Water and economics : trends in dispute settlement procedures and practice

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Water and Economics: Trends in Dispute Settlement Procedures and Practice

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1. INTRODUCTION

Competing demands over freshwater resources may result in tensions. In some instances, there are outright disputes between users of freshwater whose requirements and uses conflict with those of other users. Water disputes are notably compounded by the steady increase in the world's population and the pressures arising therefrom. Every region of the world today is afflicted with international water disputes.

Water disputes concern both quantity and quality and are triggered by various factors, including economic ones. To date, dams, diversions, water-quality issues, and, more recently, investment matters have been major causes of disputes. The case law of the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ), and the Permanent Court of Arbitration (PCA) is illustrative of this situation. To cite two examples, the Gabčíkovo-Nagymaros case adjudicated by the ICJ in 1997 involving the building of a system of locks,¹ and the case concerning the application of the Convention on the Protection of the Rhine against Pollution by Chlorides (1976 Rhine Convention), submitted by the Netherlands and France to the PCA,² addressed water-quality issues. Concession agreements regarding water and sewage services are core questions in several recent cases referred to arbitral tribunals constituted under the aegis of the International Centre for Settlement of Investment Disputes (ICSID).³ Moreover, several requests brought to the World Bank

Inspection Panel are related to projects involving the construction of large-scale water infrastructure. These examples illustrate both the importance and the extent of the relationship between water and economics. In the present contribution, these relationships, including trade and investment issues, will be broadly construed.

The progressive erosion of the traditional reluctance on the part of States to commit themselves, in advance, to judicial and quasi-judicial dispute settlement mechanisms has coincided with the considerable progress made towards the institutionalization of dispute settlement facilities. In the last decade new permanent courts and institutionalized arbitration bodies, vested with broad subject-matter jurisdiction, have begun operating. In addition to courts and other permanent adjudication mechanisms, several investigatory procedures have also recently emerged. These mechanisms include the World Bank Inspection Panel, as well as the parallel investigation procedures adopted by the Inter-American Bank, the Asian Development Bank, and the European Bank for Reconstruction and Development. Other mechanisms to add to this list include those established in the environmental and human rights areas, such as UN treaty bodies, regional human rights courts, and the newly established compliance mechanism under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

The multiplication of dispute settlement mechanisms and procedures has an impact on the resolution of water disputes. On the one hand, the existence of various dispute settlement mechanisms and procedures gives States and other actors the opportunity to bring their complaints before these bodies. On the other hand, it raises the issue of potential conflicts between different interpretations of specialized fields of law (for example, environmental and

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4 See Mbengue & Tignino and Callet & Gowlland-Gualtieri's chapters in this book.


6 As an example, in Africa five new courts have been established, namely: the African Court of Human Rights, the Court of Justice of the Common Market of Eastern and Southern Africa, the Court of Justice of the Economic Community of West Africa, the Southern African Development Community Tribunal, and the Court of Justice of the Union économique et monétaire Ouest Africaine. One should also note the establishment of: the Court of the European Economic Area, the Economic Court of the Commonwealth of Independent States, the Central American Court of Justice, the Caribbean Court of Justice, the International Criminal Court, the International Tribunal on the Law of the Sea, and the WTO Appellate Body. One can also refer to the institutionalized bodies introduced in the North American Free Trade Agreement (NAFTA) and in the MERCOSUR.

7 The Compliance Advisor and Ombudsman (CAO) Office created by the International Finance Corporation/Multilateral Investment Guarantee Agency (1999) and the citizen submission procedure established by the North American Agreement on Environmental Cooperation (NAAEC) are also part of this category.

It is interesting to note that water disputes have been brought to courts and tribunals since the very establishment of the latter in the early part of the twentieth century. Since then, they have been brought before almost all of the new dispute settlement bodies established over the last decades.

The aim of this chapter is to provide an overview of the mechanisms and procedures which have jurisdiction over water and economic disputes. It will focus on the actors entitled to bring a water dispute before international mechanisms. The chapter will be divided into two main sections. In the first section, State-to-State dispute resolution mechanisms will be considered. In this context, special emphasis will be placed on judicial (such as the ICJ and inter-State arbitration mechanisms) and quasi-judicial means (such as the WTO Dispute Settlement Body and regional economic and trade procedures). The chapter will then turn to the settlement mechanisms that are accessible to non-State actors. Both sections will highlight that water disputes are, in most cases, embedded in wider disputes dealing with other issues.

2. INTER-STATE DISPUTE SETTLEMENT MECHANISMS, WITH PARTICULAR EMPHASIS ON JUDICIAL MEANS

International law provides several mechanisms and procedures to States to avoid or settle water disputes. Several conventions and agreements dealing with water issues involving economic features, as well as codification endeavors, foresee the need to resort to dispute settlement mechanisms—be they of a diplomatic or a judicial nature. There have been a number of disputes which have been brought before the various judicial and quasi-judicial bodies established over time.

2.1 Treaty practice and codification endeavors

The Convention Relating to the Development of Hydraulic Forces Affecting More Than One State, adopted in Geneva in 1923 under the auspices of the League of Nations, is currently the only water-related convention in force with universal scope. Its Article 12 states that:

If a dispute arises between contracting States as to the application or interpretation of the present Statute, and if such dispute cannot be settled either directly between the Parties or

11 Convention Relating to the Development of Hydraulic Forces Affecting More Than One State Geneva, 9 December, 1923, 36 LNTS 76. However, this Convention has not been implemented because only two of the signatory States are riparian to an international watercourse.
by some other amicable method of procedure, the Parties to the dispute may submit it for
an advisory opinion to the body established by the League of Nations as the advisory and
technical organization of the Members of the League in matters of communications and
transit, unless they have decided or shall decide by mutual agreement to have recourse to
some other advisory, arbitral or judicial procedure.

not yet in force, expressly provides for dispute settlement mechanisms under the
terms of Article 33. According to this provision, when parties to a dispute
cannot reach agreement by negotiation,

they may jointly seek the good offices of, or request mediation or conciliation by, a third
party, or make use, as appropriate, of any joint watercourse institutions that may have
been established by them or agree to submit the dispute to arbitration or to the Inter­
national Court of Justice.

After six months, where negotiations or any other means of dispute
settlement provided for in the Convention have failed, ‘the dispute shall be
submitted, at the request of any of the parties to the dispute, to impartial
fact-finding’. In the latter case, the procedure can be invoked by any of the
parties.

Numerous regional water-related agreements provide for inter-State dispute
settlement mechanisms. In this context, mention should be made of the 1992
Southern African Development Community Treaty (SADC Treaty) and its
Protocols. The 1992 SADC Treaty obliges its parties to resolve disputes
amicably through negotiations as a first resort. Where negotiations fail, the
matter can be brought before the SADC tribunal, created to ‘ensure adherence to
and the proper interpretation of the provisions of the treaty and the subsidy
instruments, and to adjudicate upon such disputes as may be referred to it’. The tribunal has jurisdiction over all disputes related to the inter­
pretation, application, and validity of the SADC Treaty and its Protocols. The
scope of jurisdiction of the tribunal includes ‘disputes between States and
between natural or legal persons and States’ and between ‘States and the
Community’.

At the European level, besides the 1992 Helsinki Convention on the
Protection and Use of Transboundary Watercourses and International

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13 Treaty of the Southern African Development Community, 17 August 1992, 32 ILM (1993), at 120. SADC Revised Protocol on Shared Watercourses in the Southern African Development Community, Windhoek, 7 August 2000, 40 ILM (2001), at 317 (in particular, see Art. 7.2, which reads as follows: ‘Disputes between State Parties regarding the interpretation or application of the provisions of this Protocol which are not settled amicably, shall be referred to the Tribunal’).
14 SADC Treaty, supra note 13, Art. 4.
15 Ibid., Art. 16(1).
17 Ibid., Art. 16.
18 Ibid., Art. 17.
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Lakes, several water-related agreements provide for resort to arbitral and judicial mechanisms in water disputes. Many of these agreements establish compulsory rather than optional arbitration or adjudication, in the event that negotiations fail. It is interesting to note that recourse to the ICJ has been avoided in the most recent watercourse conventions. In this area, even when resort to the ICJ is anticipated, such provisions do not per se constitute an authorization to take a dispute before the ICJ. On the contrary, the jurisdictional avenue is only open by way of specific agreement rather than unilateral recourse. These provisions have the effect of encouraging recourse to the ICJ but they do not provide for it.

