An Introduction To International Litigation

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Introduction

International litigation, whatever its form, is fundamentally different from internal litigation. International litigation is litigation between two or more States, between a State and an international intergovernmental organisation, between international intergovernmental organisations, or between a State and some other entity, especially something like a privatised State enterprise or a corporation, particularly a multinational. Litigation and pleading are acts of State.

The essential principle is that such litigation can only take place with the consent of both parties. There is no such thing as compulsory jurisdiction in the true sense of the word, meaning that one State can simply haul another State into court at will, and without that other State's consent. That is the rule, whether the litigation takes place before one of the standing international tribunals now in existence, including the International Court of Justice (ICJ) itself and the International Tribunal for the Law of the Sea (ITLOS), or before an *ad hoc* arbitration tribunal. No international litigation can take place without the consent of the respondent (defendant).

But once that major condition is met, the conduct of the case is broadly speaking similar to the conduct of litigation before the highest internal tribunals. We will first look briefly at this consent, and then turn to the litigation itself.

Consent can take several forms. A State can give its consent specifically, *ad hoc*, for a defined dispute. That kind of agreement, a *special agreement*, is frequently known by its French name, *compromis*. A State can give its consent at large, for categories of future disputes with States meeting a defined condition, for instance a dispute with another State arising out of the interpretation or application of a particular treaty to which both States are party; or generically as between itself and any other State party to a treaty for the settlement of disputes between them. That treaty can be bilateral or multilateral. Most boundary disputes – maritime and land boundary disputes – have come before the ICJ or before *ad hoc* arbitration tribunals following a special *ad hoc* agreement in which the States defined the dispute to be settled.

To go further into that now would take us into the detailed technicalities both of the law of treaties, as international agreements are called generically, and of the law of international litigation, which itself is always subject to the constituent instrument (if any) under which the tribunal is acting.[1] Some agreements permit the unilateral institution of proceedings before a standing tribunal. In such cases, the State against which the proceedings are instituted has to take part in them. However, it may challenge the jurisdiction of the tribunal, or the admissibility of the claim, or raise any other issue that could prevent the tribunal from deciding the case. These are called preliminary objections.

International Tribunals

Let us first look at international tribunals. They are of two kinds: standing tribunals operating under a constituent instrument; and *ad hoc* tribunals, set up to determine a specific dispute. (I am deliberately leaving out claims commissions, such as the Iran-US Claims Commission now operating at The Hague. States establish these to settle individuals' claims arising out of a particular incident or situation, unlikely to occur in boundary disputes.) This article is concerned with two standing tribunals – the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS) – and with international arbitrations.

The two standing courts and the arbitrations are international in two senses. They are composed of a number of judges of different nationalities, and they decide the case according to international law. Boundary disputes can come before all of these, the ICJ both land and maritime boundaries, and ITLOS in principle maritime boundaries, or the maritime aspect of a mixed land and sea boundary dispute. One such mixed case is now pending before the ICJ, the *Land and Maritime Boundary between Cameroon and Nigeria* case. A similar arbitration is taking place, between Eritrea and Yemen, regarding sovereignty over the Hanish islands and over maritime delimitation between them.

The ICJ was established in 1945 in place of the Permanent Court of International Justice in existence between 1922 and 1940. Its Statute is an integral part of the UN Charter. The Court is one of the principal organs and the principal judicial organ of the UN. It consists of 15 judges of different nationalities, elected by the General Assembly and the Security Council. ITLOS operates under a Statute, which is Annex VI of the United Nations Convention on the Law of the Sea of 1982. It was established in 1996, and had its first case at the end of 1997 – a case which is still in progress, going through different phases. It consists of 21 judges of different nationalities, elected by the States Parties to that Convention. In both courts the judges serve for a period of nine years and may be re-elected. The terms of office are staggered, the term of office of one third of the judges ending each third year.

The ICJ, open only to States, has a general jurisdiction over whatever dispute States wish to bring before it. On average it has about two new cases a year. ITLOS, except for the Sea-Bed Disputes Chamber, is open only to States Parties to the Convention. Its jurisdiction is limited in principle to disputes arising out of the interpretation or application of the 1982 Convention and related instruments and other applications submitted to it in accordance with the Convention. The two Statutes are broadly similar, as are the two sets of Rules of Court, although ITLOS has some special provisions tailored to the Law of the Sea Convention.

Being standing tribunals, they have the usual staffing. The head of the staff carries the title *Registrar*, and the staff itself goes under the general name of *Registry*. English and French are the official languages of both these tribunals. The ICJ is a charge on the regular budget of the UN. The States Parties finance ITLOS. The seat of the ICJ is at The Hague, and that of ITLOS in the Free and Hanseatic City of Hamburg. Both these bodies have permanent Rules of Court, but these are little more than outlines for procedure, and do not go into the details, as do the rules of national courts.

