

**Panel III – Dispute Settlement Options for Environmental Disputes
in the Context of Energy Projects**

**Normative, jurisdictional and
procedural options**

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I. Normative devices

1. Environmental Provisions in BITs and Other Instruments

◆ BIT United States-Rwanda (19 February 2008)

Preamble

*“[...] Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;
[...] Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;*

Article 12 - Investment and Environment (footnote omitted)

1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”

I. Normative devices

1. Environmental Provisions in BITs and Other Instruments

◆ BIT Canada – Slovak Republic (20 July 2010)

Article IX (General Exceptions)

“1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:

- (a) to protect human, animal or plant life or health;
- (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
- (c) for the conservation of living or non-living exhaustible natural resources.”

I. Normative devices

1. Environmental Provisions in BITs and Other Instruments

- ◆ **SADC Protocol on Finance and Investment, Annex I (Co-operation on Investment)**

Article 14 – Right to Regulate

“Nothing in this Annex shall be construed as preventing a State Party from exercising its right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.”

I. Normative devices

1. Environmental Provisions in BITs and Other Instruments

◆ BIT Belgium-Luxemburg-Mozambique (18 July 2006)

Article 7 - Environment

“1. Recognizing the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Contracting Party shall strive to continue to improve those laws,

3. The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognised and implemented by their domestic laws.”

I. Normative devices

1. Environmental Provisions in BITs and Other Instruments

◆ BIT Canada-Benin (9 January 2013)

Article 16 - Corporate Social Responsibility

“Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption”.

I. Normative devices

1. Environmental Provisions in BITs and Other Instruments

◆ Article 12 ECOWAS Supplementary Act A/SA.3/12/08

Pre-Establishment Impact Assessment

“(1) Investors and Investments shall conduct an environmental and social impact assessment of the potential investment. Investors or the investments shall comply with environmental assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host Member State for such an investment or the laws of the home State for such an investment. The investor shall comply with the minimum standards on environmental and socio-cultural impact assessment and screening that the Member States shall adopt at the first meeting of the Parties, to the extent that these are applicable to the investment in question.”

I. Normative devices

1. Environmental Provisions in BITs and Other Instruments

◆ Article 12 ECOWAS Supplementary Act A/SA.3/12/08

Pre-Establishment Impact Assessment

“(2) Investors or the investment shall make the environmental and social impact assessments accessible in the local community and to affected interests in the host State where the investment is intended to be made prior to the completion of the host State measures prescribing the formalities for establishing such investment.

(3) Investors, their investments and host State authorities shall apply the precautionary principle to their environmental and social impact assessment. The application of the precautionary principle by investors and investments shall be described in the environmental and social impact assessment they undertake.”

I. Normative devices

2. Soft Law Instruments

◆ SADC Model BIT (2012)

“Recognizing the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development;

(...)

Seeking to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the State Parties;

(...)

Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right; ”

I. Normative devices

2. Soft Law Instruments

◆ UNCTAD Investment Policy Framework for Sustainable Development (2012)

2. Core Principles for investment policymaking for sustainable development

Principle 1. Investment for sustainable development

“The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.”

I. Normative devices

3. Interpretative tools (Article 31 of the Vienna Convention on the Law of Treaties)

◆ Arbitration regarding the Iron Rhine Railway (2005)

“It is to be recalled that Article 31, paragraph 3, subparagraph (c) of the Vienna Convention on the Law of Treaties makes reference to ‘any relevant rules of international law applicable in the relations between the parties’. For this reason [...] international environmental law has relevance to the relations between the Parties. ” (para. 58)

I. Normative devices

3. Interpretative tools (Article 31 of the Vienna Convention on the Law of Treaties)

◆ Gabčíkovo-Nagymaros Project (1997)

"It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties - even if their conclusions are often contradictory - provide abundant evidence that this impact and these implications are considerable. In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing - and thus necessarily evolving - obligation on the parties to maintain the quality of the water of the Danube and to protect nature. (...)