The Institut de droit international (IDI) and the International Law Association (ILA) have both addressed the topic of dispute settlement in case of water disputes. The Madrid Declaration adopted by the IDI in 1911 recommended the appointment of permanent joint commissions to give opinions when works or utilizations by a State might result in serious consequences in the territory of another State. Several Articles of the 1966 ILA Helsinki Rules on the Uses of the Waters of International Rivers are devoted to dispute settlement mechanisms. The Helsinki Rules envisage both diplomatic and judicial means, stating that if the States concerned have not been able to resolve their dispute through

19 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, www.unece.org. In particular, see Art. 22 of this instrument providing that: '1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute. 2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation: (a) Submission of the dispute to the International Court of Justice; (b) Arbitration in accordance with the procedure set out in Annex IV. 3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this Article, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.'


negotiation’, or they have been unable to agree through joint institutional mechanisms, good offices, or resort to a conciliation commission,24 ‘it is recommended that the States concerned agree to submit their legal disputes to an ad hoc arbitral tribunal, to a permanent arbitral tribunal or to the International Court of Justice’.25

2.2 Resort to the PCIJ and ICJ

The first case brought before the PCIJ to deal with water issues was in relation to the principle of freedom of navigation. At stake was the identification of the sections of the River Oder to which the international regime established by the Treaty of Versailles was to apply so as to allow for international navigation.26 It thus had a strong economic component as it dealt with the scope of freedom of passage within the context of a specific watercourse. According to Articles 341 and 343 of the Treaty of Versailles, the Oder was placed under the administration of an International Commission composed of representatives of Poland, Prussia, Czechoslovakia, Great Britain, France, Denmark, and Sweden. The Commission was charged, *inter alia*, ‘to define the sections of the river or its tributaries to which the international regime shall be applied’.27 In the course of discussion, differences of opinion arose with respect to the extent of the jurisdiction of the Commission, as well as to the interpretation of Article 331 of the Versailles Treaty. That Article provides that the Oder ‘and all navigable parts’ thereof ‘which naturally provide more than one State with access to sea’ are ‘international’.

The Polish government contended that two tributaries of the Oder (the Netze and the Wartha), located in Poland, provided only Poland with access to the sea, and that therefore they did not fall within the terms of Article 331. On the other hand, the six other States of the International Commission maintained that the condition prescribed by Article 331 was fulfilled. In their view, the two tributaries were thus submitted to the jurisdiction of the International Commission.

The PCIJ was asked to determine whether the jurisdiction of the Commission extended to the tributaries of the Oder situated in Poland. In holding that the jurisdiction of the Commission extended to those tributaries, the Court stated that a solution ‘has been sought not in the idea of a right of passage in favor of upstream States, but in that of community of interest of riparian States’.28 Moreover, it held that this community of interest in a navigable river ‘becomes the basis of a common legal right, the essential features of which are the perfect

25 Ibid., Art. XXXIV.
28 Territorial Jurisdiction of the River Oder Commission, supra note 26, at 27.
equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the other. 29

Another case brought to the PCIJ dealt with the use of the waters of the Meuse River by Belgium and the Netherlands. 30 This river, although for a large part unsuitable for navigation, served as a water reservoir for several artificial canals used for the transportation of goods. 31 Indeed, the Meuse River crosses one of the earliest and most highly industrialized areas of Europe. In order to meet their growing economic needs, Belgium and the Netherlands started the construction of a series of canals, fed by the waters of the Meuse, which would have allowed the expansion of commercial traffic.

In 1863, the two countries signed a treaty that regulated the withdrawal of water from the Meuse. 32 Yet, during the 1920s, it became clear that other canals needed to be built and a larger supply of water had to be drawn from the Meuse. In particular, the development of the coal-fields in the Dutch and Belgian Limburg called for an improvement in the waterways communications with the ports of the North Sea. Thus, because of the building of new canals fed by the waters of the Meuse, the Netherlands and Belgium began competing over a limited amount of water drawn from this river. In this context, the Dutch government instituted proceedings against Belgium before the PCIJ.

Belgium and the Netherlands advanced parallel claims during the proceedings before the PCIJ. In brief, the Netherlands asked the Court to decide that the diversion works carried out by Belgium were in violation of the treaty concluded in 1863 between both countries. At the same time, the Belgian government, rejecting the Dutch claim, filed a counterclaim inviting the Court to find that the works performed by the Netherlands were in breach of the same treaty. Thus, both parties cited the same instrument as a source of rights and duties, but differed in their interpretation of its scope.

The PCIJ, taking a narrow approach, stated that the 1863 Treaty did not prevent parties from constructing, modifying, or enlarging canals wholly situated in the national territory, provided that the diversion of water at the Maastricht intake and the volume of water discharged therefrom was not affected. 33 Thus, the Court confined its reasoning to issues related to the law of treaties. Its judgment gave priority to the principle of *pacta sunt servanda*, without taking into account the underlying reasons for the dispute, namely,

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29 Ibid.
the commercial rivalry between Belgium and the Netherlands. In the view of the Court, the parties could build as many canals as they wanted, even if they were entering into stiff competition for a limited amount of water, provided the principles of the 1863 Treaty were maintained. However, in adopting this approach, the PCIJ was unable to settle the question concerning the amount of water which parties had the right to draw from the Meuse. In addition, the judgment did not assist the parties to engage in further negotiations on this issue. It was only some fifty years after the judgment had been rendered that the parties were finally able, through negotiations, to establish a legal regime that was satisfactory to both sides, on the drawings from the Meuse.

The dispute over the Gabčíkovo-Nagymaros project settled by the ICJ in 1997 centered on the 1977 Treaty between Hungary and Czechoslovakia (from 1993 Slovakia). It provided for the construction of two series of locks, one at Gabčíkovo, in the territory of Czechoslovakia, and the other at Nagymaros in Hungary. The two constituted 'a single and indivisible operational system of works'. Yet, as a result of intense criticism generated by the project in Hungary, in 1989 the Hungarian government decided to suspend and then to abandon the project. Czechoslovakia worked out various alternative solutions, but Hungary maintained that further environmental studies were required before construction could be pursued. The failure of negotiations paved the road to the undertaking of unilateral actions: Czechoslovakia started to work on Variant C, which entailed, among other things, a unilateral diversion of the Danube by Czechoslovakia on its territory and the construction of a dam and two hydroelectric plants. During this phase, Hungary notified Czechoslovakia of the termination of the 1977 Treaty.

In 1993, Hungary and Slovakia signed a special agreement submitting their dispute to the ICJ. In the special agreement, the parties asked the Court to decide, inter alia, whether Slovakia was entitled to proceed to Variant C and to determine the legal effects of the notification of the termination of the 1977 Treaty by Hungary. In 1997, the ICJ decided that the 1977 Treaty remained in force and that Slovakia was not entitled to put Variant C in operation. While for the purposes of the present chapter, considerations on how the Court came to

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34 In this regard the Court stated: ‘From the history of the dispute given above, it will be seen that one of the difficulties in achieving a settlement of the differences between the two States has been the Belgian desire to obtain The Netherlands’ consent to the construction of a new canal connecting Antwerp and the Rhine, a point upon which one may infer that the Netherlands Government [has felt itself] unable to accede to the wishes of the Belgian Government because of the commercial rivalry between Antwerp and Rotterdam. With this aspect of the question the Court is in no way concerned. Its task is limited to a decision on the legal points submitted to it as to whether...certain work constructed by the Belgian Government...infringe[s] on] the Treaty of 1863 and [regarding] the Belgian counterclaim, as to whether...certain work constructed by The Netherlands Government...constitute(s) an infringement of the Treaty of 1863.' Ibid., at 16.


36 Case concerning the Gabčíkovo-Nagymaros Project, supra note 1.
these conclusions can be left aside,37 it should be noted that the Court (as the PCIJ did in the Diversion of the Meuse dispute) left the parties to negotiate an agreement that would put an end to their dispute on the basis of the Court's decision.

In the words of the Court:

It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses... What is required in the present case by the rule pacta sunt servanda, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.38

Since the Gabčíkovo-Nagymaros case, the ICJ has adjudicated two other cases involving water issues: the Kasikili/Sedudu case in 1999,39 and the Cameroon v. Nigeria dispute in 2002.40 Both cases concerned boundary issues. In addition, there were underlying economic and trade aspects to the disputes. Lastly, Niger and Benin have taken their dispute over the Niger River to the ICJ,41 which deals with demarcation of borders across boundary rivers and the attribution of the islands in the Niger River.

