Yearbook of International Environmental Law

Volume 8
1997

Jutta Brunnée
Ellen Hey
Editors-in-Chief

Daniel Bodansky
Laurence Boisson de Chazournes
Ted McDorman
Catherine Redgwell
Philippe Sands
Associate Editors

André Nollkaemper
Book Review Editor

Kenneth Rudolf
Bibliography Editor

Johan G. Lammers
Documents Editor

Stacy Belden
Assistant Editor

Marianne Breijer
Administrative Secretary

CLARENDON PRESS · OXFORD
1998

Contents

Part 3: Literature Review

Book Reviews

Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the *Case Concerning the Gabčíkovo-Nagymaros Project*

Stephen Stec and Gabriel E. Eckstein

The law of treaties often conjures up images of states as rotund gentlemen with whiskers, vests, and watch-chains proclaiming solemn and chivalric oaths upon their honour. Treaties are sacred in the same way that a man's word is his bond. This type of relationship among states is largely unquestioned since much of the way we live in the world depends upon the assumption of the inviolability of sovereign states and their treaties. Any challenge to these assumptions would surely evoke horror at the unmentionable void that would result—except in lawyers who make their livings shaving nuances. However, in the context of the environment, the analogy between states and barons begins to break down. Environmental impacts flow unimpeded across the boundaries of sovereign states, without respect for body or boundary. People form alliances across borders in order to pursue broader, more global issues. Support for adding the environment to the list of concerns that may justify interference in the affairs of neighbouring states is increasing. Environmental concerns when they relate to the actions and responsibilities of states, moreover, are increasingly expressed in the language of sustainable development and the precautionary principle.

This is perhaps why expectations were so high when the International Court of Justice (ICJ) tackled the *Case Concerning the Gabčíkovo-Nagymaros Project* (hereinafter *Gabčíkovo-Nagymaros* case)[1] and the opportunity was presented to strike a new balance between international environmental law and the law of treaties. This was the first case in which the ICJ considered the concept of sustainable development. What better scenario to give credence to the notion of sustainable development than a case concerning a "gigomaniacal"[2] scheme with its roots in the archaic, discredited, and inherently

[1] Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), (Judgment of 25 September 1997), 37 I.L.M. 162 (1998).

[2] In the words of Vaclav Havel. BBC Summary of World Broadcasts, February 18, 1991. Part 2, Eastern Europe; A. International Affairs; 2 USSR–Eastern European Relations; EE/0999/A2/1 Headline: Czechoslovak President on Security Co-operation and Nagymaros Barrage.

unsustainable form of development known as scientific socialism. The complex set of facts that were presented provided sufficient room for the Court to give guidance on the extent to which environmental protection concerns, in the context of shifting developmental paradigms, could justify the substantial reformation or termination of a treaty. The Court had the opportunity to balance two interests—each of which involved an intrusion upon sovereignty—first, the interest in enforceable rules of conduct guiding relations among nations and, second, the interest in protecting the common heritage of mankind against ill-conceived development. In addition, the ICJ had the chance to elaborate on the development of international law concerning shared natural resources as well as to provide an impetus for the recently adopted UN Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention).[3] Most importantly, perhaps, the Court had the opportunity to apply an emerging principle of international environmental law—the precautionary principle—in order to make proponents of large-scale investments responsible for the ecological justification of such projects.

Another case of this nature may not come along for quite a while. Thus, when the decision of the Court was finally issued in September 1997, it was disappointing for many. However, the conservative approach taken by the Court, which was composed of members from all over the world, was not unexpected. The Court scrutinized Hungary's reluctance to continue building the Nagymaros Dam and to negotiate more strictly than it treated Czechoslovakia's ongoing construction and ultimately illegal implementation of Variant C. Nevertheless, the judgment did open the door to an interpretation of treaty implementation that could radically alter the original scheme. Moreover, the decision contains several findings and statements of potential significance to future cases. These findings and statements touch upon several issues, including the nature of joint projects, the status and importance of environmental values, and the meaning of sustainable development. Some of the implications bode well for the protection of the environment and others do not.

The judgment, however, is likely more significant for the questions that it failed to answer and for the opportunities that it missed in advancing international environmental law. While, on the one hand, it confirmed the substantive nature of environmental protection as a core value implicit in sustainable development; on the other hand, it failed to take adequate account of the fundamental failure of technical solutions to protect the environment with respect to immense and inflexible public works projects, such as the Gabčíkovo-Nagymaros project. In order to arrive at a decision that relied upon the provisions of the 1977 Treaty, the Court had to acrobatically avoid many of the opportunities that were presented to it, and, in so doing, sent a

[3] (1997), 36 I.L.M. 700.

clear message of its conservatism. Finally, the decision may be remembered for the concepts that were introduced in its concurring opinions long after the judgment itself is forgotten.

