Oxford Public International Law

Litigation Strategy

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Content type: Encyclopedia entries
Product: Max Planck Encyclopedias of International Law [MPIL]
Module: Max Planck Encyclopedia of International Procedural Law [MPEiPro]
Article last updated: June 2019

Subject(s):

Counsel — Choice of counsel — Forum shopping — Remedies and costs — Claims — Sociology of international law

Published under the direction of Hélène Ruiz Fabri, with the support of the Department of International Law and Dispute Resolution, under the auspices of the Max Planck Institute Luxembourg for Procedural Law.

A. Introduction

1 The twenty-first century can so far be regarded as the golden age for international litigation—understood in the present entry as the process of taking a case, in which at least one of the parties is a State, to an international judicial or arbitral forum. Not only have → *international courts and tribunals* multiplied but they are busier than ever before. If litigation by States remains an essentially marginal phenomenon in international relations, States can also be—and are increasingly, if not exponentially—lured before judicial or arbitral bodies by private persons, notably in the fields of human rights and investment law. Such evolution and diversity render even harder any attempt to define the already multifaceted and dynamic concept of litigation strategy.

2 As was recalled by David Rivkin, '[t]he original meaning of strategy hails from the military sphere … Strategy determines the way in which the overall war should be fought, while tactics focus on the means of fighting the individual battles' (Rivkin, 2010, 151). However, it is debatable that the difference between strategy and tactics is clear cut—at least when litigation is at stake. Tactics are parts of the means to achieve the goals of the strategy.

3 Guidance to defining the litigation strategy is all the more valuable given that, quite often, parties to such a dispute have never appeared before an international court or tribunal and therefore legitimately inquire about the practical aspects of framing or responding to a claim. Most usefully, the → *International Centre for Settlement of Investment Disputes (ICSID)* has issued Practice Notes for Respondents in ICSID Arbitration to answer questions frequently asked by member States, including concise suggestions on securing legal representation and deciding case strategy. In the light of the diversification of international litigation, it is to be hoped that this initiative would be systematized.

4 Developing litigation strategy requires an appreciation of the complex interplay between numerous factors. In the first place, it will be necessary to determine the composition of the → *advocacy* team, the goals of the proceedings, as well as the strength and weaknesses of the case. In parallel, since the principle of → *consent* to jurisdiction permeates the entire judicial or arbitral settlement at the international level (→ *Judicial Settlement of International Disputes*; → *Arbitration*), litigation strategy implies choices concerning the mode of settlement to be used, the forum to be seised and the size and composition of the bench. Once these preliminary and essential questions have been decided, it will be for the legal team to identify the details of the proceedings to be followed and the most appropriate advocacy techniques. All these choices depend on the one hand on the identity of the parties, their perceptions of the dispute, their relative power positions, their basic policy goals and priorities, a long-term view of what the litigation can achieve, as well as a candid evaluation of the factual circumstances and the legal issues of each case. On the other hand, it is also necessary to take into account the sensitivities of the bench, the content of the rules of procedure which may provide or limit certain options, and the personalities, predilections, and skills of the individuals involved at various levels in the planning and execution of the strategy, each party being free to choose and deploy its own litigation strategy and fully develop all its arguments.

B. Organizing a Strategy

1. Constituting the Litigation Team

5 The litigation team (→ *Litigation team*; → *International Courts and Tribunals, Agents, Counsel and Advocates*) plays a pre-eminent role in the definition of the litigation strategy. It helps determine the goals of the proceedings, assesses the strengths and weaknesses of the case, advises on the most suitable forum, and puts forward the most efficient procedural and argumentative tactics. The constitution of the team is therefore both a prerequisite and part of the process of the litigation strategy. It must be secured as early in the process as possible.

6 The composition of the team will be modulated according to the specific characteristics of the case and the forum before which it is brought. Thus, more or less 'specialized' counsel and advisers will be added, if necessary, to the hard core that is almost inevitably found in all teams, depending on the technical difficulty of the case. Such a choice will be highly dependent upon the substantial characterization of the case. If, for instance, it is seen as a 'treaty case', 'generalists' of international law will suffice; on the other hand, if the dispute concerns a particular field, or if it is in the interest of the party concerned to insist on particular aspects (law of the sea, humanitarian law, environment, etc), it will be advisable to include specialists in these fields in the team—and not only lawyers and professors of international law but also hydrographers or geologists, anthropologists, historians, cartographers, etc, depending on the case at hand. Thus, to take some examples before the → *International Court of Justice (ICJ)*, the *Genocide* cases against Serbia involved international criminal law and human rights specialists; while in the *Gabčíkovo-Nagymaros*, *Pulp Mills,* and *Whaling* cases, all parties made extensive use of scientific advisers and environmental experts. In the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire* before a Special Chamber of the → *International Tribunal for the Law of the Sea (ITLOS)*, both parties had recourse to cartographers—as will always be the case concerning boundary delimitations—and petroleum specialists (→ *Maps*; → *Cartographic material*).

7 It is also appropriate, whenever possible, to involve lawyers of the nationality of the party concerned in the team as much as possible. It will usually be a cost-effective option and, most importantly, this develops in-house capacity which can contribute to legal representation in future cases. This is also of particular importance when matters of national law are involved. Thus, in cases of diplomatic protection for instance, a clear understanding of the available local remedies and knowledge of their exhaustion is necessary to establish the jurisdiction of the international court or tribunal. Such understanding is likewise most advisable when seeking to establish (or negate) the international responsibility of a State on the basis that its domestic law violates international law. These same considerations can play a role in favour of appointing an → *ad hoc judge* or an arbitrator having the nationality of the appointing party (see paras 57–58 below).

8 In assembling their team, the parties may also take into account the composition of the court or tribunal before which the case is envisaged to be heard. Thus, it may be advisable to mix French-speaking and English-speaking counsel and advocates when, as is frequently the case, they are the two official languages in which the court or tribunal operates. More fundamentally, it is good policy to use both Romano-Germanic and Common Law counsel; this is especially the case before international courts including a great number of judges such as the ICJ (15 permanent judges) or ITLOS (21 judges) whose members were trained in both legal cultures (see para 78 below).

9 If the pleading team is properly composed, it is likely that its internal discussions will, at least partly, reflect those between the judges or arbitrators (→ *International Courts and Tribunals, Judges and Arbitrators*). If counsel of different origins and legal backgrounds reach a consensus on the applicable rules and solutions during the discussions inside the team, the same should apply in the court or tribunal seised; at least, the probability is increased.

2. Determining the Goals of the Proceedings

10 The first step in defining the strategy of the party will be for the political authorities to determine, with the advice of the legal team, what the goals of litigation are.

