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Dispute Settlement Procedures and Fresh Water: Multiplicity and Diversity at Stake

Laurence Boisson de Chazournes

The resolution of water disputes has greatly benefited over time from the progressive erosion of States' traditional reluctance to commit themselves in advance to judicial and quasi-judicial dispute settlement mechanisms, as well as the considerable progress made toward the institutionalization of dispute settlement facilities. As in many other areas of international law, Tullio Treves has very aptly and subtly analyzed these trends and their consequences for the international legal order.[1]

The protection and management of fresh water offer an interesting lens to analyze these trends. Disputes concerning fresh water are varied. They reflect the many values of water: social, ecological, cultural, and economic. They concern quantity and quality aspects, involve the delivery of goods and services, and can be linked to investment activities. To date, major causes of disputes have included navigation, dams, diversions, and water quality issues. The case law of the Permanent Court of International Justice (PCIJ),[2] the International Court of Justice (ICJ), and the Permanent Court of Arbitration (PCA)[3] is illustrative of this varied nature. Water and sewage concession agreements have presented core questions

[1] On these trends, see, inter alia, Treves 1997, 2007.

[2] See, for example, ICJ: Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment (25 September 1997); PCA: Application of the Convention on the Protection of the Rhine against Pollution by Chlorides (3 December 1976) and its Additional Protocol (25 September 1991) (Netherlands v. France), Award (12 March 2004).

[3] See, among others, ICSID: Compañía de Aguas del Aconquija S.A. (formerly Compagnie Générale des Eaux) and Vivendi Universal S.A. v. Argentina, ARB/97/3, Award (21 November 2001); Aguas del Tunari S.A. v. Bolivia, ARB/02/3, Decision (21 October 2005).

L. Boisson de Chazournes (✉)
Professor, Law Faculty, University of Geneva, Geneva, Switzerland
e-mail: laurence.boissondechazournes@unige.ch

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for arbitral tribunals constituted under the aegis of the International Centre for Settlement of Investment Disputes (ICSID). Several requests brought to the World Bank Inspection Panel and other compliance mechanisms established by international financial institutions have concerned the construction of large-scale water infrastructure.[4]

The available dispute settlement procedures are diverse. They may be strictly diplomatic or judicial, but may alternatively form a hybrid of both archetypes. Non-state actors increasingly submit claims concerning access to water, health protection, and environmental issues to international dispute settlement mechanisms.[5] The multiplication of these dispute settlement procedures has aided the clarification of norms and principles applicable to fresh water. In addition, this multiplication stresses the variety of dispute settlement procedures, notably those accessible to non-State actors. However, while water disputes have been brought before almost all existing mechanisms,[6] these procedures differ in their broader contributions to the resolution of such disputes.

1 Multiplication of Dispute Settlement Procedures: Issues of Interpretation and the Development of the Law Applicable to Fresh Water

Both the multiplication of dispute settlement mechanisms and procedures and their institutionalization have an impact on the development of the principles, norms, and rules applicable to fresh water. Although jurisdictions tend to refer to their previous decisions for the sake of predictability and consistency, cross-fertilization has intertwined them. These institutions refer to decisions of other bodies in their own reasoning and holdings. In this context, the International Court of Justice plays a leading role. For example, the ICJ has gradually clarified the legal contours of important notions and principles, such as its predecessor's reference to the concept of a community of interests in the 1929 *Oder* case.[7] In the *Gabčíkovo-Nagymaros* case, the Court raised this explicitly, thereby stating:

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[4] World Bank Inspection Panel: Yacyretà Hydroelectric Project (Argentina), Eligibility Report (24 December 1996); Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretà), Investigation Report (24 February 2004); Private Power Generation Project (Uganda), Investigation Report (29 August 2008). African Development Bank Independent Review Mechanism: Uganda: Bujagali Hydropower Project and Bujagali Interconnection Project, Investigation Report (20 June 2008).

[5] Tanzi and Pitea 2003.

[6] Boisson de Chazournes and Tignino 2010.

[7] PCIJ: Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom et al. v. Poland), Judgment (10 September 1929), p. 27.

