Experiences from International Courts and Tribunals - An Outside Perspective

BOISSON DE CHAZOURNES, Laurence


Available at:
http://archive-ouverte.unige.ch/unige:95527

Disclaimer: layout of this document may differ from the published version.
The notion of the environment encompasses many aspects and can be "[...] broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate. The emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations."\textsuperscript{1}

Numerous treaties and instruments of varied legal status relating to the environment have been adopted. Customary law principles have emerged. Environmental norms and principles are geared towards the anticipation of environmental damages, sustainability as well as equity between present and future generations.

These norms and principles increasingly interact with other bodies of norms such as international trade law and investment law. Courts and tribunals are required to apprehend and scrutinize this growing synergy. The present contribution intends to analyze how international courts and tribunals have dealt with this synergy through treaty interpretation. It will also shed light on some procedural devices that could be used to take into account environmental considerations.

Absent specific provisions applicable to the environment in a treaty or if there is a need to broaden the scope of existing provisions, courts and tribunals may have recourse to canons of interpretation as codified in the 1969 Vienna Convention on the Law of Treaties in an attempt to reconcile environmental protection with other issues. When interpreting a treaty, courts and tribunals give priority to the terms of the treaty taking into consideration the following aids to interpretation: inter alia, context, object and purpose, subsequent agreements and State practice, any applicable rule of international law in force between the parties as well as the travaux préparatoires, and the circumstances surrounding a treaty's adoption as a subsidiary means of interpretation.\textsuperscript{2} These aids have allowed the environment to find application through various types of treaties.

\textbf{The Contribution of Preambular Provisions to Integrating Environmental Concerns}

Preambular provisions help to identify the object and purpose of a treaty. One particularly notable example of a preambular provision used to guide the interpretation of a substantive provision from an environmental standpoint was in the World Trade Organization (WTO) Appellate Body's (AB) decision in \textit{US-Shrimp}.\textsuperscript{3} There, the AB sought to interpret the term "exhaustible natural resources" under Article XX (g) GATT and said:

The words of Article XX (g), "exhaustible natural resources," were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement — which informs not only the GATT 1994, but also the other covered agreements — explicitly acknowledges "the objective of sustainable development."\textsuperscript{4}

This is an approach that could be followed by investment arbitration tribunals to address the interaction between evolving environmental considerations and optimal investment protection requiring consistency and stability. Indeed, under Article 31 of the Vienna Convention on the Law of Treaties, the object and purpose of a treaty is a key element of interpretation. The preamble to a treaty is often instructive for the determination of its object and purpose. As the WTO AB put it in \textit{US-Shrimp}:

...the specific language of the preamble to the WTO Agreement ... gives color, texture and shading to the rights and obligations of Members under the WTO Agreement, generally, and under the GATT 1994, in particular.\textsuperscript{5}
Environmental Norms and Standards and the Interpretation of Substantive Provisions

Environmental norms and standards have also been taken into account by international courts and tribunals in the interpretation of substantive provisions of treaties. Noteworthy is the fact that those agreements may contain provisions dealing with environmental provisions, others may not.

On various occasions, the International Court of Justice (ICJ), applying the customary canons of interpretation, has stated that existing environmental norms and standards should be taken into account when interpreting a treaty: "to evaluate the environmental risks, current standards must be taken into consideration." These standards were considered in a comprehensive manner in the Gabčíkovo-Nagymaros case. For the Court in that case, these standards included the principles of prevention and precaution, intergenerational equity and sustainable development.

The ICJ sought to find a new way to balance different interests and underlined the importance of environmental standards in this balancing exercise. The balancing exercise is evident in the following paragraph which discusses the concept of sustainable development:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

While the Court never abandoned the treaty that had been agreed by the parties in place of newly developed norms and standards of environmental protection, it nevertheless sought to interpret the 1977 treaty related to the Gabčíkovo-Nagymaros project in light of those new norms and standards. Indeed, the Court clarified that individual treaties are not to be interpreted in isolation but rather in the context of an evolving international law. The development of the international legal regime over time can have a bearing on the interpretation and application of existing treaties and thus the parties are called upon to take these developments into account. It said:

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

Moreover, it was underlined that "the Treaty is not static, and is open to adapt to emerging norms of international law." This evolutive interpretation subsequently found favour with the Tribunal in the Irw Rhine Arbitration. There, drawing support from the ICJ's approach in Gabčíkovo-Nagymaros, it was affirmed that:

an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule.

The Tribunal cited Article 31(3) (c) of the Vienna Convention on the Law of Treaties as the legal basis for a contemporaneous interpretation of the treaties at issue. The Tribunal therefore considered principles of international environmental law in their current form at the date of its decision as relevant to that decision.

