The International Court of Justice and the environment*

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Abstract. This essay illustrates the Court’s jurisprudence in environmental matters based on selected cases and including the two Nuclear Tests cases, the Nuclear Weapons Advisory Opinion and the Gabčíkovo-Nagymaros case. The selected cases prove the changing and evolving attitudes of the Court and its judges towards the importance of the environment and secondly, they show how the Court deals with certain contemporary environmental principles and concepts, such as the precautionary principle, environmental impact assessment, and intergenerational equity.

Keywords: environment, law of treaties, international customary law, precautionary principle, intergenerational equity

Introduction

In the view of the present author, the judgement in the Gabčíkovo-Nagymaros case and the Advisory Opinion in the Nuclear Weapons case (see below) were the landmark cases in the jurisprudence of the Court in relation to the environment. Despite some critical views, the Court has taken interest in the environment and noted its importance and its potential in shaping the behaviour of States. Prior to these two cases, the Court had dealt with environmental issues only incidentally; in certain other instances the environment featured only in the pleadings of the parties before the Court but was not included in its decisions. By contrast, in both the above-mentioned cases, environmental considerations belonged to the main legal issues and were dealt with directly by the Court.

Of course, we may disagree with the findings of the Court, but this is an altogether different matter and does not alter the fact that the Court recognised the importance of the environment in international law and treated it at a par with other established and classical areas of international law, such as the law of treaties. Dunoff lists the whole catalogue of issues that constitute an impediment for the Court becoming a wider forum for adjudicating disputes with an environmental element.¹ Some relate to the general legal character of the Court’s jurisdiction, others have to do specifically with environmental law.

As to the obstacles of a general character, (that also have a bearing on environmental litigation) Dunoff, first of all refers to the reluctance of States to subject themselves to the adjudication of a third party, secondly to the fact that the judicial proceedings are very inflexible and thirdly that there is usually no doubt who is the winning and who the losing party. Further, the same author refers to a certain disregard of the Court’s judgements and to the procedures of the Court as unfriendly, as well as to a general lack of knowledge of the Court, as contributing factors to its unpopularity. However, it may be said that even if to a certain degree his views are justified, the examples that illustrate them are not contemporary and that the steadily growing Court’s docket demonstrates that many States have overcome a certain lack of enthusiasm regarding the Court’s adjudication.

As to environmental disputes, according to Dunoff, a State may refrain from having recourse to the Court’s jurisdiction due to political reasons, such as having been a polluting State in the past vis-à-vis a State that is polluting at present. The same author also blames the unpopularity of judicial settlement on international environmental law itself, as not mature and in some ways not fully formed, both from the substantive and procedural points of view (e.g. locus standi in the case of harm to global commons or the impossibility for non-governmental organisations, (NGOs), to participate in the proceedings). Finally, Dunoff mentions a cluster of so-called by him “structural” reasons that are a serious obstacle for the Court’s adjudication. In particular, he refers to the often-multilateral character of environmental disputes and stresses that the heart of such disputes is their “polycentric” character, in that they involve many actors and many interrelated issues, which results in “spillover effects” in deciding of only one of them.

An additional problem is the lack of proper scientific knowledge by courts in general. This impediment, however, may be remedied, at least to a certain degree, by the use of experts. In conclusion, Dunoff, is of the view that all the above-described factors, in particular the polycentric and transboundary character (i.e. one that is not defined and confined to the notion of State sovereignty) of international environmental law, makes it very difficult to submit environmental disputes to international adjudication.

All the above are valid arguments. However, as the jurisprudence of the Court evidenced, there are no purely environmental disputes but each and every case is a “mixed bag” of international legal issues, separation of which is impossible and this in turn poses a serious challenge to the Court (especially, considering the complicated nature of international environmental law), but in the view of the present author it does

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2 Ibid., p. 21.
3 Ibid., pp. 21–22.
4 Ibid., pp. 22–23.
5 Ibid., pp. 23–26.
6 Ibid., pp. 26–29.
7 Ibid., p. 26.
8 Ibid., p. 27.
9 Ibid., p. 28.