> [I]n 1929, the Permanent Court of International Justice, with regard to navigation in the River Oder, stated as follows: '[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others' (*Territorial Jurisdiction of the International Commission of the River Oder,* Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p.27).[8]

Thereafter, in the context of water pollution and the allocation of costs, an arbitration tribunal relied on the decision of the PCIJ when it embraced the notion of a community of interests. The tribunal stated:

> [W]hen the States bordering an international waterway decide to create a joint regime for the use of its waters, they are acknowledging a 'community of interests' which leads to a 'community of law' (to quote the notions used by the Permanent Court of International Justice in 1929 in the *Case concerning Territorial Jurisdiction of the International Commission of the Oder* (P.C.I.J. Series A, No. 23, p.27). Solidarity between the bordering States is undoubtedly a factor in their community of interests.[9]

In the *Pulp Mills on the River Uruguay* case concerning transboundary environmental harm, the ICJ recognized that institutional joint mechanisms such as the Administrative Commission of the River Uruguay (CARU) are part of "a real community of interests and rights in the management of the River Uruguay and in the protection of its environment."[10]

In the same judgment, the ICJ echoed its decision in the *Dispute Regarding Navigational and Related Rights* case, interpreting the obligation to protect the aquatic environment as encompassing the requirement to carry out an environmental impact assessment. The Court noted:

> As the Court has observed in the case concerning the *Dispute Regarding Navigational and Related Rights*, "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, para 64). In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[11]

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[8] Gabčíkovo-Nagymaros, supra n. 2, para 85.

[9] Rhine Chlorides, supra n. 2, para 97. Boisson de Chazournes 2008, pp. 10, 57.

[10] ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment (20 April 2010), para 281. The Court stated: "By acting jointly through CARU, the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment."

[11] Ibidem, para 204.

The risks of incoherent jurisprudence and conflicting interpretations of applicable norms (in international water law or related fields such as the environment and trade) have yet to arise in practice. However, these risks should not be discarded. Consideration of choice of forum is a means to prevent such situations. Many dispute settlement mechanisms do not contain choice of forum provisions ("fork in the road" clauses). However, the North America Free Trade Agreement (San Antonio, 17 December 1992, hereinafter NAFTA)[12] does contain such a possibility. Disputes falling within both the NAFTA and World Trade Organization (WTO) regimes may be settled in either forum at the discretion of the complaining party; upon selection, the chosen forum retains exclusive jurisdiction.[13] However, even when disputes fall within both regimes, there has been a notable reluctance among concerned NAFTA States to utilize such choice of forum provisions.

In addition, certain disputes between NAFTA members concerning the environment and health are subject to a special regime. In these situations, the respondent State may insist that the dispute be adjudicated before NAFTA dispute settlement bodies. The applicant is then prevented from seizing the WTO procedure and must withdraw from any initiated WTO proceedings.[14]

Despite the scarcity of choice of forum provisions or other specific mechanisms, courts, and tribunals have in general become noticeably aware of decisions rendered by other courts and tribunals. Tullio Treves has even noted "a constructive dialogue" between some of these institutions.[15] Such an approach mitigates the risk of diverging interpretations. An arbitral tribunal deciding a dispute concerning the law of the sea went a step further in referring to "considerations of mutual respect and comity which should prevail between judicial institutions",[16] underlying the responsibility of courts and tribunals to prevent conflicting interpretations, and thus the need for their proactive attitude.[17] This tribunal noted that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the parties".[18]

Moreover, principles and techniques, such as *lis pendens*, *res judicata,* and *forum non conveniens* could also play a role.[19] Notably, the argument of *res*

[12] Entered into force on 1st January 1994.

[13] Article 2005.5 NAFTA, stating "[o]nce dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to para 3 or 4." For further information on procedural exceptions under paras 3 and 4 of the Article, see Kuijper 2010, pp. 28–29.

[14] NAFTA, Article 2005.3–5. See Kuijper, ibidem, Sect. 1.

[15] In this sense, Treves 2007, pp. 838–839.

