been used in its most extreme meaning ('[n]either side can claim a victory')[16] or in a meaning different from the legal one (a '"politically" palatable decision').[17]

More generally, serious doubts remain as to whether the Court fully exercised its function. First, the judgment has received much criticism for failing to clarify the obligations of the Parties[18] or, at least, for omitting 'to define the rights and obligations of the Parties with sufficient precision'.[19]

Notably, it has been observed, on the one hand, that the special role attributed by the Court to the principle *pacta sunt servanda* 'legitimized the status quo that emerged as a result of the mutual non-performance of [the bilateral Treaty of 1977]'.[20] On the other hand, the Parties themselves could be blamed for the continued non-resolution of the dispute. However, the 'condemnation' of the Parties to co-operation ('go back and negotiate in good faith')[21] has been regarded as a major cause for the 'ossification'[22] of the dispute. The judgment 'in a way exacerbated rather than help[ing] to solve the underlying conflict'.[23]

Second, it has been remarked that the Court did not sufficiently assess the relevance and the weight of the evidence submitted by the Parties. Indeed, while ensuring that 'most careful attention' had been given to the 'impressive amount of scientific material' submitted by both States with the aim of 'reinforcing their respective arguments ... as to the ecological consequences of the project', the Court concluded that 'it [was] not

[16] A Boyle, 'The Gabčíkovo–Nagymaros Case: New Law in Old Bottles' (1997) 8 *Yearbook of International Environmental Law* 13 at 14. See also Nagy (n 14) 55 ('the judgment was Solomonic, allowing a face-saving outcome for both parties') and S Stec, 'Do Two Wrongs Make a Right? Adjudicating Sustainable Development in the Danube Dam Case' (1999) 29 *Golden Gate University Law Review* 317 at 356 ('the Court reached ... an uncomfortable compromise').

[17] H Lammers, 'The *Gabčíkovo–Nagymaros* Case Seen in Particular from the Perspective of the Law of International Watercourses and the Protection of the Environment (1998) 11 *Leiden Journal of International Law* 287 at 316.

[18] See e.g., P Sands, 'International Environmental Litigation and Its Future' (1999) 32 *University of Richmond Law Review* 1619.

[19] Baranyai and Bartus (n 14) 46.

[20] See e.g., Nagy (n 14) 24–25 and Deets (n 14) 47 ('at first the court's entire approach to the case is more notable for what it did not decide than what it did').

[21] Baranyai and Bartus (n 14) 45.

[22] Ibid., 45. See also Stec (n 16) 356.

[23] Baranyai and Bartus (n 14) 45.

necessary ... to determine which of [their] points of view [was] scientifically better founded'.[24] The 1977 Treaty contained the mechanisms for the Parties to co-operate to address environmental considerations. The Court relied also on the assumption that the dangers invoked by Hungary were mostly of a long-term nature and uncertain. Accordingly, these perils, 'without prejudging their possible gravity, were not sufficiently established ... nor were they "imminent"'[25], as required by the plea of necessity under the ILC Draft Articles on State responsibility.[26]

It is certainly worth noting that the Court made a site visit in April 1997, between the two rounds of oral pleadings.[27] In addition, due to the technical issues at stake, the tensions between the Parties and the polarization of their respective positions, it would have been desirable for independent experts to assist the Court before it delivered its judgment. Regrettably, the ICJ's reluctance to appoint independent experts under Article 50 of its Statute and Article 67 of the Court Rules is well known and it is still a matter of extensive debate and criticism.[28]

Third, negotiations have also been affected by ambiguities in the Court's ruling. Accordingly, some controversial interpretations of the

[24] ICJ Judgment, para 54.

[25] ICJ Judgment, para 57.

[26] See Article 25.1(a) (State of Necessity), Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission (ILC) in 2001, *Yearbook of the International Law Commission* (2001) vol. II (Part Two).

[27] ICJ Judgment, para 10. For more details see A Pellet, 'The *Gabčíkovo–Nagymaros* Case: A Personal Recollection' in S Forlati, MM Mbengue and B McGarry (eds), *The Gabčíkovo–Nagymaros Judgment and Its Contribution to the Development of International Law* (Brill Nijhoff 2020) 3 at 7–9; J-M Thouvenin, 'La descente de la Cour sur le lieux dans l'affaire relative au projet Gabčíkovo–Nagymaros' (1997) 43 *Annuaire français de droit international* 333.

[28] See e.g., ICJ, *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*), Judgments, ICJ Reports 2010, Judges Al-Khasawneh and Simma joint Dissenting Opinion, para 5; C Foster, 'The Consultation of Independent Experts by International Courts and Tribunals in Health and Environment Cases' (2009) 20 *Finland Yearbook of International Law* 391; C Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011), in particular 136 ff.; C Foster, 'New Clothes for the Emperor?' (2014) 5 *Journal of International Dispute Settlement* 139; M Bennouna, 'Experts Before the International Court of Justice: What For?' (2018) 9 *Journal of International Dispute Settlement* 345; J Devaney, 'Reappraising the Role of Experts in Recent Cases Before the International Court of Justice' (2019) 62 *German Yearbook of International Law* 337; T Kanhanga, 'Scientific Uncertainties: A Nightmare for Environmental Adjudications' in C Voigt (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019) 121.

judgment[29] allowed both Parties to '... find sufficient legal ammunition to preserve their respective pre-litigation positions'.[30]

As to the promotion of the Parties' co-operation, only scant indications were provided by the Court to help the two governments to achieve an agreed solution. Starting from the assumption that '[i]t is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution',[31] Hungary and Slovakia were required to 'look afresh at the effects on the environment of the operation of the Gabčíkovo power plant' and to 'find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river'.[32]

Some general principles were explicitly mentioned by the Court to guide the Parties' negotiations. First, good faith, which is inherent to the general duty *pacta sunt servanda* and to the duty of co-operation. The Parties were also required to find an agreed solution, taking into account the norms of international environmental law and the principles of the law of international watercourses.[33]

Regrettably, however, the Court was unwilling to dwell upon on the existence and exact content of these principles, although this was one of the reasons for the lengthy dispute between the Parties.[34] The Court mentioned the obligation of prevention[35] and invoked the concept of

[29] See e.g., Szabó (n 14), 'The Implementation of the Judgment', 19 (who focusses, in particular, on the meaning of the term 'when' at para 136 of the judgment), and Baranyai and Bartus (n 14) 45 (who consider obscure and contradictory the operative parts of the judgment relating to the future of the unfinished installations in the Hungarian territory). See also Stec (n 16) 356.

