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978-1-107-01706-1 - Litigating International Law Disputes: Weighing the Options

Edited by Natalie Klein

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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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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?

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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

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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.

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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.

My thanks to Finola O'Sullivan, the anonymous reviewers, and the editorial team at Cambridge University Press, who provided excellent advice on formulating this book at the outset. I also appreciate the patience and diligence afforded to me in bringing this book to its conclusion.

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intellect, but also their conscientiousness and good humour in undertaking the tasks set. In this regard, I would particularly like to thank Nicholas Lennings, Lauren Knapman, Danielle Selig, and, especially in the preparation of this book, Hiruni Alwishewa and Tejas Thete.

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