

The ICJ and Environmental case law

Environmental cases in the ICJ - thinking points:

- What do these three cases tell us about the ICJ's capacity or legitimacy in hearing environmental cases?
- What are the problems/challenges the court faces?
- Do we need a specialist international environmental court?

The ICJ and Environmental Disputes

- Since 1993, the ICJ has established a seven-member Chamber for Environmental Matters. "The Chamber reflects the Court's desire to demonstrate the particular interest that it attaches to environmental issues."
- No cases thus far has been presented to the ICJ's Environment Chamber. Why?
 - no two States will agree that a given dispute is essentially "environmental".
 - States remain hesitant about referring international environmental disputes to international adjudication. So, for example, in the field of ozone depletion, and soon also in other areas such as climate change and sulphur pollution, States have put in place non-contentious procedures that are characterized by having more of an administrative function.



Pulp Mills on the River Uruguay - implications for IEL

- Injunctive relief - construction does not cause eminent harm
- Air, noise and visual pollution considered beyond the court's jurisdiction
- Large volumes of scientific information and the question of appointing experts
- Obligation to consult
- Burden of proof and the precautionary approach
- Sustainable development
- EIAs - a requirement under general international law in some circumstances



Pulp Mills on the River Uruguay



Whaling



1972 - Proposal put forward at the Stockholm Conference to establish a total moratorium on commercial whaling. Moratorium adopted in 1986 into the 1946 International Whaling Convention (with important exceptions). Whaling is seen to represent the difficulties of reconciling conservation, economic needs and cultural traditions.

Whaling in the Antarctic case

This involves the 1946 Convention on the IWC's 1986 moratorium on whaling. The case involves the United Kingdom's request for the suspension of the moratorium on whaling in the Southern Ocean. The ICJ ruled in favor of the UK, finding that the moratorium was not absolute and that the UK's whaling program was consistent with the Convention's objectives.

Whaling case - implications for IEL

- What can legitimately be considered scientific? What is "for the purpose of science"?
- The significance of recommendations issued by the IWC
- The ICJ avoided consideration of overarching environmental principles

Environmental cases before the ICJ - summing up

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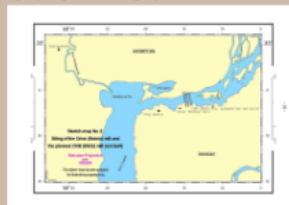
- Environmental principles
- Understanding and evaluating science
- Understanding the nature and temporality of environmental impacts
- Limits of jurisdiction and the failure of a holistic approach



Gabcikovo-Nagymaros - background



Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)



Gabcikovo-Nagymaros - assessing scientific evidence

The court found that the scientific evidence presented by the Czech Republic was insufficient to establish that the dam projects would cause significant environmental damage. The court emphasized the need for more robust scientific evidence in such cases.

The court also found that the Czech Republic had not fulfilled its obligation to consult with Hungary before proceeding with the dam projects.

- No environmental court
- What are the implications of the court's decision for the development of international law?
- Do we need a specialist international environmental court?
- What are the implications of the court's decision for the development of the precautionary principle?
- Does the court's decision have any impact?

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Whaling in the Antarctic case

This involves the Whaling Convention - an IWC - scientific cooperation relating to the preservation of whales. It was subject to such obligations as to consult and offer information as to such matters. The Convention was established by the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) 1964 - 2002 and renewed in 2004 as 2005.

19 May 2010 - Australia. New case against Japan of whaling in the legality of its whaling whaling programme under the Whaling Convention. Convention on International Trade in Endangered Species (CITES) and the Convention on Biological Diversity.