It should be noted that in the Kasikili/Sedudu case the ICJ had the opportunity explicitly to bring an economic perspective to the issues concerning the

38 Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), supra note 1, at 141 and 142. At the beginning of March 1998, representatives of the two countries initialled a draft framework agreement which was approved by Slovakia but not by Hungary. Frustrated by the failure of the framework agreement, Slovakia requested the ICJ to render an additional judgement. See ICJ Press Communiqué 98/25 of September 1998.
39 Case concerning Kasikili/Sedudu Island (Botswana/Namibia), ICJ (13 December 1999), www.icj-cij.org.
40 Case concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Eq. Guinea intervening) (10 October 2002), www.icj-cij.org. It should be noted that in this case the ICJ, dealing with the delimitation of the frontier in Lake Chad, refers to the works of the Lake Chad Basin Commission. This Commission was established by the Convention and Statutes relating to the Development of Chad Basin on May 22, 1964 (Cameroon, Chad, Nigeria, and Niger). For the text of the Convention, see Treaties concerning the Non-Navigations Uses of International Watercourses, Africa, FAO, Legislative Study, 61, at 10. Art. 8 of the Statutes establishes the Chad Basin Commission and Art. 9(g) endows the Commission with authority to examine complaints and to promote the settlement of disputes. The ICJ noted that in 1983 the riparian States gave the Commission the task of dealing with certain boundary and security issues, and the Commission has since met regularly to discuss those issues. See Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, ibid., paras 36 and 33.
delimitation of boundary rivers. The ICJ, recognizing the economic importance of navigation (mainly due to tourist activities and fishing) in the Chobe River, upheld that the Parties have undertaken to one another that there shall be unimpeded navigation for craft of their nationals and flags in the channels of Kasikili/Sedudu Island. As a result, in the southern channel of Kasikili/Sedudu Island, the nationals of Namibia, and vessels flying its flag, are entitled to, and shall enjoy, a treatment equal to that accorded by Botswana to its own nationals and to vessels flying its own flag. Nationals of the two States, and vessels, whether flying the flag of Botswana or of Namibia, shall be subject to the same conditions as regards navigation and environmental protection. In the northern channel, each Party shall likewise accord the nationals of, and vessels flying the flag of, the other, equal national treatment. The Court reminded the parties of their commitment to cooperate with each other. In highlighting this, the ICJ thus gave a modern perspective to the issues concerning the delimitation of rivers. It recognized that social and economic interactions between the people living in the two co-riparian States must be preserved and encouraged.

2.3 Inter-State arbitration

Water disputes may also be brought before inter-State arbitration tribunals. The Lake Lanoux case and the dispute related to the interpretation of the 1976 Rhine Convention and its 1991 Protocol provide examples of a resort to arbitration in water-related disputes.

In the Lake Lanoux case, a French diversion project of the waters of Lake Lanoux, located in the Pyrenean region, was at the center of the dispute. The use of transboundary waters in that region had long been the subject of disputes: since the middle of the nineteenth century, water diversion projects had resulted in tensions between France and Spain. In this context, in 1866, the two parties concluded a treaty that regulated certain transboundary issues, including the apportionment of water. In 1950, the French government presented a plan aiming to exploit the hydroelectric potential of the waters of Lake Lanoux by diverting its waters towards the River Ariège, thereby affecting the course of waters which naturally drained into Spanish territory via the Carol River. Although the French project also ensured the full restoration of flow to the Carol River, it met with opposition from the Spanish government. In particular, Spain argued that, under the provisions of the 1866 Treaty, the works affecting transboundary waters could be executed only with its consent.

42 Case concerning Kasikili/Sedudu Island (Botswana/Namibia), supra note 39, para. 40.
43 Ibid., para. 103.
45 C. Romano, supra note 31, at 219-32.
Due to these divergent positions, Spain and France brought the dispute before an ad hoc arbitration tribunal. In its award, the tribunal, developing well-established principles of international law such as the principle of good faith, concluded that the French project did not violate the 1866 Treaty.46

The arbitral tribunal affirmed that consultations and negotiations between the two States relating to the dispute must comply with the rules of good faith and must not be mere formalities.47 Sanctions could also be applied in the event, for example, of an unjustified breaking off of discussions, abnormal delay, disregard of agreed procedures, systematic refusals to take adverse proposals or interests into consideration, and, more generally, in cases of violation of the rules of good faith.48 In case of projected works, riparian States have a duty to inform and consult in good faith, as well as to take into account the interests of other riparian States.49

The case relating to the 1976 Rhine Convention and its 1991 Protocol, in which the Netherlands was matched with France, provides another example of a resort to arbitration.50 In that case too, water protection and economic factors were closely entangled. The objective of the 1976 Rhine Convention and its 1991 Protocol is the improvement of water quality through the adoption of measures against pollution by chlorides. In order to realize the aim of the Convention, Germany, France, Luxembourg, the Netherlands, and Switzerland adopted a Protocol in 1991 which set out a system of allocation of payment that participating countries would make in furtherance of this aim. A dispute arose between the Netherlands and France with respect to the interpretation and application of the 1991 Protocol. An arbitral tribunal was asked to clarify the modalities of payment as provided in the 1991 Protocol. In order to determine the amount that France was expected to pay to the Netherlands, the tribunal analyzed the relevant provisions of the 1991 Protocol in light of the rules of interpretation established by the Vienna Convention on the Law of Treaties.51

In particular, the tribunal paid attention to the principle of good faith and to the purpose and object of the Rhine Convention. During the pleadings before the tribunal, the parties adopted divergent positions with regard to the purpose of the Rhine Convention. While France argued that the aim of the 1976 Rhine Convention is to establish solidarity between riparians, taking into account the fact that pollution sources are multiple and not only located in France, the Netherlands considered that its purpose is the improvement of water quality and ensuring the supply of drinking-water. The tribunal found that both interpretations were compatible, since solidarity between riparians

47 Ibid., para. 11.
48 Ibid.
49 Ibid.
Laurence Boisson de Chazournes was the basis for the measures adopted by parties aiming to improve Rhine water quality.

For several years the Netherlands had made payments so that France could adopt measures against the pollution caused by chlorides. It argued that France had only partially fulfilled its responsibilities according to the 1991 Protocol. The tribunal decided that France was obliged to reimburse the Netherlands for payments made and not used, and at the same time the tribunal determined the accrued interest owing to the Netherlands.

The tribunal, recalling the holding of the PCIJ in the dispute over the Territorial Jurisdiction of the River Oder Commission, considered that the 1976 Rhine Convention aims at safeguarding water quality as well as creating a 'community of interest' between riparians. When riparians establish a common legal regime dealing with the utilization of their shared watercourse, they highlight the relevance of the notion of community of interest. Thus, the solidarity between riparians is an element of their 'community of interest'.

2.4 Trade dispute settlement mechanisms: specialized procedures for water-trade disputes

Depending on the status of water in relation to issues of interpretation and application of the relevant agreements, disputes could arise under WTO as well as regional economic agreements.

The compulsory jurisdiction of the WTO dispute settlement mechanism encompasses all disputes between Members arising under the so-called 'covered agreements'. Therefore, if water-related issues fall under one or more of the WTO agreements, water-trade disputes could be referred to the WTO dispute settlement mechanism.

Within the WTO, besides the 'mainstream procedures' resting on consultations, the establishment of a panel, and recourse to the Appellate Body, there also exists the possibility of resorting to arbitration in application of Article 25 of the DSU. This Article reads as follows:

Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

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32 Territorial Jurisdiction of the River Oder Commission, supra note 26, at 27. See also Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), supra note 1, para. 85.


34 See Edith Brown Weiss and Mireille Cossy's chapters in this book.

35 See Appendix I to the Dispute Settlement Understanding [hereinafter DSU].

36 The idea behind this arrangement was that some simple disputes would be more amenable to arbitration rather than to the more cumbersome panel proceedings. See L. Boisson de Chazournes, L'arbitrage à l'OMC, REVUE DE L'ARBITRAGE, n° 3 (2003) at 949–89.
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States can also agree to resort to other means of dispute settlement of a more diplomatic nature, such as good offices, conciliation, and mediation. The language used in the DSU appears to provide for an inflexible exclusive jurisdiction regime, barring referral of cases coming under the WTO legal system to any outside dispute settlement forum.

With respect to the exclusiveness of the DSU provisions, one should also note that according to Article 1(2) of the DSU, the specific dispute settlement rules included in some of the covered agreements override the provisions of the DSU. In such context, it would seem that specific jurisdiction-regulating clauses providing for non-exclusive jurisdiction of the WTO dispute settlement should prevail. Furthermore, the language used in Article 23(1) only bars Members from seeking the redress of a violation of the WTO agreements before another forum than a WTO Panel and the Appellate Body, but it does not explicitly bar other outside courts or tribunals from interpreting WTO provisions.

Inter-State trade disputes may also fall under the jurisdiction of a regional dispute settlement procedure such as the North American Free Trade Agreement (NAFTA), or under the jurisdiction of the European Court of Justice (ECJ). Chapter 20 of the NAFTA provides the main inter-State dispute settlement provisions. It establishes a Free Trade Commission, on which each Member State has a cabinet-level representative, to oversee the implementation of the Agreement and resolve disputes concerning its interpretation or application. According to Article 2003, Member States are obliged to overcome difficulties wherever possible through cooperation and consultation, but a comprehensive dispute settlement procedure is provided in case they should not succeed in doing so.

57 See Art. 5.6 of the DSU. Thus far there has been only one case of mediation through the Director-General of the WTO. In this single case, however, the requesting Members specified that the mediator ‘could be provided by procedures similar to those envisaged for mediation under Article 5 of the DSU’. See General Council, Request for Mediation by the Philippines, Thailand and the European Communities—Joint Communication from the European Communities, Thailand and the Philippines, 16 October 2002, doc. WT/GC/66.


59 Article 23(1) reads as follows: ‘1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.’

60 Obviously WTO provisions are interpreted from time to time by national courts of the Members, including the European Court of Justice. See Y. Shany, The Competing Jurisdictions of International Courts and Tribunals (Oxford University Press, Oxford, 2003), at 184.

