

TRANSBOUNDARY WATER DISPUTES

One of the most challenging aspects of climate change has been the increased pressure on water resources limited by droughts and new rain patterns, exacerbated by rapid modernization. Due to these realities, disputes across national borders over use and access to water have now become more commonplace. This study analyzes the history and adjudication of North American transboundary water disputes in five international courts and tribunals, three US Supreme Court cases, and boundary water disputes between the United States and Canada and the United States and Mexico. Explaining the circumstances and outcomes of these cases, Kornfeld asks how effective courts and tribunals have been in adjudicating them. What kind of remedies have they fashioned and how have they dealt with polycentric and sovereignty issues? This timely work examines the doctrine of equitable allocation of transboundary water resources and how this norm can be incorporated into international law.

Itzhak E. Kornfeld, Ph.D. (Hebrew University) is General Counsel and Vice President of MEJ Development Group, Ltd. (a non-profit development concern) and teaches international and transboundary water law and consults to governments and indigenous peoples on transboundary water issues. He has earned several degrees in both law and geology, and he has worked for the US EPA as a Senior Geohydrologist, working on surface and ground water issues, and for Texaco/Chevron as an environmental geologist, where he dealt with migration of contaminants in water.

Cambridge University Press
978-1-107-18660-6 — Transboundary Water Disputes
Itzhak E. Kornfeld
Excerpt
[More Information](#)

Transboundary Water Disputes

STATE CONFLICT AND THE ASSESSMENT OF THEIR ADJUDICATION

ITZCHAK E. KORNFELD, Ph.D.

General Counsel and Vice President,
MEJ Development Group, Ltd., formerly,
Faculty of Law
The Hebrew University of Jerusalem



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
 978-1-107-18660-6 — Transboundary Water Disputes
 Itzhak E. Kornfeld
 Excerpt
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
 New Delhi - 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107186606

DOI: 10.1017/9781316890776

© Itzhak E. Kornfeld 2019

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication data

Names: Kornfeld, Itzhak E., author.

Title: Transboundary water disputes : state conflict and the assessment of their adjudication / Itzhak E. Kornfeld, Hebrew University of Jerusalem.

Description: Cambridge : Cambridge University Press, [2017] | Includes bibliographical references.

Identifiers: LCCN 2017026492 | ISBN 9781107186606

Subjects: LCSH: Water – Law and legislation. | Water rights. | Riparian rights. | Water rights (International law) | Rivers – Law and legislation. | Interstate controversies – United States | United States – Boundaries – Canada. | Canada – Boundaries – United States. | United States – Boundaries – Mexico. | Mexico – Boundaries – United States.

Classification: LCC K3496.K67 2017 | DDC 341.4/4097 – dc23

LC record available at <https://lcn.loc.gov/2017026492>

ISBN 978-1-107-18660-6 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

<i>The Adjudication of Transboundary Disputes</i>	<i>page</i> vii
<i>Table of Authorities</i>	ix
<i>Other Authorities</i>	xviii
1 Adjudication and the Scope of Transboundary Water Disputes	1
I The Reallocation of Water Use and Impending Disputes	6
2 The Proliferation of Dispute Resolution Fora	12
I Introduction	12
II Selection of the Cases and Selection Bias	18
3 The Scope of Transboundary Water Issues and Polycentricity	29
I The Unique Challenges of Adjudicating Transboundary Water Disputes	29
4 Pacific Dispute Resolution & the Limitations on Adjudication	42
I Introduction	42
5 The Impacts of Sovereignty	49
I Theories of Sovereignty	49
II Adjudication of Transboundary Water Disputes	53
III Sovereignty as Applied to Transboundary Water Law	55
6 The Courts and Tribunals Assessed Here	75
I The Supreme Court of the United States: A Brief History	75

vi	<i>Contents</i>	
	II The International Boundary and Water Commission ("IBWC") (Mexico/USA)	92
	III The International Joint Commission (Canada/USA)	99
	IV The North American Free Trade Agreement (NAFTA)	108
7	Factors Used in Analyzing Effectiveness	116
	I Introduction	116
8	Analyzing the Disputes – The Supreme Court	132
	The American West and the Water Paradox	134
	I <i>Kansas v. Colorado</i>	136
	II <i>Wyoming v. Colorado</i>	168
	III <i>Arizona v. California</i>	189
9	Arbitration of Transboundary Water Disputes	239
	I The Chamizal Dispute	239
	II The Gut Dam Arbitration	253
	III Bayview Irrigation District v. United Mexican States	274
10	Conclusion	297
	<i>Index</i>	303