11 In some cases, things are clear: the parties share the wish to genuinely settle the dispute between them. This is supposedly the case when they conclude a special agreement (or → *compromis*) to that end. Such an objective is usually formally expressed in the preamble (see eg the Special Agreement of 21 July 2010 between Burkina Faso and Niger to submit their *Frontier Dispute* to the ICJ*:* 'Desirous of resolving this dispute once and for all in the spirit of fraternity between brotherly peoples and neighbourliness characterizing their relations and in compliance with the principle of the intangibility of frontiers inherited from colonization').

12 However, as is well-known, the only treaties that count are those concluded between the ulterior motives, according to Paul Valéry's illustrious formula (1931, at 56). It is rather apparent that, when Malaysia concluded, on 14 May 1998, a special agreement for submission to the ICJ of the plainly winnable → *Sovereignty over Pulau Ligitan and Pulau Sipadan Case (Indonesia/Malaysia)*, it had in mind its other and more difficult dispute with Singapore concerning *Pedra Branca*. While the negotiations for both agreements had started at about the same period, the *compromis* between Malaysia and Singapore was only signed five years later: it is only after the Judgment of 12 December 2002 in *Ligitan and Sipadan* gave full satisfaction to Malaysia that it accepted to bring to the Court the politically very sensitive → *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge Case (Malaysia/Singapore)*, thus avoiding excessively negative reactions from public opinion. In a similar vein, the Agreement of 4 November 2009 between Croatia and Slovenia to submit their territorial and maritime dispute to arbitration was adopted in the framework of a wider strategy within a regional power play: it was a condition imposed by Slovenia to lift its reservations to Croatia's accession to the European Union (*Arbitration between the Republic of Croatia and the Republic of Slovenia*, 2016, paras 12–5).

13 Besides winning (or losing) bets (see below paras 15, 26, 28), States often look beyond the current case to other disputes which may need to be addressed in a similar fashion (Shaw, 1997, 833). Although a decision has no binding force except between the parties and in respect of the particular case (see eg Art 59 ICJ Statute), it is obvious that it is not devoid of consequences upon other situations and States, whether legally or politically. In addition to the pursued objective effect of a decision (such as the determination of a boundary), some elucidate particular legal principles which may assist, stimulate, or engage bilateral and multilateral negotiations, regional and global settlement mechanisms, or the crystallization of further norms. The expected decision may confer authority upon a State's particular approach to a legal problem and help legitimize its international—or sometimes domestic—policy. The goals of litigation thus range from obtaining a legal decision on a specific issue to attempting to establish or avoid a precedent relevant for other cases, as well as gaining a bargaining chip, decreasing diplomatic isolation, or securing political validation. Litigation 'is, after all, part of the machinery of international diplomacy, albeit one with a special role' (Gill, 1989, 48). Together with these international ramifications, the

State will need to weigh the domestic impact and economic consequences which might flow from a decision to litigate.

14 To take a famous example, Nicaragua's Application before the ICJ against the United States in 1984 (→ *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*, hereinafter 'the *Nicaragua* case') is said to have had five objectives:

1. to gain support from world public opinion by portraying Nicaragua as a victim of superpower intervention;

2. to influence US public opinion and especially Congressional opinion to oppose further funding of the contra guerrillas;

3. to influence US and especially Congressional opinion to end authorization of 'covert' CIA activities against Nicaragua – in particular the mining of its harbours, attacks upon shipping by speedboats and light aircraft, and sabotage of its oil depots and storage facilities, etc.;

4. to isolate the US diplomatically from both its regional Latin American neighbours and allies and its Western partners in its opposition to Nicaragua;

5. to improve Nicaragua's negotiating position in any subsequent bilateral or regional negotiations (Gill, 1989, 134).

Since its big win in this case, recourse to the ICJ has become an element of Nicaragua's foreign legal policy. Whenever it has been confronted with a problem with its neighbours or felt threatened, this country has almost systematically applied judicial pressure, before sometimes requesting a removal of the case from the list once an agreement was reached with the opposing party (compare for instance the two → *Border and Transborder Armed Actions Case (Nicaragua v Honduras; Nicaragua v Costa Rica)*).

15 Submitting a dispute to a judicial or arbitral body is not always inspired by the will to win the case. The seisin of a court or a tribunal may also result from the desire to get rid of an embarrassing issue or situation. This was most certainly the case when Libya and Chad signed the 1989 Framework Agreement submitting to the ICJ the *Aouzou Strip* dispute. This dispute bore upon an enormous territory devoid of any proven exploitable resources, and poisoned the relations between the two States; while the Libyan case was legally clearly untenable, taking it before the World Court was for Colonel Kadhafi both a means to put an end to a costly dispute and to get an image as a law-abiding leader (→ *Territorial Dispute Case (Libyan Arab Jamahiriya/Chad)*).

3. Identifying the Strengths and Weaknesses of the Case

16 Another element that will guide the entire strategy is the legal team's assessment of the strengths and weaknesses of the case. 'Are all the elements of a claim reasonably satisfied? What are the possible defenses? What witnesses are available? Would privilege or data protection restrictions hinder one's ability to access documentary evidence?' (Rivkin, 2010, 153)—although the two last points will usually be rather secondary in inter-State issues.

17 To adequately answer these questions, 'freedom of speech' and confidence between all components of the team—the national side and foreign counsel, the political authorities, and the lawyers—must be absolute from all sides: the client must clearly explain to counsel what its expectations and fears are; counsel must be genuine in their assessments of the

strengths and weaknesses of the case and their views on the likely outcomes, without creating excessive expectations nor undue anxieties.

18 It will be usual for the client to inform counsel at the first contact about how they perceive things, if only to ensure that a counsel is not conflicted and that he or she has no difficulty in defending the thesis of the party requesting him or her (which does not imply a full adherence to said thesis). Then, a decisive step will be the first meeting of the whole team which will be the occasion for the client to make a general presentation of the case and for counsel to exchange views on the main issues and their assessment of the case. It might be appropriate to hold this first meeting (or another early meeting) in the capital of the State in order for counsel to be able to meet all the local stakeholders and to make them aware of their role in the success of the case and, in particular, of the importance of fact-finding.

19 To develop a consistent and persuasive legal strategy, counsel must have a clear sense of all the factual issues. It is therefore crucial that documentary evidence be *fully* disclosed to counsel as early as possible—the good ones which serve the case, as well as, and even more importantly, the bad ones which would make some argument difficult or untenable.

20 Early preparation is vital to ensure that the case proceeds as effectively as possible. Ideally, such preparation should begin as soon as the dispute arises since '[a] reactive strategy, developed as the case proceeds, places the client at a tactical disadvantage and risks undermining the overall case' (Rivkin, 2010, 152).