In arbitration, the parties have to agree on everything – the issue or issues to be decided, the place of the arbitration, the arbitrators, the Registrar, the staff and other logistical requirements, the language or languages to be used, procedure, whether there is to be a visit to the site, whether the proceedings are to be public or not, and how the costs of the arbitration, as distinct from their own costs, will be met. They also have to receive the agreement of the host State, find adequate accommodation, and arrange for the custody and disposal of the arbitration's archives.

In all cases, international tribunals are usually at one and the same time courts of first instance and courts of final resort. Judgments of the ICJ and ITLOS are final and without appeal. Arbitral awards are also usually final and without appeal, unless the parties have agreed otherwise. However, the general law of international arbitration does envisage the possibility of proceedings attacking the validity of an arbitral award, something which is very rarely encountered.

As they are courts of first instance, international tribunals have to establish the facts relevant for their decision. In boundary cases, this will often require a detailed examination and analysis of the diplomatic and general history of the region concerned, its geography and the relevant human factors and natural features. This problem is becoming difficult in cases involving newly-independent States, since frequently that diplomatic history belongs to the colonial period and the relevant archives are not always easily accessible. Israel encountered that problem in its 1988 arbitration with Egypt over Taba, which required not only research in British archives going back to the beginning of the century, but also in Ottoman archives for the critical period before the First World War (1914–1918).

All international tribunals can, if necessary, invoke the assistance of court-appointed experts. International litigation is becoming more complex, especially in light of the enormous advances in modern technology. International tribunals share with internal tribunals the increasingly difficult and delicate problem of how to deal with scientific and technical facts.

Procedure

The procedure normally consists of two phases, a written phase and an oral phase. The written pleadings, or 'briefs' as they are sometimes called, consist of a party's statement of its case with all supporting documents and other evidence annexed. They are filed with the Registrar who transmits them to the other party. The technical names for the pleadings are: *memorial*, which should contain a statement of the relevant facts, a statement of law and what are called *submissions*, that is a concise formulation of what the Court is being asked to decide; *counter-memorial*, containing an admission or denial of the facts as stated in the memorial, additional facts, observations on the statement of law in the memorial, a statement of law in answer, and

submissions. The next pleadings, if there are any, are called *reply* and *rejoinder*. Their purpose is to bring out issues that still divide the parties.

The parties may file the pleadings simultaneously or consecutively (as in a national court). Simultaneous written pleading was traditional in arbitration and is supposed to reflect the equality of States. It has the great inconvenience that States are inclined to withhold their full cases in the first pleading, playing a wait-and-see game with the other side, and this can lead to three rounds of written pleadings. Also, there is no knowing which pleading a judge will read first and in that way form his or her first impression of the case. Consecutive pleading is becoming more frequent.

As a matter of law, consecutive pleading is without prejudice to the burden of proof. Each party prepares its written pleadings unilaterally in the tranquillity of a Foreign Ministry desk or Counsel's chambers. In standing tribunals, the written pleadings are in due course made public. In arbitrations, each party is free to decide whether to make its pleadings available to the public.

In a case before one of the standing tribunals, the oral phase is in principle open to the public (including the press and electronic media). These oral proceedings are important, because it is only then that the parties directly confront each other for the first time. They are also very strenuous for those who have to take part in them. In arbitration proceedings, the parties decide whether the oral phase shall be open to the public or not, usually not. The parties, or the tribunal (after consulting the parties), usually fix the order of speaking, frequently by the simple tossing of a coin. Usually there are two rounds of oral pleading; opening statements, and answers or rebuttals. Very rarely, a third round is allowed, but that would be on a very limited point.

The judgments of the standing tribunals are read in public, open to the press and the electronic media, and today are quickly available on one of the websites.[2] Arbitral awards are usually published, but the parties can agree not to publish them at all, or to withhold their publication for a time.

Submitting a Dispute to Litigation

The decision to submit a dispute to litigation and decisions about litigation tactics are political decisions. To submit a dispute to litigation is a major foreign policy step. It usually signals that the diplomatic negotiations have reached a deadlock, and that the party or parties have decided that instead of letting the dispute smoulder indefinitely, they would like to see it settled by a binding decision made on the basis of international law and in the application of international judicial techniques. The decision is not lightly reached. International litigation is expensive, time-consuming, uncertain, and the losing party may well smart under the loss. However, not always. Sometimes litigation is useful to get governments 'off the hook', to use a colloquialism.