[30] Baranyai and Bartus (n 14) 45.

[31] ICJ Judgment, para 141.

[32] Ibid., para 140.

[33] See n 13.

[34] See B Fuyane and F Madai, 'The Hungary–Slovakia Danube River Dispute: Implications for Sustainable Development and Equitable Utilization of Natural Resources in International Law' (2001) 1 *International Journal of Global Environmental Issues* 329 at 340 (although these principles '... formed the essence of the protracted dispute [between Hungary and Slovakia] ... the Court responded to them only in *obiter dicta*'). See also the expectations emerging from a contribution published two years before the ICJ Judgment: E Hoenderkamp, 'The Danube: Damned or Dammed? The Dispute between Hungary and Slovakia Concerning the Gabčíkovo–Nagymaros Project' (1995) 8 *Leiden Journal of International Law* 287 at 308–9.

[35] For a thorough analysis, see: L-A Duvic-Paoli, 'Vigilance and Prevention: The Contribution of the Gabćikovo–Nagymaros Judgment' in S Forlati, MM Mbengue and B McGarry (eds), *The Gabčíkovo–Nagymaros Judgment* (Brill 2020) 193. When the judgment was delivered, various principles contained in the two declarations had already

sustainable development as aptly expressing the need to reconcile economic development with protection of the environment.[36] It declined, however, to explain its opinion with regard to the legal content of the latter, which is still one of the most controversial issues in international environmental law.[37] With regard to environmental impact assessment (EIA), the ICJ did not mention this term in its ruling. Neither did it assist the Parties in the reconciliation of their scientific and technical divergences.[38] Hungary and Slovakia agreed on the need to submit the joint project to EIA but disagreed on the substance of this decision-making process.[39] The failure by the Court to uphold the principle of precaution was also blamed by various scholars. In particular, the 'state of ecological necessity' – invoked by Hungary for justifying the suspension or termination of the 1977 Treaty – was considered by the Court exclusively from a legal perspective, that is, according to the parameters of the state of necessity under the law of State responsibility.[40] As a result, the Court imposed a much higher threshold[41] than the one required by the precautionary principle, which relies on a basic assumption: scientific uncertainty.[42]

been incorporated into various binding and non-binding instruments at the international level. Some of them were also considered customary international legal obligations by a number of prominent scholars.

[36] ICJ Judgment, para 140.

[37] See e.g., Sands (n 18) 1633.

[38] As has rightly been highlighted: 'This was a rather curious position to adopt since the environmental effects of the project were central to the arguments advanced by both parties and were in fact the essence of the dispute.' PN Okowa and M Evans, 'Case Concerning the Gabčíkovo–Nagymaros Project (*Hungary/Slovakia*)' (1998) 47 *International and Comparative Law Quarterly* 688 at 695. For further considerations, see: EL Preiss, 'The International Obligation to Conduct an Environmental Impact Assessment: The ICJ *Case Concerning the Gabčíkovo–Nagymaros Project*' (1999) 7 *New York University Environmental Law Journal* 307.

[39] See Preiss (n 38) 325 ff.

[40] See text corresponding to n 25 and n 26.

[41] 'The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, 'grave' and 'imminent' 'peril' existed in 1989', ICJ Judgment, para 54.

[42] See e.g., Sands (n 18) 1631–32; S Stec and GE Eckstein, 'Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the *Case Concerning the Gabčíkovo–Nagymaros Project*' (1997) 8 *Yearbook of International Environmental Law* 41 at 49; A A-Khavari and D Rothwell, 'The ICJ and the *Danube Dam* Case: A Missed Opportunity for International Environmental Law? (1998) 22 *Melbourne University Law Review* 507 at 529 ff.; D Dobos, 'The Necessity of Precaution: The Future of Ecological Necessity and Precautionary Principle' (2002) 13 *Fordham Environmental Law Review* 375; C Foster, 'Necessity and Precaution in International

As to the duty of co-operation in good faith, the Court observed – quoting its famous dictum in the *North Sea Continental Shelf* case[43] – that '[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it'.[44] Leaving aside any discussion on the effective compliance of the Parties with the duty to co-operate in good faith, the exact content of this obligation, as codified by Principle 19 of the 1982 Rio Declaration on Environment and Development,[45] remains controversial.[46]

4.2.2 *Integration of the Interests of the Parties Concerned with the Interests of Other States and of the Global Environment*

One of the most remarkable aspects of the judgment in the *G/N* case is to be found in the special role that the rules on interpretation played in the legal reasoning of the Court. It was in fact through the method of evolutionary interpretation that the ICJ established a dynamic inter-relationship and integration between the bilateral treaty obligations undertaken by the Parties in 1977 and the general principles of international environmental law that had been developed after that date. Accordingly, sustainable development was integrated into the scope of the obligations that the Parties had undertaken under their bilateral agreement.

The management of the Danube was not handled, however, as a matter transcending the interests of single riparian States. The ICJ judgment focussed strictly on the rights and obligations of the litigating States *inter partes*.[47] No explicit mention of the interests of other riparian

Law: Responding to Oblique Forms of Urgency' (2008) 23 *New Zealand Universities Law Review* 265.

[43] ICJ, *Case Concerning the North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3.

[44] ICJ Judgment, para 141.

[45] UN Doc A/CONF.151/26 (Vol I), 12 August 1992.

[46] For a thorough analysis of internal judicial bodies' evaluation of States' conduct in complying with the duty to co-operate in good faith, see K Hagiwara, 'Sustainable Development before International Courts and Tribunals: Duty to Cooperate and States' Good Faith' in C Voigt (ed.), *International Judicial Practice on the Environment* (Cambridge University Press 2019) 167.

