

# The 2019 Henry Wheaton Prize

## An Introduction to Katalin Sulyok's Award-Winning PhD Dissertation

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### Abstract

*Katalin Sulyok, senior lecturer at ELTE Law School, Department of International Law was awarded the Henry Wheaton Prize by the Institut de Droit International in 2019; this prize is awarded by an international jury to the best English, German, French, Italian or Spanish language PhD dissertation in the field of international environmental law. This article presents and evaluates the major findings of the award-winning dissertation entitled 'Scientific Engagement of International Courts and Tribunals in Environmental Disputes – Science and the Legitimacy of Adjudicatory Reasoning'.*

**Keywords:** Henry Wheaton prize, environmental disputes, scientific argument, judicial interaction, burden of proof.

### 1. About the Henry Wheaton Prize and the 2019 (First Hungarian) Winner

The *Institut de Droit International*, having its registered seat in Geneva, was established in 1873 with the aim of bringing together the world's leading international jurists independently of governments. This Institute was awarded the Nobel Peace Prize in 1904 for its role in the amicable settlement of disputes between states. The Institute handles the Henry Wheaton Prize, founded in 1931 from the legacy of J. B. Scott and it is supposed to be awarded every two years. The prestige of this prize is well demonstrated by the fact that, in the absence of any outstanding dissertations, it has not been awarded since 2003. In 2019, the jury consisted of the professors Jutta Brunnée (University of Toronto), Francesco Francioni (European University Institute) and Alfred Soons (University of Utrecht) and who awarded the prize unanimously to Katalin Sulyok's dissertation titled 'Scientific Engagement of International Courts and Tribunals in Environmental Disputes – Science and the Legitimacy of Adjudicatory Reasoning'.<sup>1</sup> The winner, Katalin Sulyok is a Head of Secretariat at the Office of

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1 The dissertation was supervised by Gábor Kardos and Pál Sonnevend, professors of law at ELTE Law School.

the Ombudsman for Future Generations in Hungary and is also a senior lecturer of ELTE Law School, Department of International Law.

## 2. About the Prize-Winning Dissertation<sup>2</sup>

Sulyok's PhD dissertation is a gap-filling work, as in the light of the strategic relevance of scientific arguments, there are surprisingly few legal studies that have comprehensively examined the role of scientific arguments in court rulings. This research focuses on judicial methods that may be used to include scientific arguments and evidence in the legal analysis and to render a convincing and legitimate judicial reasoning that also reflects scientific arguments. Natural science plays an increasingly important role in environmental disputes as more and more parties rely on scientific arguments and evidence before the various courts.

According to Jorge E. Vinuales, an environmental dispute is a "dispute with environmental components",<sup>3</sup> and Sulyok also uses this term in such a broad sense. In this sense, environmental elements cover not only the case where parties dispute the performance of an environmental obligation, but also the case where the legally relevant circumstance is the protection or use of the environment, the assessment of environmental risks or where the exercise of a party's alleged rights threatens or damages the environment. Environmental disputes in the broad sense are being discussed before an increasing number of judicial *fora*, including the ICJ, the Permanent Court of Arbitration, the CJEU, the regional human rights courts, the UN Tribunal for the Law of the Sea, the WTO dispute settlement mechanism and the investment arbitration courts.<sup>4</sup> This approach may be accepted in part because independent environmental courts do not exist under international law, so the role of the environmental issue in a given case is irrelevant as regards the jurisdiction of the specific forum, because it does not change the scope of substantive legal norms applied in order to settle the dispute.

- 2 The dissertation will be published by Cambridge University Press under the title 'Science and Judicial Reasoning – The Legitimacy of International Environmental Adjudication' in late 2020.
- 3 Pierre-Marie Dupuy & Jorge E. Vinuales, *International Environmental Law*, Cambridge University Press, Cambridge, 2015, p. 247.
- 4 Sulyok analyzes the case-law of the ICJ (Chapter 3), the arbitral awards issued in interstate environmental disputes under the *aegis* of the Permanent Court of Arbitration or *ad hoc* panels (Chapter 4), the judgments of the regional human rights courts (ECtHR, IACtHR, AfCHPR, ECOWAS Court) (Chapter 5), the case-law of the CJEU (Chapter 6), the decisions of the WTO Dispute Settlement Body (Chapter 7), the awards of *ad hoc* investment arbitration courts and tribunals (Chapter 8), as well as the decisions of ITLOS (Chapter 9). It is highly welcomed that the dissertation also addresses the decisions of some courts that are not international in character and are not even considered to be courts in the strict sense, insofar as their innovative solutions may serve as judicial 'best practice' for judicial interaction with natural science. These judicial best practices include the decisions of the UN Compensation Commission, which administered environmental damage claims arising from the Gulf War, the decisions of the Marshall Island Nuclear Claims Tribunal, as well as the case-law of US courts in toxic tort cases and climate change litigation.