A word about enforcement is required here. There is no international sheriff to come along with a writ of what is called in English 'dog-Latin' a writ of *fi[eri] fa[cias]*. It is a fact that once States have agreed to litigate a boundary dispute, they will abide by the decision. If they do not, and if the situation that results from this non-compliance is or becomes a threat to international peace and security, the regional or international organs responsible for the maintenance of international peace and security can step in. This includes the UN Security Council, as well as the regional organisations such as the Organization of African Unity (OAU), the Organization of American States (OAS), etc. In fact these have all been helpful either in having boundary disputes submitted to dispassionate third-party settlement, or in assisting in the implementation of the decision once it has been rendered. Non-compliance with boundary decisions is not a serious problem.

Although the standing international tribunals have power to award costs, the basic principle is that each side bears its own costs, and costs are not awarded in international litigation.

Advisory Opinions

There is also a special form of the international judicial process known as the advisory opinion. Both courts may give advisory opinions to international organs authorised to request them. In the UN, the General Assembly and the Security Council may request an advisory opinion on any legal question. The General Assembly may also authorise other United Nations organs and the specialised agencies to request advisory opinions on legal questions arising in the course of their activities. For ITLOS, both the Council and the Assembly of the International Seabed Authority may request an advisory opinion from the Sea-Bed Disputes Chamber on legal questions arising in the course of their activities. An advisory opinion is what it says, an *advisory* opinion. It is rendered

after judicial proceedings, but is not technically binding in the sense that a judgment is binding, so there is no question of enforcement. The organ that requests an opinion decides on what to do next.

The Proliferation of Tribunals

The establishment of ITLOS as the second standing international tribunal with broad jurisdiction has raised in an acute form the related issues of the proliferation of international tribunals and the possibility of overlapping jurisdiction between them. Are we witnessing a proliferation of dispute-settlement organs, to the detriment of the principal judicial organ of the United Nations – the International Court of Justice? Will the existence of ITLOS take business away from the ICJ and undermine its general standing? Will it lead to conflicting interpretations of the law, especially after the ICJ has made so significant a contribution to the development of the law of the sea since 1946?

The proliferation of international tribunals, whether standing such as the ICJ, semi-permanent such as claims commissions, or *ad hoc* tribunals, is certainly becoming a prominent feature on today's international scene. The United Nations alone now has as functioning bodies the ICJ, the UN Administrative Tribunal, two International Criminal Law Tribunals (one for former Yugoslavia and the other for Rwanda), and a Compensation Commission dealing with claims arising out of Iraq's invasion of Kuwait. A new International Criminal Court is in the making. That is not all.

There is the Permanent Court of Arbitration working under the Hague Convention of 1907. There is the International Center for the Settlement of Investment Disputes (ICSID) working under the auspices of the World Bank. The new World Trade Organization (WTO) has its own panels for dispute settlement, following on the precedent of its predecessor, GATT. Many other major international treaties have their own dispute settlement mechanisms.

However, it is important not to exaggerate the matter. It is unlikely that these specialised bodies would produce conflicting decisions on matters of general international law. In that respect, the general supremacy of the ICJ is not really at risk. In addition, conflicts of jurisdiction between this set of tribunals are unlikely. More serious is the new problem of conflict of jurisdictions where these might overlap, and the difficulties which that might cause to politicians and diplomats, and their legal advisers, when they have to take decisions on these matters. Their questions will relate to the choice of machinery, if there is disagreement between the parties to the dispute as to what the dispute is really about and what would be the appropriate tribunal. That is the real problem created by the establishment of ITLOS – the possibility, even the prospect, of conflicting jurisdictions.

Many writers and some judges of the International Court itself, have drawn attention to this problem, and have suggested that there is need for an international tribunal with jurisdiction to decide that particular type of dispute, something like the *certiorari* writ of common law. This is becoming more urgent. In this connection it is interesting to note that the proposal of the Preparatory Committee on the Establishment of an International Criminal Court, for the Rome Conference scheduled for June 1998, contains an article on the settlement of disputes on the interpretation or application of the Statute. It suggests conferring a residual jurisdiction on the International Court of Justice to settle that type of dispute. This shows awareness of the problem, and points out how it can be met. Whether that will be adopted belongs to the realm of prophecy. The International Court of Justice is uniquely available to fulfill this task.

Notes

From a talk at the International Boundaries Research Unit's Training Workshop *Preparing for Boundary Litigation/Arbitration*, Durham, 25-26 March 1998.

1 For instance see: Sir Derek Bowett, 'The Conduct of International Litigation', *International Court of Justice: Process, Practice and Procedure 1–20*, British Institute of International and Comparative Law, 1997.

2 For instance, see the ICJ's website at: http://www.icj-cij.org/icj002.htm

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