21 Still, the litigation strategy is not set in stone. It goes without saying that the assessment of the strengths and weaknesses of the case is a continuing process which must be reviewed at each stage of the proceedings. It is only when drafting the written proceedings or even during the oral phase that the true strengths and weaknesses become apparent:

> Arguments which stated generally appear convincing may be less so (or may even be more so) when stated with the particularity which is necessary in presenting detailed argument to a tribunal; and similarly, facts which can be set out persuasively in papers prepared as a basis for political decisions may look different when one has to assess how they are actually to be *proved* (Watts, 2007, 329).

Adjustments must further be made every time the opponent's strategy and arguments are unveiled—whether through written or oral pleadings. For instance, the positions taken in the Application and Memorial often change when drafting the second round of written proceedings in order to answer the Respondent's thesis. *In fine*, the most important part of the State's presentation and core of the strategy are its final submissions, in the sense that they embody the *petitum*—ie the prayers for relief on which the forum must take action. Obviously, in the event of incidental proceedings (see section D.2 below), a number of strategic decisions will also need to be revisited in the light of the forum's decision on the matter. Thus, a party should be aware of the next steps and always be ready to address them.

C. Choosing a Forum

1. Opting for Litigation – or Not

22 Not every dispute is amenable to judicial or arbitral review; and even when it is, litigation constitutes but one means at the free disposal of the parties for its settlement (→ *Peaceful Settlement of International Disputes*). The range of possibilities that States contemplate in their quest for the most advantageous offers, which can be either singled out or combined, notably includes → *negotiation*, → *mediation*, → *conciliation*, and other peaceful means (see Art 33 (1) envisaged by the → *United Nations Charter*; United Nations General Assembly ('UNGA') Res 2625 (XXV) and 37/10 (1982); Bogotá Pact (1948); European Convention for the Peaceful Settlement of Disputes (1957); Helsinki Final Act (1975); see also *Free Zones of Upper Savoy and the District of Gex, France v Switzerland*, 1929, 13).

23 The attitude of States towards these means is closely linked to their historical, political, and cultural traditions—for instance, African States have long been considered as favouring informal means of dispute settlement. Parties to a dispute need to be aware of their opponent's stance towards the various means of settlement to make the most effective choice in improving international relations and not aggravating tensions. They must consider what the reaction of the other party would be and, if there is a risk of plain opposition to a certain means, what the consequences would be. A related important question is whether, in case of an adverse decision, both parties (including the one choosing to resort to litigation) are willing to comply. Still, however reluctant a State may be towards litigation, once it gets there, very considerable time and effort are usually invested in the presentation of the case.

24 Considering the diversity of choices offered, recourse to litigation represents in itself one particular strategy for settling disputes which possesses special characteristics. The defining difference between litigation and other means is the parties' expectation of an impartial bench 'composed of independent and appropriately qualified judges [or arbitrators] applying objective and verifiable rules of law in a reasonably predictable manner'; the end result is 'an authoritative decision, which is reasoned and enforceable, binding and final, consistent and coherent' (Shaw, 1997, 840). States must weigh the disadvantage of losing control of the dispute settlement process and the advantage of reaching a solution through such a decision (→ *Judgments of International Courts and Tribunals*). There is no turning back from → *res iudicata* and this is why:

> 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 (Watts, 2007, 327).

25 Thus, the first decision which has to be taken by either or both States to a dispute is whether arbitral or judicial settlement is the appropriate choice. The authorities within the State who will decide to institute legal proceedings must be clear in their own minds as to the purpose of the prospective litigation and as to what may ultimately emerge from the process (see section B.2 above). Though various legal considerations will influence the decision, it is essentially a political one, in which many non-legal factors play their part.

26 The most obvious (but not only) reason which leads States or any other parties to litigate rather than to negotiate and compromise is their desire and chances of winning (Pellet, 2017, 20). In the main, the Applicant seeks a → *declaratory judgment* that the Respondent has breached international law. It may further request reparation, whether for direct injury to the State or injury to its citizens or their property, and for material or moral damage caused by the internationally wrongful act. As regards the form, there exists a wide range of possibilities, from *restitutio in integrum* to a general claim for reparations leaving it open to the court or tribunal to apply whatever remedy it feels appropriate.

27 In theory at least, a total victory is possible through arbitral or judicial settlement (and it does sometimes happen, including in inter-State disputes, contrary to a commonly held belief—see the *Territorial Dispute Case*, *Sovereignty over Pulau Ligitan and Pulau Sipadan Case,* or the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire*), while it 'is unlikely in an international negotiation where concessions will usually be made. A party convinced of the quality of its case, of the good dispositions of the judges towards it, and not inclined to make even the slightest concession, may then be tempted to resort to [litigation] to achieve unmitigated success' (Pellet, 2017, 20).

28 However, as explained (see para 15 above), 'in some instances, a government can consider referring to [an international court or tribunal] a "lost cause" when it is convinced that sacrifices are reasonable, if not indispensable, to solve peacefully a given dispute but that the public opinion would disavow it if it were to conclude any agreement with the other party or that [the] Parliament would refuse' to ratify the solution (Pellet, 2017, 20). In such cases, the political cost and ultimate responsibility for the envisaged concessions are obviated when they are imposed by a third party through an unquestionably independent and objective process.

29 It might happen that, even when a State has opted for litigation, it may, upon further reflexion, regret submitting the case to a judicial or arbitral body. One of the clearest examples of such reversals is given by Italy's attitude in the → *Monetary Gold Arbitration and Case*: it made an Application to the ICJ but later raised a preliminary question as to whether the Court had jurisdiction to adjudicate upon the validity of its claim (for the reason for this apparently inconsistent attitude, see the Court's Judgment in that case: *Monetary Gold Removed from Rome in 1943, Italy v France, United Kingdom and United States*, 1954, 26). The same can be said of the → *Corfu Channel Case* where Albania, after formally accepting the ICJ's jurisdiction, challenged it (*Corfu Channel Case, United Kingdom v Albania*, 1948, 20). The *Burkina Faso/Niger Frontier Dispute* case is another, less well-known, example of such a (partial) late repentance; while Niger had accepted to include a formal provision in the Special Agreement placing 'on record the Parties' agreement on the results' of a previous demarcation process, Niger took the position that there was no need to include a reference to the sectors concerned in the operative part of the Judgment (*Frontier Dispute, Burkina Faso/Niger*, 2013, 68).

30 Generally speaking, cases in which a party raises objections to jurisdiction show that while, abstractly, the party concerned may support legally binding means of settling disputes, the perception is different when it comes to a particular dispute where there is a risk of losing. Here, litigation strategy may conflict with the general legal policy of the State. In the words of Guy de Lacharrière, 'States often consider that the simplest course of action is not to accept general commitments and to express the sympathy they think they have for settlement by judges or arbitrators on a case-by-case basis, as opportunities arise' ('Les États jugent souvent que le plus simple est de ne point accepter d['engagements généraux et de manifester la sympathie qu'ils pensent avoir pour le

règlement par des juges ou des arbitres cas par cas, au fur et à mesure que les occasions se présentent' [translation by the author]) (1983, at 163).