Based on the case-law, Sulyok concludes that courts often seek to separate scientific arguments from the legal substance of the case.<sup>5</sup> This is often due to the fact that the levels of evidence in the scientific and in the legal sense are different and difficult to compare. Yet, where scientific arguments or facts constitute a substantive part of the dispute, they seek to justify the judicial choice between competing positions supported by scientific arguments in a wide variety of ways. The role of natural science in court rulings also deserves special attention because scientific arguments are of strategic relevance in the decision-making process, therefore they are distinguished from other legal and policy arguments relied on. Their relevance lies in their ability to endow the parties' arguments with seemingly objective and cognitive persuasiveness beyond the law. However, judges do not have sufficient scientific knowledge to judge these arguments. The persuasiveness of a judgment is largely the result of judicial reasoning, therefore in the analysis of the legal practice, included in the PhD dissertation, different techniques of judicial reasoning are relied on when assessing the extent to which natural science has influenced the court ruling. Sulyok points out that through their interaction with natural science, the judges ultimately determine the extent to which natural science may be included in the legally relevant aspects of a dispute. This, in turn, requires different judicial approaches at different stages of the adjudication process. On the one hand, such judicial solutions determine the extent of natural science 'permissible' in the case and allow the scientific perspectives that are considered legally relevant to be explored by the judges and interpreted with respect to the legal issue. In this respect, the scientific arguments – such as the position of a forensic expert or technical expert – play a similar role in resolving a dispute.

Sulyok examines judicial interaction with natural science in four distinct stages of the adjudication process: (i) Framing legally relevant issues to decide to what extent judicial bodies focus exclusively on non-scientific aspects of the case while deciding the dispute. Framing represents a strategic choice of adjudicators, which allows them not to regard scientific arguments as having compelling force in resolving environmental disputes, since doing so would tie their hands in terms of the adjudicatory outcome. With framing techniques they may also use the cognitive power of science for neutralizing conflict. (ii) Scientific fact-finding – that is the extent to which courts request and rely on expert evidence in reaching their decisions, and the procedures in which judges handle and weigh expert opinions. (iii) Causal inquiry – Sulyok investigates whether courts are willing to conduct a thorough, science-intensive causal inquiry with an appropriate causal test or whether they rather circumvent or substitute science in reaching their decision. In this part of her PhD thesis she also examines whether courts are willing to consider uncertain, probabilistic scientific proof of causation and establish a causal link therewith. (iv) Extent and standard of judicial review –

5 See e.g. Jorge E. Vinales, 'Observations sur le traitement des motifs scientifiques dans le contentieux environmental international', in Florian Couveinhes Matsumoto & Raphaelle Nollez-Goldbach (eds.), *Les motifs non-juridiques des jugements internationaux*, Pedone, Paris, 2016, pp. 114-115.

that is the willingness and the techniques of courts to assess the credibility and validity of scientific arguments put forward by expert opinions. The standard of review chosen by adjudicators describes the degree of deference they accord to legislators, who make policy choices based on complex scientific evidence. Margin of discretion and margin of appreciation are also used to describe related phenomena.<sup>6</sup> In several cases, the above four stages of decision-making are not sharply separated one from the other, and any given judicial technique may be attached to several stages.

Earlier studies have not yet touched on the question of how science affects the legitimacy of judicial decisions. Do cognitively authoritative scientific arguments in a legal dispute constitute obstacles to efficient legal dispute resolution? Or are they an asset, or even a necessary element? Is scientific legitimacy a prerequisite to legal legitimacy? Or can legal legitimacy be constructed irrespective of scientific facts? Sulyok tries to uncover these overlooked aspects of legitimacy with regard to international adjudicatory reasoning in science-heavy cases. According to Sulyok, judges may not completely disregard scientific considerations in their judgments. The rule of thumb in this regard is not that the 'use' of more natural science by judges results necessarily in better (more legitimate) decisions. It is much more decisive what the judges' attitude is to scientific arguments and how they interpret them, and finally, how they incorporated them into the legal reasoning. A judicial decision that only minimally reflects the arguments of science may also exploit the maximum potential of the power of natural science, while a judgment that refers a lot to natural science may still be extremely weak and uncertain. Sulyok emphasizes that scientific arguments cannot be judged by the rules of legal logic alone; the correct use of such arguments presumes also an understanding and correct use of the methodology of natural science. This is what really causes the difficulty: while adjudicators always seek objectively verifiable facts to ascertain the facts, scientists formulate their research findings in probabilistic statements and accept that their valid and convincing research findings in this sense are always subject to uncertainty.

Sulyok underlines that, in principle, despite all the challenges associated with it, natural science may become a key ally for judges if used properly. In fact, in such cases the cognitive persuasiveness of a legally sound judicial argument is only further reinforced by the findings of natural science. In addition to the challenges, the scientific and technological developments of the 21st century mean that courts cannot remain in their ivory tower, and the scientific arguments arising in environmental disputes need to be properly explored and interpreted in order to resolve disputes convincingly. It is a real pleasure in this respect that the Hungarian Constitutional Court in several cases, prior to taking decisions on environmental protection, sought the opinion of the Ombudsman for Future Generations, and it even sought the opinion of the Hungarian Academy of

6 For a summary, see Katalin Sulyok, *Scientific Engagement of International Courts and Tribunals in Environmental Disputes – Science and the Legitimacy of Adjudicatory Reasoning*, Theses, ELTE Law School, Budapest, 2018, pp. 7-8. See in detail: Chapter 2, Part V. of the dissertation.

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Sciences Centre for Ecological Research about the impact of the application of a given piece of legislation on the protection of Natura 2000 habitats.<sup>7</sup>

7 Decision No. 28/2017. (X. 25.) AB, especially Reasoning [17] and [20]. About the decision *see e.g.* Marcel Szabó, 'Importance of the Legal Protection of Biological Diversity – Thoughts on the Constitutional Court's Decision No. 28/2017. (X. 25.) AB', *Hungarian Yearbook of International Law and European Law*, Vol. 6 (2018), pp. 485-499.