[16] PCA/UNCLOS Arbitral Tribunal: MOX Plant (Ireland v. United Kingdom), Order no. 3 (24 June 2003), para 29.

[17] On this issue, see Boisson de Chazournes 2011.

[18] MOX Plant, supra n. 16, para 28.

[19] See Shany 2004, p. 418.

judicata has been raised in a water dispute: the *Pulp Mills* case. Following a Mercosur arbitral decision,[20] Argentina claimed that it had settled one of the issues raised by Uruguay in its request for provisional measures. However, the ICJ considered that this legal argument could not find concrete application in the case before it, stating:

> [T]he rights invoked by Uruguay before the Mercosur *ad hoc* arbitral tribunal are different from those that it seeks to have protected in the present case (…).[21]

2 Water Disputes and the Resort to the Varied Dispute Settlement Procedures

The multifaceted nature of fresh water is reflected in both the types of disputes that have arisen and the diversity of the dispute settlement procedures that have been seized. These may be State-to-State or accessible to non-State actors. They can be of a diplomatic or a judicial nature. Numerous water agreements provide for the resort to both types of mechanisms. Most often, the jurisdictional avenue is only through a specific agreement, rather than unilateral recourse. Both arbitration and resorting to the ICJ can be promoted in this context. Disputes may also be brought before judicial dispute settlement procedures established within specialized international organizations, including the European Court of Justice.[22] Trade-related water disputes may be brought to the WTO, NAFTA, or MERCOSUR mechanisms, although they have not yet been utilized in a water dispute context.

Dispute settlement mechanisms' increasing openness attracts a wide array of actors, including States, international organizations, and non-State actors. The opening of dispute settlement mechanisms to several actors and the emergence of specialized universal and regional dispute settlement bodies represent key elements in the development of a corpus of norms and principles concerning water protection and management. Non-State actors (such as individuals, NGOs, and private companies) have brought water-related claims after gaining *locus standi* before various dispute settlement mechanisms. At the same time, the existence of the various sets of rules adopted at the bilateral, regional, and universal levels

[20] MERCOSUR Arbitral Tribunal: Omisión del Estado Argentino en Adoptar Medidas Apropiadas para Prevenir y/o Hacer Cesar los Impedimentos a la Libre Circulación Derivados de los Cortes en Territorio Argentino de vías de Acceso a los Puentes Internacionales Gral. San Martín y Gral. Artigas que unen la República Argentina con la República Oriental del Uruguay (Uruguay v. Argentina), Award (6 September 2006).

[21] ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Order (23 January 2007), para 30.

[22] See, e.g., ECJ: Commission v. France (Étang de Berre), C-239/03, Judgment (7 October 2004).

allows water disputes to be tackled in new ways. This is the case with investment law disputes[23] and with human rights disputes.[24]

Access to varied dispute settlement procedures has, in turn, made courts and tribunals more sensitive to each other's existence. By broadening the sources of persuasive case law, this has led to decisions that include more diverse cross-references to other courts and tribunals, and has helped to strengthen the interpretation and application of law in water disputes. Human rights case law provides interesting examples of cross-references between regional human rights dispute settlement mechanisms.[25] One such example is the *Saramaka People v. Suriname* case brought before the Inter-American Court of Human Rights. The Court stated that it "takes notice" of the views of the African Commission on Human and People's Rights to support its interpretation that natural resources found on indigenous territories are subject to property rights under the American Convention. The Inter-American Court stated:

> [D]ue to the inextricable connection members of indigenous and tribal peoples have with their territory, the protection of their right to property over such territory, in accordance with Article 21 of the Convention, is necessary to guarantee their very survival. Accordingly, the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land.[26]

In the *Tătar v. Romania* case, the European Court of Human Rights (ECtHR) referred to the case law of the Court of Justice of the European Communities,[27] as well as the decision of the ICJ in the *Gabčíkovo-Nagymaros* case.[28] The ECtHR decision relied on these references to assert the customary nature of environmental law principles and their applicability to the water pollution case before it.

