

# Dispute settlement and the role of Third Parties in supporting implementation

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# Pacific Settlement of Disputes



## CHARTER *of* THE UNITED NATIONS

AND STATUTE *of* THE  
INTERNATIONAL COURT  
OF JUSTICE

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other **peaceful means of their own choice**.

Article 33(1)

# Dispute settlement procedure

- A **multistep approach** to seek a solution (not strict order):
  - **Joint institutions** or expert groups (*technical experts to study potentially controversial issues and make recommendations*)
  - **Diplomatic** negotiation (*parties only*)
  - Other **diplomatic** means: good offices, mediation, conciliation (*3<sup>rd</sup> party but joint solutions*)
  - A neutral **expert** or expert commission (*advisory or binding*)
  - **Judicial** arbitration, court (*binding resolution by an third party*)
- **Pre-agreed** in a basin agreement (e.g. Indus) or in **ad hoc agreement** once the dispute has emerged (e.g., the Gabčíkovo-Nagymaros).
- **Internal Process and/or Third Party Involvement**
  - **Internal** (*confidentiality, control*): joint institutions, technical group meetings, technical investigations, negotiation
  - **Third Party** (*neutrality, impartiality, 'space for dialogue', experiences*): good offices, mediation, conciliation, a neutral expert or expert commission, arbitration, court

# Treaty Practice





## Article 33 of the 1997 UN Convention

The Parties seek to resolve the dispute by peaceful means

First of all, start with the negotiations, only then other means

### Diplomatic means

jointly seek the good offices of, or request mediation or conciliation by, a third party

### Joint watercourse institutions

joint watercourse institutions that may have been established

### Judicial means

Agree to submit the dispute to the

- Arbitration
- International Court of Justice

### IMPARTIAL FACT-FINDING

If after 6 months from the date of the request for negotiations, the dispute is not settled by negotiation or other means, at the request of one of the Parties the dispute becomes subject to impartial fact-finding

# 1992 Water Convention

- Article 22: 1) The Parties shall seek a solution by *negotiation* or by any *other means* of dispute settlement acceptable to the parties to the dispute 2) “opt in’ formula for compulsory arbitration or adjudication.
- By Decision VI/1 on support to implementation and compliance adopted at MOP-6 (Rome, 28-30 Nov 2012), **the Implementation Committee** to facilitate, promote and safeguard the implementation and application and compliance with the Convention was established.
  - Consider requests for advice
  - Consider self-submission or Party-to-Party submission
  - Consider undertaking a Committee initiative

# Treaty Practice (Asia)

- **1995 Mekong Agreement:** *the Commission* shall first make every effort to resolve the issue (Art. 34). If the Commission is unable to resolve, the issue shall be referred to the Governments for resolution by *negotiation* through diplomatic channels. The Governments may request the assistance of *mediation* (Art. 35)
- **1992 Almaty Agreement (Aral Sea basin):** All disputes shall be settled by the heads of *national water agencies*, with involvement of *third party*, if necessary (Art. 13)
- **1960 Indus Treaty:** “questions” are handled by the *Commission*; “differences” are to be resolved by a *Neutral Expert*; and “disputes” are to be referred to a seven-member *Court of Arbitration* (Art 9). The WB ” As a signatory to the Treaty, the World Bank’s role is limited and procedural. In particular, its role in relation to “differences” and “disputes” is limited to the designation of people to fulfill certain roles when requested by either or both of the parties.

# Treaty Practice (Africa)

- **2005 Zamcom Agreement:** 1) Enter into *consultations and negotiations*. 2) The Council may make *recommendations* to the parties. 3) If not settled, the dispute may be brought before *the Tribunal* (Art 21). The Council may request the Tribunal to give *an advisory opinion* (Art 22(1)).
- **1986 Treaty on the Lesotho Highlands Water Project:** 1) Lesotho Highlands Development Authority (LHDA) or the Trans-Caledon Tunnel Authority (TCTA) may request the Lesotho Highlands Water Commission (LHWC) to conduct an *investigation*. The LHWC may *recommend* the proper action to be taken at the end of its investigation or recourse to more formal procedures. 2) Formal meeting among the three institutions backed by a investigation report. 3) If a dispute is not resolved, subject of *negotiation* between the governments. 4) If negotiation does not resolve the dispute, an *Arbitral Tribunal* is called on to issue a final and binding decision.

# Treaty Practice (Europe)

- **2002 Sava Agreement:** 1) seek a solution by *negotiation*, 2) may jointly seek *good services, mediation or conciliation from a third party*, or they may agree to refer the dispute to *arbitrage*, or to *ICJ*, 3) If, within six months from submitting a request by above means, the dispute unresolved, any Party concerned may request that an independent *fact-finding expert committee* be established (Art 22).
- **1998 Rhine Convention:** 1) the parties concerned will strive for a solution by means of *negotiations* or any *other possibility of arbitration* acceptable to them. 2) *arbitration* proceedings (Art 16)

# Some Reflections

- **Joint bodies as dispute prevention and resolution**
- **The role of fact finding is increasing**
- **Diversification of dispute resolution means**
  - Some treaty practices limit dispute settlement mechanisms either to **specific means** (for example, several Central Asian agreements refer to "negotiations" or "negotiations and consultations" as means of dispute settlement) or to **regional mechanisms** (trend in Africa in particular Southern Africa, referral to SADC Tribunal as a last resort in several agreement)

# The role of Third Parties in supporting implementation



# The roles of Third Parties

- Providing **technical assistance** (e.g. neutral knowledge, building capacity, supporting joint institutions)
- Facilitating **dialogues** (e.g. the Petersberg Process for the Drin, the Berlin Process for Central Asia )
- Promoting **implementation and compliance**
  - Implementation trust funds (e.g. the Indus Basin Development Fund, the Nile Basin Trust Fund, a trust fund at the 1992 UNECE Convention)
  - Procurement standards (e.g. World Bank Operational Policies)
  - Payment and loan guarantees (e.g. WB Guarantee Arrangement for Lom Pangar/Nachtigal Dams)
- Assuming responsibilities **in dispute settlement** (a facilitating role through mediation and conciliation or appointment of arbitrators or neutral experts or a Third-Party decision making)
- The Indus Treaty, the only international waters treaty that is signed by a third party – the World Bank (relates to funding and dispute settlement).

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**Thank you for your attention!**