61 North American Free Trade Agreement between the governments of Canada, Mexico and United States, 1 January 1994, 32 ILM (1994), at 289. Special provisions are made for the settlement of disputes concerning antidumping and countervailing duty obligations (Chapter 19, NAFTA). In addition to the inter-State procedure, Chapter 11 provides for the settlement of disputes between a party and an investor of another party (see infra).

First, consultation and good offices, mediation, and conciliation by the Free Trade Commission are available to the States parties. Should those steps fail, the parties may request the establishment by the Commission of a five-person arbitral Panel. The Panel may seek technical information and advice from experts, and may establish a Scientific Review Board to give a written report on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in the proceedings. The Panel renders an Initial Report, where it sets out its findings of fact and its determination as to whether the measure at issue is or would be inconsistent with the obligations of the NAFTA. It then presents its Final Report to the Free Trade Commission. On receipt of the Final Report the parties may agree upon the resolution of the dispute, in conformity with the determinations and recommendations of the Panel.

To the extent that the subject matter of a dispute falls within both the NAFTA and the WTO dispute settlement mechanisms, the dispute may be settled in either forum at the discretion of the complaining party. In this regard, under the terms of Article 2005, the NAFTA provides that in disputes falling under the jurisdiction of both NAFTA and the WTO, the applicant party can choose where to litigate. Upon selection, the chosen forum has exclusive jurisdiction. It should be noted that certain disputes between NAFTA Members concerning the environment, conservation, or health and safety are subject to a special arrangement. In these cases the respondent State may insist that the dispute will be adjudicated before NAFTA dispute settlement bodies. The applicant is then prevented from seizing the WTO procedure and must withdraw from WTO proceedings, if already initiated.

At the European level, the ECJ has jurisdiction over a wide range of disputes. In particular, it has jurisdiction over disputes brought by the Community institutions against Member States, alleging non-compliance with EC law. The Court may also rule upon challenges to the legality of acts of the Community, and of refusals of Community institutions to act in circumstances where they are obliged to act. A third kind of jurisdiction derives from Article 177 of the EC Treaty. The Court may receive requests from the national courts of the Member States for an authoritative interpretation of Community law.

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67 NAFTA, Art. 2018. Unless the parties agree otherwise, the Initial Report is to be presented within ninety days of the appointment of the last panellist, and the Final Report within a further thirty days.
68 NAFTA, Art. 2005(3)-(5).
69 Claims may be brought by one or more States, or by Community institutions. See Consolidated Version of the Treaty establishing the European Community (EC Treaty), 2001 OJ (C801), at 84.
70 In this case, claims can be brought by any Member State, or by a Community institution. In addition, the ECJ may be seized by natural or legal persons having a direct interest in the matter. See EC Treaty, Arts 173, 174, and 175.
With respect to water disputes, it is to be noted that the ECJ has rendered decisions dealing with the failure of a Member State to comply with EC water legislation. As an example, on 14 November 2002, the ECJ ruled against Ireland on account of its failure to ensure compliance with the microbiological standards set out in Annex I to Council Directive 80/778/EEC of 1980, relating to the quality of water for human consumption.\(^{71}\)

The analysis of case law practice relating to water disputes shows that disputes have been brought before inter-State dispute settlement mechanisms, be it the PCIJ, the ICJ, or through arbitration. This could also be the case on the basis of the WTO DSU as well as various regional procedures. The latter are additional mechanisms to which States may have recourse in case the water issue at stake falls within the scope of jurisdiction of these procedures. Other dispute settlement procedures allow non-State actors to be parties to them. Such is the case, for example, in the areas of investment and human rights.

3. NON-STATE ACTORS AND WATER DISPUTES

Water disputes may also emerge when individuals and groups of individuals allege that their interests are affected.\(^{72}\) International procedures to which these non-State actors can have access are still rather an exception. The limited number of procedures in which non-State actors are entitled to participate can be found mainly in the fields of investment law and human rights law. Under international investment law, in particular multilateral and regional treaties such as the ICSID Convention and Chapter 11 of the NAFTA dealing with investment protection, private parties are entitled to challenge a State in an international forum. Human rights instruments can also provide avenues for settling water disputes. Lastly, other international procedures, such as the World Bank and multilateral development banks’ inspection panels, the PCA Environmental Rules, or the SADC tribunal, grant a right of access to non-State actors. One must also add to this list the new compliance mechanism established under Aarhus Convention, entitling members of the public to make communications concerning a Party’s compliance with the Convention.


3.1 Investor-to-State dispute resolution mechanisms: the ICSID and the NAFTA experiences

The ICSID is the oldest institutionalized arbitration procedure granting non-State actors access to international arbitration tribunals.\textsuperscript{73} This instrument entitles a private party to proceed directly against a State in an international forum. In so doing, it is important that the consent of both States concerned by the dispute is obtained (namely, the host State and the investor's State of nationality). Article 25(1) of the ICSID Convention provides that:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.\textsuperscript{74}

Arbitration before ICSID arbitration tribunals depends not only on accession to the Convention by the relevant States, but also on a specific agreement to arbitrate a dispute before ICSID, entered into by the investor's State of nationality and the host State. This agreement may be expressed in several ways. The most common form is a direct agreement between the two parties recorded in a single instrument, such as a bilateral investment treaty (BIT). Alternatively, the parties may submit a dispute that has already arisen by way of a compromis. Moreover, national legislation and multilateral and regional agreements may also establish the jurisdiction of ICSID tribunals to settle State-investor disputes.\textsuperscript{75}

Article 26 of the ICSID Convention states:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy...

This provision establishes a typical exclusive jurisdiction clause. Indeed, the arbitration clause or agreement establishing the ICSID jurisdiction is normally lex specialis and overrides any general dispute settlement arrangement entered into by the contracting States. Thus, if the parties to a dispute have chosen to refer it to the ICSID, the Centre will normally have exclusive jurisdiction.

\textsuperscript{73} Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965, 4 ILM 524 (1966).

\textsuperscript{74} Under the so-called Additional Facility Rules, the ICSID offers a second set of arbitration rules in order to accommodate disputes which involve a State (or an investor's home State) which has not already acceded to the ICSID Convention. ICSID Additional Facility Rules, 21 ILM 1443 (1982).

\textsuperscript{75} Over the last ten years, several multilateral agreements have been concluded granting the jurisdiction of ICSID Tribunals to settle investor-State disputes. These include: the NAFTA (Art. 1120); the Colonia Protocol on the Reciprocal Promotion and Protection of Investments within Mercosur, signed on 17 January 1994 (Art. 9), and the Buenos Aires Protocol on the Promotion and Protection of Investments Made by Countries that are not Parties to Mercosur, signed on 8 August 1994 (Art. 2(h)) (both protocols concluded under the Asuncion Treaty Establishing a Common Market Between Argentina, Brazil, Paraguay and Uruguay (Mercosur), signed on 26 March 1991); and the Energy Charter Treaty, 34 ILM 381 (Art. 26).
Another important characteristic of the ICSID Convention deals with diplomatic protection. Article 27 provides that:

No Contracting State shall give diplomatic protection, or bring an international claim in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such a dispute.

Through this provision, the ICSID Convention bars inter-State adjudication over disputes that the parties have agreed to submit to ICSID dispute settlement procedure. The aim of this Article is to strengthen the exclusivity of the ICSID regime as the only forum for settling investment disputes, and thereby to prevent the rendering of conflicting judgments.76

Because of the increased number of bilateral, regional, and multilateral treaties providing for ICSID jurisdiction, this mechanism is likely to play a growing role in the settlement of disputes over water issues. Indeed, several cases concerning water services concession agreements have already been submitted to ICSID tribunals.77 To date, two awards have been rendered in this area: the Zhinvali Development project78 and the Compañía de Aguas del Aconquija S.A. and Vivendi Universal [formerly Compagnie Générale des Eaux] v. Argentina.79 However, this last award (rendered in 2000) has been annulled by an ad hoc Committee and the case is currently pending before a new ICSID tribunal.80 Concerning matters of jurisdiction, a decision has been handed down in another dispute, the Azurix v. Argentina case.81

In the case concerning the Zhinvali Development project, the investor claimed the reimbursement of the costs incurred in the course of its negotiations with the Georgian government for the rehabilitation of a hydro-electric plant.78 See C. Schreuer, The ICSID Convention. A Commentary (Cambridge University Press, Cambridge, 2001).

77 ICSID pending cases on water issues: Azurix Corp. v. Argentine Republic (Case No. ARB/01/12); Aguas del Tunari S.A. v. Republic of Bolivia (Case No. ARB/02/33); Jacobs Gibb Limited v. Hashemite Kingdom of Jordan (Case No. ARB/02/12); Salini Costruttori S.p.A. and Italsstrade S.p.A. v. The Hashemite Kingdom of Jordan (Case No. ARB/02/13) (Dam construction project); Impregilo S.p.A. v. Islamic Republic of Pakistan (Case No. ARB/03/3) (Hydropower project); Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic (Case No. ARB/03/17); Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic (Case No. ARB/03/18) (Water services concession); Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v. Argentine Republic (Case No. ARB/03/19).