31 Reluctance to a broad *ex ante* binding option for litigation also explains the care States take to draft arbitration agreements or *compromis* submitting a dispute to an international court, the negotiation of which can sometimes take many years (see eg the → *Belize Dispute* with Guatemala which is almost two centuries long and involved decades of negotiations under the auspices of the → *Organization of American States (OAS)* before a Special Agreement was signed on 8 December 2008, though the process did not end there since the Agreement was subsequently amended by a Protocol concluded on 25 May 2015, then submitted to referenda, and finally notified to the Court by Guatemala on 22 August 2018 and by Belize on 7 June 2019; see also the *Mbanié* dispute between Gabon and Equatorial Guinea which, after more than 40 years of negotiations, similarly signed an agreement to submit it to the ICJ; or the → *Guyana-Venezuela Border Dispute* which dates back to the first half of the nineteenth century and led to the *Arbitral Award of 3 October 1899*, the validity of which has been at issue for more than 50 years and in 2018 was finally referred to the ICJ by a unilateral application).

32 In the same vein, States will generally be concerned to strictly confine their acceptance of a unilateral request directed against them: see eg the → *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* in which France

> "consent[ed] to the Court's jurisdiction to entertain the Application pursuant to, and solely on the basis of … Article 38, paragraph 5", of the Rules of Court, while specifying that this consent was "valid only for the purposes of the case, within the meaning of Article 38, paragraph 5, ie in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" (Djibouti, *Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v France*, 2008, 181).

33 A more radical attitude is for a Respondent to refuse to participate in a case (→ *International Courts and Tribunals, Non-Appearance*). This strategy has been adopted from the beginning of the proceedings where the Respondent considered that the forum manifestly lacked jurisdiction to entertain the claim (as did France in the → *Nuclear Tests Cases*; China in *The South China Sea Arbitration* against the Philippines, see Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (2014); or the United States in the case concerning the *Relocation of the United States Embassy to Jerusalem* brought before the ICJ by Palestine, see the Order of 15 November 2018 where the Court considered 'with reference to Article 79, paragraph 2, of its Rules, that, in the circumstances of the case, in particular in view of the fact that, according to the United States, the Court manifestly lacks jurisdiction to entertain Palestine's Application, it is necessary to resolve first of all the question of the Court's jurisdiction and that of the admissibility of the Application, and that these matters should accordingly be separately determined before any proceedings on the merits'). In other cases, the Respondent has refused to participate in certain phases only, especially in the merits if it has lost on its preliminary objections as the United States did in the *Nicaragua* case. This attitude was strongly protested against by the Agent of Nicaragua: '[t]his is very clearly a case in which the United States Government and its formidable legal team ran out of arguments and preferred to contemptuously disregard these proceedings, this tribunal and the rule of

law.' (*Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States of America*, 1985, 8).

34 In fact, non-appearance is resorted to (and should only be resorted to) when the outcome is uncertain at best and the Respondent has much more to lose from an unfavourable judgment than it could gain from a favourable one since the dispute concerns its vital interests or highly sensitive policy considerations. A former president of the ICJ thus made the following suggestion:

> If I have a piece of advice to give to any Respondent State whose case would appear to be a little difficult, I would not hesitate to recommend that it should take the side of nonappearance … In a situation of non-appearance, it is almost consciously that the Court redoubles its vigilance, protects the non-appearing State, and makes an exceptional effort to set imaginative traps for the Applicant, which the defendant himself would not have considered. In short, it seeks to mitigate the absence of the Respondent and to create a balance between the Applicant and the non-appearing Respondent, so much so that it almost substitutes itself for the latter against the former (Bedjaoui, 2017, 9).

35 Such 'vigilance' originates either directly from a formal statutory requirement (see eg Art 53 (2) ICJ Statute; Art 28 ITLOS Statute (Annex VI UNCLOS); Art 25 (3) ILC Model Rules on Arbitral Procedure; Rule 42 (4) ICSID Arbitration Rules) or in the exercise of the inherent power of the court or the tribunal which must 'satisfy itself, not only that it has jurisdiction … but also that the claim is well founded in fact and law' (Art 53 (2) ICJ Statute). However, what might have been true in the 1980s is perhaps less so in the twenty-first century when one looks at the repeated decisions unfavourable to the non-appearing Respondent (see notably *The South China Sea Arbitration, The Republic of Philippines v The People's Republic of China*, 2016, or *Case concerning the detention of three Ukrainian naval vessels, Ukraine v Russian Federation*, 2019). The decision to fail to defend one's case is thus a risky strategy, both politically and procedurally, and it must therefore not be taken lightly. Non-appearance may antagonize some judges or arbitrators, as well as public opinion (see eg the implied criticism in *Case concerning the detention of three Ukrainian naval vessels, Ukraine v Russian Federation*, 2019, para 28, which underlines that 'the absence of a party may hinder the regular conduct of the proceedings and affect the good administration of justice', and Separate Opinion of Judge Lucky, 2019, paras 8–13). Besides, though the Respondent generally makes its views known to the bench through informal communications or public statements, it forfeits the right to take measures which an appearing party may take: it deprives itself of the possibility to request interim measures of protection and, more generally, it loses the opportunity to develop its arguments as fully as it could have done had it decided to appear, to establish factual allegations which are outside the public domain, to cross-examine witnesses, or to assert a positive defence, and all this to the detriment of the good administration of international justice as a system.

2. Choosing a Particular Forum

36 Once the decision is taken to have recourse to litigation, a particular forum must be chosen—if there is a choice, which in many instances will not be the case, at least when a unilateral seisin is contemplated. This involves considerations at two overlapping levels: the potentially available fora, and the extent to which any of them has jurisdiction over the particular dispute.

37 The first consideration is in practice usually quite limited. The leading standing forum with a general competence for inter-State disputes involving issues of international law is the ICJ. If the dispute falls within certain fields, there might also be a specialized standing forum—examples are the ITLOS, the Court of Justice of the European Union (→ *European Union, Court of Justice and General Court*), or the dispute settlement system of the World Trade Organization (→ *World Trade Organization, Dispute Settlement*). Another option consists of having recourse to *ad hoc* arbitration, whether *de novo* or as part of an established institutional framework—such as the so-called Annex VII tribunals under the United Nations Convention on the Law of the Sea ('UNCLOS').

38 The overriding consideration has to be which forum has jurisdiction. International litigation is still essentially consensual and the form in which consent is expressed determines the manner in which a case may be brought before an international court or tribunal. While *ad hoc* tribunals will typically be set up by a special agreement between the parties in dispute, standing tribunals may offer different jurisdictional bases.