[47] Only an indirect reference to the 'community interest in a navigable river' was made, through the quotation of the famous dictum of the Permanent Court of International Justice in its decision on the *River Oder* case ('[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and

States or to the preservation of vulnerable ecosystems as an interest of the international community as a whole can be found in the Court's ruling. Unfortunately, these considerations are also missing in more recent ICJ environmental jurisprudence.[48]

It should finally be recalled that the representation of community interests through NGOs was only partially possible in the *G/N* case, due to the very limited role that NGOs can play in the context of contentious proceedings before the ICJ. An *amicus curiae* brief was prepared by two NGOs, but no reference was made to this brief in the judgment.[49] In any case, absent specific provisions in the Court Rules, no NGOs would have been entitled to make more than this indirect contribution.[50]

4.2.3 Assessment

The previous remarks confirm the limits of traditional dispute settlement generally highlighted by international scholars. It has been observed, for instance, that '[i]nternational adjudication is supposed to be slow, cumbersome, expensive and, ultimately, ineffective'.[51] Indeed, the judgment on the *G/N* case was rendered four years after the deposit of the special

the exclusion of any preferential privilege of any one riparian State in relation to the others', *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No 16, 1929, PCIJ, Series A, No 23*, 27, ICJ Judgment, para 85). It has rightly been observed, however, that 'the ICJ endorses the PCIJ's statement without making an effort to clarify what it understands by the COI [community of interest] of riparian States and how this becomes a common legal right'. J Gjørtz Howden, *The Community of Interest Approach in International Water Law: A Legal Framework for the Common Management of International Watercourses* (Brill Nijhoff 2020) 27.

[48] See e.g., ICJ, *Whaling in the Antarctic* (*Australia v Japan: New Zealand Intervening*), Judgment of 31 March 2014, ICJ Reports 2014, 226. For further considerations see L Pineschi, 'Inter-Legality and the Protection of Marine Ecosystems' in J Klabbers and G Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019) 188 at 191 ff.

[49] National Heritage Institute and International River Network; for more information see: A Wiik, *Amicus Curiae before International Courts and Tribunals* (Nomos and Hart Publishing 2018) 96, n 99. See also *Excerpts from Position Taken by WWF (World Wild Fund) with Regard to the Gabčíkovo Barrage Project*, in Counter Memorial Hungary 5 December 1994, vol. IV, Annexes, Part I, 349 ff.

[50] On the indirect role played by NGOs in contentious cases in the ICJ see: E Valencia-Ospina, 'Non-Governmental Organizations and the International Court of Justice' in T Treves, A Fodella, A Tanzi and M Frigessi di Rattalma (eds), *Civil Society, International Courts and Compliance Bodies* (TMC Asser Press 2005) 227, at 228 ff.

[51] AL Paulus, 'Dispute Resolution' in G Ulfstein, T Marahun and A Zimmermann (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press 2007) 351.

agreement between the Parties. This is 'not a speed record for a case without procedural difficulties';[52] it must be acknowledged, however, that among the reasons that '[t]he Court was not quick to organize hearings', was the fact that the ICJ was simultaneously dealing with other cases.[53] However, this is still a very long delay, when addressing significant environmental problems.

As mentioned, the judgment on the *G/N* case also confirms, on the one hand, that 'judicial pronouncements serve rather to elucidate important principles than to achieve a concrete and detailed settlement by themselves'.[54] On the other hand, highly technical issues can hardly 'be decided by lawyers. Allocation of responsibility for harm to specific actors is difficult, if not impossible ... Problem-solving thus requires a less confrontational, more co-operative approach'.[55]

It would be misleading, however, to conclude that the above-mentioned failures derive exclusively from structural limits of the judicial settlement of disputes or from its inadequacy in discharging a function for which it is not fully equipped. On the one hand, it could be argued that 'by asking the Parties to negotiate a solution ... the Court was abdicating the very responsibility that the Parties had assigned to it'.[56] On the other hand, the actions and omissions of all the Parties directly or indirectly concerned in the *G/N* case cannot be ignored. In particular, the slow development of fruitless negotiations between the two contending States is largely due to the high politicization of their dispute.[57] In addition, the lack of transparency that characterizes the ongoing negotiating process does not seem to be fully consistent with the general principles of international environmental law and, notably, with the principle of access to information.[58]

The modest role played by other riparian States or international institutions in the solution of the conflict is also striking. Apparently, neither the European Union (which had been actively involved in the

[52] Pellet (n 27) 4.
[53] The advisory opinions on Nuclear Weapons and the jurisdiction in the Genocide and Oil Platform cases; Pellet (n 27) 5.
[54] Paulus (n 51) 363; see also C Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer Law International 2000) 323–24.
[55] Paulus (n 51) 365.
[56] Okowa and Evans (n 38) 697.
[57] See e.g., RD Lipschutz, 'Damming Troubled Waters: Conflict over the Danube 1950–2000' (1997) 1 *Intermarium*.
[58] See e.g., Principle 10 of the Rio Declaration on Environment and Development.

negotiations preceding the ICJ judgment)[59] nor the permanent bodies established under the Convention on Co-operation for the Protection and Sustainable Use of the River Danube (hereinafter: Danube River Protection Convention)[60] have significantly supported or facilitated the bilateral negotiations subsequent to the ICJ judgment.

Obviously, it can hardly be said that these entities or other riparian States are under a legal duty to intervene in the negotiating process. However, the issue clearly transcends the individual rights and duties of the Parties to the dispute due to the dramatic impact that the failure of their bilateral negotiations may have on the management of shared natural resources and the preservation of vulnerable ecosystems. A more proactive role in defence of a community interest should thus have been played by other riparian States or international institutions entrusted with specific competences in environmental matters.

4.3 The *Bystroe Canal* Case

The second case deals with NCPs and concerns the (re)construction[61] of the Bystroe Canal in the Ukrainian sector of the Danube Delta. The Delta covers an area of approximately 5,800 km^2, shared by Romania (86 per cent of the area), Ukraine and Moldova – ensuring a connection for Ukraine to the Black Sea, as an alternative to the two existing routes

[59] See ICJ Judgment, paras 24–25. Both Hungary and Slovakia have been member States of the European Union since 2004; accordingly, the EU legislation applies to the Danube River basin, including the EU Water Framework Directive (WFD) (Directive 2000/60/EC of the European Parliament and the Council on 23 October 2000 establishing a framework for community action in the field of water policy, OJ L 327 of 22 December 2000, 1), that focuses on the sustainable development of water systems, considered geographical and hydrological units, according to a combined approach and a common implementation strategy. It has been remarked, however, that neither political pressure nor infringement procedure have ever been undertaken by the EU Commission to induce Slovakia and Hungary to find a solution consistent with their EU obligations; see Nagy (n 14) 56.

[60] Convention on Co-operation for the Protection and Sustainable Use of the River Danube, Sofia, 29 June 1994, entered into force 22 October 1998, available at www.icpdr.org/flowpaper/app/#page=14. It includes fifteen parties: Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Moldova, Montenegro, Romania, Slovakia, Slovenia, Serbia, Ukraine and the European Union. For further information on the effective involvement of the ICPDR in the implementation of the ICJ Judgment, see A Haefner, *Negotiating for Water Resources: Bridging Transboundary River Basins* (Routledge 2016) 97.