Of all the issues before the Court, the handling of the question of Hungary's notification of termination attracted perhaps the greatest interest. Indeed, it was this issue that generated most discussion in chambers since it ultimately provoked the biggest split on the bench. Among the various arguments put forward by Hungary in this regard, the most significant ones related to environmental protection, including necessity and changed circumstances. In regard to changed circumstances, the ICJ showed little sympathy, avoiding an indepth discussion of the issue. Even though the project arose largely out of Cold War interests and the assumptions behind it were profoundly affected by the loss of Soviet patronage, the shift to a market economy, democratization, geopolitical developments, and improved environmental awareness, the Court made every effort to resolve the dispute within the confines of the 1977 Treaty between Hungary and Czechoslovakia and related documents.

With respect to the argument of necessity, the Court concluded that the threats to ecology had not been sufficiently established and were merely perceived perils as opposed to actual and imminent threats. Surprisingly, the Court determined this conclusion notwithstanding its unwillingness to evaluate the merits of the scientific data presented. The ICJ expressly declined to consider the value or the validity of the information presented to it by both sides and asserted that "it is not necessary . . . for [the Court] to determine which of those points of view is scientifically better founded" (para. 54). Although such information is possibly beyond the purview of the judges, the Court's decision to ignore it raises a troubling question: how can a court determine the degree or immediacy of a particular environmental threat without evaluating the very data describing the peril? Nevertheless, while not sustaining the argument in this case, the Court left the door open to the possibility that even a legal pillar, such as *pacta sunt servanda,* might, in some circumstances, have to yield to environmental concerns. In particular, the ICJ asserted that the threat of imminent harm could give rise to a state of necessity. As the precautionary principle develops, its impact on the meaning of imminent harm might well create pressures on existing, rigid treaties. The solution, therefore, should involve an increased flexibility in treaties with respect to environmental matters.

In rejecting Hungary's environmental arguments, the Court leaned heavily on three specific provisions of the 1977 Treaty. In the Court's words, Articles 15, 19, and 20 of the treaty, which pertain to the protection of nature, fisheries, and the quality of the Danube, "actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives,"

through reference to the joint contractual plan according to which all measures for implementation of the treaty would be carried out (para. 103). These articles, in the Court's view, were designed to accommodate change and reflected the understanding in 1977 that the implementation of the treaty might need to take into account new developments in the state of environmental knowledge. In regard to Hungary's argument that these very provisions had been violated by Czechoslovakia in so far as it had not negotiated in good faith to adapt the joint contractual plan to new scientific and legal developments, the Court found as a factual matter that there was insufficient evidence to conclude that Czechoslovakia had consistently refused to negotiate on this account. On the contrary, the Court found that Hungary's refusal to countenance further construction pending negotiations had contributed to the failure of the negotiations. This conclusion could only have come about as a consequence of the Court's remarkable finding that Czechoslovakia's substantial progress in the construction of Variant C—a unilateral provisional solution that the Court found to be in violation of international law—had not justified termination.

This element of the decision is the weakest link. In the largest expression of disunity on the bench, six judges concluded that Czechoslovakia had no right to proceed to the provisional solution. In particular, the dissenters felt unable to distinguish between the substantial work that had been done to complete Variant C and its being put into operation. Czechoslovakia's actions with respect to Variant C had implicitly belied its good faith towards Hungary's concerns and, in the opinion of four of the dissenters, had justifiably prompted Hungary's termination of the treaty. The logic of the dissenters' argument is compelling, especially as the majority placed great weight on the fact that Czechoslovakia had gone to enormous expense to carry out its part of the project. The majority, therefore, did not adequately distinguish between the substantial completion of the works under the treaty as an equitable argument in favour of specific performance and the massive investment in a white elephant of a provisional solution, whose ultimate implementation the Court later determined to be an internationally wrongful act.