The Tribunal in the Indus Waters Kishenganga Arbitration followed the same pattern of reasoning as the ICJ and the Irw Rhine Tribunal. It said:

It is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law. The Irw Rhine Tribunal applied concepts of customary international environmental law to treaties dating back to the mid-19th century, when principles of environmental protection were rarely if ever considered in international agreements and did not form any part of customary international law. Similarly, the International Court of Justice in Gabčíkovo-Nagymaros ruled that, whenever necessary for the application of a treaty, "new norms have to be taken into consideration, and ... new standards given proper weight." It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today.

It also discussed the interpretation of substantive provisions in accordance with international law in the following way:

As the Court noted with approval in its Partial Award, the Tribunal in the Irw Rhine Arbitration, building on the judgment of the International Court of Justice in the Case concerning the Gabčíkovo-Nagymaros Project, held that principles of international environmental law must be taken into account even when interpreting treaties concluded before the development of that body of law. In implementing this
holding, the Court notes that the place of customary international law in the interpretation or application of the Indus Waters Treaty remains subject to Paragraph 29.14

Notably, the I.C.J. had also suggested in the Gabčíkovo-Nagymaros case that no explicit treaty provision was required to apply new environmental norms.15 This has been commended as a sensible approach given that where treaties do not provide for obligations under customary international law — such as environmental impact assessments — the latter should in any event apply.16 This interpretative approach has been followed in subsequent cases, such as in the Pulp Mills on the River Uruguay case, in which the Court interpreted the 1975 Statute of the River Uruguay, at issue in that case, as follows:

The Court next briefly turns to the issue of how the 1975 Statute is to be interpreted. (...) In interpreting the terms of the 1975 Statute, the Court will have recourse to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention. Accordingly the 1975 Statute is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the (Statute) in their context and in light of its object and purpose". That interpretation will also take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties".17

For the Court, those relevant rules encompassed rules of general international law and rules contained in multilateral conventions to which the two States were parties.18 Among the principles of general international law to be taken into account is the general obligation on States not to conduct activities that would be detrimental to the environment beyond their jurisdiction, as was recognized by the International Court of Justice in Legality of the Threat or Use of Nuclear Weapons.19

Bilateral investment treaties (BITs) could also represent an opportunity for similar interpretative practices, especially where they contain provisions dealing with prevention and sustainable development. There is no real reason why BITs should be interpreted any differently from other international agreements, albeit taking into account the object and purpose of those agreements.

> The Contribution of General Exceptions to Environmental Protection

General exceptions, such as those under Article XX of the GATT 1994, afford States regulatory space to achieve certain policy objectives. In US — Gasoline, the Appellate Body of the WTO held that clean air could be an exhaustible natural resource within the remit of Article XX GATT, and thus the USA was justified in adopting a measure that imposed stricter environmental criteria on imported fuel.20 In US — Tuna II, the WTO’s Appellate Body confirmed that a Member could adopt trade restrictive measures that had as their objective environmental protection.21 However, these measures must be exercised in accordance with certain requirements, namely that they are not more trade-restrictive than necessary to fulfill a legitimate objective.

In US — Shrimp the AB sought to clarify those conditions.

What we have decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in United States — Gasoline, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.22

Reference to other courts and tribunals’ case law is instructive as it highlights that, in practice, methods of interpretation may serve the purpose of reconciling environmental considerations with other international obligations. Such reconciliation is also emerging in the context of investment disputes. Investment arbitration tribunals may draw inspiration from the case law of other courts and tribunals in this respect.

While general exceptions for the protection of the environment modelled on GATT Article XX are quite rare,23 some countries have on a number of occasions incorporated such provisions into their international investment agreements (IIAs). Such examples may be found in the Canada-Romania BIT24 or the Canada-China BIT25. Further still, Article 1114 of Chapter II of the North American Free Trade Agreement (NAFTA) provides for a substantively similar provision, except that it is differently formulated. Those general exceptions provisions are aimed at preserving a certain amount of policy space for States and set up a framework in which a State can exercise its regulatory power without compromising the purpose of a treaty. Where environmental exceptions
are not inserted, there is a risk that arbitral tribunals will find a violation of a treaty obligation if the State adopts a measure intended to protect the environment.

The Contribution of Procedural Devices to Environmental Protection

The procedural devices of international courts and tribunals, including investment tribunals, may also be crucial for ensuring environmental protection. They include, inter alia, the resort to experts, counterclaims and res judicata.