[61] After the Soviet Union's fall, the waterways used by Ukrainian vessels were no longer navigable by large ships due to the natural accumulation of sediments and lack of proper maintenance.

through Romania. Romania is obviously concerned about the implications of the project for its economic and social system, but also about its impact on an area characterized by particularly vulnerable ecosystems. Due to its special features, the Danube Delta was included in the list of wetlands of international importance under Article 2.1 of the Ramsar Convention[62] in 1991[63]. It was also inscribed on the World Heritage List in the same year[64] and designated as a Biosphere Reserve under UNESCO's Man and the Biosphere (MAB) Programme in 1998.[65]

Ukraine notified Romania of its intention to develop the Bystroe Canal Project (BCP) in 2002, but it did not provide Romania with the information required under the Espoo Convention, including an EIA, which was completed after the project had already started.[66] Ukraine was also considered to be in breach of its obligations under the Aarhus Convention for not having informed the public of the project and of its related decision-making process.[67] The first phase of the BCP was completed in 2004; the final decision to continue with Phase II was taken in 2007, and in 2010 works related to its full-scale implementation started.[68]

The actions and omissions of Ukraine in respect of its international obligations have been brought to the attention of (and monitored by) almost all institutional mechanisms established under the various international treaties and multilateral environmental agreements (MEAs) applicable to the area. The Danube Delta falls within the scope of four world treaties (the 1971 Ramsar Convention;[69] the World Heritage Convention;[70] the Convention on the Conservation of Migratory

[62] Convention on Wetlands of International Importance Especially as Waterfowl Habitats, Ramsar, 2 February 1971, entered into force 21 December 1975, 996 UNTS 245.
[63] See www.ramsar.org/sites/default/files/documents/library/sitelist.pdf.
[64] See https://whc.unesco.org/en/list/588/.
[65] See https://en.unesco.org/biosphere/eu-na/danube-delta.
[66] See submissions by Romania under the Espoo Convention of 26 May 2004 (EIA/IC/S1) and 23 January 2007 (EIA/IC/S1bis).
[67] For more details see this chapter, 23–24.
[68] Standing Committee of the Bern Convention, Doc T-PVS/Notes (2015) 2, 2.
[69] The BCP was considered under Article 3.2 of the Ramsar Convention (human interference) by the IX MOP in 2005. See Resolution IX.15, paras 14, 16 and recommendations under para 27. The file was closed in 2012, on the basis of the information submitted by Ukraine and 'on the consideration that the Ramsar Administrative Authority in Kyiv took the responsibility to declare publicly that no negative change will occur through the planned works', information provided by the Secretariat of the Ramsar Convention to the Secretariat of the Bern Convention (Standing Committee, Doc T-PVS/Notes (2015) 2, 5).
[70] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, entered into force 17 December 1975, 1037 UNTS 151.

Species of Wild Animals (Bonn, 23 June 1979);[71] and the Convention on Biological Diversity[72]) and five regional agreements: the Convention on the Conservation of the European Wildlife and Natural Habitats (Bern, 19 September 1979);[73] the Danube River Protection Convention; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992);[74] as well as the already mentioned Espoo and Aarhus Conventions.[75]

In this context, suffice here to recall that two NCPs under the Espoo Convention[76] were triggered by Romania in 2004 and 2007.[77] The latter complaint was submitted after the carrying out of an inquiry procedure

[71] Entered into force 1 November 1983, 1651 UNTS 356.

[72] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, entered into force 29 December 1993, 1760 UNTS 79.

[73] Entered into force 1 June 1982, 1284 UNTS 209 (hereinafter: Bern Convention). In 2004, the Standing Committee of the Bern Convention recommended Ukraine not proceed with phase II of the BCP until certain conditions were met (Recommendation No. 111 (2004)). The case was closed in 2016, considering 'the constant, fruitful and promising co-operation' of the parties, that were invited to 'report every two years on the progress achieved in solving the remaining issues'; Standing Committee 36th Meeting, Strasbourg, 15–18 November 2016, *List of Decisions and Adopted Texts*, Doc T-PVS (2016) Misc, 12.

[74] Entered into force 6 October 1996, 1936 UNTS 269.

[75] For a survey of the actions undertaken under the aforementioned Conventions, see M Koyano, 'Effective Implementation of International Environmental Agreements: Learning Lessons from the Danube Delta Conflict' in T Komori and K Wellens (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Routledge 2009) 259 at 271 ff.

[76] On the trigger mechanism under the Espoo Convention, see Decision III/2, Appendix, paras 5–6. For further details see E Fasoli, 'Procedures and Mechanisms for Review of Compliance under the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context and its 2003 Protocol on Strategic Assessment' in T Treves, L Pineschi, A Tanzi and C Pitea (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009) 181 at 184 ff.

[77] See n 66. The Espoo Convention does not explicitly provide for a compliance procedure. However, at their second meeting, the Parties established an ad hoc body, the Implementation Committee, 'for the review of compliance by the Parties with their obligations under the Convention with a view to assisting them fully to meet their commitments' (Decision II/4, Doc MP.EIA/2001/4, 6 December 2000). The Implementation Committee (composed of eight States Parties) reports to the MOP and makes recommendations regarding compliance with the Convention (Decision III/2, Doc MP.EIA/2004/3, 26 March 2004). In 2007, the Implementation Committee agreed that the second submission by Romania superseded its first submission, which was considered closed (Doc ECE/MP.EIA/WG1/2007/4, 12 March 2007, para 23). All documents available at https://unece.org/environment-policy/environmental-assessment/eiaics1-ukraine.

on the request of the same country under Article 3.7 of the Convention.[78] The Inquiry Commission (a body composed of three independent experts appointed by the Parties concerned)[79] unanimously concluded that the BCP was likely to have a significant adverse transboundary impact in Phase I and that an even greater impact was expected in Phase II of the project.[80] In 2008, the Meeting of the Parties (MOP) declared Ukraine non-compliant with its international obligations and decided to issue a caution unless the Government of Ukraine stopped the works, repealed its final decision of 28 December 2007 concerning the BCP and took steps to comply with the relevant provisions of the Espoo Convention and the relevant decisions of the MOP.[81] The Ukrainian government was also requested to fully implement the Convention's provisions through: a revision of its legislative and administrative measures; the adoption of a strategy to be submitted to the Espoo Convention's Implementation Committee by the end of 2009; and the negotiation of agreements and arrangements with neighboring countries under Article 8 of the Convention.[82]

The above-mentioned caution to the Government of Ukraine became effective on 31 October 2008; nevertheless, no steps (or limited steps) have been taken to bring the project into full compliance with the Convention.[83] In 2021 the MOP welcomed various positive steps

[78] All documents concerning the inquiry procedure are available at https://unece.org/environment-policyenvironmental-assessment/inquiry-commission.

