CONFERENCE REPORTS

Gabčikovo-Nagymaros Project Case Judgment – 25 Years On

Report on the 'Gabčikovo-Nagymaros Project Case Judgment – 25 Years On International Conference' Organized by Pázmány Péter Catholic University, 23 September 2022, Budapest*

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Abstract

Pázmány Péter Catholic University organized an international scientific conference titled 'International Conference on the 'Gabčikovo-Nagymaros Project Case Judgment – 25 Years On' in Budapest on 23 September 2022. The speakers covered the historical background of the case, the legal arguments presented by the parties, the judgment and the separate opinion, assessed its impact on the development of international environmental law and outlined options for future environmental cases before the ICJ.

Keywords: conference report, Pázmány Péter Catholic University, ICJ, Gabčikovo-Nagymaros, international environmental law.

The case before the ICJ on the *Gabčikovo-Nagymaros Project*[1] concerned three issues. *(i)* The first question sought to determine whether Hungary was entitled to engage in conduct – precisely suspend and subsequently abandon the project – that differed from the international treaty signed in 1977 between Hungary and Czechoslovakia (1977 Treaty).[2] The joint project aimed at building a system of locks using the river Danube's natural resources to gain hydroelectricity.[3] *(ii)*

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1 *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Jurisdiction and Admissibility, Judgment of 25 September 1997, 1997 ICJ Reports, p. 7.

2 Treaty concerning the construction and operation of the Gabčikovo-Nagymaros system of locks. Signed at Budapest on 16 September 1977. *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Memorial of the Republic of Hungary*, Volume III. 2 May 1994, Annex 21. No. 17134.

3 Judgment in Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), para. 15.

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Secondly, deciding whether the other State party[4] had the right to plan and then put in operation the so-called 'Variant C', a provisional solution to the one-sided river diversion at the Czechoslovak territory. *(iii)* Third, identifying the legal effect of Hungary's notification of the Treaty's termination.[5] In the judgment, the ICJ found that neither Hungary was entitled to suspend and abandon the project nor Slovakia to put into operation the one-sided barrage system.[6]

On the one hand, the decision has not definitively settled the issue, as – after Slovakia's request for additional judgment in 1998 – it is still one of the ICJ's pending cases. On the other hand, the case itself showed various significant legal aspects. It was unequivocally relevant for the assessment of international treaty law, but it is also relevant in the context of environmental law, as Hungary justified its activity with environmental concerns that were not foreseeable at the time of the Treaty's signature.[7] The judgment, its documents, such as the Separate Opinion of Vice-President Weeramantry,[8] and the environmental awareness inherent in the Hungarian Party's arguments still provide valuable lessons today, as it was reflected in the presentations of the 'International Conference on the 'Gabčikovo-Nagymaros Project Case Judgment – 25 Years On' organized by Pázmány Péter Catholic University in Budapest on 23 September 2022. The merit of the event was enhanced by the fact that some of the academic speakers were personally engaged in the proceedings as counsel and advocates of the Republic of Hungary.

Philippe Sands,[9] a counsel of Hungary during the proceedings, highlighted that the case's temporal dimension was determined by the fact that it happened when Europe, as known today, was formed after the fall of communism, when increased attention was focused on the environmental factors and the collective rights. In 1997, however, international law was not yet able to effectively contribute to environmental protection, but within a short time the situation altered. The case has also revealed how the ICJ actually functions, by not mechanically applying the law to the examined situation. Moreover, it has also revealed the practical characteristics of international law, pointing out that the outcome was vaguely connected to the Parties' arguments. These arguments were often based on the scientific findings, which have drawn attention to the problem that lawyers do not have this specialised knowledge. It has also become clear that law and politics are highly interrelated, and the present case concerns how to create a balance between the competing interests of the states.

4 At the time of the activity in question (1991) the official name of the Party was the Czech and Slovak Federative Republic, before 1990 Czechoslovakia and by the time of the proceedings, it was the Slovak Republic.

5 Special Agreement, Signed at Brussels on 7 April 1993 between the Republic of Hungary and the Republic of Slovakia, Article 2(1)(a)-(c).

6 Judgment in Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), para. 155.

7 For further analysis of the case *see* Johan G. Lammers, 'The Gabčíkovo-Nagymaros Case Seen in Particular From the Perspective of the Law of International Watercourses and the Protection of the Environment, *Leiden Journal of International Law*, Vol. 11, 1998, pp. 287-320.

8 Separate opinion of Vice-President Weeramantry to the Judgment in Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia).