39 Very few cases have been instituted by special agreements before standing tribunals—barely 11 per cent before the ICJ, the majority of which concerned maritime delimitation. Thus, in its search for the appropriate basis, the prospective applicant generally turns to the question as to whether the parties have made a declaration recognizing the jurisdiction of a standing tribunal as compulsory. Roughly one quarter of the States have done so with regard to the ICJ over at least certain categories of disputes (→ *International Court of Justice, Optional Clause*; → *Optional clause declarations: International Court of Justice (ICJ)*). Additionally or alternatively, the inquiry turns to whether the dispute can be framed in such a way as to fall within the scope of the jurisdictional clause of a treaty which is both in force and not subject to reservations by either State. An extensive network of bilateral and multilateral treaties covering a very wide range of issues confer jurisdiction to certain courts or tribunals.

40 Whether there exists a sufficient basis for jurisdiction in relation to the particular dispute is not a matter on which the Applicant can reach a definitive conclusion since it will often be questioned by the Respondent or even by the Court itself (→ *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*). In fact, such challenges occur in more than 40 per cent of the cases before the ICJ. Any doubt will be settled by the forum in accordance with the *Kompetenz-Kompetenz* principle (→ *competence-competence*). Thus, in most cases, the only possibility for the Applicant is to do a probability calculation and to seise a judicial body if it comes to the conclusion that a sufficiently arguable basis for jurisdiction exists to make it worthwhile pursuing the idea of litigation.

41 The question arises symmetrically for the Respondent, who must determine whether or not it is in its interest to use the method of settlement chosen by the Applicant and when the answer is negative, what its chances are of effectively opposing the jurisdiction of the court or tribunal seised. If this assessment is positive, or if the Respondent has reasons to slow down the proceedings, it will raise → *preliminary objections* (see section D.2 (b) below).

42 In the absence of a title of jurisdiction, a State may nevertheless unilaterally file a claim by virtue of the rule of → *forum prorogatum* (see notably Art 38 (5) ICJ Rules; Art 54 (5) ITLOS Rules). Such an attempt can of course be made in the hope that the other State will consent to the jurisdiction of the court or tribunal in order to settle the dispute, but also in the event of a deadlock when it is obvious that the Respondent will not conclude a special agreement, in the hope that accusing it of violating international law without accepting to submit the dispute to a binding mode of settlement will embarrass it. The benefits of this

‘naming and shaming’ strategy are political; it essentially aims at giving maximum publicity to the case, portraying the Respondent as a ‘villain’ and occupying the moral high ground.

43 The State which is asked to consent to the Court’s jurisdiction ‘is completely free to respond as it sees fit’ (*Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v France*, 2008, para 63), and while one might expect the answer to be usually negative, political and strategic interests might actually lead it to consent. This was France’s decision in the *Mutual Assistance* case in light of its underlying geopolitical interests in Djibouti which hosts the largest French overseas military base. The ‘risk’ taken by the State is mitigated by the fact that ‘if it consents to the Court’s jurisdiction, it is for it to specify, if necessary, the aspects of the dispute which it agrees to submit to the judgment of the Court’ (*Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v France*, 2008, para 63). By contrast, most probably in view of the very high political and emotional burden of the case, France has not responded to Rwanda’s unilateral request dated 18 April 2007 concerning arrest warrants over the 1994 genocide.

44 To side-step a potentially non-existent or uncertain jurisdictional basis, a last option of an entirely different nature is worth mentioning: a State could envisage inducing a competent body to request an advisory opinion from the targeted forum (→ *Advisory Opinions*). For instance, the General Assembly or the Security Council may request the ICJ to give an advisory opinion ‘on any legal question’ (Art 96 (1) United Nations (‘UN’) Charter); a State could thus lobby them to place a question on some aspects of the dispute (→ *Advisory opinion: International Court of Justice (ICJ)*).

45 The advantage of seeking an advisory opinion is that the issue acquires a higher profile and is internationalized. While the pronouncement of the Court ‘as such … has no binding force’ (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999, para 25), most members of the international community will probably accord weight to them.

46 If an advisory opinion is envisaged, the question should, in principle, be carefully crafted not to jeopardize ‘the fundamental principle of consent to jurisdiction’ (*Western Sahara*, 1975, para 33). However, the (Permanent) Court has only once refused to give the requested opinion, not solely because it bore ‘on an actual dispute’ between Finland and Russia, but for the particular reason that ‘Russia [was] not a Member of the League of Nations’ (*Status of Eastern Carelia*, 1923, 27); generally speaking, the Court hardly stops at the question of whether the request for an opinion does in fact constitute a way of circumventing its lack of jurisdiction in litigation. Thus, in the *Wall* case, the Court acknowledged

> that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel’s construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, “Differences of views … on legal issues have existed in practically every advisory proceeding” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, 24, para 34).
>
> The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the

exercise of its discretion, decline to give an opinion on that ground. (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, paras 48 and 50).

47 Sometimes, the dispute can fall within the jurisdiction of two or more international courts, which the Applicant can exploit to its advantage (→ *Forum shopping*). It is axiomatic that a claimant will endeavour, wherever possible, to submit its claims to a forum where it considers that it has the greatest chance of prevailing. This strategy is not in itself objectionable, provided that it accords with the terms of the parties' consent to jurisdiction.

> On the other hand, a claimant will commit an abuse of process when it initiates more than one proceeding to resolve the same or related dispute in order to maximize its chances of success. This strategy is highly prejudicial to a respondent, who is forced to defend multiple sets of claims before different [fora rather than in a single one]. This tactic also fragments the parties' disputes and leads to excessive costs and delays' (Gaillard, 2017, 23).

In recent years, investment treaty arbitration has repeatedly witnessed this type of procedural tactic. Thus, the ICSID Practice Notes for Respondents suggest that States envisage consolidation by raising the question 'Are there related or like cases in parallel proceedings? Can they be consolidated? Parallel proceedings can generate additional costs or inconsistent results which might be avoided by consolidation of similar or related cases' (ICSID, 2015, 12; → *Parallel proceedings: Investment arbitration*).

48 When the choice is open to the parties, either because both have accepted in advance two or more bases for jurisdiction, including judicial settlement and arbitration, or when they are minded to conclude a special agreement, they will have to decide in favour of one or the other of these two possibilities.

49 The principal factors which need to be weighed to determine the appropriate forum—together with the issues suitable for litigation—comprise its stance on particular questions of law based on an analysis of its jurisprudence and composition, its size, its experience and established authority, its institutional mystique, its procedural requirements for the conduct of the case, the time that the proceedings are likely to take before decisions are handed down, the enforceability of the latter, and the probable costs involved (Shaw, 1997, 834; Watts, 2007, 333).