78 Zhinvali Development Ltd v. Republic of Georgia (Case No. ARB/00/1) (Rehabilitation of a hydropower plant), Award (24 January 2003). Award not yet published.


81 Azurix Corp. v. The Argentine Republic (Case No. ARB/01/12), Decision of the Tribunal on Jurisdiction (8 December 2003), at 78–80, 85, http://www.asil.org/.
power plant, while the dispute between Vivendi and Argentina deals with the interpretation of a concession agreement and its relation with a BIT concluded between France (the investor's State) and Argentina. This latter dispute (which started in 1996) illustrates the juridical complexities of investment-water disputes. As stated by the ICSID tribunal, the dispute raised 'a set of novel and complex issues not previously addressed in international arbitral precedent relating to the interplay of a bilateral investment treaty, a concession contract with a forum-selection clause and the ICSID Convention'. The ICSID tribunal, despite holding that it had jurisdiction to hear the Vivendi and Argentina dispute, dismissed the claims on the grounds that the investors ought first to pursue their case before national courts. After the dismissal on the merits of the case, Vivendi requested the annulment of the award pursuant to Article 52 of the ICSID Convention. The ad hoc Committee established in accordance with this provision found that the tribunal had 'manifestly exceeded its powers'. A new ICSID tribunal was constituted on April 2004 to render an award in the dispute between Vivendi and Argentina.

Other cases pending before ICSID dispute settlement mechanisms present many similarities with the Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina dispute. The Azurix and the Aguas del Tunari cases also deal with the relation between a BIT and a concession agreement. In the Azurix case, an ICSID tribunal, in its recent decision on jurisdiction, affirmed that the waiver of jurisdiction in forum selection clauses did not exclude ICSID jurisdiction because the subject-matter of any proceedings before the domestic courts under the contractual arrangements and the dispute before the ICSID tribunal are different.

Therefore, even when the investors agree in the concession contract to the jurisdiction of national courts over all disputes and to the waiver of all other fora, the jurisdiction of ICSID tribunals is not excluded.

82 Although the award has not yet been published, the Investment Law and Policy Weekly News Bulletin of the International Institute of Sustainable Development reported that the ICSID tribunal ruled that up-front costs do not fall under the definition of investment as set out in the ICSID Convention. Investment Law and Policy Weekly News Bulletin, 11 April 2003, www.iisd.ca. The Zhinvali case echoes an earlier ruling of an ICSID tribunal, where it affirmed that expenditures made in furtherance of a prospective investment could not be qualified as an investment under the ICSID Convention. (See Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2), ICSID Review—FILJ, 17, 2002.)

83 Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, supra note 79, at 95.

84 In their application, the claimants sought the partial annulment of the award on three grounds: (1) that the Tribunal has manifestly exceeded its powers; (2) that there has been a serious departure from a fundamental rule of procedure; and (3) that the award has failed to state the reasons on which it is based. Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, Decision on application for annulment rendered, supra note 80.

85 Ibid.

86 See Pannatier & Ducrey's chapter in this book.

87 Azurix Corp. v. The Argentine Republic, supra note 81.

88 Aguas del Tunari, S.A. v. Bolivia (Case No. ARB/02/3).

89 Azurix Corp. v. The Argentine Republic, supra note 81.
In the dispute *Aguas del Tunari v. Bolivia*, the private investor is attempting to enforce the concession agreement through a BIT. The case arises from a dispute associated with a concession contract that Bechtel (an American private corporation) and its Bolivian affiliate made with Cochabamba (the third largest city in Bolivia). The measures adopted by the private company, such as higher water rates, provoked public anger: protests and a general strike brought the city to a halt for four days. In this context, the government of Bolivia declared a state of emergency and deployed soldiers and police. More than 100 people were injured and a 17-year-old boy was killed. The company claimed that factors other than increased water rates were responsible for the civil unrest and it reaffirmed its commitment to meeting the area’s water service needs. However, in April 2000, as anti-Bechtel protests continued to grow, the company’s managers abandoned the project. In November 2001, Aguas del Tunari filed a legal action with the ICSID under a BIT between the Netherlands and Bolivia. Although Aguas del Tunari is a subsidiary of the American corporation Bechtel, it had established a P.O. box presence in the Netherlands in order to make use of the BIT. This case is now pending before an ICSID tribunal which was constituted in July 2002 and held its first session in December 2002. The *Aguas del Tunari v. Bolivia* dispute raises issues of public concern. In particular, the tribunal will have to address the relationship between a concession agreement and the government’s authority to guarantee public order and access to water. Given the broad public impact of this case, some NGOs requested permission to intervene as parties in the arbitration, or, in the alternative, to participate as *amici curiae*. The petitioners also requested public disclosure of the submissions made to the tribunal, the opening of the hearings to the public, and that the tribunal visit Bolivia to conduct public hearings concerning the facts of this claim. In January 2003 the ICSID tribunal dismissed the request of the petitioners to participate as *amici curiae*.

A number of regional agreements have also set up mechanisms that allow private investors to have access to arbitration against the host State. Among the regional agreements, Chapter 11 of the NAFTA, in its Article 1120, provides that private investors from one of the NAFTA Member States investing in another NAFTA State may unilaterally bring their investment dispute with the host State either to the ICSID (or the ICSID Additional Facility Rules), or to arbitration in accordance with the UNCITRAL Rules. In doing so, they waive their rights to pursue the same matter before any other dispute settlement procedure operating under domestic law.

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91 Decision of the ICSID Tribunal on Petition from Third Persons to Intervene as 'Amicus Curiae', 29 January 2003 (on file with the author). See Mbengue & Tignino’s chapter in this book.

During the negotiations of the NAFTA some consideration was given to the link between the water and free trade; however, it appears that almost no attention was given to the question of how international investment rules would affect the ability of a State to protect its natural resources. In this context, it is interesting to note that in 1998 a case on water issues was initiated by Sun Belt (an American company) against Canada. In the 1980s, Sun Belt, Inc. of California and a Canadian company, Snow Cap, saw an opportunity to capitalize on the water shortage in northern California by shipping water from British Columbia in retrofitted oil supertankers. In 1991, the government of British Columbia, concerned about the environmental implications of this new venture market, passed a temporary ban on bulk water exports and refused to award new or expanded licenses on water export. This was codified by a permanent ban in 1995. Both Snow Cap and Sun Belt sued British Columbia for damages for contracts lost due to the initial moratorium. Although the government of British Columbia settled the dispute with the Canadian company, Snow Cap, in 1996, it did not reach an agreement with Sun Belt. The American company brought an arbitration claim under the Chapter 11 of the NAFTA against Canada. In particular, it claimed loss of profits, market access, and access to resources.

Although not dealing directly with water issues, an ICSID tribunal constituted under Chapter 11 of the NAFTA in the case Metalclad v. Mexico considered national environmental measures aimed, inter alia, at the protection of water resources. This case deals with the construction of a hazardous waste landfill in Mexico by a private company, Metalclad. Given the denial by the municipality of a local construction permit and the issuance of an ecological decree, Metalclad was prevented from operating the landfill. In particular, the town council of Guadalcazar, where the landfill was located, denied the permit 'for reasons which included, but may not have been limited to, the opposition of the local population, the fact that construction had already begun when the application was submitted,... and the ecological concerns regarding the environmental effect and impact on the site and surrounding communities'. In this respect, the ICSID tribunal affirmed that 'the Municipality denied the local construction permit in part because of the Municipality’s perception of the adverse environmental effects of the hazardous waste landfill and the geological unsuitability of the landfill site. In so doing, the Municipality acted outside its authority'.

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93 See the 1993 Joint Statement of Canada, United States, and Mexico, which declares ‘unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA... Water in its natural state in lakes, rivers, reservoirs, aquifers and the like is not a good or product...’. See Appendix D of this book.

94 Sun Belt Inc. v. Canada, Notice of intent to submit a claim to arbitration, 27 November 1998, Notice of claim and demand for arbitration, 12 October 1999, www.naftaclaims.org. This case has not proceeded to arbitration at this time according to available information.

95 Metalclad Corp. v. The United Mexican States (Case No. ARB(AF)/97/1), Award of 30 August 2000, at 111; ICSID Review—FIL, vol. 16 (2001), at 92.

