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The role of science in environmental adjudication

Hungary

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administrative judge

1) Mandate of the court to review techno-scientific matters

a) In what forms do judges gather scientific advice (e.g. party-appointed experts, court-appointed experts, in-house experts, expert judges (legal adjudicators having a formal training in a certain scientific field), and/or expert assessors (scientific experts sitting with judges during the deliberation without the right to vote)? What is the task of these actors?

The court may at the request of a party (the burden of proof is mainly on the plaintiff):

- appoint the expert involved in the administrative procedure to revise his/her expert opinion (according to the relevant legal provision: the expert opinion of the forensic expert appointed in the preceding proceedings shall be deemed as the expert opinion of the expert appointed by the court. In the action regarding the same professional issue, primarily the forensic expert appointed in the preceding proceedings shall be employed as an expert.)
- if the opinion of the expert involved in administrative procedure is contradictory or ambiguous the court may appoint an expert on technical matters.

b) What forms of scientific references are acceptable as bases for making persuasive scientific findings (E.g. expert evidence, standards issued by competent international or national organizations, regulatory trends of other states, etc.)?

According to the law, the court is not bound by formal requirements relating to the taking of evidence, or to specific procedures for the performance of taking evidence or to the use of specific means of proof, and may freely use the arguments of the parties, as well as any other evidence deemed admissible for ascertaining the relevant facts of the case.

In practise courts mostly rely only on expert evidences.

c) Can a higher court (e.g. appeal court, supreme court) in your jurisdiction investigate scientific questions, and/or review the scientific findings of lower courts? If so, to what extent?

There is no possibility to appeal the first instance judgements in environmental cases. The Supreme Court can not investigate scientific questions.

d) How would you handle evidence derived from geospatial (GIS) technologies (such as satellite images, aerial photography, drones, etc.) (see for instance the use of geospatial intelligence in the Bialowieza case, C-441/17 R)? In what type of cases and in what ways do you utilize them? How can they promote compliance monitoring and a more effective enforcement?

Neither public authorities, nor courts rely on GIS technologies in environmental litigations. Such technologies are used mainly in agricultural cases.

2) When do you gather expert advice?

a) How do you distinguish between technical/scientific questions and legal questions in fact-intensive disputes, where science and law are closely interlinked in the underlying legal rules and concepts?

According to the law an expert shall be engaged if specific expertise is considered necessary so as to define the framework of the dispute. In practice there are no guidelines for this kind of distinction in environmental cases, the judge decides on this issue on a case-by-case basis.

b) Are there any types of cases and/or questions where gathering scientific evidence is mandatory under domestic law?

No.

c) To what extent are judges allowed to investigate the scientific dimensions of cases ex officio?

In environmental cases judges are not allowed to investigate ex officio scientific issues.

3) Rules of expert appointment

a) What are the selection criteria of experts in your jurisdiction (e.g. having requisite training, being impartial, independent from the party, being enrolled on government-issued lists, etc.)?

Forensic experts have to be enrolled by the Hungarian Chamber of Judicial Experts. The court can also appoint a forensic institution as expert. The experts are classified according to their field of expertise and specialization. They must be independent and impartial.

b) Whether and on what basis can a party challenge the appointment of a party-appointed/court-appointed/in-house expert?

The party can challenge the appointment only on grounds of bias.

c) To what extent and in what ways do judges in your jurisdiction exercise control over the scientific fact-finding process (e.g. by defining precisely the scope of factual controversy needed to be addressed by experts)?

After the submission of the parties the judge determines the scope of the assignment by defining the issues for the expert to examine.

4) Evidentiary issues: standard and burden of proof

a) What is the applicable standard of proof for environmental cases in administrative, civil and criminal law (e.g. preponderance of the evidence, beyond reasonable doubt, etc.)? Is it set in domestic law, or are judges free to adjust the standard as they deem fit?

In administrative cases judges are free to adjust the standards. In practice it is decided on a case-by-case basis.

b) What are the rules of allocating the burden of proof in science-intensive cases (maybe give one or two examples to indicate what is meant by science-intensive cases)?

According to the law, facts which are considered material for the case shall be evidenced by the party who harbors an interest that such facts are recognized by the court as true, moreover, the

consequences of failure to provide such evidence or to corroborate said facts shall also fall upon that party.

In administrative litigation the burden of proof is on the plaintiff.

5) Rules of evaluating expert evidence: standard (intensity) of review

a) How do you choose between two competing or conflicting pieces of expert evidence?

Because of the principle of free evaluation of evidences the judge will assess the expert evidences and on a case-by-case basis chooses which one is more convincing.

The Civil Procedure Code declares that if the appointed expert's opinion contains any cause for concern, and such cause for concern could not have been eliminated despite the information given by the expert, the court shall appoint a new expert upon request. The court may appoint a body of experts if following the appointment of a new expert more new experts should be appointed, and the specific issue falls within the area of expertise of the body of experts under statutory provisions.

b) Could you review the scientific assessments and justifications made by a competent domestic authority (by conducting a de novo review of the evidence)? Or is your judicial review deferential towards the scientific claims of domestic authorities?

Courts review the scientific assessment made by the competent public authority by conducting a de novo review of the evidence.

c) What is the applicable standard of review to scrutinize the scientific assessments of domestic authorities (e.g. scrutinizing 'manifest errors', or the reasonableness/consistency/coherence of their scientific conclusions, or interrogating the scientific validity and factual correctness of the evidence, or reviewing the procedural aspects of science-based decision-making process at hand)?

First, the standard of review depends on the petition (as judges are bound to it). On the other hand there is no general rule on the standard of review. In most of the cases the standard of review implies scrutinizing reasonableness/consistency/coherence of the scientific conclusions made by the competent authority.

6) The role of science and technology in the courtroom – an overall assessment

a) To what extent do you consider the difficulties of scientific fact-finding to be a defining challenge in environmental adjudication compared to other difficulties?

First, it is difficult to distinguish between legal and scientific issues in environmental court procedures. Then, it is difficult to find appropriate scientific experts. Furthermore, different interpretations and conflicts between expert opinions are difficult to resolve.

b) Do you consider the domestic rules of expert involvement to be appropriate to secure judicial control/monopoly over deciding environmental disputes? Or do you think judges should exercise greater control over the scientific fact-finding process?

The domestic rules are mainly appropriate. It would be helpful to have inhouse-experts to consult on the above-mentioned issues (6. a.) during environmental litigations.

c) Do you consider the limits of curial supervision of fact-intensive cases are appropriate for

providing effective judicial protection and promoting uniform application of EU law?

Yes, I think there are appropriate.

d) Do you think it is necessary and if so, in what ways, to improve the scientific engagement of judges (E.g. would you improve the procedural rules of scientific fact-finding, enhance the scientific competence of the judges through training and capacity building, or develop new legal tests to review contradicting scientific evidence, etc.)

In my opinion all of the examples would be helpful for judges dealing with environmental disputes.

7. Case study

A.

The court has to assess first whether the expert opinions submitted during the administrative proceedings are incomplete or in any other aspect ambiguous or contradictory. If the court finds the expert opinions incomplete, it has to appoint the experts of the administrative procedure to complete the given expert opinion. If the court finds that the expert opinion is ambiguous or contradicting itself, the court appoints a forensic experts. (I would appoint two experts, one expert of hydrology and the other on nature conservation issues.) The evaluation of the expert evidence mostly depends on the parties statement regarding the expert opinion, and whether they can successfully refute the conclusions of the expert opinion.