50 A topical example of institutionalized forum shopping can be found in UNCLOS which allows States parties to choose between the ICJ, ITLOS, or arbitration (Art 287 UNCLOS). Each of these possibilities has advantages and disadvantages. The ICJ has a clear head start since it is 'the principal judicial organ of the United Nations' (Art 92 UN Charter; Art 1 ICJ Statute) and it constitutes 'the guardian of legality for the international community as a whole, both within and without the United Nations' (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v United Kingdom,* Order (Separate Opinion of Judge Lachs), 1992, 26). It has a vast and established body of jurisprudence as well as an enforcement mechanism (see Art 94 UN Charter), contrary to ITLOS which appears in certain respects less experienced though more expeditious. ITLOS's sound case law policy has however improved its credibility over the years and, were it not for the Court's superior prestige, there is no particular reason for preferring it to ITLOS, including in matters of delimitation. Both institutions benefit from a standing statute and rules of procedure, providing a predictable framework for the proceedings. States are not required to pay the costs of the

proceedings while benefitting from an established and experienced registry capable of providing legal, administrative, and support services.

51 Arbitration is generally described as diametrically opposed to judicial settlement. Besides the composition of the bench (see para 54 below), the parties to an arbitration have a significant degree of control over the procedural rules, which directly affect the way the case is conducted and ultimately its likely duration. Particularly important elements to be determined by the parties are the number, order, and timing of written pleadings, the possibility of requesting provisional measures, making preliminary objections or third-party intervention, confidentiality, and, in certain cases, the seat or place of arbitration, as well as the scope of document production and the appointment of experts.

52 However, the development of semi-institutionalized arbitration systems is blurring the lines between judicial and arbitral proceedings. While the → *Permanent Court of Arbitration (PCA)* proposes an 'opt-in' set of Optional Rules for Arbitrating Disputes, ICSID has adopted an 'opt-out' approach since Article 44 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ('ICSID Convention') provides that arbitrations will be conducted in accordance with the Arbitration Rules, except as the parties otherwise agree. Further, the establishment of lists of potential arbitrators may more or less restrict the choice of the parties in the composition of the tribunal. Constitutionally, semi-institutionalized forums benefit from a secretariat which may be used as a registry during the proceedings, however the difference compared to judicial settlement is that the costs of the registry and tribunal are shared equally by the parties. This downside is compensated by the fact that while standing tribunals must operate within a pre-established budget, so States must adapt their expectations to institutional constraints, the registry of semi-institutionalized forums acts as a service provider, thus the budget is tailored to their expectations and demands. Still, it appears that neither the choice of forum nor the complexity of the case or the length of proceedings influence the great disparity that one may notice in the figures of judicial and arbitral proceedings; States themselves are the masters of the overall budget of a case (Miron, 2014, 241).

53 The often-asserted expeditiousness of arbitral proceedings compared to judicial proceedings also appears to be partly fictitious. While 'the average duration of cases argued before the ICJ, from the institution of proceedings to the delivery of final judgment, is four years' (ICJ, 2014, 50), it is less than three years in inter-State cases dealt with through the PCA since the beginning of the twenty-first century. However, the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* took a course similar to that of maritime delimitation cases before the ICJ and was twice as long as the settlement by ITLOS of the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*. More generally, it is noticeable that ITLOS has adopted expeditious working practices (see notably Art 59 (1) ITLOS Rules which imposes a time-limit of six months for each pleading, thus significantly reducing the length of the proceedings). As for investment disputes, a study carried out by the Secretariat of the → *United Nations Commission on International Trade Law (UNCITRAL)* noted that the current practice has 'put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method for resolving investor-State disputes with average costs exceeding $8 million per party and duration averaging between three to four years' (UNCITRAL, 2018, para 2).

3. Determining the Composition of the Bench

54 The composition of the bench is really what differentiates judicial forums from arbitral bodies. Theoretically, the parties only control the composition of the latter, an especially important factor if the dispute raises issues requiring particular expertise or a certain legal and practical approach. The ICSID Practice Notes for Respondents rightly qualify the constitution of the tribunal as 'one of the most important decisions made in a case' (2015, at 11).

55 However, the apparent freedom of the parties in choosing the arbitrators must not be exaggerated. In effect, → *mixed commissions* comprising an equal number of members appointed by each party have been replaced by uneven arbitral tribunals. Today, though different appointment modalities can be adopted, the parties must not only agree on the number of arbitrators, but also on the identity of at least some of them. Tribunals established by general arbitration treaties frequently use five arbitrators, with only one unilaterally appointed by each party and three appointed jointly or by an external appointing authority. But it can be more (see eg the seven members tribunal in the → *Indus Waters Kishenganga Arbitration, (Pakistan v India)*), or less (generally three—see eg *Duzgit Integrity (Malta/Sao Tome and Principe)*), or even one, in investment arbitration. The size of the tribunal impacts the time and cost of the proceedings, as well as the amount of influence of each arbitrator—in particular, the president's role, will be all the more important as the number of arbitrators is limited. The Gordian knot, however, is who to appoint since the substantive and procedural competences of the tribunal are dependent on the individual capabilities of its members. Determining the composition of the tribunal is thus the result of an extremely sensitive and sometimes lengthy process.

56 To avoid endless delays in the appointment of the members of the tribunal some treaties impose a limited time to reach such an agreement beyond which the arbitrators will be appointed by a designated authority (see eg Art 3, Annex VII UNCLOS; Art 38 ICSID Convention; Arts 6–8 PCA Optional Rules for Arbitrating Disputes).

57 The parties usually have various views on the ideal profile for an arbitrator. In order to decide which arbitrators are best suited to the particular case, they will need to quickly assess potential claims and defences on the merits as well as incidental proceedings (including an initial assessment of any objections to jurisdiction or admissibility, together with permissible counter-claims). They will then consider the experience of possible arbitrators, their past awards and academic writing, issues regarding → *conflict of interests*, their language capacity, and availability to devote the time required to the arbitral process (see para 7 above). In addition, the president of the tribunal should have the capacity to run the arbitration efficiently and create a collegial working environment.

58 Judicial forums are however not completely alien to *ad hoc* organization. First, their statute often provides for an option reminiscent of arbitration: a State party to a case which does not have a judge of its nationality on the bench may choose a person to sit as judge *ad hoc* in that specific case (see eg Art 31 ICJ Statute). Such choice, which, *mutatis mutandis*, calls for the same remarks applying to the selection of arbitrators in arbitral proceedings, must be secured as early as possible.

59 Within standing forums, a further option subject to the parties' litigation strategy may be offered to them: either having their case heard by the full court or by a chamber (→ *International Courts and Tribunals, Chambers*). By giving preference to the latter, the parties lose the benefit of a large bench whose objectivity is probably better guaranteed precisely because of the greater number of judges. But, as with arbitral tribunals, the driving rationale is the appearance of flexibility and influence over the composition of the chosen forum. While formally the authority to determine composition remains with the court or tribunal (see eg Art 17 ICJ Rules; Art 15 ITLOS Statute; and Art 30 ITLOS Rules),

the parties may have a significant influence (see Art 17 ICJ Rules according to which 'the President shall ascertain their views'), if not a decisive role—whether *de facto* under an ultimatum as in the → *Gulf of Maine Case*, or *de jure* as for ITLOS where the 'approval' of the parties is required by the basic texts.