[79] Appendix IV to the Espoo Convention, para 2, provides that: 'if two or more States Parties to the Espoo Convention cannot agree whether a proposed activity is likely to entail a significant adverse transboundary impact, any such Party may submit that question to an inquiry commission, established under Appendix IV of the Convention, with the mandate 'to advise on the likelihood of significant adverse transboundary impact' (Article 3.7). The final opinion of the inquiry commission is based on 'accepted scientific principles' (Appendix IV, para 14).

[80] *Report on the Likely Significant Adverse Transboundary Impacts of the Danube–Black Sea Navigation Route at the Border of Romania and the Ukraine*, July 2006, available at https://unece.org/DAM/env/eia/documents/inquiry/Final%20Report%2010%20July%202006.pdf, para 6.8.

[81] Fourth MOP of the Espoo Convention, Bucharest, 19–21 May 2008, Decision IV/2, Doc ECE/MP.EIA/10 of 28 July 2008, 81 ff.

[82] Decision IV/2, paras 11, 12 and 14. Appendix VI of the Espoo Convention, under para 2 contains a detailed list of possible elements that can be included in bilateral and multilateral agreements to implement the Convention.

[83] See Decisions V/4, para 17, Doc ECE/MP.EIA/15, 16 August 2011; VI/2, para 20, Doc ECE/MP.EIA/20/Add.1—ECE/MP.EIA/SEA/4/Add.1, 15 July 2014; IS/1f, para 6, Doc ECE/MP.EIA/27/Add.1—ECE/MP.EIA/SEA/11/Add.1, 9 April 2019. Some positive steps undertaken by Ukraine were however mentioned by MOP under Decision V/4, paras

undertaken by Ukraine, including: the adoption of national measures on EIA, aimed at 'fully align[ing]' its national legislation with the provisions of the Convention;[84] an assessment of the environmental damage and the preparation of a draft plan of compensatory and mitigatory measures; the development of a new 'Bystroe Route' project and its notification to Romania.[85] However, the MOP has expressed deep concern as Ukraine has not yet fulfilled all its obligations under decisions IV/2, V/4, VI/2 and IS/1f.[86] Accordingly, the caution issued in 2008 is still effective.[87] The MOP has also reiterated that the continuation of dredging activities constitutes a further breach of the Convention.[88]

An NCP was also triggered under the Aarhus Convention,[89] on the basis of a communication from the public[90] and a submission by Romania[91]; in 2005 the MOP found Ukraine non-compliant by failing to provide for access to information and public participation under Articles 4 and 6 of the Convention.[92] After three cautions issued by the MOP in 2008, 2011 and 2014 for persistent non-compliance with its

20–22 (i.e., notification of the project and transmission of the EIA documentation to Romania; the holding of a public consultation; start of negotiations for the conclusion of bilateral agreements with neighboring countries).

[84] The law on EIA was approved on 4 October 2016 and revised in 2017. The law on strategic environmental assessment was enacted in April 2018.

[85] Decision VIII/4d, paras 2 and 3, Doc ECE/MP.EIA/30/Add.2–ECE/MP/EIA/SEA/13/Add.2, 11 February 2021.

[86] Ibid., para 9.

[87] Ibid., para 10.

[88] Ibid., para 11. See also Implementation Committee, Doc ECE/MP.EIA/IC/2016/4, 13 October 2016, para 13.

[89] The non-compliance procedure is provided for under Article 15 of the Aarhus Convention – requiring the Parties to set up 'arrangements of a non-confrontational, non-judicial and consultative nature' for reviewing compliance with the provisions of the Convention – a Compliance Committee was established by the first MOP (Lucca 2002, Decision I/7). The main function of the Compliance Committee (composed of eight members, serving in their personal capacity) is to consider issues of non-compliance by a Party with any provision of the Convention and to make recommendations to the MOP. On the trigger mechanism, see Decision I/7, paras 15–24. For further details, see C Pitea, 'Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters' in Treves et al., *Non-Compliance Procedures* (n 76), 221 at 224 ff.

[90] See Communication ACCC/C/2004/03 of 5 May 2003 and additional information of 1 December 2004 submitted by Ecopravo-Lviv, an NGO based in Ukraine (now Environmental People (EPL)), in (2004) 34 Environmental Policy and Law 39–42; 54–56.

[91] Submission ACCC/S/2004/01 of 7 June 2004.

[92] Second Meeting of the Parties to the Aarhus Convention, Decision II/5b, Doc ECE/MP.PP/2005/2/Add.8, 13 June 2005.

decisions,[93] Ukraine enacted the above-mentioned EIA provisions in 2016.[94] Accordingly, the Compliance Committee, having found that the country had adopted the necessary measures to bring its legislation into compliance with the Convention, concluded that the caution should be lifted and that Ukraine's special rights and privileges under the Convention should not be suspended.[95]

No doubt, a positive result has been achieved. It cannot be overlooked, however, that Ukraine has never abandoned the Bystroe Canal Project and that the case has been pending before the Implementation Committee and the MOP of the Espoo Convention for about eighteen years.

4.3.1 Balancing Conflicting Interests and Supporting the Parties' Co-operation

The classical bilateral structure of traditional inter-State dispute settlement procedures is lacking under NCMs. The main concern of non-compliance bodies established under MEAs is to prevent non-compliance (or to bring a State back into compliance) with certain treaty obligations, acting in the common interest of all Parties to the MEA. This aim is pursued through a pragmatic approach and a procedure that is mainly characterized by an interactive dialogue, usually based on discussion of data, persuasion and international assistance for capacity building.[96]

Indeed, the interactive dialogue promoted by the Espoo Convention's monitoring bodies in the *Bystroe Canal Project* case was based on the findings of the Espoo Inquiry Commission[97] as well as on information provided for and comments made by both Parties. Persuasion has also been exercised through consultations and exchanges of letters between relevant institutions and Ukraine. International assistance has also been provided. First, the MOP requested the Implementation Committee to

[93] Decision III/6f, Doc ECE/MP.PP/2008/2/Add.14, 26 September 2008. The action plan submitted by Ukraine in May 2008 was insufficient; Decision IV/9h, Doc ECE/MP.PP/2011/2/Add.1, 1 July 2011; Decision V/9m, Doc ECE/MP.PP/2014/2/Add.1, 14 October 2014.