Ironically, the Court's reluctance to condemn "preparatory acts," no matter how disingenuous, required it to look beyond the four corners of the treaty to international legal principles concerning shared natural resources in order to find that the implementation of Variant C had been illegal. The holding that approximate application, even where one party claims to have taken into account the interests of the other, cannot be used to extract benefits from a failed joint project involving shared natural resources appears to provide a means for one party to kill treaty regimes relating to such joint projects. Moreover, since the Court took special notice of Hungary's difficulty in coordinating its position in 1989 during a transitional political phase, a people's right to an equitable and reasonable sharing of an international watercourse

appears to be independent of the machinations of its government and, thus, could be raised at any time.

This kind of veto power, however, cannot be exercised without substantial risk of liability. The Court placed a nearly insurmountable burden on Hungary to demonstrate that Czechoslovakia had refused to consult with it concerning possible environmental protection measures, even though Czechoslovakia had refused to stop work on an illegal solution. On the contrary, suspension of work in these circumstances was considered "not conducive to negotiations." In the Court's mind, therefore, the status quo had been based on a legal regime—in this case, for the construction of the barrage system—rather than on the pre-existing physical and environmental conditions. The finding that Hungary had contributed to the failure of negotiations under Articles 15, 19, and 20 would therefore make it exceedingly difficult for a state to legitimately abandon construction of *any* project, on *any* grounds, no matter how clearly its environmental impacts outweighed other considerations and regardless of irreversible harm.

While the majority of the Court found no problems with Slovakia's construction of Variant C, it did find that implementation of that scheme constituted an internationally wrongful act. It reached this conclusion by giving credence to the long-argued notion that all riparian states enjoy a "perfect equality" in the use of the waters of shared rivers.[4] This concept has found modern expression as a right of states to an equitable and reasonable share of a transboundary resource and was recently codified by the UN in the Watercourses Convention.[5] The Court's recognition of this principle, however, was merely perfunctory—a stepping stone towards its conclusion that Slovakia's diversion of the Danube violated international law. The Court asserted that in depriving Hungary of its right to a fair share of the river, Slovakia had violated the international law norms of approximate application (although the Court did not discuss whether such a rule actually exists in international law), of proportionality in effecting a countermeasure, and of lawful mitigatory measures. The Court, however, never considered the right of states to an equitable and reasonable share of a transboundary resource as creating a legal obligation, nor that the deprivation of this right constituted a transgression of international law in and of itself. Indeed, purposefully denying a state a fair share of water, which the state has enjoyed and expects to have at its disposal, constitutes an injury to sovereignty.

In addressing the question regarding the diversion of the Danube, the Court also neglected to substantively consider the more tangible injuries caused to Hungary and to its environment. Under international watercourse law, a corollary and a more established principle than that of equitable and

[4] Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No. 23, at 27.

[5] *Supra* note 3, Article 5.

reasonable use is the obligation of states not to cause significant harm to other states in their use of a transboundary watercourse. In its decision, the Court acknowledged the diversion's serious impacts on Hungary's ecology (paras. 85 and 140) and even framed part of its proportionality argument around "the continuing effects of the diversion of these waters on the ecology of the riparian area of Szigetköz" (para. 85). However, the ICJ never evaluated the extent of the impact and, thus, did not assess whether the consequences constituted violations of international law. Given the Court's acceptance of a safe and balanced ecology as an "essential" state interest and its acknowledgment of actual harm, the absence of a more extensive treatment is surprising. Such an analysis might have been useful not only for addressing the issues of this case but also for providing much needed clarification of the relationship between the principles of equitable and reasonable use and of no significant harm—a relationship that continues to be a source of much debate.

It is noteworthy that in discussing Slovakia's actions, the Court again seemed to dismiss the importance of scientific evidence in assessing the environmental consequences of the diversion. While the Court used the possibility of environmental damage as a basis for some of its arguments, it appraised neither the quantitative nor the qualitative "effects" of the river diversion on the region's ecology nor the data suggesting the amount and quality of water required to maintain a balanced natural and human environment. This lack of scientific consideration in the Court's decision is troubling particularly in two respects. First, it suggests that the Court was uncomfortable with science and scientific evidence. Although the scientific analysis and data might have been considered to be beyond the scope of the Court's expertise, this information was highly relevant and should not have been discounted. Doing so allowed the Court to ignore evidence that was at the very heart of the case. How else could the Court establish whether a particular threat was plausible, what the ecological and human consequences of the threat might have been, whether it was imminent, and whether it was so significant as to warrant corrective action?