96 Ibid., at 106.
For the ICSID tribunal, the denial of the municipal permit amount to an indirect expropriation.\textsuperscript{97}

Moreover, the ICSID tribunal also identified the ecological decree as a further ground for a finding of expropriation. Some provisions of this decree deal with water protection. In particular, Article 14 forbids "any conduct that might involve the discharge of polluting agents on the reserve soil, subsoil, running water or water deposits and prohibits the undertaking of any potentially polluting activities".\textsuperscript{98} In relation to the ecological decree, the Metalclad tribunal stated that

\[\text{[it] need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the tribunal's finding of a violation of NAFTA Article 1110. However, the tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.}\textsuperscript{99}

Therefore, in the light of the tribunal's interpretation of Article 1110,\textsuperscript{100} measures taken to protect a State's water resources might, in certain circumstances, constitute an act tantamount to expropriation and thus not be exempt from compensation. In the tribunal's view, expropriation under the NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.\textsuperscript{101}

In the context of the NAFTA, another case still pending concerning water issues has been submitted under UNICTRAL rules.\textsuperscript{102} The Methanex corporation, a Canadian marketer and distributor of methanol (a key component of MTBE\textsuperscript{103}), has submitted a claim for arbitration for alleged injuries resulting from a Californian ban on the use or sale in California of the gasoline additive MTBE. In particular, when gasoline containing MTBE is discharged into the environment some of the MTBE may dissolve in the surrounding groundwater rendering it unfit for human consumption. In 1999, as a result of these environmental concerns, the Governor of California issued an executive order calling

\textsuperscript{97} Ibid., at 107. \hfill \textsuperscript{98} Ibid., at 109-10. \hfill \textsuperscript{99} Ibid., at 111.
\hfill \textsuperscript{100} Article 1110 reads as follows: "A Contracting Party shall not expropriate or nationalize directly or indirectly expropriate an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect... except... accompanied by payment of prompt, adequate and effective compensation... equivalent to the fair market value of the expropriated investment."
\textsuperscript{101} Metalclad Corp. v. The United Mexican States, supra note 95, at 103.
\textsuperscript{102} Methanex Corp. v. United States of America, Notice of Intent to Submit a Claim to Arbitration, 2 July 1999. The tribunal issued a first partial award on issues of jurisdiction and admissibility. See First Partial Award (7 August 2002) and Methanex Submission on its Application for Reconsideration of the First Partial Award (8 March 2004), www.naftaclaims.org.
\textsuperscript{103} Methyl tertiary-butyl ether.
for the removal of the MTBE from gasoline. Following this order, the Methanex corporation initiated an arbitration proceeding against the US.

3.2 Human rights procedures and water-related disputes

Although most human rights treaties were drafted and adopted before water protection became a matter of international concern,\(^\text{104}\) UN treaty bodies and regional human rights courts have dealt with water issues. Indeed, they have addressed water issues in relation to the protection of natural resources taking into account various economic aspects.

\(a\). United Nations treaty bodies

Concerning the practice of the Human Rights Committee (HRC) established by the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR),\(^\text{105}\) one can note the communication brought by the Lubicon Lake Band and its chief B. Ominayak.\(^\text{106}\) In this case, the author of the communication alleged the violation of the right to self-determination as protected by Article 1, which includes the right freely to dispose of natural resources. In particular, the communication regarded the expropriation of part of the Band's territories in favor of private gas and oil corporations. However, under the Optional Protocol to the ICCPR, an individual communication may not be brought by or on behalf of groups of individuals. As a result, the communication was considered inadmissible with regard to the alleged violation of Article 1. However, the HRC found that the communication was admissible to the extent that it raised issues under Article 27, which deals with the question of the right of persons belonging to communities,\(^\text{107}\) as well as under other Articles of the Covenant. The Committee accepted many arguments of the author of the communication, saying that "[h]istorical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 as long as they continue."\(^\text{108}\) Therefore, the HRC, through Article 27, ensured the safeguard of natural resources.

Moreover, in the communication Ilmari Lansman et al. v. Finland, the HRC, dealing with alleged violations brought by the Sami population, observed that a


\(^{107}\) Art. 27 of the ICCPR reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

State may wish to encourage economic development, but that nevertheless this freedom must be tested by reference to the obligations established under Article 27. The communication Apirana Mahuika et al. v. New Zealand arose as a result of New Zealand's violations of Maoris' minority rights because of New Zealand's efforts to regulate commercial and non-commercial fishing. In this case the Committee emphasized that

the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.

The General Comment No. 15 on the Right to Water adopted by the United Nations Committee on Economic, Social, and Cultural Rights recognized that States must demonstrate that "they have taken the necessary and feasible steps towards the realization of the right to water". Moreover, States have to prevent third parties, including 'individuals, groups, corporations and other entities', from interfering 'in any way with the enjoyment of the right to water'. States also have to adopt the 'necessary and effective legislative and other measures to restrain third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems'. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) does not establish the right of individuals or groups to submit communications concerning non-compliance. However, under Article 16, States Parties have an obligation to submit reports on the measures which they have adopted in order to comply with the rights recognized by the Covenant.

b. Regional human rights bodies

At the regional level, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Economic, Social, and Cultural Rights, General Comment No. 15 on the Right to Water. See Appendix A of this book. 112 Ibid., at 23.

111 UN Committee on Economic, Social, and Cultural Rights, General Comment No. 15 on the Right to Water. See Appendix A of this book.
112 Ibid., at 23.
Human and Peoples' Rights have also dealt with water issues. This has been done by means of a teleological interpretation of the constitutive instruments of these bodies.

The European Court has dealt with several cases raising environmental and water concerns, notwithstanding the fact that there is no explicit provision in its mandate dealing with these issues. Most cases that have come to the Court have involved either the right to respect for private life and family life (Article 8), or the right to information (Article 10). Article 6, which provides judicial guarantees of a fair trial, has also been invoked in order to protect the right of access to justice in relation to environmental issues.

In the Zander v. Sweden case, the European Court found a violation of Article 6.1, which provides that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' This protection was applied to persons who had been denied judicial review for threatened environmental harm resulting from contamination of their well water by cyanide from a neighboring dump site. In particular, following the discovery of high levels of cyanide in water wells, the municipality established temporary water supplies. However, subsequently, the municipality raised the permissible level of cyanide and halted the city supply. When the company maintaining the dump site sought a renewed and expanded permit, the applicants argued that the threat to their water supply would be sufficiently high that the company should be obliged to provide free drinking water if pollution occurred. However, the government granted the permit and denied the applicants’ request. The claimants had sought but could not obtain judicial review of the national decision. It was thus considered that Article 6.1 of the European Convention applied in granting the right of judicial review where civil rights had been violated by national decisions.

At the level of the Inter-American Convention on Human Rights, it is interesting to note that the Inter-American Commission on Human Rights has recently published several country reports where it devoted particular attention to the relationship between the environment, water, health, and human rights.

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120 In this regard, the Court notes that 'the applicants' claim was directly concerned with their ability to use the water in their well for drinking purposes. This ability was one facet of their right as owners of the land on which it was situated. The right of property is clearly a "civil right" within the meaning of Article 6.1.' Zander v. Sweden, supra note 119, at 27.
121 Inter-American Court of Human Rights, Report on the Situation of Human Rights in Brazil, OEA/Ser.L/VII/II.97, doc. 29, rev. 1 (1997). In particular, the Report on Brazil discusses problems of environmental destruction leading to severe consequences on the rights to health and culture. Indigenous cultural and physical integrity are said to be under constant threat and attack. State protection is called 'irregular and feeble', leading to constant danger and environmental deterioration.
In its country report concerning the situation in Ecuador, the Commission responded to claims that oil exploitation activities were contaminating the water, air, and soil, thereby causing the people of the region to become sick and to have a greatly increased risk of serious illness. After an on-site visit, it found that both the government and inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic byproducts of oil exploitation in their drinking and bathing water, in the air, and in the soil. The inhabitants were unanimous in claiming that oil operations, especially the disposal of toxic wastes, jeopardized their health and their lives. In addition, many claimed that pollution of local waters contaminated fish and drove away wildlife, threatening food supplies. The Commission emphasized the right to life and physical security, stating that

\[ \text{[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.} \]

In the country report on Paraguay, the Inter-American Commission directly addressed concerns on economic development, noting that the Convention neither prevents nor discourages it, but rather requires that it take place under conditions of respect for the rights of affected individuals. Thus, while the right to development implies that each State may exploit its natural resources, the absence of regulation, inappropriate regulation, or a lack of supervision in the application of norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention. The Commission concluded that

\[ \text{[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being... The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.} \]

The Inter-American Commission thus recommended that the State adopt the necessary measures to protect indigenous communities from environmental degradation, with special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities.

With respect to African practice following several communications against Zaire, the African Commission held that failure by the government to provide basic services such as safe drinking water constituted a violation of Article 16 of the African Charter on Human and Peoples' Rights providing for the recognition of

\[ \text{122 Inter-American Court of Human Rights, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/VIII.96, doc. 10 rev. 1 (1997).} \]
\[ \text{123 Ibid., at 88.} \]
\[ \text{124 Inter-American Court of Human Rights, Report on the Situation of Human Rights in Paraguay, OEA/Ser.L/VIII.110, Doc. 52 (2001).} \]
\[ \text{125 Ibid., at 89.} \]
\[ \text{126 Ibid., at 92, 93.} \]
of a human right to health. In 2002, the African Commission found the former military government of Nigeria guilty of economic, social, and cultural rights violations against the Ogoni people concerning an oil development project in the Niger Delta. In particular, the Commission affirmed the violation of Articles 16 and 24 of the African Charter on Human and Peoples’ Rights. The Commission stated that the right to a general satisfactory environment, as guaranteed under Article 24 of the Charter, ‘imposes clear obligations upon a government’. It required the ‘State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources’. 

