LITIGATING INTERNATIONAL LAW DISPUTES

Litigating International Law Disputes provides a fresh understanding of why states resort to international adjudication or arbitration to resolve international law disputes. A group of leading scholars and practitioners discern the reasons for the use of international litigation and other modes of dispute settlement by examining various substantive areas of international law (such as human rights, trade, environment, maritime boundaries, territorial sovereignty, and investment law), as well as considering case studies from particular countries and regions. The chapters also canvass the roles of international lawyers, non-governmental organizations, and private actors, as well as the political dynamics of disputes, and identify emergent trends in dispute settlement for different areas of international law.

NATALIE KLEIN is Dean of Macquarie Law School, Macquarie University, where she teaches and researches in various areas of international law, with a focus on the law of the sea and international dispute settlement.

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Weighing the Options

Edited by

NATALIE KLEIN

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CONTENTS

NOTES ON CONTRIBUTORS

LEA BRILMAYER is the Howard M. Holtzmann Professor of International Law at Yale Law School. She has also taught as a visiting professor or full-time faculty at the law schools of the University of Chicago, the University of Texas, Harvard University, Columbia University, the University of Michigan, and New York University. During her first decade of teaching Professor Brilmayer's writing interests mainly concerned conflict of laws (in particular, personal jurisdiction and choice of law), federal jurisdiction and jurisprudence. Her interests have gradually turned to international law and international relations, which have led to two books: *Justifying International Acts* (1989) and *American Hegemony: Political Morality in a One-Superpower World* (1996). Professor Brilmayer has had extensive experience as a consultant in conflict of laws and private international law. She has also served as lead attorney in several important public international law arbitrations dealing with boundary issues (*Eritrea* v. *Yemen* and *Ethiopia* v. *Eritrea*), maritime delimitation (*Eritrea* v. *Yemen*) and civil compensation for violations of the laws of war (*Eritrea* v. *Ethiopia*).

CHESTER BROWN is Professor of International Law and International Arbitration at the Faculty of Law, University of Sydney, a barrister at 7 Selborne Chambers, Sydney, and a door tenant at Essex Court Chambers, London, and Maxwell Chambers, Singapore. He teaches, researches and practises in the fields of public international law, international dispute settlement, international arbitration, international investment law, and private international law. He previously served as Assistant Legal Adviser at the British Foreign and Commonwealth Office (2007–9), and prior to this he was a Senior Associate in the International Law and International Arbitration Group of Clifford Chance LLP, London (2004–7). He is the author of *A Common Law of International Adjudication* (2007), a major study on the applicable procedure and remedies before international courts and tribunals, which was awarded the American Society of International Law's Certificate of Merit.

RODMAN R. BUNDY is a partner in Eversheds litigation practice group. Based in Singapore, he has over thirty years of experience as counsel and advocate in high-profile public international law litigations and international commercial arbitrations, including appearances before the International Court of Justice, the Iran–United States Claims Tribunal and various ad hoc investment and ICC arbitral tribunals. Rodman lectures on international boundary disputes at King's College, London, and is a frequent guest speaker at conferences and workshops on issues of public international law and upstream oil and gas operations. He is ranked by *Chambers* 2009 as 'a real talent' in the field of public international law and as 'an absolutely excellent advocate who has vast experience, especially in boundary cases'. *Legal 500* 2009 describes him as a 'star' partner and one of the leading experts in public international law.

HENRY BURMESTER AO, QC was Chief General Counsel in the Australian Government Solicitor (AGS) for over a decade and before that head of the Office of International Law in the Attorney-General's Department. In 2009 he became a Consultant Counsel to the AGS. He has appeared as counsel for the Commonwealth in leading constitutional cases before the Australian High Court.

JOHN R. CROOK is a judge on NATO's Administrative Tribunal. He is a former vice-president of the American Society of International Law and past editor of the *American Journal of International Law*'s section on Contemporary US Practice Relating to International Law. He served on the Eritrea–Ethiopia Claims Commission and is an arbitrator and consultant in international proceedings. During three decades in the US State Department's Office of the Legal Adviser he was US Agent at the Iran–United States Claims Tribunal, and was deeply involved in creating the UN Compensation Commission. He later was General Counsel of the Multinational Force and Observers, which operates peacekeepers in the Sinai Desert. He teaches international arbitration at George Washington University Law School.

ADELE FAURE is a joint degree student at Yale Law School and the Harvard Kennedy School. She is originally from Palo Alto, California, and received a BA in economics and international relations from Stanford University in 2007. She first became interested in international law while at Stanford, where she researched mechanisms compelling reimbursement of sovereign debt and the environmental implications of international

trade agreements. Between college and law school she lived in San Francisco, Madagascar, South Africa, and France.