9 Title of the presentation: What have we learned from the Gabčikovo-Nagymaros Case?

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Boldizsár Nagy[10] was also a counsel of Hungary during the litigation. He identified three principles that are highly relevant in the case's context. First, the requirement of the normativity of the environmental impact assessment was denied by Slovakia. The ICJ should also have acknowledged the principle as part of international customary law but missed the opportunity. However, years later, in the case of *Pulp Mills on the River Uruguay,*[11] the ICJ recognized it as a general principle of international law. Secondly, the precaution principle was a major part of Hungary's legal reasoning, while Slovakia questioned its applicability. Slovakia stressed that even if the principle could be relevant, its applicability would be limited to the 1977 Treaty. The ICJ also abstained from taking a position on the matter. Thirdly, he mentioned the theory of intergenerational equity developed by Edith Brown Weiss. According to this theory, we should preserve the planet and its resources for the future generation; therefore, we should guarantee access to resources that are at least of the same quality as today and where options are also provided.[12] Nagy highlighted that this principle was not referred by any of the Parties, but its legal afterlife is remarkable.

Gábor Kecskés[13] referred to Jorge E. Viñuales, who identified the judgment as part of the 'second wave' of the ICJ's decision related to international environmental law. The first cases mainly focused on transboundary damages, and the deducted principles could be relevant to some environmental norms. Cases of the second wave specifically contained environmental elements that led to the establishment of the ICJ's Special Environmental Chamber.[14] After describing this historical background, Kecskés presented the judgment's influence on other decisions. The ICJ referred to it in the case of *Pulp Mills on the River Uruguay*,[15] among others, in the light of sustainable development[16] and the necessity of vigilance and prevention in environmental protection.[17] The judgment of the *Gabčikovo-Nagymaros* case contributed to the declaration of environmental impact assessment (EIA) as a general principle of international law. Moreover, the International Tribunal for the Law of the Sea recalled the ICJ's considerations on 'state of necessity' in the *M/V "SAIGA" (No. 2)* judgment,[18] and the ECtHR also relied on its description of what

10 Title of the presentation: Buds to blossom later. The precautionary principle, EIA and future generations in the Gabčikovo-Nagymaros case and thereafter.

11 *Case concerning Pulp Mills on the River Uruguay*, Jurisdiction and Admissibility, Judgment of 20 April 2010, 2010 ICJ Reports, p. 14.

12 Edith Brown Weiss, 'In Fairness To Future Generations and Sustainable Development' *American University International Law Review*, Vol. 8, Issue 1, 1992, pp. 19-23.

13 Title of the presentation: The effect of the Gabčikovo-Nagymaros jugdment to the development of international environmental law.

14 Jorge E. Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment', *Fordham International Law Journal*, Vol. 32, Issue 1, 2008, pp. 235-236.

15 *Case concerning Pulp Mills on the River Uruguay*, Jurisdiction and Admissibility, Judgment of 20 April 2010, 2010 ICJ Reports, p. 14.

16 Id. para. 76.

17 Id. para. 185.

18 *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, para. 133.

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environment is.[19] Finally, he concluded that the case enriched the international environmental law with considerations on the equitable utilization of transboundary waters, the requirement of the Parties to negotiate and the obligation to make full reparation or compensation for a wrongful act. Furthermore, Vice-President Weeramantry mainstreamed the principle of sustainable development, while the reasoning serves as an example of the evolutionary interpretation of an international agreement.

According to Katalin Sulyok,[20] the case represents that the ICJ started to address environmental issues. Since then, it has opened to considering the Parties' scientific arguments. However, the further details are not yet clear; for instance, it is not decided whether the curia or the shadow experts should play a more significant role. She proposed that the ICJ should give importance to scientific arguments because this approach can promote the legal effect of the environmental rules and improve the prospects of future environmental cases. Moreover, this approach can increase the legitimacy of the judgment and fits into the understanding that environmental issues cannot be considered only between the two parties, because the undeniable impact on third parties cannot be ignored.

Christina Binder[21] outlined the 'toolbox' of international environmental law, constituted by static – *e.g.* treaty termination and non-performance – and dynamic elements, like treaty interpretation. The latter became evolutionary in *Gabčikovo-Nagymaros*, when the ICJ acknowledged environmental concerns. The case also points out that an institutionalized joint commission could have proved beneficial during the negotiation process and illustrates the significant role of environmental expertise. The latter is still primarily applied in deciding compensation or calculating damage. Roger O'Keefe[22] has suggested that there is a difference between evolutionary interpretation and application, since the former means the determination of meaning, in this case, according to the rules of the Vienna Convention on the Law of Treaties.[23] Contrary to this, the application is the deduction of legal consequences from the results of interpretation.

Malgosia Fitzmaurice[24] called Hungary's approach 'visionary', especially since the environmental principles were evolving at that time, and the ICJ's finding that safeguarding the ecological balance can be accepted as an essential interest of the states was a significant step in this process. She also found it remarkable that the ICJ has analyzed how the states can apply countermeasures which link the current issue to equitable utilization – the foundation of water contribution – and the

19 *Tătar v Romania*, no. 67021/01, 27 January 2009, para. B, Le droit et la pratique internationaux pertinents, subpara. d).