As this brief survey illustrates, most of the global and regional human rights bodies have considered the link between water resource degradation and internationally-guaranteed human rights. This practice demonstrates the benefits of using human rights-based approaches to water-related problems.

3.3 New trends in dispute settlement procedures

Newly established dispute settlement procedures, whilst not all addressing water issues in a specific manner, do cover a wide range of water-related issues. Procedures such as the Environmental Rules adopted by the PCA, the tribunal established by the SADC, the inspection panels established by multilateral development banks, and the compliance mechanism adopted under the aegis of the Aarhus Convention allow non-State actors to have access to them.

a. PCA Environmental Rules

In 2001, the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment (PCA Environmental Rules) were adopted under the aegis of the PCA. They enable States, international organizations, and private entities such as NGOs and multinational corporations to submit disputes to arbitration. The peculiar characteristic of this mechanism is its flexibility: the Rules are available for the use of all parties who have agreed to their use.
use them and they can be used for a wide range of disputes. Under Article 1.1 of the PCA Environmental Rules, 'the characterization of the dispute as relating to the environment or natural resources is not necessary for jurisdiction, where all the parties have agreed to settle a specific dispute under these rules'. Thus, the Rules permit great flexibility not only in the number and nature of the parties, but also in the characterization of the dispute. Therefore, the scope ratiome materiæ of the PCA Environmental Rules is broader than the ICSID Convention which is limited to investment disputes. Parties to a dispute have to agree to submit it to the PCA Environmental Rules. In particular, Article 1.1 provides that 'all parties have to agree in writing that a dispute that may arise or that has arisen between them shall be referred to arbitration'. This provision specifies that the expression 'agree in writing' includes provisions in agreements, contracts, conventions, treaties, the constituent instrument of an international organization or agency, or reference upon consent of the parties by a court.

The 2003 Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Effects defines the grounds for resorting to the PCA Environmental Rules. It applies to damage caused by the transboundary effects of an industrial accident on transboundary waters. Under Article 13, claims for compensation may be brought before the courts of a Party where the damage was suffered, where the industrial accident occurred, or where the defendant 'has his or her habitual residence . . . or if the defendant is a company where it has its principal place of business'. According to Article 14, victims and harm-causing operators may also have recourse to international arbitration under the aegis of the PCA.

b. Southern African Development Community (SADC) regime

The regional SADC regime offers another avenue for non-State actors to bring their claims before an international tribunal. Indeed, the scope of jurisdiction of the SADC tribunal is not limited to State-to-State disputes but includes disputes between natural or legal persons and States, between States and the Community, as well as between natural or legal persons and the Community. Insofar as natural or legal persons are concerned, they must first exhaust all available remedies or be unable to proceed under the relevant domestic jurisdiction before they can submit a dispute against a State party to the tribunal.

132 Ibid.
133 The Protocol was adopted and signed by 22 countries, at the Ministerial Conference held in Kiev on 21 May 2003, www.unece.org.
134 Art. 14 reads as follows: 'In the event of a dispute between persons claiming for damage pursuant to the Protocol and persons liable under the Protocol, and where agreed by both or all parties, the dispute may be submitted to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.'
135 Tribunal Protocol, supra note 13, Arts 15, 17, 18.
136 Ibid., Art. 13(2).
to note that while this rule entails the obligation for non-State actors to exhaust local remedies, it also establishes that claimants may bring a claim before the tribunal if such remedies are not available. Therefore, a non-State actor prevented from having access to administrative or judicial bodies in a country could bring a dispute between itself and that other State before the tribunal.

Moreover, SADC Community water policies and laws can also be challenged before the SADC tribunal. Indeed, under the tribunal Protocol, non-State actors are entitled to bring a claim against the SADC Community before the tribunal. As can be seen, the SADC instruments provide for innovative opportunities for non-State actors to participate in international water disputes.

c. Investigatory procedures

International financial institutions, such as the World Bank, the Inter-American Development Bank (IDB), and the Asian Development Bank (AsDB), have established dispute settlement mechanisms to which non-State actors can bring requests in relation to violations of their respective policies and procedures. The World Bank Inspection Panel, created in 1993, was the first international forum whereby non-State actors were granted the possibility of bringing complaints against an international organization in order to hold it accountable for non-compliance with its policies and procedures. Its creation led to the establishment of similar mechanisms at the IDB and the AsDB.

In 2003, the European Bank for Reconstruction and Development (EBRD) created its own mechanism. Such investigatory procedures constitute a response to the requests to see the multilateral development banks becoming more accessible to non-State actors.

The World Bank Inspection Panel procedure enables groups of persons affected by a Bank-financed project to seize the Panel in order to request that the organization assess, and even correct, its own behavior. The Panel decides on the complaint's eligibility, as well as on the merits of asking the Board to

137 According to Art. 18: 'The Tribunal shall have exclusive jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal either by the natural or legal person concerned or by the competent institution or organ of the Community.'


139 The IDB created an Independent Investigation Mechanism in 1994, which was reviewed in 2001. Pursuant to a decision taken in May 2003, the AsDB replaced in December 2003 its Inspection Function (itself created in 1995) with a mechanism modeled on the Investigation Mechanism of the IDB. See www.iadb.org and www.adb.org.

140 EBRD, 'Independent Recourse Mechanism as Approved by the Board of Directors on 29 April 2003', www.ebrd.com.

authorize an investigation into the Bank’s action with regard to the application of its operational policies and procedures. In the event of an investigation, the Bank may adopt an action plan in order to correct the litigious situation. This process is innovative, if not original, since it gives civil society a place at the core of the international decision-making system within the organization, and paves the way for ensuring greater accountability of the organization.

On a number of occasions, the Inspection Panel has received requests relating to water issues; for example, the Arun III, the Bujagali, and the Yacyretà dam projects. In this last case, the Inspection Panel found that the management of the Bank had failed to comply with the policies on environmental assessment (OD 4.01) and on involuntary resettlement (OD 4.30).

The Chad-Cameroon Oil Pipeline Project is the largest energy infrastructure development on the African continent. Among the claims of the request was the fact that the project would affect access to safe and clean water for people living in the project area. With respect to this issue, the Investigation Report considered that although the consortium of financial institutions has incorporated a number of mitigation measures in the Project design to avoid contamination of regional water supplies, the institutional mechanism for regional water management has not been developed to a similar extent.

In particular, the Panel’s view was that it is imperative that Management ensures that the Regional Development Plan, and those responsible for its implementation, gives priority to the provision of safe and clean water

142 The Arun III dam project was the first case brought before the World Bank Inspection Panel. The requesters claimed that the World Bank did not comply with its own operational policies and procedures (such as Operational Directive (OD) 4.01 and OD 4.30) in designing and financing a hydroelectric dam in the Arun Valley. The Panel recommended further investigation and the World Bank Board of Directors approved the investigation. In August 1995, the World Bank announced that it would not approve funds for the dam and would instead study energy conservation and small-scale hydro power. The Inspection Panel Investigation Report Nepal: Arun III Proposed Hydroelectric Project and Restructuring of IDA Cre-in-20 9-NEP (21 June 1995).

143 In July 2001, the Panel received a request for inspection concerning the Bujagali Hydroelectric Project in Uganda. The requesters claimed violations of several Bank policies and procedures, including: environmental assessment, involuntary resettlement, natural habitat, as well as indigenous people’s policies. The Inspection Panel found that the World Bank was not in compliance with the policy on environmental assessment. It also expressed concerns that a cumulative impact assessment of hydroelectric projects on the Nile was not properly completed. The Bank’s management responded to the Panel’s findings and proposed in its report specific actions that would remedy any cases of non-compliance. The most important outcome was the Bank’s commitment to amend the agreement between Uganda and the Bank regarding the protection of the Kalagala falls. The Ugandan government also affirmed its commitment not to develop the Kalagala falls for hydropower but to set it aside exclusively as a natural habitat and for tourism. See Inspection Panel’s Report and Findings on the Uganda Third Power Project, the Power IV Project and the Bujagali Hydropower Project (17 June 2002). For other cases see The Inspection Panel Report and Recommendation on Request for Inspection Lesotho/South Africa: Proposed Loan for Phase 1B of Lesotho Highlands Water Project (15 May 1998); The Inspection Panel Report and Recommendation on Request for Inspection Lesotho/South Africa: Lesotho Highlands Water Project (Loan No. 4339-LSO) (26 April 1999).

to those living in the Project area. It is also imperative that such Area Specific Oil Spill Plans contain a review of the response to a spill to watercourses that form part of the watershed of Lake Chad.145

