

**BUDS TO BLOSSOM LATER.
THE EIA, THE PRECAUTIONARY PRINCIPLE, AND FUTURE
GENERATIONS
IN THE GABCIKOVO-NAGYMAROS CASE AND THEREAFTER**

Presented by Boldizsár Nagy

at the conference:

Gabcikovo–Nagymaros Project Case Judgment – 25 Years Later

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Motto

*„When technical questions are discussed, in particular concerning **cases related to environmental protection**, it seems to me that the files constituted by the parties are abusively technical and abstruse – or in any case, **incomprehensible for normally constituted jurists** who have only limited training in chemistry, geology or hydrographics.”*

Questions

How did the ICJ treat,

- the duty to conduct environmental impact assessment,
- the precautionary principle and
- the respect for intergenerational equity

in the Gabčíkovo-Nagymaros Project Case in 1997?

Why and how has it circumvented these concepts/principles then, some of which later showed up in its jurisprudence?

Presumptions

- 1) The audience is **familiar with the Original Project** as envisaged in 1977 **and Variant C** as realised between 1990 and 1992 and being operated at present
- 2) Listeners have **read the 1997 judgement** of the ICJ
- 3) The concepts/principles of **environmental impact assessment, precaution and intergenerational equity** are household terms in this circle

Disclaimer

I speak in my private capacity. My words and views should not be attributed to any other actor or institution

Potential and Actuality – Aristotle in the Hague

The goal of the talk is to show that

the duty
to pursue EIA

the precautionary
principle

intergenerational
equity

were **inchoate** in both the dispute and the judgment,
without
being able to play a **decisive** role.

The proposal is that the **judgment** was an opportunity to transform
their potential into actuality in the Aristotelian sense.

These ideas **could have had the power to** deeply **influence or** right
away **determine** the content of the judgment.

Major concerns in the eighties justifying the reliance on the three concepts/principles

Surface and subsurface waters.

- Drying up of parts of the last inland delta in Europe, comprising several hundred square kilometers (Szigetkoz and Zitny Ostrov) with an unusually dense branch system in the flood plain area supporting **unique wetlands**.
- Substantive **deterioration of water quality including the danger of eutrophication**.
- Threat of profound changes is the **aquifer**. The aquifer under the Hungarian side contains approx. 5.4 km³ ground water of potable quality with the sustainable capacity of **750 million litres per day**. The **Slovak side's similar resources are even larger**
- Reduction of the quantity and impairment of the quality of the water produced by the **bank filtered wells** located between the Nagymaros Barrage and Budapest and supplying **2/3 of the drinking water needs of the 2 million inhabitants** living in the Hungarian capital.

The three chosen concepts / principles - their interrelation

EIA = Identifies

certain future harm - the principle of prevention applies

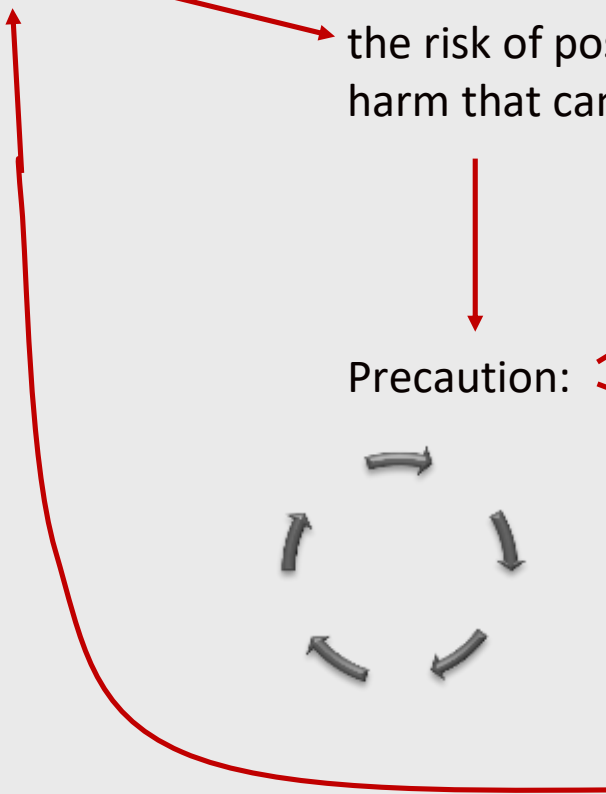
the risk of possible large scale /irreversible future harm that can not be excluded by scientific certainty

abandon project

Precaution:

investige further to reach certainty

Assure that the rights/interests of future generations are not unduly compromised - exercise intergenerational equity