MARK FELDMAN is Assistant Professor of Law at the Peking University School of Transnational Law. He previously served as Chief of NAFTA/CAFTA-DR Arbitration in the Office of the Legal Adviser at the US Department of State. He holds a JD from Columbia Law School, where he was a James Kent Scholar and recipient of the Parker School Certificate in International and Comparative Law.

XIMENA FUENTES is Professor of Law at Universidad Adolfo Ibáñez and Associate Professor of Public International Law at Universidad de Chile. She holds a D.Phil. from Oxford University. She worked for the government of Chile in the *Peru* v. *Chile* maritime dispute before the International Court of Justice. She has represented the Republic of Chile and private investors before the International Centre for the Settlement of Investment Disputes (ICSID), and is a former co-rapporteur of the Committee on International Law on Sustainable Development of the International Law Association (2003–12).

CHRISTINE GRAY is Professor of International Law at the University of Cambridge and a Fellow of St John's College. She has written widely on the use of force, and she also works on reparation in international law. Her main publications are *International Law and the Use of Force* (3rd edn 2007) and *Judicial Remedies in International Law* (1987). She is a member of the editorial board of several journals, including the *British Yearbook of International Law*, the *Journal of Conflict and Security Law*, the *International and Comparative Law Quarterly*, and the *Cambridge Law Journal*.

M. RAFIQUL ISLAM is a professor of law at Macquarie Law School, Macquarie University. He obtained an MA in economics and an LLB (first class) from the University of Rajshahi, and an LLM and a Ph.D. from Monash University. His teaching and research interests are in public international law. He has published extensively in international law, human rights, international trade, and the constitutional law of Bangladesh. Professor Islam was the recipient of the Macquarie University Outstanding Teacher Award 2000. His recently published book is *International Law: Current Concepts and Future Directions* (2013).

MD. SAIFUL KARIM is a lecturer at the School of Law, Faculty of Law, Queensland University of Technology (QUT). Before joining QUT he was an associate lecturer at Southern Cross University. He also taught law at Macquarie University and at the University of the South Pacific. He has published extensively in the fields of public international law and environmental law and has presented research papers in a number of conferences and workshops organized by different academic and research organizations based in Asia, Australia, Europe, and North America.

NATALIE KLEIN is Dean of Macquarie Law School, Macquarie University, where she teaches and researches in different areas of international law, with a focus on law of the sea and international dispute settlement. Dr Klein is the author of *Dispute Settlement and the UN Convention on the Law of the Sea* (Cambridge University Press, 2005) and *Maritime Security and the Law of the Sea* (2011). Prior to joining Macquarie, she worked in the international litigation and arbitration area of practice of Debevoise & Plimpton LLP, served as counsel to the government of Eritrea and was a consultant in the Office of Legal Affairs at the United Nations.

COALTER G. LATHROP is principal and owner of Sovereign Geographic, an international boundary consultancy providing legal and cartographic services to clients throughout the world. He has acted as counsel before the International Court of Justice and the International Tribunal for the Law of the Sea. He holds a Master of Marine Affairs from the University of Washington, and a JD and an LLM in international and comparative law from Duke University. He is a member of the extended faculty at Duke Law and editor of *International Maritime Boundaries*. His research, writing, and speaking have focused on ocean law and the resolution of international disputes, including territorial sovereignty and maritime boundary disputes.

MAKANE MBENGUE is an associate professor at the University of Geneva Law School and a visiting professor at Sciences Po Paris (School of Law). He acts as a professor for regional courses in international law organized by the United Nations Office of Legal Affairs (OLA), and as counsel for states before the International Court of Justice, and has acted as a legal advisor for the World Bank and the Senegal River Organization, as well as a legal expert for the Secretariat of the Nile Basin Initiative, the International Labour Organization (ILO), the Swiss Federal Office of

Public Health, the World Health Organization (WHO) and Green Cross International.

JOHN MERRILLS has taught international law all over the world. He has held visiting posts at the Universities of Auckland and Toronto and has twice served as Dean of the Faculty of Law at Sheffield University, where he is now an Emeritus Professor. For eight years he was an Alternate Member of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. He is the author of numerous books and articles on international law, and in 2007 was elected an Associate Member of the Institut de Droit International.

CESARE P. R. ROMANO is Professor of Law and W. Joseph Ford Fellow at Loyola Law School, Los Angeles. His expertise is in international law, but he also has substantial background in diplomatic history and economics. In 1997, he co-funded the Project on International Courts and Tribunals, which he continues to co-direct. In 2012, he became Senior Fellow of Pluricourts, the centre of excellence for the study of international courts of the Faculty of Law of the University of Oslo. He recently co-edited with Karen J. Alter and Yuval Shany *The Oxford Handbook of International Adjudication*.