Japan also submitted the ICJ to order that Japan:

- Must cease implementation of JARPA II
- Provide information on permits
- Provide information on the status of the whale population under JARPA II for each permit programme and each programme sample with international

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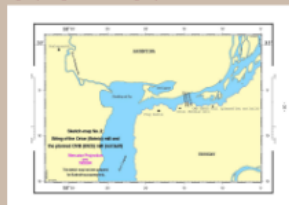
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Gabcikovo-Nagymaros - background



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Gabcikovo-Nagymaros - assessing scientific evidence

The court found that the scientific evidence presented by the ICJ in 1991 was not sufficient to establish the existence of a causal link between the construction of the dam and the alleged environmental damage. The court found that the scientific evidence presented by the ICJ in 1991 was not sufficient to establish the existence of a causal link between the construction of the dam and the alleged environmental damage.

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- Gabcikovo-Nagymaros - implications for international environmental law
- No environmental court
- What are the implications of the court's decision for the development of international environmental law?
- Do we need a specialist international environmental court?
- What are the implications of the court's decision for the development of the precautionary principle?
- Does the court's decision support IEL?

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International Court of Justice



The ICJ is the judicial wing of the United Nations, sitting in the Hague. It is the preeminent global judicial institution. It settles legal disputes submitted to it by states and provides advisory opinions on legal questions submitted by authorized international branches, agencies, and the UN General Assembly.

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Music credit: Johann Strauss "The Blue Danube"

Gabcikovo-Nagymaros - background



Gabcikovo-Nagymaros - implications for international environmental law

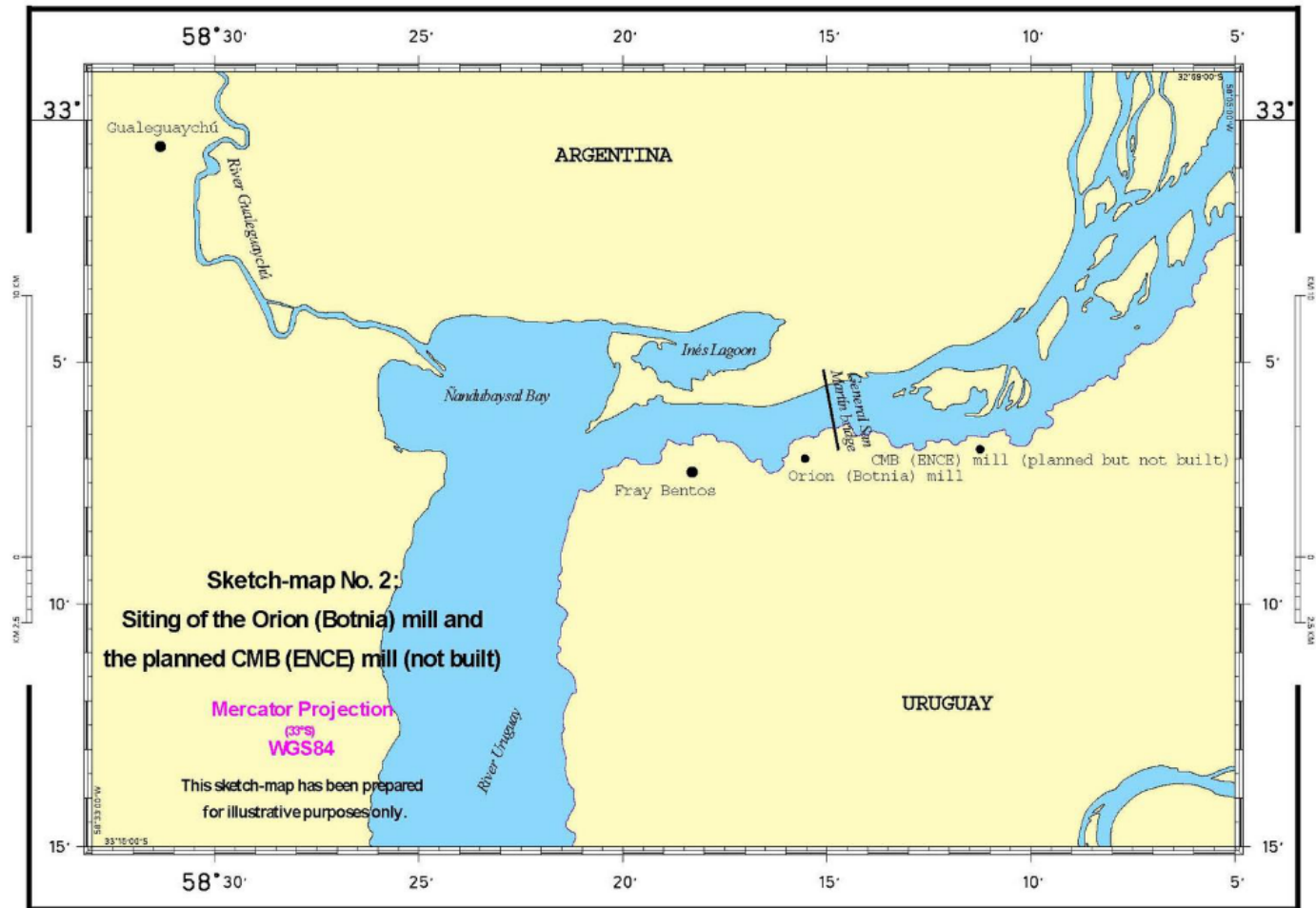
- Was this an environmental case?
- What is an ecological state of necessity?
- What are the implications of the case for the concept of sustainable development? Is it a norm of international law?
- Did the case help develop customary international environmental law?
- What are the implications of the case for the development of the precautionary principle?
- Does the case develop the law of EIAs?