Environmental Impact Assessment

Until
judgment

National start: US, 1969. Czechoslovakia, Hungary: 1992-93

International: Espoo Convention 1991, Rio Declaration, Principle 17, 1992,

EU: 1985 directive

In the
pleadings

H: the studies were not complex, failed a rigorous methodology and did not adequately investigate alternatives to the project. Relies on Espoo and Rio.

SL: Slovakia ignores EIA as a legal norm. Applies threefold strategy:

- 1) **challenging details** of H evidence
- 2) **moving the dispute to** the field of water management, **equitable and reasonable share** and economic benefits.
- 3) In Reply: **representing its studies as if** they were **EIA**, without identifying criteria of an EIA

Environmental Impact Assessment

ICJ: no recognition of EIA as customary law in 1997 ↔ Judge Weeramantry

The judgment

The Court acknowledges that “the concerns expressed by Hungary ... related to an ‘essential interest’ of that State.” and declares that “the Project’s impact upon, and its implications for, the environment are of necessity a key issue.” It finds that „The numerous scientific reports ..– provide abundant evidence that this impact and these implications are considerable” para. 53. still, no call for an EIA. Instead vague terms:

Para 140: „the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant.”

After-life

The Draft Articles on Prevention of Transboundary Harm from Hazardous Activities adopted by the ILC in 2001: prescribes EIA for activities risking significant transboundary harm.

Pulp Mills, 2010: due diligence, and the duty of vigilance and prevention require EIA that „ has gained so much acceptance among States that it may now be considered a requirement under general international law” para 204

Certain Activities - Construction of a Road 2015. EIA extends beyond industrial projects – remains silent on whether a state of necessity absolves the state from the duty

Precaution

Until
judgment

Late eighties, early nineties: mention of precautionary measures / approach / principle in political declarations and the Montreal protocol
1992: Rio Declaration, principle 15 (within states' capabilities) **Climate change** convention – principle 3, **Biodiversity Convention** – content appears in preamble; **Helsinki Convention** on the Protection and Use of **Transboundary Watercourses** and International Lakes - principle
1992 Article 191(2) of the TFEU (since Maastricht)
1994 Sofia Convention on co-operation for the **protection of the Danube** river - principle

In the
pleadings

H: **Consistently calls for the application** of the principle/approach : „the Court, the principal judicial organ of the United Nations, is bound itself to apply a precautionary approach” H C.M., para 7.25 and 7.28
SI: **overall attitude: general principles of environmental law, including the precautionary principle are not applicable** at all, but even if they were, **only for the interpretation of the 1977 Treaty**, and in fact, Czechoslovakia and Slovakia had always acted in accordance with these principles (SI reply, 3.56)
„[T]he **conduct** of the Parties in relation to the **Project was fully compatible with the precautionary approach.**” Mc Caffrey, CR 9, at pp 33-37

Precaution

In the
judgment

“Both Parties have placed on record an impressive amount of scientific material ... The Court ... concludes, however, that, ..., it is not necessary ... for it to determine which of those points of view is scientifically better founded.” Para 54

Para 140 again contains an idiosyncratic formulation :

„The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.”

Crawford: “Perhaps unusually, the Parties had been in agreement as to the content of the precautionary principle as a question of general international law. It is all the more surprising that the Court chose to sidestep the application of the principle.” p.262

Precaution

Afterlife

The ICJ has not (yet) recognised it as an applicable principle
In other fora: gradual progress, but clear breakthrough only in the EU

1998 WTO, does not give way to a precaution based argument in the *Beef hormones* case

1999 Bluefin Tuna and 2000 MOX – ITLOS approvingly quotes content
2011 ITLOS, Advisory opinion:

“[T]he precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the [mining] Regulations.”

Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, para. 127.

de Sadeleer (2020): „...there has been repeated and widespread state practice accompanied by an opinio juris in order to crystallize precaution into a customary norm, at least from a European perspective.” p.469

Intergenerational equity

Until
judgment

Wide array of references to future generations from the Charter to the Moon Agreement, Stockholm 1972, Rio 1992, etc.