[94] See this chapter, 22, and *supra* text corresponding to n 84.

[95] Doc ECE/MP.PP/2017/45, 2 August 2017, paras 65–66.

[96] See e.g., Koyano (n 75) 275 and A Tanzi and C Pitea, 'Non-Compliance Mechanisms: Lessons Learned and the Way Forward', in Treves et al., *Non-Compliance Procedures* (n 76) 569 at 579.

[97] See the Inquiry Commission Report (n 80).

assist Ukraine in complying with its obligations, notably offering technical advice in bringing Ukraine's domestic legislation into line with the Convention's provisions.[98] Second, the MOP invited both Parties to seek advice from the Secretariat to help them develop bilateral agreements or other arrangements.[99] Third, international funding and other support to Ukraine for the revision of its national legislation[100] and for bilateral cooperation was also provided through the Secretariat. A similar approach was undertaken under the Aarhus NCP.

It is also worth noting that the promotion of an interactive dialogue does not exclude the adoption of more stringent measures in the context of NCMs, such as the cautions issued by the monitoring bodies of the Aarhus and the Espoo Conventions. Cautions are not expressly envisaged under the latter's NCP. Nevertheless, their legitimacy can hardly be denied, as they are the result of a negotiating process and a final agreement of all contracting Parties in the context of one of their periodic meetings. Some decisions have also been considered severe, if not confrontational. For instance, as mentioned, Ukraine was urged by the decision of the MOP of the Espoo Convention 'to repeal without delay the final decision of 28 December 2007 concerning the implementation of the [BCP] and not to implement Phase II of the project before applying fully the provisions of the Convention'.[101] Also in this case, however, the MOP's decision can be considered consistent with general principles of international environmental law and, in particular, with the principles of prevention and precaution.[102]

4.3.2 Integration of the Interests of the Parties Concerned with the Interests of Other States and of the Global Environment 245

Under NCMs, bilateral conflicts are managed by a collective body that interacts with the Parties directly concerned, acting in the common

[98] Decision IV/II, para 26. An independent review of the Ukraine legislation was undertaken by a consultant, nominated by the Implementation Committee in 2009; see Doc ECE/MP.EIA/IC/2009/5, 2 July 2009.

[99] Doc ECE/MP.EIA/2008/4, paras 9, 11, 12.

[100] See n 84.

[101] Decision IV/2, para 9. See also the recommendations made by the Implementation Committee to the MOP in Doc ECE/MP/EIA/10, 95–96.

[102] M Koyano, 'The Significance of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) in International Environmental Law: Examining the Implications of the Danube Delta Case' (2008) 26 *Impact Assessment and Project Appraisal* 299 at 306.

interest of all contracting Parties. Accordingly, it can be assumed that under NCMs dealing with the BCP, not only the interests of Romania, but also those of other Parties to the relevant MEAs have been taken into account or, at least, all the contracting Parties have had the opportunity to represent their interests. The interconnection between different ecosystems has also been safeguarded.[103]

It is also noteworthy (and far from obvious) that the simultaneity of proceedings relating to the BCP under different multilateral treaties has not hindered, but rather strengthened a co-operative approach by promoting joint and complementary actions. Positive co-operation between various institutional systems is evidenced, for instance by the exchange of information on their respective activities;[104] the undertaking of joint fact-finding;[105] and the organization of multilateral consultations, such as the international conference held in Odessa in 2006 involving representatives of States, international institutions and one NGO,[106] and the informal meeting held in Geneva in 2008 by representatives of institutions established under relevant international treaties and MEAs.[107]

It should also be highlighted that, contrary to the *G/N* case, where the International Commission for the Protection of the Danube River (ICPDR) played a limited role, the ICPDR has actively contributed to fostering the dialogue between the Parties directly involved in the *Bystroe Canal* case and to sharing relevant information with other Parties to the

[103] Suffice here to mention the impact upon other European or extra European ecosystems due to the modification of migratory species routes.

[104] See e.g., Standing Committee of the Bern Convention, Doc T-PVS (2016) 25, 11 ff.

[105] See e.g., the joint mission carried out by UNESCO, under the MAB Programme and the Ramsar Secretariat in October 2003. The purpose of the mission was to examine alternative choices to the BCP and their impact on the Ukrainian Biosphere Reserve, i.e., an area that covers the most pristine part of the Danube Delta. The area was also included in the list of wetlands of international importance under the Ramsar Convention in 1995. Report available at www.ramsar.org/sites/default/files/documents/library/ram53_ukraine_kyliiske.pdf.

[106] Conference for the sustainable development of the Danube Delta (Romania, Moldova, Ukraine, ICPDR, UNESCO, Council of Europe, Ramsar Convention, European Union and WWF). Information on the outcome of the Conference and its follow-up available at www.icpdr.org/icpdr/static/dw2006_1/dw0106p16.htm.

[107] ICPDR, Secretariat of the Bern Convention, Secretariat of the Ramsar Convention, UNESCO MAB and World Heritage Convention, UNECE Secretariat of the Espoo Convention, Aarhus Convention and Water Convention. More information available at www.ramsar.org/news/bystroe-canal-project-under-international-scrutiny.

Danube River Protection Convention.[108] An integrated approach has been promoted by the ICPDR, since the BCP has been considered 'as a basin-wide threat and as a test case for the ICPDR on whether it was able to stand up for the environment and the basin'.[109]

With regard to the European Union, which is a party to all the aforementioned treaties,[110] except the Ramsar and the World Heritage Conventions, an active engagement was shown, in particular, when the EU promoted bilateral talks with Ukraine (2004–2005) and when it funded a project, consisting of an independent review of Ukraine's legislation and recommendations to ensure a correct implementation of the Espoo and Aarhus Conventions.[111]

A final remark concerns NGOs, who can be regarded as key players in many respects. The participation of NGOs (or independent individuals with an NGO background within the independent Committees) can significantly strengthen the representation of public interest in the context of NCMs.[112] On the one hand, the NGO Environmental People (EPL) filed complaints under the Espoo Convention,[113] the Aarhus Convention,[114] the

[108] For more details see: Haefner (n 60) 108 and 110; S Schmeier, *Governing International Watercourses: River Basin Organizations and the Sustainable Governance of Internationally Shared Rivers and Lakes* (Routledge 2013) 171 ff.; S Schmeier and I Zavadsky, 'Managing Disagreements in European Basins: What Role for River Basin Organizations in Water Diplomacy?' in A Kittikhoum and S Schmeier (eds), *River Basins Organizations in Water Diplomacy* (Routledge 2021) 275 at 281–83.