The Adjudication of Transboundary Disputes

This work makes the following findings and contributions to international water law and to international dispute resolution:

- (1) This is the very first study of its kind in any geographic venue/location.
- (2) Transboundary water disputes are resolved by courts and tribunals' use of equity, or equitable remedies, such as *equitable apportionment* and the *equitable and reasonable utilization* of international watercourses. The present research finds that this is the first study of its kind that definitively demonstrates this fact.
- (3) State sovereignty is a hallmark of transboundary water disputes.
- (4) The apportionment of water is best done by treaty or compact between states in the United States.
- (5) In one respect, *ad hoc* international tribunals are more effective than international courts in adjudicating transboundary disputes because they are more adept at addressing polycentric issues.
- (6) The results yielded in this volume demonstrate that within the universe of disputes *ad hoc* tribunals adjudicate disputes quicker – than do courts.
- (7) I also compare the length of time from the execution of the *compromis* until the issuance of the arbitral awards for the three arbitrations analyzed herein: the *Chamizal Dispute* the *Gut Dam Arbitration*; and the *Bayview Irrigation District Case*, with the *Bering Sea Arbitration* (*Fur Seals*), the *Trail Smelter Case*, The *San Juan River Case* and the *Lac Lanoux Arbitration*, and found that the average time for resolution of these disputes is between 1.9 years and 2.2 years, while most court cases, particularly those of the United States Supreme Court whose cases are analysed herein take much longer – for two SCOTUS disputes analyzed here it took 86 years and 102 years respectively to resolve. Thus, I

argue that arbitral tribunals are more effective, in resolving these types of case.

- (8) The use of precedents and the development of norms is one major thread that runs through the cases that are analyzed herein, particularly to fill lacunae. The use of precedents, which I term “cross-pollination,” leads to greater coherence in international law, and helps the development of new norms; regardless of whether an adjudicative body employs its own case law or imports it from another jurisdiction. Thus, if we think of the use of precedents as pieces of a puzzle that fit together to provide a fully integrated archetype, we can comprehend and envisage the building of a system of international law.

Table of Authorities

CASES

- ADF Group Inc. v. United States of America*, Case No. ARB (AF)/00/1,
 January 9 2003
Bayview Irrigation District v. United Mexican States
Bering Sea Arbitration (Fur Seals)
Glamis Gold, Ltd. v. United States, an arbitration under NAFTA's
 Chapter 11
Metalclad v. United Mexican States, ICSID Additional Facility, Case No.
 ARB (AF)/07/1 (Award, Aug. 30, 2000)
Mondev International Ltd. v. United States of America, Case No. ARB
 (AF)/99/2, Award (Oct. 11, 2002), 42 I.L.M. 811 (2003)
San Juan River Case (Costa Rica v. Nicaragua)
The Lac Lanoux Arbitration
Trail Smelter Arbitration (U.S. v. Canada), 3 U.N.R.I.A.A. 1965 (1941)
United Parcel Serv. of Am., Inc. v. Canada, ICSID (W. Bank), Award
Waste Management, Inc. v. United Mexican States, Arbitral Award of 2 June
 2000, 40 ILM 56 (2001)
Case Concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay).
 Judgment, I.C.J. Reports 2010, 14
 Delimitation of Maritime Boundary in Gulf of Maine Area (Can/US), 1984
 I.C.J. 246
Dussault v. Can. Customs and Revenue Agency, [2003] F.C. 973 (Can. Fed.
 Ct.)
Anderson-Tully Co. v. Walls, 266 F. Supp. 804, 812 (D. Miss. 1967)
Argentina v. Uruguay, Judgment, [2010] I.C.J. Rep. p. 14
Arizona v. Bonelli Cattle Co., 107 Ariz. 465, 489 P. 2d 699 (1971)
Arizona v. California, 283 U.S. 423, 449 (1931)