Doctrinal sources: **Common heritage** of mankind and **sustainable development**

Theory: Edith Brown Weiss IN Fairness to future generations = conservation of **options, of quality and of access** = planetary trust

EBW: In Fairness to Future Generations ... 1989

In the
pleadings

H: A well-governed state has a **duty of diligence to avoid major risks** to the health and livelihood of **future generations**, H.M., 10.39

P.M. Dupuy arguing during the oral hearing: the case is **archaic and prophetic**, „ it confronts us with an **anachronistic dam project** while at the same time obliging us to **consider the rights of future generations**” CR 97/6 p 62

S: Mentions **FG in the context of sustainable development** and states that „that the **emerging human right to the environment** requires each generation to preserve and **pass on its environmental patrimony to the next generation**” S.C.M., 10.116

Intergenerational equity

In the
judgment

Parties did not rely on intergenerational equity as a legal argument in support of a claim.

The Court ignored the idea, beyond perceiving it as part of sustainable development and beyond recalling twice its dictum from the *Nuclear Weapons* advisory opinion „the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.” Para 53, 112.

Afterlife

UN SG Report: Intergenerational solidarity and the needs of future generations, 2013

SDG, 2015: „ We will implement the Agenda for the full benefit of all, for today’s generation and for future generations.” Para 18

Climate change litigation worldwide

Supreme Court of Columbia, 2018

Hungarian Supreme Court 2018

Bundesverfassungsgericht, 2021

Quoted sources

- Brown Weiss, Edith: *In fairness to future generations: International law, common patrimony, and intergenerational equity*, United Nations University; Dobbs Ferry, Tokyo, Japan, 1989
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- Pellet, Alain: The Anatomy of Courts and Tribunals
The Law and Practice of International Courts and Tribunals 7 (2008) pp. 275 – 287
- Sadeleer, Nicolas de: *Environmental law principles: From political slogans to legal rules, 2nd edition*, Oxford University Press, Oxford, 2020
- Sulyok, Katalin: *Science and judicial reasoning: The legitimacy of international environmental adjudication*, Cambridge University Press, Cambridge, 2021
- Szabó, Marcell: The implementation of the judgment of the ICJ in the Gabčíkovo–Nagymaros dispute, *Iustum Aequum Salutare* vol. V (2009) No. 1. pp. 15–25.

So why not, then?

- The Court is **still too distanced from really weighing scientific-technical arguments** – avoids norms presupposing that.
- In fact EIA, precaution and intergenerational equity were **relative „newcomers”** compared to well-established mainstream doctrines on treaty law or even water law
- The Court may have hoped that by **delegating the task of finding an environmentally sustainable solution** to the parties it may free itself from considering these complex norms and approaches

Further links

http://kovacsgyorgy.eu/?page_id=167

[Splnomocnenec pre SVDGN \(gov.sk\)](#)

www.szigetkoz.biz

Thanks!

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www.nagyboldizsar.hu

What opponents feared

Action No. 2015-SK-TM-0151-W “Upgrade of Gabčíkovo locks”

[2017_03-07_gabcikovo-extended-summary.pdf \(gabcikovolocks.eu\)](#)

The current status of the Gabčíkovo locks limits safety, capacity and reliability of shipping as a consequence of:

1. One lock is shut down due to a malfunction, the second lock is operational only partially. Defects lie in the hydraulic filling system (technological part - caps systems, construction part - degraded concrete and channel part - bad route shaping, poor management of the hydraulic system resulting from a poor control system of the locks) and in the failures of large upper and lower gates directly at the lock chambers.
2. Poor expert control system resulting in an unsafe manipulation with the water flows in terms of navigation limiting the navigation depths at the shallow points. It also includes unreliable flow and level measurements at important sites and profiles (consumption curves in managing profiles, capacity curves of weirs).
3. Poorly sealed subsoil and expansion joints in the construction of the locks - flowing water in the subsoil endangers the stability of the entire locks by scouring fine particles, formation of cavities and causing - subsidence, shifts and deformations. Degraded areas in the locks subsoil should be remedied (required identification of the degraded area, extent and subsequent filling by a sealant). It is required to seal the space between the filling object of the locks and the wall connecting the power plant and lock chamber.

2016-2020 Project, 144 million euros