Water disputes have followed a trend favoring the creation of new international dispute settlement mechanisms and procedures. In practice, water disputes were brought before courts, tribunals, and other dispute settlement mechanisms soon after their respective establishment. States did not hesitate to bring them before the PCIJ, the ICJ, and various arbitral tribunals.[29] States and non-States actors continue to resolve their disputes in judicial and investment arbitration fora, as well as through compliance and inspection mechanisms. Almost all international dispute settlement bodies have dealt with water issues. This omnipresence can be explained by the complex nature of water disputes, which involve multiple factors. Indeed, in almost all cases, water disputes are embedded in wider disputes

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[23] See e.g., NAFTA (UNCITRAL): Methanex Corporation v. United States, Decision (15 January 2001).

[24] See, e.g., ECtHR: Tătar v. Romania, 67021/01, Judgment (27 January 2009).

[25] Boyle 2007, p. 475.

[26] IACtHR: Saramaka People v. Suriname, Judgment (28 November 2007), para 122.

[27] Tătar, supra n. 24, para 69.

[28] Ibidem, para 69.

[29] See Del Castillo-Laborde 2009.

involving issues of pollution abatement, investment protection, human rights, or trade policies. In this context, it is quite understandable that the use of specialized water tribunals has been limited to only a few examples.[30]

3 New Types of Dispute Settlement Procedures and Procedural Challenges

Some dispute settlement procedures may present unique contours. Such is the case with non-compliance procedures. Notably, the specificities of such procedures are not directly linked to water resources, but to characteristics that water can share with other natural resources. The protection of the environment is geared toward collective interest issues, rather than reciprocal commitments. It also focuses on the need to anticipate and prevent social and environmental impacts. In these areas, non-compliance procedures play an important role.[31]

Non-compliance procedures are often described as collective and non-contentious proceedings. Their diplomatic character is often highlighted. However, this qualification is in some cases too simple an analysis of the dynamics of the procedures for non-compliance. Rather, these procedures reveal an increasingly complex picture. Both diplomatic and judicial elements are at play within them.[32] Some present an increased diplomatic character, while others possess a more litigious character. Innovative non-compliance procedures, such as the facilitation and enforcement mechanisms of the Kyoto Protocol, forge a clear hybrid of both diplomatic and judicial elements in order to promote a collective interest as defined in the context of a multilateral treaty.[33] Due to the close interrelations between climate change and water management, water disputes could be brought before both the facilitative and enforcement branches of the Kyoto Protocol non-compliance procedure.

Additionally, another variant aspect among dispute settlement procedures is linked to their outcomes, as some such procedures do not produce a binding decision. For example, recommendations and mediation reports may require endorsement by the parties involved in a dispute. Non-compliance with recommendations may test the strength and credibility of the dispute settlement procedures concerned. In particular, the Bystroe Canal case (concerning the construction of a canal in the Ukrainian part of the Danube Delta) offers insightful perspectives on this issue.[34] The Danube Delta enjoys special protection as a World Heritage site, and falls under UNESCO's Programme on Man and the Biosphere (MAB

[30] See Hey and Nollkaemper 1992, pp. 82–87.

[31] Boisson de Chazournes 1995.

[32] See Treves et al. 2009, p. 634.

[33] See Boisson de Chazournes and Mbengue 2007.

[34] On this point, see Aurescu 2010.

Programme). The Delta is also covered by the Convention on Wetlands of International Importance (Ramsar, 2.2.1971, hereinafter Ramsar Convention)[35] especially as Waterfowl Habitat. At the invitation of the Ukrainian government, the Ramsar Convention Secretariat and the MAB Programme carried out a joint study in October 2003. In 2005, the MAB International Coordinating Council and the UNESCO World Heritage Committee called upon Ukraine to abide by its international obligations.[36] In 2008, the latter Committee noted that progress on the Bystroe Canal did not conform to obligations[37] under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991, hereinafter Espoo Convention).[38]

The actions UNESCO has implemented have been complemented and strengthened by those of other institutional mechanisms, such as the decisions adopted by the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), the Espoo Convention, and the Parliamentary Assembly of the Council of Europe. In addition, other international organizations (such as the European Union and the International Commission for the Protection of the Danube River) have become actively involved in the system of monitoring and supervising the project by calling for lawful compliance with relevant obligations.