In its investigation report into the Western Poverty Reduction Project in China, the Inspection Panel noted that the environmental impact assessment relating to the project dealing with the improvement and the building of dams, as well as the construction of irrigation and drainage systems, was inadequate for predicting either possible environmental or social impacts. In particular, it did not adequately assess the impact of the dam on water resources and on the region's ecology, including salt marsh wetlands. Moreover, it stated that the environmental impact assessment 'is uninformative about the layout of the new towns and villages, their infrastructure, and the facilities such as water, heat and light that will be provided for the settlers'.146 The Inspection Panel concluded that Bank Management had violated the Environmental Assessment policy, the Indigenous Peoples policy, and the Involuntary Resettlement policy.147

In April 2004, the World Bank Inspection Panel registered a request for an inspection of a water supply project in Cartagena. According to the request, the project involves an upgrading and expansion of Cartagena's water and sewerage system, which includes the construction of a pipeline and submarine outfall that will carry the city's essentially untreated wastewater 20 kilometres north of the city and discharge it into the Caribbean Sea. The requesters claim that the project affects some coastal fishing villages close to the proposed outfall discharge site. The residents of these villages are indigenous people who maintain a subsistence living from fishing and farming in this area. In the view of the requesters, this project will also have major health implications for fishermen, residents, and others exposed to the polluted waters.148

d. Aarhus compliance mechanism

Apart from the mechanisms already mentioned, compliance mechanisms such as those provided under Multilateral Environmental Agreements (MEAs) may be new fora for non-State actors. Although in most MEAs non-State actors are not entitled to make communications claiming that a State Party to the agreement is

145 The Inspection Panel Investigation Report Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No. 3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD) (17 September 2002) at 99.
146 The Inspection Panel Report and Recommendation on Request for Inspection Re: Request for Inspection China: Western Poverty Reduction Project (Credit No. 3255-CHA and Loan No. 4501-CHA) (28 April 2000), at 229.
147 In relation to this case it may be noted that, on 7 July 2000, before the Executive Directors were able to reach a conclusion on the Inspection Panel Investigation Report, China withdrew its application for one of the loan components on the grounds that new conditions were unacceptable as the loan conditions had already been agreed upon, and noted that it would pay for the project itself.
not fulfilling its obligations under an agreement, an innovative procedure has been adopted under the Aarhus Convention. Under this new mechanism, members of the public may make communications concerning a Party’s compliance with the Convention. The right of the public to make communications to the Aarhus compliance committee, as well as the entitlement for NGOs officially to submit candidatures for the committee’s membership, are the most innovative features of this compliance mechanism. The new characteristics of the Aarhus compliance mechanism reflect the principles of public participation, transparency, and access to justice that are endorsed by the Aarhus Convention itself.

While focusing on public participation and access to justice, the Aarhus compliance mechanism also encompasses water-related issues. In particular, the failure to allow for public participation in water-related decision-making processes may be challenged before the Aarhus compliance committee. This was the case in a communication submitted by an NGO, Ecopravo Lviv, concerning the Ukrainian project of building a navigable ship canal to the Black Sea through the Danube Delta. The communication by the NGO raises important water-related issues such as the protection of the Danube Delta, which is a Wetland of International Importance under the Ramsar Convention on Wetlands as well as a Biosphere Reserve protected by the UNESCO ‘Man and the Biosphere’ Program.

Ecopravo-Lviv alleged non-compliance by Ukraine with Article 6 of the Aarhus Convention. This provision provides, inter alia, that ‘the public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner…’. According to the Ecopravo-Lviv communication: ‘The fact that [the] Ministry of Environment did not inform EPL (Ecopravo-Lviv), either by a public notice or individually, and even not upon our written request, of the commencement of the state environmental expertiza and

149 See, inter alia, the compliance procedures under: the Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the Ozone Layer (Decision IV/5); Geneva Protocol concerning the Control of Emissions of Volatile Organic Compounds (VOCs) and Oslo Protocol on Further Reduction of Sulphur Emissions to the 1979 Convention on Long-Range Transboundary Air Pollution (Decision 1997/2); Convention on Environmental Impact Assessment in a Transboundary Context (Decision III/2); Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal (Decision VI/12).


151 According to para. 20 of Decision I/7, the compliance committee ‘shall consider any such communication unless it determines that the communication is: (a) Anonymous; (b) An abuse of the right to make such communications; (c) Manifestly unreasonable; (d) Incompatible with the provisions of this decision of with the Convention’. When determining the admissibility of the communication, the compliance committee should also take into account ‘any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress’. Decision I/7, ibid., paras 20-21.

152 Ibid., para. 4.

153 Communication ACCC/C/2004/03-Ukraine, 6 May 2004. For the text of the communication submitted to the Compliance Committee, see http://www.ecopravo.lviv.ua/files/Danube/Aarhus%20Complaint.doc.
its procedure leads to breach of the obligations set by paragraph 2 of the Article 6 [of the Aarhus Convention].\footnote{Communication ACCC/C/2004/03-Ukraine, 6 May 2004. For the text of the communication submitted to the Compliance Committee, see http://www.ecopravo.lviv.ua/files/Danube/Aarhus\%20Complaint.doc., para. 85.} In particular, Ecopravo-Lviv's communication to the Aarhus compliance committee was motivated by the lack of information on the commencement of the State environmental impact assessment (environmental expertise) and the short timeframe between the publication of the State environmental expertise and the approval of the project by the Ukrainian Ministry of the Environment.\footnote{In relation to this case, it should be noted that, in 2003, Ecopravo-Lviv filed a lawsuit before national courts against the Ministry of Environment challenging the conclusions of the State environmental expertise. However, while the first instance national court ruled that the Ministry of Environment violated the right of the public to participate in the State environmental expertise, the Appeal Court annulled the court of first instance's decision and dismissed Ecopravo-Lviv's suit. The court ruled, in particular, that 'the Ministry of Environment might involve [the] public into the state environmental expertise, but had no obligation to do so' (see Communication from Ecopravo-Lviv, \textit{ibid.}, paras 112–114). Moreover, before filing a complaint with the Aarhus compliance committee, Ecopravo-Lviv attempted to bring a communication before the implementation committee of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), claiming that Ukraine violated this Convention by not carrying out an environmental impact assessment in a transboundary context. However, at its Fifth Meeting, the Espoo Implementation Committee dismissed the claim on procedural grounds. According to the Report on the Fifth Meeting of the Implementation Committee, 'the majority [of the Implementation Committee] agreed not to consider the information, because considering unsolicited information from NGOs and the public relating to specific cases of non-compliance was not within the Committee's existing mandate. A minority disagreed, interpreting the present mandate to mean that there were no restrictions on how the Committee became aware of a case of possible non-compliance, preferring to examine the information further'. Report of the Fifth Meeting of the Implementation Committee, MP.EIA/WG.1/2004/4, 8 April 2004, para. 7.} 

Although most agreements on transboundary waters, including the 1997 UN Watercourses Convention, do not provide for compliance mechanisms, some instruments, such as the 1999 \textit{Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes},\footnote{Protocol on Water and Health to the 1992 UN/ECE Watercourse Convention, London, 17 June 1999, www.unesco.org.} foresee the elaboration of a compliance procedure. In this regard, the draft decision on the compliance mechanism to be adopted at the first meeting of the Parties to the Protocol on Water and Health is interesting, as it will entitle non-State actors to make communications concerning a Party's compliance with the Protocol.\footnote{Draft Decision, Review of Compliance to be adopted at the first meeting of the Parties to the Protocol on Water and Health, MP.WAT/ACA/2004/8, 23 July 2004, www.unesco.org. See also the \textit{Geneva Strategy and Framework for Monitoring Compliance with Agreements on Transboundary Waters}, setting out the principles and guidelines meant to provide guidance for the establishment of compliance review procedures for any legal instruments negotiated under, or in connection with, the UN/ECE Watercourse Convention. In particular, the Geneva Strategy invites Parties to focus on 'whether it is appropriate for the Compliance Review Committee to consider communications from the public' (para. 23.a). \textit{Geneva Strategy and Framework for Monitoring Compliance with Agreements on Transboundary Waters}, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, MP.WAT/2000/5, 23–25 March 2000, www.thewaterpage.com.} This compliance mechanism will certainly have a great impact on the settlement of water-related disputes.
Water protection and management issues are playing a growing role in the context of dispute settlement mechanisms and procedures at the inter-State level, as well as in relation to procedures involving non-State actors. Almost all international dispute settlement bodies have dealt with water issues. This trend can be explained by the complex nature of water disputes, which may involve multiple factors. Indeed, in almost all cases, water disputes are embedded in wider disputes involving issues of pollution abatement, investment protection, human rights, or trade policies.

Moreover, dispute settlement mechanisms and procedures nowadays are characterized by their openness to a wide array of actors, be they States, international organizations, or non-State actors. Non-State actors, such as individuals, NGOs, and private firms, have gained *locus standi* before various dispute settlement mechanisms. At the same time, the existence of the various sets of rules allows water disputes to be tackled in new ways. The opening of dispute settlement mechanisms to several actors and the emergence of specialized universal and regional dispute settlement bodies represent a key element in the development of a corpus of norms and principles with respect to water disputes. This situation contributes to greater legal normalcy in the operation of international law in the water area.