International litigation is not a course embarked upon at the drop of a hat. Before a State institutes legal proceedings against another State there are many matters which have to be considered – not least of which is whether to begin that process at all. The judgment of an international tribunal, together with the formal initiation of the proceedings and the written and oral pleadings of the parties which underpin the eventual judgment, constitute the visible or evident components of the settlement process. What is much less visible or evident is the lengthy and often complex process of preparation which precedes the parties’ pleadings and even the institution of the legal proceedings.

I. The Decision Whether or Not to Institute International Legal Proceedings

Perhaps the first decision which has to be taken by one of the States involved in a dispute is whether the time has come to refer the dispute to binding third party settlement by an international tribunal. Even if the final formal decision is an agreed reference of the dispute to an international tribunal, one or other of the States concerned (or perhaps both of them, acting independently) has to decide whether that is the most appropriate course for it to take.

At this very early stage the prospective applicant State will almost certainly be keeping to itself its consideration of the matters on which it needs to take decisions, lest by alerting the prospective respondent State to what is afoot it raises the diplomatic temperature or prompts that State to take whatever pre-emptive action is open to it to thwart the possibility of it being “taken to court” (for example by withdrawing or amending its existing acceptance of the jurisdiction of a possibly relevant tribunal). So in most cases at these very early stages the prospective respondent State will usually be unaware of what the prospective applicant State is doing by way of readying itself to initiate, or to propose the joint initiation of, litigation before an international tribunal. Even if the two States are each separately considering the possibility of initiating
The first question which a State contemplating the initiation of litigation against another State has to address is the critical question whether to initiate such litigation at all. To a large extent this is a question to be decided by the authorities within the State which are concerned with matters of policy, although in reaching their decision they will be heavily influenced by various legal and other considerations. But essentially the decision is a political one, in which many non-legal factors play their part, such as the impact of a decision to litigate on the other State concerned and even perhaps on other regional States who might have an interest in the way States in their region choose to settle their differences; the State will also need to weigh the domestic impact of any decision to litigate against another State, and the economic consequences which might flow from the decision.

It will also be as well for those who take the decision to institute legal proceedings to be clear in their own minds as to the purpose of the prospective litigation. Often this will involve a combination of political, economic and legal factors. The view that the objective of litigating is “to win” the case may be too simplistic, although most States will indeed hope that by referring some outstanding dispute to an international judicial tribunal the outcome will be in their favour. But settling the dispute on, hopefully, favourable terms is not the only reason which might motivate a State to initiate international litigation. The settlement of a long-standing dispute, for example, may be politically welcome just because it will be settled and will no longer be a cause of friction between the States concerned, almost irrespective of the outcome; again, reference of a dispute to an international judicial tribunal may be seen, irrespective of the eventual outcome, as a valuable step in the management of an inter-State difference; yet again, it may be easier for a State to accept an impartial judicial decision against it than to agree to arrive at the very same outcome by making diplomatic concessions on its own authority.

Whatever the political calculations may be, it is only when (and if) the decision to litigate is agreed at the political level that the more strictly legal considerations in the preparation of the case come to the fore. Even though the State’s own legal advisers will have contributed extensively to the discussions leading up to the eventual political decision to institute legal proceedings, it is only once that decision has been taken that the legal aspects of the case become dominant. The principal legal considerations which the State’s lawyers have to address at an early stage can be summarised as “the three Cs” – Case, Counsel, and Court.

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