However, a persistent problem among organizational compliance procedures is the inherently soft character of the recommendations they produce. For example, after attempting to fulfil some of its commitments in the Bystroe Canal case, Ukraine resumed project implementation in breach of its obligations, meriting a warning from the Meeting of the Parties of the Espoo Convention.[39] The decision also requested Ukraine to report by the end of each year on steps taken to bring the Bystroe Canal Project into full compliance. The Meeting of the Parties to the Aarhus Convention also issued a caution lamenting Ukraine's pace of compliance with prior decisions of the Meeting, and urging Ukraine's immediate action while threatening suspension of its rights and privileges under the Convention.[40] It can be seen that collective monitoring, surveillance, and non-compliance procedures play a role in requesting the defaulting State to be accountable. They also present limits when the State resists compliance with its commitments, unless specific

[35] Entered into force on 21 December 1975, amended by the Protocol of 3 December 1982, entered into force 1 October 1986, and by the Amendments of 28 May 1987, entered into force 1 May 1994.

[36] UNESCO World Heritage Committee: Danube Delta (Romania), Decision 29 COM 7B.18, UN doc. WHC-05/29.COM/22 (9 September 2005), p. 50.

[37] UNESCO World Heritage Committee: Danube Delta (Romania), Decision 32 COM 7B.21, UN doc. WHC-08/32.COM/24Rev (31 March 2009), p. 59.

[38] Entered into force on 10 September 1997.

[39] Report of the Fifth Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, UN doc. ECE/MP.EIA/15 (16 August 2011), pp. 19–20.

[40] Decision IV/9(h) on Compliance by Ukraine with its Obligations under the Convention, UN doc. ECE/MP.PP/2011/CRP.9 (1 July 2011), items 4–5.

sanctions can be exercised (as is the case in the framework of the Enforcement branch of the Kyoto Protocol non-compliance procedure). The threat of suspension or termination of membership is seen as a last resort, highlighting the diminished capacity of a collective framework to remedy a situation of non-compliance.

Procedural complexities also arise concerning cultural aspects of the preservation of lakes or rivers. A recent denunciation from the UNESCO World Heritage Committee illustrates this point. The Committee determined that Ethiopian dam construction projects on the Omo River would threaten tribal peoples living in the area of Lake Turkana shared between Ethiopia and Kenya. These impacts were detailed in African Development Bank reports that concluded that dam construction projects would result in significant harm to Lake Turkana without consideration of tribal communities' concerns.[41] Importantly, dam construction would impact the hydrological ecosystem that propelled Lake Turkana to the UNESCO World Heritage List. In July 2011, the UNESCO Committee requested that Ethiopia halt construction of the Gibe III dam (as per the UNESCO Convention's requirement that State Parties not take "any deliberate measures which might damage directly or indirectly the cultural and natural heritage located on the territory of another State Party"), and submit assessments regarding its construction to the World Heritage Centre.[42]

In addition, when a dispute concerns preventative measures, the parties may face difficulties linked to the inherent nature of the claim. Alleging the conjectural risk of a future injury may lead to evidentiary problems when demonstrating damages. A prime example is the *Pulp Mills* case. The central factual question of the likely future capacity of seasonally varying river flows to cope with pollutant discharges led to the parties' retention of experts, supplementary arguments as to expert credibility, and the production of reports with scientific and technical data to help the Court determine the risk of damage to water and biodiversity. The International Court of Justice noted "the volume and complexity of the factual information submitted to it".[43] In this context, it also indicated its willingness to evolve in its treatment of evidence and expertise, opening the door to the examination and cross-examination of witnesses and experts.[44] Some judges referred to Article 50 of the Statute of the Court to stress that the Court could have appointed its own experts.[45]

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[41] See African World Development Bank's: Studies of the GIBE III project on the Assessment of Hydrological Impacts of Ethiopia's Omo Basin on Kenya's Lake Turkana Water Levels (November 2010); Public Consultations and Socio-Economic Analysis of Lake Turkana Communities (December 2009).

