Methods for Settling Boundary Disputes

Escaping from the Fetters of Zero-Sum Outcomes

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It should be interesting for an arbitration audience to not just look at an individual International Court of Justice (ICJ) case—such as the Qatar–Bahrain case presented earlier—but to develop a wider, deeper and more sophisticated understanding of the main methods of settling such boundary disputes and of their implications in terms of definitive solution and acceptance, cost, time and quality, as well as the range of benefits and costs that are likely to arise for the parties involved. I am therefore putting myself, not in the position of a litigator on behalf of a State, but rather in the position of a strategic adviser to a government party in a dispute. I will try, quite generally and in a preliminary way, to clarify to this government client what their options are, their alternatives.

In what situations does it make sense to try out which part of the dispute settlement method? It is essentially in the identification of strategies, of their risk-benefit and cost-benefit implications, of probabilities and likely outcomes, so that the government client can make up its mind in a rational and informed way which allows it to assess the always very specific circumstances with established concepts and criteria.

Here, I will look at the various dispute settlement methods. Litigation, the ICJ, is just one method. The other methods remaining are war (very traditional), bilateral negotiations, mediation and arbitration.

War used to be the traditional method of dispute settlement. It has become, not extinct, but less fashionable. Bilateral negotiation is the main form of settlement. I understand that 87 percent of border disputes get settled by bilateral negotiation.

Mediation as the form of dispute settlement has been recently used in the Belize–Guatemala and the Beagle Channel disputes. I am most interested in the current mediation for Belize and Guatemala and will discuss this in more detail further on. My interest has to do with my former advisory services (as the UN Inter-regional Advisor on Energy-Investment Policy) for governmental clients and my current international

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This is an edited version of a short presentation. For a more extensive discussion of mediation in international disputes, see the author’s comment in Oil-Gas-Energy Law Intelligence Newsletter, Volume 2, at: «http://www.gasandoil.com».

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mediation practice. I wish to propose, and I am trying to develop, a modern concept and practice guideline for professional application of mediation expertise to boundary disputes. My impression is that, at present, many, if not most, boundary disputes are settled in a mainly political way or, if litigated, very much in legal procedures which discourage the innovative search for optimal solutions.

Arbitration has been used in the Guinea-Bissau-Guinea and Eritrea-Yemen boundary cases. Litigation was chosen, mainly before the Icj in The Hague, in recent cases opposing Namibia and Botswana, Bahrain and Qatar, Guinea-Bissau and Guinea and, in 2002, Nigeria and Cameroon (See Annex). An excellent study by Munkman in the 1970s provides a most helpful overview of earlier cases.

For the government client, it is necessary to define the criteria by which to assess the usefulness of each option available. I have selected a few key criteria for this discussion. The first criterion is really the most important: the peace-making function of a dispute. To solve a dispute means coming to a decision but also means getting that decision accepted. Effectiveness in solving a dispute depends on the ability to reach a result and then gain acceptance by the parties directly involved and their constituencies. This is largely a matter of domestic politics; referenda, legislative ratification and developing a consensus of the domestic forces which count determine the chances of formal governmental acceptance.

This is quite different from commercial arbitration, where you can, usually, though often at risk, cost and some uncertainty, enforce an award. Enforcing Icj or arbitral awards against a sovereign State is, almost, impossible, though there are implications in terms of the forces of legitimacy, external pressure and using the external constraint in domestic politics. The ability to have a judgment—or a non-judicially achieved solution—that is politically accepted is the key criterion for success in all of these methods.

One should not, however, disregard the solution of doing nothing. Arguably, it is the most frequently chosen strategy and may, in many situations, be the most efficient one. There are many ways to paper over and camouflage the continuation of a boundary dispute, and there is great advantage in such camouflage.

There are issues of efficiency, cost, time and effort. These are arguably less relevant here than in commercial arbitration; the question has, though, never been properly investigated. It could well be that recourse to formal, external ways of dispute settlement (including mediation) is often not practical due to resource constraints. The recently created WTO Legal Advisory Centre offers a way to help co-finance poor countries' litigation. The international community and the Icj badly need such a mechanism. Justice is usually never had without money; the higher the quality of legal advice, the greater the chance of success. Market prices will tend to reflect approximately the quality of the legal advice. Poor countries face the same handicap in international litigation, arbitration and mediation as they face in WTO dispute procedures.