Gabcikovo-Nagymaros - assessing scientific evidence

"Environmental issues invariably raise competing scientific claims. A court will often be called upon to adjudicate on two sharply differing views, in which mountains of scientific arguments – several thousand pages in the Gab·ikovo-Nagymaros case – may be presented in an equally compelling manner. Unlike many national systems that provide for environmental or scientific assessors to join panels and assist in deciphering technical information, the international judge likely will often find herself in a difficult position when seeking to decide on the relative merits of a scientific claim. This problem is not unique to the environmental field, but it calls for a specialized approach."

The court makes NO REFERENCE to the original studies in the judgment or the adequacy of the EIAs. It decides that it does not need to decide which argument was more scientifically sound to decide the matter.

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Pulp Mills on the River Uruguay - implications for IEL



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Pulp Mills on the River Uruguay

The court's finding - The Court ruled that Uruguay was obligated by treaty to notify and consult with Argentina before authorizing the pulp mills and letting construction start; and that Uruguay breached this obligation.[2] However, the Court found that its declaration of Uruguay's breach was in itself a sufficient remedy for Argentina's claim.

The Court also examined Argentina's claim that Uruguay breached substantive treaty obligations to coordinate with Argentina through a bilateral river management agency, and to monitor and prevent pollution of the water and riverbed. The Court scrutinized factual evidence from both sides in detail, and found no breach had occurred. The Court rejected all other claims in light of these two decisions.

This judgment is significant in that the Court recognized EIA as a practice that has become an obligation of general international law in these situations.

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Whaling in the Antarctic case



Whaling in the Antarctic case

1946 International Whaling Convention – Art VIII(1) – scientific exception – whaling “for the purposes of scientific research subject to such restrictions as to number ... and other conditions as the party thinks fit.” Scientific research is undefined in the Convention and Schedule.

Japan established the ‘Japanese Whale Research Programme under Special Permit in the Antarctic’ (JARPA) (1986 – 2002) and resumed in 2004 as JARPA II.

31 May 2010 – Australia files a case against Japan challenging the legality of its scientific whaling programme under the Whaling Convention, Convention on International Trade of Endangered Species (CITES) and the Convention on Biological Diversity.

Australia asked the ICJ to order that Japan:

- Must cease implementation of JARPA II
- Revoke licences or permits
- Provide guarantees that it will not take further action under JARPA II or nay similar programme until such programme complies with international law.

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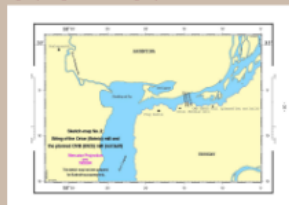
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- Does the precautionary principle apply?