[109] Haefner (n 60) 107.

[110] See *supra* Section 4.3.

[111] *Support to Ukraine to Implement the Espoo and Aarhus Conventions, Draft Final Report*, EuropeAid Development and Cooperation, European Commission, August 2010, prepared by NIRAS A/S, Denmark. For a general assessment, see Koyano (n 75) 274, 279–80.

[112] For further considerations on the role played by NGOs in the context of NCMs, see C Pitea, 'NGOs in Non-Compliance Mechanisms under Multilateral Environmental Agreements: From Tolerance to Recognition?' in T Treves et al., *Civil Society* (n 50), 205; C Pitea, 'The Legal Status of NGOs in Environmental Non-Compliance Procedures: An Assessment of Law and Practice' in P-M Dupuy and L Vierucci (eds), *NGOs in International Law. Efficiency in Flexibility?* (Edward Elgar 2008), 181.

[113] EPL submitted a complaint to the Secretariat of the Espoo Convention in 2003, one year before the submission of Romania, prior to the construction of the BCP (text available in (2004) 34 *Environmental Policy and Law* 54 ff.). The complaint was dismissed for lack of standing, because ' ... unsolicited information from NGOs and the public relating to specific cases of noncompliance was not within the Committee's existing mandate'. Doc MP.EIA/WG.1/2004/4, 8 April 2004, para 7.

[114] See *supra* note 91.

Bonn Convention[115] and the Danube River Protection Convention.[116] On the other hand, NGOs, including the World Wildlife Fund (WWF) and the Danube Environmental Forum (DEF), actively supported various international monitoring bodies, providing information or technical advice.[117]

4.3.3 *Assessment*

As the previous remarks clearly show, the main strength of the *Bystroe Canal* case is to be found in the continuous monitoring of the situation by competent treaty bodies and their concrete support, as well as in the active involvement of intergovernmental and non-governmental organizations and their mutual co-operation. This was a hard and lengthy process, but, in the end, a significant result was achieved: the reform of Ukraine's legal system in the field of EIA, providing for the participation of the public in the decision-making process through public hearings, in accordance with Ukraine's international obligations under the Espoo and the Aarhus Conventions.

The pragmatic and flexible approach characterizing NCMs has also facilitated a dialogue that takes into account both the interests of the Parties directly concerned and the interests of other States. The achievement of this goal has been strengthened through the promotion of inter-institutional co-operation.

A few challenges nonetheless remain. First, one of the major strengths of NCMs that is generally emphasized is their preventive approach, aimed at avoiding the infringement of international environmental obligations and the occurrence of huge or irreversible damage.[118] In the present case, it cannot be overlooked that the relevant NCMs were put into motion only after the BCP had already started. Further, monitoring

[115] EPL notified the Secretariat of the Bonn Convention alleged violations by Ukraine in 2004, http://epl.org.ua/en/law-posts/biodiversity-conservation-2/.

[116] In May 2004 EPL filed a complaint with the Secretariat of the Danube River Protection Convention for alleged violations by Ukraine of its treaty obligations. For further details on this and aforementioned complaints see http://epl.org.ua/en/law-posts/biodiversity-conservation-2/. For an overall assessment of actions undertaken by NGOs in this case, see TD Sobol, 'An NGO's Fight to Save Ukraine's Danube Delta: The Case for Granting Nongovernmental Organizations Formal Powers of Enforcement' (2006) 17 *Colorado Journal of International Environmental Law & Policy* 123 and Koyano (n 75) 276–77.

[117] For further details see Koyano (n 102) 308.

[118] See e.g., Paulus (n 51) 355.

bodies have been apparently more focussed on the consistency of the Ukrainian authorities' actions with their procedural obligations rather than on the BCP's conformity with the purposes of the applicable MEAs, which has been considered a 'delicate issue'.[119] As a result, no international proceeding prevented Ukraine from completing its project, which indeed took place before the proceedings had been completed.

Second, the very long time frame that elapsed between the initiation of compliance procedures and the enactment of legal measures by Ukraine cannot go unnoticed. Various reasons may explain the length of the process. It has also been contended, however, that Ukraine contributed to the procrastination of international procedures with a view to advancing its project and confronting the international community with a *fait accompli*.[120]

Third, reliance on NCMs can have negative effects. For instance, some doubts have been expressed with regard to certain measures adopted by the MOP of the Espoo Convention in the *Bystroe Canal* case. It is in fact unclear whether the caution issued to Ukraine, consisting of 'repealing without delay' its final decision of December 2007 and not implementing Phase II of the project 'meant cancellation [of the BCP] ... or not'.[121] Indeed, ambiguity can be fostered by the political character[122] and the 'hybrid' nature of compliance mechanisms. In fact, NCMs 'have at their disposal a variety of tools that enable them to better tailor their responses to a specific case',[123] being based on 'combinations of good will, cooperation, political handling of matters, technical expertise and the prudent recourse to incentives and disincentives which include the possibility of declaring non-compliance'.[124] In the end, however,

[119] K Wellens, 'Concluding Remarks' in Komori and Wellens (eds), *Public Interest Rules* (n 75) 459 at 461–62.

[120] S Urbinati, 'La contribution des mécanismes de contrôle et de suivi au développement du droit international: le cas du Projet du Canal de Bystroe dans le cadre de la Convention d'Espoo' in N Boschiero, T Scovazzi, C Pitea and C Ragni (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser Press 2013), 457 at 471.

[121] Koyano (n 102) 307. Indeed, cancellation 'seems to imply something beyond suspension'.

[122] G Ulfstein, 'Dispute Resolution, Compliance Control and Enforcement in International Environmental Law' in G Ulfstein, T Marahun and A Zimmermann (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press 2007) 115 at 132.

[123] *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment. Report of the Secretary-General*, UN Doc A/73/419*, 30 November 2018, para 92.

[124] T Treves, 'Introduction', in Treves et al. (eds), *Non-Compliance Procedures* (n 76), 1 at 8.