20 Title of the presentation: Science and the International Court of Justice – the epistemically legitimate argumentative space in environmental dispute.

21 Title of the presentation: The 25th anniversary of the Gabčikovo-Nagymaros case: the potential and limits of international law as regards environmental protection.

22 Title of the presentation: Evolutionary interpretation versus evolutionary application of treaties: Gabčikovo-Nagymaros as a case in point.

23 Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol. 1155, p. 331.

24 Title of the presentation: Everlasting significance of the Gabčikovo-Nagymaros Case in international law.

principles of water law to general international law. According to Fitzmaurice, this was the first case before the ICJ where international law, water law, states responsibility and the general law of treaties were brought together, which led to cases like the *Pulp Mills case*. She acknowledged that the ICJ had only mentioned the principle of precaution, but stressed that this should be examined in light of the period when international environmental law was not fully developed. The case also advanced the concept of future generations and intergenerational equity with practical and philosophical approaches.

Gyula Bándi[25] also focused on the case's impact on the right of future generations, which was addressed by the Court, stating that humankind constantly interferes with nature – ignoring for a long time the damage to the environment. Thanks to the growing scientific knowledge and environmental awareness, new standards occurred, realizing the risk for the present and future generations and aiming to balance economic and environmental interests, such as the concept of sustainable development.[26] He reckons that this concept can be found several times in Weeramantry's Separate Opinion linked to cultural heritages of ancient origin, like the Buddhism and Islamic law. Therefore, this clearly shows that the notion of sustainable development is not new; Bándi complemented this with the path from the Stockholm Declaration[27] to the Sustainable Development Goals.[28] From a legal point of view, the judgment and the Separate Opinion included considerations on the right of future generations and the right to environment, public participation, cooperation, integration, precautionary principle, subsidiarity and good governance. Although the judgment did not mention the right to environment explicitly, Weeramantry's Separate Opinion realized that the right to development and the right to environmental protection have collided.[29] Ottavio Quirico[30] recalled that Weeramantry found that environmental problems cannot be decided on *inter partes* conduct, but rather *erga omnes* characteristics, as, in cases like this, a sider scope occurs rather than the interest of particular states.[31]

Marcel Szabó[32] framed the results and findings of the conference and placed the case in the context of today's legal background. On the one hand, the Parties' arguments showed the confrontation of the law of treaties as a traditional international legal field and environmental law as a new area. This also implies the opposite of the *pacta sunt servanda* and precautionary principles. The judgment

25 Title of presentation: The Gabčikovo-Nagymaros case from the perspective of the rights and interests of future generations.

26 Judgment in Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), para. 140.

27 Stockholm Declaration on the Human Environment. Adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972.

28 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

29 Separate opinion of Vice-President Weeramantry to the Judgment in Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), p. 89.

30 Title of the presentation: From Gabčikovo-Nagymaros to climate rights? European and international perspectives.

31 Separate opinion of Vice-President Weeramantry to the Judgment in Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), p. 118.

32 Title of the presentation: The Gabčikovo-Nagymaros case and its afterlife – 25 years later.

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clarified that it was relevant not only during the implementation of the 1977 Treaty but also during the negotiations following the judgment. Nevertheless, the ICJ marked that the 1977 Treaty should be interpreted in line with the constantly changing circumstances. This formulation can also be viewed as a result of the Hungarian litigation strategy which stressed that environmental principles cannot be ignored. On the other hand, he raised what the outcome of the case could look like today. He notes that in the aftermath of the *MOX Plant* case,[33] it could be possible that the case could raise the appliance of EU law – particularly the use of prevention and precaution principle – and could be the starting point for an infringement procedure.

The conference provided an opportunity to reflect on the lessons learned from the case, which simultaneously was relevant to international treaty law, water law and environmental law. The speakers reviewed the further legal developments and went beyond this by drawing the possibilities for future environmental interpretation before the ICJ. Most of the presentations were published in Vol. 10 (2022) of the Hungarian Yearbook of International Law and European Law.

33 Judgment of 30 May 2006, Case C-459/03, *MOX Plant case*, ECLI:EU:C:2006:345. About the case *see* Patrick T. Eicher, 'International forum shopping: the Mox Plant case and the ECJ', *Dublin University Law Journal*, Vol. 30, 2008; Marcel Szabó, 'A Mox Plant ügy: út az eurosovinizmus felé?' *Európai Jog*, Vol. 2, 2010; Marcel Szabó, 'The Mox Plant case: the way towards Euro-chauvinism?', *in* Gyula Bándi (ed.), *The impact of ECJ jurisprudence on environmental law*, Szent István Társulat, Budapest, 2009, pp. 143-166.