The Resort to Experts

In recent years there has been an increasing number of disputes in which experts have played a role in the assessment of environmental or scientific issues that a case may involve. One of the reasons leading to the appointment of experts is the complexity of the notion of environmental harm and of its assessment. In the determination of the range and the scope of alleged environmental harm, tribunals may seek the assistance of experts. The parties might also appoint their own experts to explain the alleged damages.

Recent cases brought before the International Court of Justice have attracted attention due to the significance given to the resort to experts. In the Pulp Mills on the River Uruguay case, the Court noted that:

Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.²⁴

In the Whaling in the Antarctic²⁵ case, as well as in the Nicaragua v Costa Rica case²⁶, the parties relied heavily on scientific experts who testified before the Court.

Courts and Tribunals can also appoint experts of their own accord. In their Dissenting Opinion in the Pulp Mills on the River Uruguay case, Judges Simma and Al-Khasawneh noted:

The adjudication of disputes in which the assessment of scientific questions by experts is indispensable ... [and] ... requires an inter-weaving of legal process with knowledge and expertise that can only be drawn from experts properly trained to evaluate the increasingly complex nature of the facts put before the Court. The Court on its own is not in a position adequately to assess and weigh complex evidence of the type presented by the Parties.

We consider, however, that the Court had another, more compelling alternative, provided in Article 50 of its Statute: “The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.” (Emphasis added)

Although this procedure does not allow for the parties to cross-examine the Court-appointed experts, it nevertheless grants them a voice in assessing the opinions that such experts might produce. The Court is therefore endowed with considerable discretion, and two well-defined procedures under its Statute and Rules, to have recourse to outside sources of expertise in handling complex scientific or technical disputes.²⁹

An important question in this context is whether science may be considered a legal or a factual question.³⁰ Courts and tribunals must therefore appropriately distinguish between legal and non-legal issues when recourse to expertise is sought. It is important to bear in mind that the expert is there to assist the court or tribunal in determining the relevant facts of the dispute.³¹ Certain standards assist in the recourse to experts, such as cross-examination³² where the experts are appointed by the parties or the opportunity to respond to the choice of expert and their evidence where the latter is appointed by the Court³³.

Another forum from which guidance can be sought on the recourse to experts is the WTO. The WTO’s Dispute Settlement Body has developed procedures that aim to ensure the sound administration of justice and transparency when experts are involved in proceedings. Written and oral consultations, meetings and the opportunity to comment on expert reports are all important mechanisms that are utilized to this end.

A recent investment award highlights the role played by experts’ opinions and statements. In the Perenco v Ecuador³⁴ dispute, the Respondent through a counterclaim alleged the violation of the applicable BIT by the investor. The State claimed to have suffered US$3 billion in damage due to the massive pollution of the Amazonian forest. After analyzing the facts and law around the counterclaim, the Tribunal recognized that there had been some contamination of soils for which the investor was responsible³⁵. However, the Tribunal also noted the difficulty of determining the
degree of liability on the basis of expert reports produced by the parties and decided as a result to appoint its own expert. The transparency of the process was enhanced as the Tribunal allowed the parties' experts to comment on the expert's reports.

Counterclaims

In investment disputes, counterclaims have recently gained more interest from States willing to enforce obligations against the investor or claim compensation for the damages they suffer. To the extent that they meet the requirements of admissibility and enter within the tribunal's jurisdiction, counterclaims have the potential to absorb environmental obligations and make them part of the resolution of the dispute.

Recently, environmental protection and assessment of environmental harm were key issues of the above-mentioned dispute between Ecuador and Perenco. Following a first decision on the merits, Ecuador used a counterclaim as a procedural device to enforce domestic environmental obligations relating to oil extraction. In a unique decision, the Tribunal focused on the assessment of environmental harm claimed by Ecuador in the Amazonian rainforest in a counterclaim.

Before entering into a detailed assessment of the damages suffered by the Respondent State, the Tribunal unequivocally recognized the right for a State to claim environmental harm and the right to be compensated for such harm. As noted, Ecuador had evaluated its environmental damages at US$3 billion. The Tribunal said:

Ecuador presented the environmental counterclaim on the basis that its experts had determined the existence of an "environmental catastrophe" (..) Ecuador viewed this as an extremely serious matter deserving the most careful consideration by the Tribunal. On this point, the Tribunal cannot but agree. Proper environmental stewardship has assumed great importance in today's world. The Tribunal agrees that if a legal relationship between an investor and the State permits the filing of a claim by the State for environmental damage caused by the investor's activities and such a claim is substantiated, the State is entitled to full reparation in accordance with the requirements of the applicable law.