[42] UNESCO World Heritage Committee: Lake Turkana National Parks (Kenya), Decision 35 COM 7B.3, UN doc. WHC-11/35.COM/20 (7 July 2011), p. 48.

[43] Pulp Mills Judgment, supra n. 10, para 168.

[44] On this point, see Sands 2010, p. 158.

[45] Pulp Mills Judgment, supra n. 10, Separate Opinion of Judges Al-Khasawneh and Simma, para 8.

Other valuable means include the conduct of a risk assessment procedure, such as the one developed in the context of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.[46] This procedure serves to identify and assess risks to determine whether a Member State public health measure is WTO compliant or disproportionately protectionist. When there is an insufficient scientific basis to determine the magnitude of the health risk associated with a regulated substance or product, Member States are likely to adopt or maintain such measures on the basis of the precautionary principle.[47] Such a procedure could be adjusted for other regulatory contexts, allowing interests to be weighed in light of data and information provided through a commonly agreed methodology.

4 Conclusion: The Contribution of Rule of Law-based Dispute Settlement Procedures to the Protection of Fresh Water

The large number and broad utilization of dispute settlement procedures should not obviate an inquiry into such procedures' contribution to the protection of water resources. These mechanisms' characteristics and applicable rules play a role in assessing their ultimate contribution to the protection of natural resources. In some circumstances, there may be a need to ensure that more adequate and comprehensive information is accessible to a tribunal. In others, there might be a need to complement the information that the parties to a dispute have provided. This argument has been raised in investment arbitrations through petitions to submit *amicus curiae* briefs. Such briefs stake their legitimacy on the public interest in these arbitrations. While Tribunals have considered water distribution and sewage concession disputes to be matters of public interest for this purpose,[48] *amici curiae* arguably have a greater role to play in those disputes where the ecological health and protection of water resources is at issue.[49]

[46] See WTO Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994, entered into force on 1 January 1995), Article 5 ("Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection").

[47] On this point, see Boisson de Chazournes et al. 2009, p. 45.

[48] See, e.g., ICSID: Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina, ARB/03/19, Order (19 May 2005), para 3; Biwater Gauff (Tanzania) Limited v. Tanzania, ARB/05/22, Order no. 5 (2 February 2007), paras 51–53.

[49] See, e.g., Methanex, supra n. 23, Sect. 2, para 53; ICSID: Pac Rim Cayman LLC v. El Salvador, ARB/09/12, Order no. 8 (23 March 2011) (affirming a policy basis for public participation, as stated in Center for International Environmental Law, et. al: Application for Permission to Proceed as Amici Curiae (2 March 2011), pp. 1–2).

In this respect, an analogy may be drawn to the voice that *amicus* petitioners gave to environmental concerns in the WTO *Shrimp-Turtle* case.[50] Whereas the State parties focused on the potential justification of trade restrictions in the context of Article XX of the GATT, the *amici curiae* essentially pleaded on behalf of the environment, stressing the relevant effects and obligations of its protection for the Appellate Body's ultimate consideration.[51]

Multiplicity and diversity among dispute settlement mechanisms contribute to the improved protection of fresh water. They also create consequences that should be addressed (such as the risk of conflicting interpretations) through parties' specific commitments and the proactive attitude of courts and tribunals. At base, however, the variety and number of such mechanisms suggest States' compelling faith in dispute settlement based on the rule of law, whose necessity to the protection of fresh water remains gospel.