The absence of scientific consideration in the Court's decision further suggests that the Court did not regard environmental concerns as being sufficiently important to override or modify treaty obligations. As noted earlier, although the judgment seems to allow for the possibility of an abrogation of treaty obligations on the grounds of ecological threats, this appears to apply only to very limited cases. Unfortunately, the formidable burden of showing likelihood of harm, as delineated by the Court, ignores the seriousness of actual and future damage to the environment—ecological damage typically requires years or decades of remediation at huge costs and some damage is completely irreversible.

Thus, while the Court laudably found it unquestionable that the protection of the natural environment is an "essential interest" of a state, it was unable

to strike a balance between this essential interest and an immense investment, even though it was an investment that might result in a long-term and uncertain impact on the environment. The Court, in the face of development interests, therefore, failed to uphold the precautionary principle. In particular, it failed to take into account the implications of present uncertainty for future generations and allowed for the continuation of activities with potentially devastating environmental effects. Nowhere in the Court's decision was a balance struck between the admittedly significant investment in the construction, which the Court viewed sympathetically, and the potentially larger costs of environmental protection and future corrective measures. The attitude of the Court towards this complex problem can be summed up by its cavalier suggestion that application of an end-of-pipe solution—potentially costly water purification techniques—might be appropriate to address environmental problems anticipated to arise from operation of the works. Principles of prevention and precaution are lost.

What is perhaps more remarkable, however, is that the Court, despite its endorsement of a treaty regime that smacked of unsustainability, went on to invoke sustainable development in order to miraculously salvage something from a sinking ship. This effort began with the simple statement that "newly developed norms of environmental law are relevant for the implementation of the Treaty" (para. 112). Was the Court relying on the ubiquitous Articles 15, 19, and 20 of the 1977 Treaty for this statement or on an obligation of international environmental law of more general applicability? Later in the judgment, the Court stated more clearly its opinion that "new [environmental] norms have to be taken into consideration, and . . . new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past" (para. 140). Although Articles 15, 19, and 20 were again referred to in this paragraph of the judgment, the Court took pains to point to a different source for this rule—the concept of sustainable development. Applying the concept to the case, the Court held that the parties should "look afresh" at the environmental impacts of the operation of the Gabčíkovo power plant.

This particular part of the Court's judgment appears to rely heavily on the separate opinion of Judge Weeramantry. Judge Weeramantry proposed two international legal principles and a new approach to dispute resolution in furthering the "harmonization of human developmental work with respect for the natural environment."[6] The two principles are continuing environmental impact assessment (EIA) and contemporaneity in the application of environmental norms. Weeramantry drew upon *erga omnes* analysis in the resolution of traditionally *inter partes* disputes.

[6] *Supra* note 1 at 212 (separate opinion of Judge Weeramantry).

The principle of continuing EIA is derived from the duty to continuously monitor the environmental impacts of development projects as facts and knowledge progress. However, it goes further in requiring an exchange of information so that continuing EIAs can be accomplished in a cooperative way. More than a mere concept, it is a principle with normative value. In the context of the judgment in the *Gabčíkovo-Nagymaros* case, this principle provides the basis for restructuring the original project in a manner that is quite different from what was envisioned at the time of the signing of the 1977 Treaty. Judge Weeramantry noted that Slovakia had taken the view in its submission that sustainable development includes the principle that "developmental needs are to be taken into account in interpreting and applying environmental obligations," thereby indicating Slovakia's acceptance of sustainable development as the principle that harmonizes two vital and developing areas of law.[7] To deny sustainable development, therefore, would be to condone a state of "normative anarchy." To further support his view, Judge Weeramantry found substantial evidence that Articles 15, 19, and 20 of the 1977 Treaty, which inserted in the treaty an element of dynamism in relation to environmental considerations, arose out of an early notion of sustainable development.[8]

The principle of continuing EIA is supplemented by the principle of contemporaneity in the application of environmental norms. Beginning with the simple statement: "Environmental rights are human rights,"[9] Judge Weeramantry goes on to propose that as the understanding of these human rights evolves, the evolving norms must be applied accordingly. Judge Weeramantry sums up this natural rights-based principle with the statement: "The ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standards of yesterday."[10] Finally, Judge Weeramantry considers the question of whether, in environmental cases, *inter partes* principles, such as estoppel, can be applied. He concludes that environmental issues generally have *erga omnes* quality. Thus, where such issues are of sufficient importance, estoppel and other *inter partes* arguments should not be applied:

[7] *Supra* note 1 at 205.

