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 1945, the ICJ has established a seven-member Chamber for Environmental Cases. The Chamber reflects the Court's desire to demonstrate its particular interest in that it attaches to environmental issues.
- No case that has been presented to the ICJ's Environmental Chamber has been heard.
- 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, on the quest for clean-up, and others face similar challenges in other areas such as climate change and cyberlaw. States have put in place multilateral procedures that are characterized by having, more or less of an administrative function.

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 - summary:
- Environmental philosophy.
- Understanding and evaluating science.
- Understanding the nature and temporality of environmental impacts.
- Ethical precision and the failure of the holistic approach.
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 Cases. The Chamber reflects the Court’s desire to demonstrate the particular interest that it attaches to environmental issues.
- The cases to date have been presented to the ICJ Environmental 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 ocean pollution, States have put in place non-contentious procedures that are characterized by having more of an administrative function.

Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)
- Implications for IEL:
- Jurisdiction
- Construction of hydraulic structures
- Acoustic and visual pollution
- Water pollution
- Eutrophication
- Allocation and protection of wetlands
- Climate change
- Restoration
- Jurisdiction
- Impartiality
- Professionalism
- Time limits
- Costs and expenses
- Scope of inquiry

Whaling in the Antarctic case
- Implications for IEL:
- Scientific basis
- Impact on the environment
- Harm to the whales
- Protection of marine life
- Conservation
- International cooperation

Environmental cases before the ICJ - summary up:
- 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?

- Environmental policies
- Understanding and evaluating science
- Understanding the nature and temporality of environmental impacts
- Critical reflection on the future of adjudication
Environmental cases in the ICJ - thinking points:

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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.
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.
Gabčíkovo-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-Nagyamaros 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.
Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)
Pulp Mills on the River Uruguay - implications for IEL

- Injunctive relief - construction does not cause imminent 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
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. 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.
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

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.
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

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 avoided consideration of overarching environmental principles

• Environmental principles
• Understanding and evaluating science
• Understanding the nature and temporality of environmental impacts
• Limits of jurisdiction and the failure of a holistic approach
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?
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The ICJ and Environmental Disputes
- Since 1993, the ICJ has established a seven-member Chamber for Environmental Cases. The Chamber reflects the Court’s desire to demonstrate the particular interest that it attaches to environmental issues.
- The cases that so far have been presented to the ICJ's Environmental 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. See, for example, the field of ozone depletion, and ozone in other areas such as climate change and fisheries. States have put inadequate context into procedures that are characterized by having more of an administrative function.

Pulp Mills on the River Uruguay: Implications for IEL
- Objective of IEL: construction of four pulp mills on the upper course of the river Uruguay
- Project is not consistent with Pakistan’s and Uruguay’s commitment to sustainable development
- Case was referred to the Court by the International Chamber of Commerce
- The Court’s judgment upheld the application of the GATT, and awarded damages to Uruguay

Whaling in the Antarctic case
- The Whaling case is concerned with the Convention on the Conservation of Antarctic Marine Living Resources, which regulates whaling in the Antarctic Ocean
- The case was brought by Norway, Iceland, and Japan against Australia, New Zealand, and South Africa
- The Court’s judgment upheld the application of the GATT, and awarded damages to Australia, New Zealand, and South Africa

Environmental cases before the ICJ - some more...
- Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)
- Case Concerning Whaling in the Antarctic (Australia v. Norway, Iceland, and Japan)
- Case Concerning Whaling in the Antarctic (New Zealand v. Japan and South Africa)