I. Normative devices

3. Interpretative tools (Article 31 of the Vienna Convention on the Law of Treaties)

◆ Gabčíkovo-Nagymaros Project (1997)

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.”(para. 140)

I. Normative devices

3. Interpretative tools (Article 31 of the Vienna Convention on the Law of Treaties)

◆ The Indus Waters Kishenganga Arbitration (2013)

“110. The Court’s Partial Award did not make the operation of the KHEP immune from environmental considerations. Here, however, the Court considers that a second factor becomes relevant. As India has recalled to the Court, recourse to customary international law is conditioned by Paragraph 29 of Annexure G to the Indus Waters Treaty, which provides as follows:

Except as the Parties may otherwise agree, the law to be applied by the Court shall be this Treaty and, whenever necessary for its interpretation or application, but only to the extent necessary for that purpose, the following in the order in which they are listed :

(a) International conventions establishing rules which are expressly recognized by the Parties.

(b) Customary international law

111. As the Court noted with approval in its Partial Award, the Tribunal in the Iron 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.”

II. Jurisdictional avenues

1. International dispute settlement mechanisms: Plurality at stake

◆ *Interstate mechanisms*

- ✓ **ICJ** : *Gabčíkovo-Nagymaros Project (Hungary / Slovakia)*
- ✓ **ITLOS**: *The Mox Plant Case (Ireland v. United Kingdom)*
- ✓ **PCA**: *Arbitration regarding the Iron Rhine Railway (Belgium v. Netherlands)*

◆ *Other mechanisms*

- ✓ **Mediation**: *Baglihar Hydroelectric Plant, Expert determination (2007)*
- ✓ **Investment arbitration**
- ✓ **Human Rights**: *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, African Commission on Human and Peoples' Rights (2001)*

II. Jurisdictional avenues

2. Specific dispute settlement avenues: PCA Optional Rules for Environmental Disputes

- ◆ Specific features:
 - ✓ **Experts**
 - ✓ **Provisional measures**
 - ✓ **List of arbitrators**

III. Procedural Tools

1. The resort to experts

◆ *Pulp Mills on the River Uruguay (2010)*

“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” (para. 167)

◆ *Whaling in the Antarctic (2014)*

“74. Australia, relying primarily on the views of one of the scientific experts that it called, Mr. Mangel, maintains that scientific research (in the context of the Convention) has four essential characteristics [...]

75. [...] As a matter of scientific opinion, the expert called by Japan, Mr. Walløe, agreed in certain respects with the criteria advanced by Mr. Mangel, while differing on certain important details [...] ”

III. Procedural Tools

2. Exchange of data and Monitoring

◆ The Indus Waters Kishenganga Arbitration (2013)

“118. 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(iii) 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.

119. 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.”

III. Procedural Tools

2. Exchange of data and Monitoring

◆ The Indus Waters Kishenganga Arbitration (2013)

120. As recounted in greater detail above (see above at paragraph 71), Pakistan has requested that the Court establish a monitoring regime to permit it to evaluate India's compliance with the minimum flow fixed in this Award.

121. In the Court's view, the appropriate mechanism for the exchange of data and for the monitoring of the Parties' uses on tributaries of the Indus River is the Permanent Indus Commission. The Court recalls, in particular, that Article VI(1) of the Treaty already requires the Parties to exchange '(a) Daily (or as observed or estimated less frequently) gauge and discharge data relating to flow of the Rivers at all observation sites' and '(b) Daily extractions for or releases from reservoirs.' The Court is confident that the Parties will continue to do so, and that the data provided by India will include the necessary data relating to the KHEP. The Court further recalls that Article VIII(4) calls for the Commission to 'undertake promptly, at the request of either Commissioner, a tour of inspection of such works or sites on the Rivers as may be considered necessary by him for ascertaining the facts connected with those works or sites.'

122. In light of the foregoing provisions, it is neither necessary, nor within the Court's purview, to instruct the Commission as to the manner in which it carries out its responsibilities or to mandate a special monitoring regime in implementation of this Award."