> [w]hether the combination of all these elements, legal and not, succeeds in obtaining the result desired has to be assessed on a case-by-case basis. The right combination of good will, political finesse, legal and technical expertise, whatever the provisions to be applied, depends on the political situation of the moment and on the quality of the men and women engaged in the proceedings.[125]

4.4 Concluding Remarks

Both the *G/N* and the *Bystroe Canal* cases are particularly complex, as the legal and political issues involved are closely interrelated and inextricably linked. It would also be an overly ambitious task to claim to draw overall conclusions in respect of a hypothetical competition between adjudicative bodies and NCMs from the comparative analysis of only two cases. Accordingly, some general remarks will be tentatively developed strictly on the basis of the findings in the previous sections.

The judgment in the *G/N* case is rightly considered 'one of the most interesting judgments ever rendered by the International Court of Justice',[126] for 'the outstanding contribution given by the Court to the clarification of core issues of international law',[127] in particular the law of treaties, the law of international responsibility and their mutual relationship. The same judgment also represented a decisive step in the evolution of international environmental law. The formal recognition of the principle of prevention[128] and the 'irruption' of sustainable development in the jurisprudence of the ICJ[129] are among the most quoted parts of the judgment. The judgment confirmed the outstanding contribution that may be made to the development of international law through the case law of the Court. It should also be acknowledged that the role of the Court is 'not that of a ground-breaking body but rather that of a stock-taking institution or, to put [it] in [a] somewhat more colorful term, that of being the gate-keeper and guardian of general international law'.[130]

If, however, the same judgment is considered from the perspective of the main function generally ascribed to the Court, the judicial settlement of international disputes, it must be regrettably concluded that this

[125] Ibid.
[126] Pellet (n 27) 3.
[127] Nagy (n 14) 24.
[128] ICJ Judgment, para 140.
[129] Ibid.
[130] JE Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2007/2008) 32 *Fordham International Law Journal* 232 at 258.

function was not fulfilled. The dispute in the *G/N* case was decided but not settled by the Court. Obviously, we will never know whether Hungary and Slovakia would have reached an agreement if the Court had provided them with more guidance. However, the 'condemnation' of the Parties to negotiation and the absence of supporting indications as to how they might proceed at the legal and technical level contributed to radicalizing the dispute.

More generally, with regard to the integration of the interests of the Parties to the disputes with the interests of other States and of the global environment, the right direction is the one indicated by Judge Weeramantry in his Separate Opinion in the *G/N* case:

> 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 procedural rules fashioned for purely *inter partes* litigation.[131]

It can hardly be said, however, that substantive progress was made in this direction as a result of the ICJ judgment in the *G/N* case.[132]

As to the *Bystroe Canal* case, its main strength lies in the constant promotion of an interactive dialogue and in the effective involvement in the NCMs and in other international monitoring mechanisms of all main stakeholders, including other riparian States, intergovernmental organizations and NGOs. Positive results were also achieved in restoring Ukraine to compliance with some of its international obligations, through substantive reforms within the Ukrainian domestic legal system. In sum, if the issue at hand were considered from the perspective of an abstract competition between international courts and compliance mechanisms, the NCMs would win the game. Innovative mechanisms, like NCPs, appear more effective than traditional tools in managing new causes of conflicts.

A more cautious conclusion might be drawn, however, if attention is focussed on the concrete outcome achieved through the NCMs dealing with the BCP. First, it can hardly be said that legality has been fully restored: Ukraine is still considered to be non-compliant with some of its treaty obligations after decades of discussions and negotiations. Second, and above all, the different approach adopted by the monitoring bodies

[131] ICJ Judgment, Separate Opinion of Vice-President Weeramantry, 118.
[132] See this chapter, 13.

in assessing Ukraine's conduct with respect to the implementation of its procedural and substantive obligations may have serious implications for the effectiveness of the entire process.

More generally, if one considers the efficacy of the relevant international procedures in the *G/N* and the *Bystroe Canal* cases from the perspective of the protection of the environment as a common concern, there are no real winners but certainly one loser: the ecosystems directly or indirectly affected by the two projects and, notably, the Danube River basin's and the Danube Delta's ecosystems.

Against this backdrop, the obvious conclusion that could be drawn would be that very little can be done, within the limits of a decentralized legal order, whatever procedure is adopted to settle an international environmental dispute. The international legal system seems in fact structurally unsuited to cope with the equitable management of shared natural resources, where two fundamental principles, with formal equal rank – territorial sovereignty and sovereign equality – inevitably are in tension or even collide.[133] It should also be added that the international legal order lacks effective tools against the lack of political will, the persistent unwillingness of States or their dubious, if not bad faith.[134] In the end, it cannot be overlooked that international courts and non-compliance bodies dealing with environmental disputes are required to interpret very vague rules and principles, with serious implications both for international courts and NCMs. The former are composed of legal experts, impartial and independent, but they are obviously reluctant to play a law-making role.[135] The latter are extremely flexible and pragmatic, but their political nature tends to prevail over a legal approach.[136]

[133] See *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v Costa Rica*), Separate Opinion of Judge Donoghue, ICJ Reports 2015, 783, section 5.

[134] Suffice here to recall that the authorization and initiation of a project without waiting for the end of the negotiations between the parties concerned are a clear violation of the duty to co-operate in good faith; see ICJ, *Pulp Mills* case (n 28), para 147.

[135] See P Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' in TM Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martyinus Nijhoff Publishers 2007), 313 at 315.

[136] See J Klabbers, 'Compliance Procedures' in D Bodansky, J Brunnée and E Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 995 at 1002–3.

Nevertheless, a more optimistic outlook can also be suggested. As much of the academic literature has rightly emphasized, both adjudicative bodies and treaty-based institutions are imperfect, but can play a complementary role in the settlement of international environmental disputes and in restoring legality.[137] It should also be added that their contribution can be remarkable, provided that international environmental disputes are understood in correct terms, that is, not because of the 'environmental' character of the legal rules at issue, but because they relate to the alleged detrimental impact of certain human activities on natural environmental systems.[138] To this end, some essential conditions will have to be met: all available means under international environmental law must be effectively used; the representation or participation of all key actors in the process must be assured; all possible alternative solutions must be carefully considered with the assistance of independent experts in the evaluation of scientific evidence; and, above all, the public interest in the conservation of the environment as a common concern must be duly taken into account through a genuinely integrated approach.

[137] See e.g., G Handl, 'Compliance Control Mechanisms and International Environmental Obligations' (1997) 5 *Tulane Journal of International and Comparative Law* 29 at 46; Romano (n 54) 332–34.

[138] A Boyle and J Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) 4 *Journal of International Dispute Settlement* 245 at 247–50.