60 Another question that may arise when a court is seised or a tribunal is constituted is whether to challenge a member whose independence and impartiality are suspected (→ *Independence: International adjudication*; → *Impartiality: International adjudication*). Such a request must not be made lightly, not only because it may unfairly burden the person concerned, but also because, in the event of rejection, resentment cannot be excluded. Moreover, it is not necessarily in the interest of a party to challenge a conflicted judge or arbitrator; if, during the deliberations, bias is too apparent, he or she will in all likelihood have no influence on the other members of the court or the tribunal. Another, more perverse, reason for not challenging a judge or arbitrator might be for the party suffering from any malevolence to obtain the annulment or review of the decision after its adoption if it is unfavourable to it (see however *Compagnie d'Exploitation du Chemin de Fer Transgabonais v Gabonese Republic,* 2010, para 129; *EDFI v Argentina*, 2016, para 145; *von Pezold v Zimbabwe*, 2018, paras 265–66).

D. Determining Procedural and Argumentative Tactics

1. Commencement of the Proceedings

61 The further level of analysis on which litigation strategy is conducted concerns the means to be employed in the actual pursuit and attainment of goals.

> Any State engaged in a dispute with another State will, or should, have a clear view of what the dispute is about and the conditions required for its resolution. In particular, views will be formed as to how to achieve the desired result in terms both of general strategic considerations and in the light of tactical methods (Shaw, 1997, 835).

62 After the decision has been made to resort to a particular forum, the first question to be decided is when to actually commence the proceedings. In this respect, general public international law—contrary to investment treaties (see eg Art 9.21 (1) Trans-Pacific Partnership ('TPP')—does not lay down any specific time-limits; it is a matter to be determined in the light of the circumstances of each case (*Certain Phosphate Lands in Nauru, Nauru v Australia*, 1992, para 32). Various parameters are involved:

— Internally, the parties must ensure that, as far as possible, there are no objections to the filing of the case—which may sometimes involve intense legal and political preparation (eg the Slovenian Government referred its Arbitration Agreement with Croatia for review to the Constitutional Court, before submitting it to Parliament for ratification and finally holding a referendum for its entry into force; see also the *compromis* envisaging the submission to the ICJ of the territorial and maritime dispute between Belize and Guatemala which was still waiting for national approval ten years after its signature in 2008).

— It is also advisable that all the technical preparation be ready, including the composition of the team (see paras 5 and 19 above)—and the domestic support (including financial arrangements).

— It must further be noted that many treaties include pre-conditions to litigation which might affect jurisdiction; it is of the utmost importance to ensure that these conditions have been met before launching the litigation procedure. Mandatory steps before a decision to litigate may be taken often include cooling off periods (this is the case of most investment instruments), exhaustion of local remedies (a typical requirement in diplomatic protection cases; see also eg Art 35 European Convention on Human Rights (1950)), as well as negotiations or recourse to other means to attempt to settle the dispute (see eg *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v Russian Federation*, 2011, para 141; see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, Ukraine v Russian Federation*).

63 When a unilateral seisin is envisaged and is not subject to procedural preconditions, another kind of decision must be taken: should the intention to litigate be made public in advance or should it be kept secret until the Application is filed? 'Even if the two States are each separately considering the possibility of initiating litigation, each will still in principle be keeping its consideration of this issue as confidential as it can' (Watts, 2007, 327–28). It is generally accepted that, provided the dispute is sufficiently characterized, there is no 'warning' obligation. Absent an express declaration limiting the delay between the withdrawal of the acceptation of the declaration and the seisin of the court or tribunal, a State may even lodge an application immediately after making an optional declaration:

> The Court's determination of the existence of a dispute is a matter of substance, and not a question of form or procedure … Prior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its Statute, unless one of the relevant declarations so provides … Moreover, "although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition" for the existence of a dispute (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72). Similarly, notice of an intention to file a case is not required as a condition for the seisin of the Court' (*Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, Marshall Islands v United Kingdom*, 2016, para 38—cross-references omitted).

64 However, there is a thin line between the advantages of confidentiality (avoid the risk of the respondent withdrawing its optional declaration or adding exceptions to binding procedures) and its disadvantages (need to establish the existence of a dispute prior to the commencement of the proceedings).

2. Procedural Incidents

65 'Procedure is often one of the keys to success in litigation' (Shaw, 1997, 854; → *International Courts and Tribunals, Procedure*). However, while Anglo-Saxon counsel—more usually than those trained in civil law—tend to encourage procedural incidents, this is not always advisable nor well-perceived by the judges or arbitrators and the advantages and disadvantages must be carefully weighed before embarking on incidental proceedings, whether the decision is taken by the Applicant, the Respondent or a third 'party'.

(a) Interim (Provisional) Measures of Protection

66 The benefits of obtaining provisional measures can extend beyond the tangible protection from harm that they provide. They are sometimes deemed psychologically advantageous, not least in domestic political terms, in particular when jurisdiction has been challenged by the other side since their indication implies that the court or tribunal is satisfied that it does have, *prima facie*, jurisdiction to hear the case. Further, 'it is possible that the application for provisional measures, although apparently delaying the ultimate merits stage because of the interposition of an additional phase of the case, may in fact have the opposite effect' (Shaw, 1997, 860–61). Thus, in the → *Passage through the Great Belt Case (Finland v Denmark),* it appears

> that the application for provisional measures, although unsuccessful, in fact succeeded in causing an acceleration in the planned timetable. Another advantage in applying for an indication of provisional measures is that it may stimulate the furnishing of assurances from the other party with regard to a critical matter. [Again, t]he *Great Belt* case provides an example of this. During the oral hearing on the application, Denmark gave assurances that no physical hindrance for the passage through the Great Belt would occur before the end of 1994 … [Hence,] despite failing to obtain interim relief, Finland in fact achieved an important objective in terms of the assurances.
>
> Less tactically, the applicant state may feel that the deterioration in the situation alleged is such that both it and the Court must be seen to do something or lose credibility. This is particularly so where it is envisaged that several years may elapse before the merits of the case are heard (Shaw, 1997, 861).

67 Another tactical issue arises if the provisional measures ordered are not complied with: while the party concerned can consider returning to the forum, a second order may prove counter-productive since it may be no more successful in achieving the desired result but it will surely delay the consideration of the merits of the case (see eg → *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)*; Shaw, 1997, 862).

68 Requests for provisional measures are not the privilege of the Applicant as the Respondent can also request them, and it sometimes does as a form of 'countermeasures' (see here also the *Bosnian Genocide Case*).