References

Aurescu B (2010) L'efficacité des dispositions sur le règlement des différends dans les conventions environnementales, étude de cas: Le projet ukranien du canal navigable "Bystroe" dans le delta du Danube. In: Aurescu B, Pellet A (eds) Actualité du droit des fleuves internationaux. Pedone, Paris, pp 265–283

Boisson de Chazournes L (1995) La mise en œuvre du droit international dans le domaine de la protection de l'environnement: enjeux et défis. Revue générale de droit international public 1:37–76

Boisson de Chazournes L (2008) The Rhine chlorides arbitration concerning the auditing of accounts (Netherlands - France) – Its contribution to international law. The Permanent Court of Arbitration Award Series, T.M.C. Asser Press, The Hague, p 10, 57

Boisson de Chazournes L (2010) The principle of Compétence de la Compétence in international adjudication and its role in an era of multiplication of courts and tribunals. In: Arsanjani MH, Katz Cogan J, Sloane RD, Wiessner S (eds) Looking to the future, essays on international law in honor of W. Michael Reisman. Martinus Nijhoff, Leiden, pp 1027–1064

Boisson de Chazournes L, Mbengue MM (2007) À propos du caractère juridictionnel de la procédure de non-respect du Protocole de Kyoto. In: Maljean-Dubois S (ed) Changements climatiques les enjeux du contrôle international. CERIC, Paris, pp 73–109

[50] Center for International Environmental Law, et. Al: Amicus Brief to the Appellate Body on United States—Import Prohibition of Certain Shrimp and Shrimp Products (1999). www.ciel.org/Publications/shrimpturtlebrief.pdf. Accessed 10 April 2012.

[51] See, e.g., ibidem, p. 39 (raising principles of inter- and intra-generational equity to the sustainable development objectives incorporated in the Preamble to the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994, entered into force on 1st January 1995); WTO: United States—Import Prohibition of certain Shrimp and Shrimp Products, WT/DS58/AB/R, Appellate Body Report (12 October 1998), note 147 (reflecting these *amici curiae* concerns by emphasizing its consideration of Principle 3 of the Rio Declaration on Environment and Development ("[T]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations")).

Boisson de Chazournes L, Tignino M (2010) Le règlement des différends internationaux relatifs à l'eau, in L'eau et son droit. In: Études et documents du Conseil d'État. La Documentation Française, Paris, pp 489–514.

Boisson de Chazournes L, Mbengue MM, Thomas UP (2009) Reflexions sur la relation entre la science, l'incertitude scientifique et l'Accord sur les mesures sanitaires et phytosanitaires (SPS). In: Trigo Trindade R, Peter H, Bovet C (eds) Liber Amicorum Anne Petitpierre-Sauvain: Economie Environnement Ethique de la Responsabilité Sociale et Sociétale. Schulthess, Geneva, pp 43–56

Boyle A (2007) Human rights or environmental rights? A reassessment. Fordham Environ Law Rev 18:471–511

Del Castillo-Laborde L (2009) Case law on international watercourses. In: Dellapenna JW, Gupta J (eds) The evolution of law and politics of water. Springer, pp 319–335

Hey E, Nollkaemper A (1992) The second international water tribunal. Environ Policy Law 22:82–87

Kuijper PJ (2010) Conflicting rules and clashing courts: the case of multilateral environmental agreements, free trade agreements and the WTO. ICTSD's programme on dispute settlement and legal aspects of international trade, (International centre for trade and sustainable development), issue paper n. 10, Geneva. http://ictsd.org/downloads/2010/11/j_kuijper_web_6.pdf

Sands P (2010) Water and International Law: science and evidence in international litigation. Environ Law Manag 22:151

Shany Y (2004) The competing jurisdictions of international courts and tribunals. Oxford University Press, Oxford

Tanzi A, Pitea C (2003) Emerging trends in the role of non-state actors in international water disputes, resolution of international water disputes, peace palace papers. Kluwer Law International, The Hague, pp 259–297

Treves T (1997) Recent trends in the settlement of international disputes. Cursos Euro-mediterráneos Bancaja de Derecho Internacional I:395–437

Treves T (2007) Fragmentation of International Law: the judicial perspective. Comunicazioni e studi 23:821–875

Treves T, Pineschi L, Tanzi A, Pitea C, Ragni C, Romanin Jacur F (eds) (2009) Non-compliance procedures and mechanisms and the effectiveness of international environmental agreements. T.M.C. Asser Press, The Hague

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