CHAPTER 4

The Legal Adviser and International Disputes: Preparing to Commence or Defend Litigation or Arbitration

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I Introduction

Litigation is more often perceived as the last resort than the Plan A of strategic options. This is particularly true for States, who have diplomatic and other tools to deploy before they turn to courts or tribunals. But sometimes a scenario evolves such that formal dispute resolution becomes the necessary – or indeed best – way to solve the issue. In these circumstances, the Legal Adviser becomes the litigator, and must equip him/herself with the specialist tools for this trade, construct an expert disputes team, and plan strategies and tactics accordingly.

This chapter examines the decision by a State to adopt formal dispute resolution mechanisms, and some of the key strategic considerations for a Legal Adviser when contemplating the dispute resolution process, including questions as to the scope and nature of the claim, timing, evidence, choice of arbitrators, remedies and alternative dispute resolution.

A When to Choose Formal Dispute Resolution – and Why?

Why does a State choose formal dispute resolution? Quite often, of course, the State has no immediate choice, as it is named as the respondent or defendant to a claim – for example, in a judicial review, European Court of Human Rights (ECHR) application, World Trade Organisation (WTO) dispute, or bilateral investment treaty (BIT) arbitration.

But it is over simplistic to say the State has no choice in these circumstances. Rather, this is the function of earlier choices by the State as to the legal structures and mechanisms to put in place to govern the substantive relationships it has chosen to form. That is, the choice is one of participation, and process: to provide the domestic mechanisms to review government decisions and actions in a public law action; to ratify a multilateral human rights treaty

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with a specific redress mechanism; to sign up to a multilateral trade agreement with specialised dispute settlement bodies; or to enter into a BIT providing for investor-State arbitration. Each of these is a quite different decision from the others, reached no doubt by a multitude of different considerations, but the end result is in one fundamental respect the same: the State has agreed to a particular formal mechanism to resolve certain disputes with others – be they its nationals, foreign nationals, or other States.

The decision may also be made on a case-by-case basis in agreements that the State enters into with other States, organisations, or private parties, when a State agrees to an arbitration clause for a particular context – eg an investment contract or a submission agreement for a pre-existing dispute. In each case, one assumes the State has performed the cost-benefit calculation and has concluded that, ultimately, and for the time-being at least, the value of the dispute mechanisms on offer outweighs the disadvantages.

Of course, these are not necessarily permanent choices. For example, parties may withdraw from the WTO, as indeed four States withdrew from the General Agreement on Tariffs and Trade (GATT) prior to the establishment of the WTO.\(^1\) In BITs, the termination provision will typically include a “sunset clause”, allowing the arbitration mechanism to outlive the decision to terminate – often by ten years\(^2\) or more.\(^3\) By their nature, however, these choices are likely to have some reasonable continuity and longevity, and to require fundamental amendments to constitutional structures or withdrawal from treaty agreements if they are to be altered.

In terms of the choice to become a claimant, the decision-making process is rather different. The question is one not just of legal merits and the prospects of the other party’s compliance with a final decision, but more generally,

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