SHIRLEY SCOTT is an associate professor and faculty co-ordinator of the programme for Master of International Law and International Relations at the University of New South Wales. She is co-chair of the Research and Planning Committee of the Asian Society of International Law, and vice-chair of the International Law Section of the International Studies Association. Her recent books include *International Law in World Politics: An Introduction* (2nd edn 2010), *International Law, US Power. The United States' Quest for Legal Security* (Cambridge University Press, 2012), and *International Law in the Era of Climate Change* (edited with Rosemary Rayfuse, 2012).

IVAN SHEARER is Emeritus Professor of Law of the University of Sydney, having retired from the Challis Chair of International Law in 2003, and is currently an adjunct professor of law at the University of South Australia. He has wide experience in teaching and practice and is presently involved as a member of arbitral panels convened under Annex VII of the International Convention on the Law of the Sea in two cases. From 2001 to 2008 he served as an elected member of the UN Human Rights Committee.

TIM STEPHENS is an associate professor in the Faculty of Law at the University of Sydney and is co-director of the Sydney Centre for International Law. He holds a Ph.D. in law from the University of Sydney and an MPhil in geography from the University of Cambridge. He has published widely on issues of public international law, international environmental law, international climate law, and the law of the sea. He is the author of *International Courts and Environmental Protection* (Cambridge University Press, 2009) and *The International Law of the Sea* (with Donald R. Rothwell, 2010). In 2010 he was the recipient of the International Union for the Conservation of Nature Academy of Environmental Law Junior Scholarship Prize in recognition of his scholarship in the field of international environmental law.

CHRISTOPHER WARD is a recognized expert in the field of international law and practises extensively. He has particular expertise as an advocate in cases which involve the domestic and international law interface, and has worked regularly in areas as diverse as human rights, maritime boundaries, and diplomatic immunity. He also regularly accepts instructions in appellate and significant commercial and public law matters. He has appeared before all the major Australian courts and tribunals, including the High Court of Australia. He is president of the International Law Association (Australian Branch) and sits on a number of international law committees. He is a Visiting Fellow at the ANU Centre for International and Public Law, where he conducts research, teaching, and international advocacy.

MICHAEL WOOD, KCMG, is a member of the International Law Commission and a Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge. He is a barrister at 20 Essex Street, London, where he practises in the field of public international law, including before international courts and tribunals. He was Legal Adviser to the UK Foreign and Commonwealth Office between 1999 and 2006, having joined as an Assistant Legal Adviser in 1970.

PREFACE

This book is the result of research conducted for an Australian Research Council Discovery project entitled 'Choosing Litigation to Resolve International Law Disputes in the Protection of Australia's Offshore Assets, Its Citizens and Foreign Trade'. Australia has a rich experience in international adjudication and arbitration (referred to collectively as 'litigation'), and the case studies in the project focused on areas that have high political, social, and economic interest for both the Australian government and the Australian people. Issues related to Australia's marine resources (including whaling, fishing, and hydrocarbon exploitation) have been the primary subject areas litigated by Australia before international courts, as well as defending and asserting trade interests at the World Trade Organization (WTO). By contrast, the protection of Australian nationals abroad has not resulted in litigation, although it has been contemplated, despite the high media attention accorded to these issues on almost a daily basis. Through these case studies, a critical question posed was whether a comprehensive and integrated framework of legal and political factors could be devised to determine when international litigation should be pursued or rejected as a dispute settlement option. More simply, why do states litigate?

While the project had a focus on Australian practice, this book is intended to take some of the key lessons from those studies and consider them in a broader context, both substantively and geographically. From a substantive perspective, I have long been interested in the question of whether particular substantive areas of international law lend themselves more to litigation when disputes arise. Is there something about international trade law or the law of the sea that made states more amenable to the idea of including legal, binding, third-party dispute resolution in the key constitutive agreements in these areas? Or perhaps it is not the area of law per se, but the issues concerning international trade or maritime matters that make arbitration or adjudication a necessary regulatory component of these regimes?

From a geographic perspective, questions can be posed as to what extent one state's experience in litigation may be indicative of what another state's experience may be. Or, even if comparisons could not be drawn between different states, whether there may be regional trends one way or another in terms of state decision making vis-à-vis the use of litigation for the resolution of international law disputes. An immediate difficulty is the obvious fact that no one state is the same as another, but different histories, economic status, political power, government structures, and national interests will all inform decision making on how international disputes, and the legal dimensions of those disputes, should be resolved.

The intention behind this book has therefore been to provide a unique perspective on international adjudication and arbitration. Rather than just examining procedural requirements and the operation of different courts and tribunals, or exploring the legal principles as articulated by international courts and tribunals, this book seeks to link the very nature of different substantive areas of international law with the procedures that are typically preferred for resolving disputes over that particular subject area and to discern why such a preference may exist. The question is examined both in terms of the preferences and practice of particular states or regions, and in relation to different areas of substantive international law.

