Chapter 19
Case Law on International Watercourses

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Abstract States have turned from negotiations to other means for resolving international controversies over water. They moved from technical reports of mixed commissions to arbitration to international courts. Arbitration is more independent than technical commissions, but is limited in its competence and procedures. International adjudication requires permanent international courts, principally the International Court of Justice. Because the Court relies on its precedents and is consistent in its holdings, the few disputes over water have produced controlling case law. Arbitration and judgments have a reciprocal influence with international custom and treaties in the creation of law. A systematic enquiry into the relevant arbitral awards and court judgments discloses trends and the effectiveness of adjudication.

Keywords Arbitration • international courts • judgments • navigation • technical commissions • water disputes

19.1 From Negotiation to Adjudication in Dispute Settlement

International adjudication has included issues relating to water institutions and the norms of international law that govern access to and use of water resources. States turned from negotiations to other peaceful means to resolve international controversies through recourse to technical information and the interpretation of international law rules. The path to solutions grounded on legal sources went from the technical reports of mixed commissions that resembled mediation to decisions by international tribunals. Between commissions and courts lies arbitration—more independent than technical commissions because the decision-makers are of a nationality different
from the parties, but limited in competence and procedures. Arbitration, after all, is a creature of contract. Arbitration can be traced back to ancient times, and the same is true of water institutions, international, national, and local.

Today, besides arbitration, States have recourse to permanent international courts, beginning with the Permanent Court of International Justice established by the League of Nations in 1920. The International Court of Justice is its successor and is the principal judicial organ of the United Nations and the oldest permanent tribunal of the international community. The main judicial systems and geographical regions of the world are represented in the Court, whose judges enrich their decisions with their different cultural and legal backgrounds. The sources of legal thought embodied in the decisions of the World Court consolidate and nurture international law and influence national legal systems as well. Because the Court relies on its precedents and is consistent in its holdings, the few relevant disputes on water issues have created controlling case law. In 1920, the Permanent Court issued its first Advisory Opinion concerning international watercourses, regarding the Jurisdiction of the European Commission of the Danube, and in the docket of cases before the International Court of Justice in 2008, three cases deal with river issues: The Gabcíkovo-Nagymaros Project Case (1993) (still pending following the decision on the merits because of a request for an additional judgment), and two other cases brought before the Court: Dispute Regarding Navigational and Related Rights (2005) and the Pulp Mills on the River Uruguay Case (2007); (see Chapter 18, Capaldo, this book). Arbitral awards and judicial decisions have a reciprocal influence on international custom and treaties in the creation of law (Allain 2000: 14–15). The general rules developed by the international tribunals go beyond the circumstances of a particular dispute and permeate international law. A systematic enquiry through selected cases discloses trends and the effectiveness of adjudication.

19.2 Decisions Shaping International Watercourses Law

During its brief existence, the Permanent Court of International Justice had the opportunity to decide several cases on international river management that crystallized the controlling legal principles. In the River Oder Case (1929), the Permanent Court concluded that there is a ‘community of interests of riparian States’ that, in a navigable river, ‘becomes the basis of a common legal right’—a rich concept that forms the basis for a duty of cooperation for international navigable rivers. The ‘community of interests’ entails a ‘legal partnership’, imposed by nature and acknowledged by law. Persistently quoted, the recognition of this equitable principle contributed a new approach to navigable international watercourses in particular and to natural resources in general. The Court also applied the rule of ‘freedom of navigation for navigable watercourses’ in the Oder case. Both freedom of navigation and the community of interests of riparian States were brought to the fore by the Court and repeatedly endorsed since.