[8] Yet even Judge Weeramantry's enlightened opinion takes only the first steps towards a truly integrated approach to environment and development. The principle of sustainable development, according to Judge Weeramantry, enables the Court to balance environmental considerations *against* developmental considerations. Unfamiliarity with the concept of integration reached a peak in Judge Oda's dissent, in which the judge took the view that economic development and preservation of the environment are more or less contradictory. He contends that "modern technology would, I am sure, be able to provide some acceptable ways of balancing the *two conflicting interests*" (emphasis supplied), *supra* note 1 at 224, (dissenting opinion of Judge Oda).

[9] *Supra* note 1 at 215.

[10] *Id.*

> We have entered an era of international law in which international law not only subserves the interests of individual states but also looks beyond them and their parochial concerns to the greater interests of humanity and to 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.[11]

Had this view been fully adopted by the Court, the Court may have taken the position that the uncertain impacts of the Gabčíkovo-Nagymaros project and, in particular, of Variant C on an international watercourse and on an area of particular environmental sensitivity and value, might have justified a departure from the prescriptions of the treaty-based regime. After all, it is possible that by applying both the principle of continuing EIA and the precautionary principle, one would be led to the conclusion that the optimal implementation of the Gabčíkovo-Nagymaros works would have been the "no alternative" alternative. In addition, this point brings into question the Court's failure to respect a status quo ante based upon existing physical and ecological values. The Court might have carved out an area of law in which the global interest in environmental protection would permit the fashioning of a compensatory remedy in cases where legitimate environmental concerns require one party to abandon a joint project. Nevertheless, in terms of the law of sustainable development, the Court's recognition that environmental risks have to be assessed on a continuous basis, even for projects begun long ago, is a major contribution.

The *Gabčíkovo-Nagymaros* case bears witness to the critical role that environmental and sustainable development issues play in the deep transformations occurring in Eastern Europe. Given the factors that are present in this region, it is significant, though not surprising, that it is there that the first case in which the ICJ had to grapple with the concept of sustainable development arose. The judgment and Judge Weeramantry's remarkable opinion ought to be viewed together—not only in terms of legal substance but also in terms of the flexibility and sufficiency of international legal mechanisms to respond to concrete challenges such as those posed by developments in Eastern Europe. The results of this response are mixed.

The Court's treatment of environmental issues in the case was perfunctory at best, leading one commentator to assert that "the Court's pronouncements on the environment are necessarily more recommendatory than prescriptive."[12] The Court failed to uphold the precautionary principle when it required Hungary to meet the nearly insurmountable burden of showing the likelihood of significant harm. It also failed to give recognition to a particular set of changed circumstances that were highly relevant to the notion of

[11] *Id.* at 216.

[12] P.H.F. Bekker, *Gabčíkovo-Nagymaros Project*, 92 AM. J. INT'L L. 273, 278 (1998).

sustainable development—that is, to the revolutions of 1989 that purged a fundamentally unsustainable set of economic and ecological values. Furthermore, it neglected many substantive considerations and the application of the international law on the use and management of shared watercourses. Finally, it avoided any evaluation of the scientific data that might have offered some justification for many of its conclusions.

The Court, however, did succeed in establishing a mechanism for taking into account the progressive development of environmental law in order to modify a treaty-based regime that does not depend on specific provisions of the treaty itself. But the value of this mechanism is questionable because of the substantial burdens placed on any party seeking to use it. The Court did call for the application of the concept of sustainable development through the constant reconsideration of the environmental consequences of a project. Yet, it tied the hands of parties that determine that the integration of environmental protection values into development decisionmaking might require a "no alternative" alternative. In the final analysis, forces on both sides of the Danube in favour of the old fashioned technocratic approach to nature were able to regroup under the nose of a vague ICJ decision. As a result, one of Europe's most precious natural resources may be one step further away from sustainability.

This offprint is taken from

Yearbook of International Environmental Law Vol. 8 1997

0-19-826799-1 December 1998 £95.00 Hardback

To order your copy

Use our credit card hotline
Tel: +44(0) 1536 454 534

By fax
Fax: +44(0) 1536 746 337

By e-mail
oders@oup.co.uk

By Post
CWO Department, OUP
Saxon Way West
Corby, Northamptonshire
NN18 9ES

If you would like more information on this title or you would like to receive the latest OUP law catalogue, please contact:

Marianne Lightowler
Marketing Manager, Law
Academic Division
Oxford University Press
Great Clarendon Street
Oxford OX2 6DP

Tel: +44(0) 1865 267844
Fax: +44(0) 1865 267741
email: lightowm@oup.co.uk