The book is therefore structured in three parts. The first part sets the scene, by considering the place of international litigation in international law, the political dynamics of inter-state litigation, and the increasing role of national courts resolving or contributing to international law disputes. The second part turns to case studies of particular country and regional experiences. Given the genesis of this book, the Australian experience is included, and the United States provides another individual case study. Regional perspectives are provided from Asia, Africa, Europe, and Latin America. The third part then turns to relatively discrete areas of international law in which each author addresses why particular dispute settlement procedures are available and which are most commonly utilized for that particular area of law. Each contributor was charged with the task of assessing the fundamental questions whether and why a certain dispute settlement procedure lends itself for use in relation to a particular substantive area of law.

The assignment was not an easy one. There is always an initial barrier to work through in terms of jurisdiction. Of course, some disputes cannot be resolved by an international court or tribunal because there is no court or tribunal available with jurisdiction over the subject matter of the

dispute. Yet there is still much to consider around the decision making as to whether jurisdiction is or can be established. A starting point may be whether a state has accepted the jurisdiction of the International Court of Justice (ICJ), either under the optional clause of that Court's Statute or in a compromissory clause in a treaty. For international trade law and the law of the sea, states are compelled to accept the possibility of legal proceedings being instituted against them by dint of their participation in the overall regime. So the very fact that a state becomes party to a treaty that contains a compulsory dispute settlement regime indicates that a state has agreed, at least potentially, to international litigation. Whether a state follows through on a commitment to participate in international litigation provides another dimension to this question. The practice of states in deciding whether to refer a matter to ad hoc arbitration or to enter into a special agreement to consent to adjudication further provides ground for study as to why states select litigation to resolve international law disputes. States may also devolve the resolution of international law disputes to non-state actors, and so allow for the possibility of corporations pursuing investment treaty arbitrations or individuals presenting human rights claims directly to international courts or committees.

Even when the variety of jurisdictional avenues is identified, there is still a need to question why one procedure was selected over another, or why one was seemingly not contemplated at all. Resolving this issue may necessarily remain speculative. Government decision making may be opaque; even if reasons are provided publicly, there may be other factors that have been relevant but are not aired. Documents may only become available after the passage of a certain amount of time (or when released illegally), but a historical or documentary survey may not reveal what conversations occurred or the strength of personalities involved at the time. For the lawyers who worked on the cases and who may well have been privy to the thinking of primary government decision-makers as to how to resolve a particular dispute, they cannot reveal those discussions because of ethical constraints. There is still much analysis that can be undertaken based on the public record, but the limitations should be acknowledged. Moreover, generalizations cannot easily be made, and caveats and exceptions must frequently be noted.

There are also many ways that the question, 'why does a state litigate?', could be answered. The field is ripe for empirical research. Assessments of the number of cases in a particular area, the states presenting claims and how often, the number of treaties with compromissory clauses, the involvement as respondent or claimant can all be calculated and

conclusions potentially drawn from these statistics. There is also scope for sociological research when attempting to drill down into the reasons for decisions of particular members of a government. Different theoretical paradigms (such as law and economics, realism, positivism, feminism) could each provide frames of reference for interpreting the decisions of states in relation to the different issue areas or national practice. The approach favoured in this book has been oriented towards international relations theory, without a wholesale adoption of any particular strand, inasmuch as the political dimensions have frequently been taken into account in assessing state decision making and the operation of the relevant courts and tribunals and legal principles in any given area.

Ultimately, we have provided many different answers to the core question of why states may choose adjudication or arbitration for the resolution of international law disputes. In doing so, we have hopefully contributed to the substantive areas under discussion, as well as to scholarship on international dispute settlement more generally, by giving readers something more to think about when considering the place of litigation in international dispute resolution.

Natalie Klein

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For the purposes of the project I benefited from the advice of an expert advisory group, which then expanded for a workshop dealing with core issues arising from the research. I am very grateful for the participation of Lea Brilmayer, Chester Brown, Henry Burmester, M. Rafiqul Islam, Md. Saiful Karim, Shirley Scott, Ivan Shearer, Tim Stephens, and Christopher Ward in this regard. The workshop was followed a year later by a conference, and my thanks to Cesare Romano for participating in the conference and for his support of the project.

Following the conference I was able to broaden the participants further for the purposes of this book. In doing so, I looked not only to academics in the field, but to those who are or had been involved in practice. I am extremely grateful to all the contributors for the time and effort they have taken in preparing their chapters, particularly those who were involved in cases at the same time. It has been a privilege for me to work with you all in seeing this book through to fruition.

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TABLE OF CASES

International