- Arizona v. California*, 292 U.S. 341 (1934)
Arizona v. California, 298 U.S. 558
Arizona v. California, 373 U.S. 546 (1963) (Arizona I)
Arizona v. California, 376 U.S. 340 (1964)
Arizona v. California, 383 U.S. 268 (1966)
Arizona v. California, 439 U.S. 419 (1979)
Arizona v. California, 460 U.S. 605 (1983) (Arizona II)
Arizona v. California, 466 U.S. 144 (1984)
Arizona v. California, 530 U.S. 392 (2000)
Arizona v. California 531 U.S. 1 (2000)
Arizona v. Colorado, 547 U.S. 150 (2006)
Bayview Irrigation District et al. (Claimants) v. United Mexican States
 (Respondent), ICSID Case No. ARB(AF)/05/1 (June 19, 2007), Award
Bering Sea Arbitration (Fur Seals)
Brown v. Board of Education, 347 U.S. 483 (1954)
Bush v. Gore, 531 U.S. 98 (2000)
California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142
 (1935)
California v. Arizona, 373 U.S. 546
California v. Arizona, 440 U.S. 59 (1979)
California v. Southern Pacific Co., 157 U.S. 229, 251, 257 (1894)
California v. Washington, 365 U.S. 955 (1958)
California v. West Virginia, 454 U.S. 1027 (1981)
Canada – United States Settlement of Gut Dam Claims, Report of the
 Agent of the United States Before the Lake Ontario Claims Tribunal, 8
 I.L.M. 118, 140 (1969)
Canadian Council of Churches v. Canada (Minister of Employment and
 Immigration), [1992] 1 S.C.R. 236
Case Concerning the Gabcikovo Nagymaros Project (Hungary v Slovakia)
 [1997] Judgment ICJ Rep. p. 7
Case Concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay)
Case Relating to the Territorial Jurisdiction of the International Commission
of the River Oder, PCIJ Series A, Judgment No. 16 (1929) 27
Chamizal Tract Arbitration
Chisolm v. Georgia
Chorzów Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, (Sept. 13), at 47
Colorado v. Kansas, 320 U.S. 383, 385 (1943)
Colorado v. New Mexico, 459 U.S. 176, 178 (1982)
Compassion in Dying v. Wash., 85 F.3d 1440, 1450 (9th Cir. 1996)
Connecticut v. Massachusetts, 282 U.S. 660

Table of Authorities

xi

- Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 20 (D. Nev. September 19, 2005) (NO. CV-S-05-08700-KJD-GWF), 438 F.Supp.2d 1207, 1221 (D. Nev. 2006), *rev'd on other grounds*, 482 F.3d 1157 (9th Cir.2007)
- Delimitation of Maritime Boundary in Gulf of Maine Area (Can/US)*, 1984 I.C.J. 246
- Diversion of Water from Meuse River*
- Florida v. Georgia*, Original No. 142
- Florida v. Georgia*, U.S. Supreme Court Docket No. 22O142 ORG, Original 142, Oct. 4, 2013, *cert. granted* Oct. 10, 2017
- Frontier Dispute (Benin/Niger)*, Judgment, [2005] ICJ Rep., p. 90
- Gabcikovo Nagymaros Project*, (Hungary v Slovakia) [1997] Judgment ICJ Rep. p. 7
- Georgia v. Tennessee Copper Co.*, 206 U. S. 230
- Gibbons v. Ogden*, 22 U.S. 1, 3 (Wheat.) (1824)
- Glamis Gold, Ltd. v. United States*, an arbitration under NAFTA's Chapter 11
- Grisbardånra Case*, (Norway/Sweden), Award, PCA 1908
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Gut Dam Dispute*
- HCJ 5100/94, *The Public Committee Against Torture in Israel v. the Government of Israel*
- Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)
- In re Agent Orange Prod. Liab. Litig.*, 304 F. Supp. 2d 404 (E.D.N.Y. 2004)
- In re MDL-1824 Tri-State Water Rights Litigation* 644 F.3d 1160 (11th Cir. 2011)
- Indus Waters Kishenganga Arbitration (Pak. v. India)* (Final Award of Dec. 20, 2013)
- In the Proceedings Between Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (Claimants) and The Argentine Republic (Respondent) ICSID Case No. ARB/03/19
- Island of Palmas Case (Netherlands/USA)*, Hague Court Reports 2d 83 (1932) (Perm. Ct. Arb. 1928), 2 U.N. Rep Intl. Arb. Awards 829
- Kansas v. Colorado*, 185 U.S. 125, 126 (1902)
- Kansas v. Colorado*, 206 U.S. 46 (1907)
- Kansas v. Colorado*, 475 U.S. 1079 (1986)
- Kansas v. Colorado*, 1986 WL 1178161 (U.S.)
- Kansas v. Colorado*, No. 105, Original 1997, WL 33796878 (U.S. Sept. 9, 1997), Report of Special Master
- Kansas v. Nebraska*, 120 S. Ct. 519, 519 (1999)