In resolving the dispute, the Tribunal applied Ecuadorian law as well as international law noting that the Rio Declaration inspired the drafting of Ecuadorian legal provisions relating to environmental protection. It is interesting to highlight that, instead of focusing on the investor's economic benefits recognized by treaties, the Tribunal analysed the State's rights, including non-economic "imperatives of the protection of the environment" recognizing that:

[A] State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities, including those of extractive industries such as oilfields. All of this is beyond any serious dispute and the Tribunal enters into this phase of the proceeding mindful of the fundamental imperatives of the protection of the environment in Ecuador.

Basing its reasoning on environmental protection, the Tribunal held the investor liable for the environmental harm that occurred in the Amazonian rainforest in connection with the investor's oil extraction activities.

As seen, the filing of a counterclaim on a violation of Ecuadorian environmental law was an opportunity for an investment tribunal to analyze the investors' conduct against the State's non-economic rights that include the right to protect its environment.

Res Judicata and Environmental issues

Res judicata is a widely recognized principle of law which operates to bar proceedings involving a matter that has already been decided upon. It has application in most formal dispute settlement fora. Where the parties to a dispute and the facts therein are the same, this principle can apply. This said, it is important to bear in mind that certain decisions rendered in environmental disputes may result in detrimental outcomes after a judgment has been given. Very interestingly, the Tribunal in the Indus Waters Kishenganga Arbitration took this into account and said the following:

In its Partial Award, the Court stated that "stability and predictability in the availability of the waters of the Kishenganga/Neelum for each Party's use are vitally important for the effective utilization of rights accorded to each Party by the Treaty (including its incorporation of customary international environmental law)." This remains true. Indeed, the Court rejected a fully ambulatory interpretation of paragraph 15(ii) of the Treaty for this reason. At the same time, the Court considers it important not to permit the doctrine of res judicata to extend the life of this Award into circumstances in which its reasoning no longer accords with reality along the Kishenganga/Neelum. The minimum flow will therefore be open to reconsideration as laid down in the following paragraph.

The KHEP should be completed in such a fashion as to accommodate possible future variations in the minimum flow requirement. If, beginning seven years after the diversion of the Kishenganga/Neelum through the KHEP, either Party considers that reconsideration of the Court's determination of the minimum flow is necessary, it will be entitled to seek such reconsideration through the Permanent Indus Commission and the mechanisms of the Treaty.
This award is unique in the way that it takes into account the potentially long term detrimental effects of a project on the environment while identifying a means for addressing these potential impacts. Additionally, it indicates a venue for dealing with this issue. Last but not least, it was bold enough to go beyond the res judicata principle.

\section*{Conclusion}

Through a variety of means, environmental concerns have been subjected to growing consideration by international courts and tribunals. As shown in this contribution, the promotion of environmental protection can feature in judicial dialogue, including for that matter cross-references to other courts and tribunals’ decisions. It is hoped that investment tribunals be part of this judicial dialogue.

\section*{Notes}

1. Award in the Arbitration Regarding the Iron Rhine Railway (Kingdom of Belgium/Kingdom of the Netherlands), Award, 24 May 2005, Report of International Arbitral Awards, Vol XXVII pp. 35-125, para. 58.


4. Ibid., para. 129.


7. Ibid., para. 140.

8. Ibid., para. 104.

9. Ibid., para. 112.

10. Award in the Arbitration Regarding the Iron Rhine Railway (Kingdom of Belgium/Kingdom of the Netherlands), Award, 24 May 2005, Reports of International Arbitral Awards, Vol XXVII pp. 35-125, para. 80.

11. According to this provision “any relevant rules of international law applicable in the relations between the Parties shall be taken into account in interpreting international agreements.”

12. Award in the Arbitration Regarding the Iron Rhine Railway (Kingdom of Belgium/Kingdom of the Netherlands), Award, 24 May 2005, Reports of International Arbitral Awards, Vol XXVII pp. 35-125, para. 58.

13. Indus Waters Kishenganga Arbitration (Pakistan/India), Partial Award (PCA 2013), para. 452 (original footnotes omitted).


18. Ibid., para. 66.


31. Ibid., 8.

32. As provided for under Rule 62 of the ICIJ Rules.

33. As provided for under Rule 50 of the ICIJ Rules.

34. Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador) (ICSID Case No. ARB/08/6), Interim Decision on the Environmental Counterclaim, 11 August 2010.

35. Ibid., para. 582.

36. Ibid., paras. 587.

37. Ibid., para. 588.

38. Ibid., para. 54.

39. Ibid., para. 331.

40. Ibid., para. 35.

41. Ibid., para. 582.


43. Indus Waters Kishenganga Arbitration (Pakistan/India), Partial Award (PCA 2015), paras. 118-119.