69 In any case, timing will be critical. 'To apply too early might lead to rejection on the basis that the requisite urgency has not been demonstrated, to apply later might adversely impact upon the rights sought to be protected' (Shaw, 1997, 841).

(b) Preliminary Objections

70 It is standard practice for an unwilling party to attempt to prevent the case from reaching the merits by the use of preliminary objections relating either to the jurisdiction of the Court or to the admissibility of the dispute. Preliminary objections have a number of political, legal and tactical functions. They serve as a signal to the Court, third States and public opinion that the objecting State is not willing to submit to adjudication. They may be motivated by delaying tactics since they will afford the Respondent more time for the preparation of the counter-memorial, which can be of real importance when the institution of proceedings came as a surprise; the Respondent might also wait for certain potential

political developments, new trends in the law, or the election of judges, all of which may have an unfavourable effect upon the Applicant's case. Besides,

> [b]ecause it is almost impossible to wholly divorce preliminary questions, except the most technical aspects of jurisdiction such as the validity of the title of jurisdiction, from the merits, the applicant will be obliged to at least partially "show his hands". This will give the respondent the opportunity to take stock of the strengths and weaknesses in the applicant's case. Moreover, it will provide the respondent an opportunity to "get the feel of the Court" and gain a better perspective of how the Bench is leaning on key issues in the case (Gill, 1989, 74).

71 While the use of preliminary objections is perfectly legitimate both from a legal and a strategic point of view, it may give a political advantage to the Applicant if one of its goals in bringing the case was to influence public opinion by arguing that the Respondent is afraid of having the legality of its actions investigated on the merits.

72 Challenges will essentially relate to the scope of the Respondent's consent to → *jurisdiction*, the issue being in particular whether the terms on which it has been given by way of an 'optional declaration' or 'jurisdictional clause' are adequate to cover a dispute of the particular kind which has arisen. Preliminary objections are, however, not limited to jurisdictional questions. The Respondent can also formulate objections to → *admissibility* which 'normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits' (*Oil Platforms, Iran v United States of America*, 2003, para 29). While, generally speaking, international courts and tribunals rather firmly maintain the distinction between objections to jurisdiction on the one hand and to the admissibility of the application on the other hand, 'this makes little difference in practice' (*Questions Relating to the Obligation to Prosecute or Extradite, Belgium v Senegal*, 2012, para 9); it is concretely a 'secondary issue' since the effect is the same (*Territorial and Maritime Dispute, Nicaragua v Colombia*, 2007, para 61). Consequently, although lack of jurisdiction should usually be pleaded before inadmissibility, in practice, a mistake in presenting them is rather anodyne and the court or tribunal will restore the correct qualification without penalizing the party which made the mistake (see eg *Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v France*, 2008, paras 49–50).

73 Without submitting a formal preliminary objection, a respondent may also contest the jurisdiction of the court or the admissibility of a claim in its written pleadings or oral arguments so that such questions are examined at the same time as the merits (see eg → *LaGrand Case (Germany v United States of America)*). Whether to raise *preliminary* objections or to challenge jurisdiction together with rebutting the substance of the claim(s) is, therefore, also an issue to be considered by the Respondent as soon as the Application is notified to it.

(c) Counterclaims

74 The decision to make a → *counterclaim* may be made in the same spirit and be aimed at satisfying public opinion or even intimidating the other party by making it aware that it could itself be held responsible for its unlawful activities or that an existing situation could be modified to its detriment—the 'biter bit' system. Counterclaims may also be made with the hope of prompting the court or tribunal to split the difference. In the event that counterclaims are pure gesticulations, they might have an effect contrary to that sought

and aggravate the defeat of their author, which would see both its defence and its counter-claims rejected.

(d) Strategy of Third 'Parties' – Intervention

75 Intervention (→ *International Courts and Tribunals, Intervention in Proceedings*) can be a useful opportunity to side with one of the parties, as was the case of New Zealand's intervention in the *Whaling* case. But it is mostly a means for a third State to protect itself against the possible effects of a decision in which it has not been involved, either where it considers that it has an interest of a legal nature which may be affected by the decision in the case or where it is a party to a convention the construction of which is in question (see eg respectively Arts 62 and 63 ICJ Statute; Arts 31 and 32 ITLOS Statute). It is under the first scenario that strategical considerations will be particularly acute. The State 'has the choice … whether to intervene, thus securing a procedural economy of means … or to refrain from intervening, and to rely on' the principle that decisions have no binding force except between the parties (*Continental Shelf, Libyan Arab Jamahiriya/Malta,* 1984, para 42). If the decision is taken to intervene, the question is then whether to do so as a party or as a non-party (→ *Intervention: International Court of Justice (ICJ)*). The first hypothesis amounts to a request that the court or tribunal recognize or define the legal interests of the intervener who will then be bound by the decision in the same way as the initial parties; while the other option is simply a request to refrain from prejudicing such interests in the decision—in other words, the aim is only 'to inform the Court' of their existence (see *Continental Shelf, Libyan Arab Jamahiriya/Malta,* 1984, para 32 and Separate Opinion of Judge Mbaye, 1984, 45). It should be noted that the distinction does not seem to apply, *inter alia*, to intervention before ITLOS (see Art 31 (3) ITLOS Statute; → *Intervention: International Tribunal for the Law of the Sea (ITLOS)*).

76 The unpredictable and very unstable jurisprudence existing on intervention makes litigation decisions extremely difficult in this regard. However, two empirical findings can be made:

— first, as shown by several precedents, even when a request for intervention is dismissed, the court or tribunal will take into account the interests invoked during the proceedings (see in particular *Continental Shelf, Libyan Arab Jamahiriya/Malta,* 1984, paras 41 and 43, and *Continental Shelf, Libyan Arab Jamahiriya/Malta,* 1985, paras 20–22; see also Pellet, 2011, 245–64);

— second, a request to intervene as a party is only justified in very exceptional circumstances. Why would an intervener commit to being bound by a future and hypothetical decision which could be detrimental while it may develop its argument without taking such a risk? The extreme scarcity of interventions as a party bears witness to the extreme caution of the interveners.

3. Presentation of the Arguments

77 Argumentative techniques must first represent the State's overall position and accommodate its legitimate political interests in arguing certain claims or defences. Coordination and a clear decision-making process are key since different government entities may be involved and have different interests. Argumentative techniques must also combine and reconcile the various 'legal cultures' represented both in the litigation team and the court or tribunal (see para 8 above).

78 It is essential for the team to present its arguments in a way that 'speaks to the bench as a whole' (Crawford, Pellet, and others, 2013, 718). If the diverse backgrounds of judges and arbitrators often make it difficult to determine in advance to which arguments they will be sensitive to, their final decision often (but not always, contrary to some preconceived ideas) represents some form of compromise, with neither party prevailing in all its claims or arguments.

79 Throughout the case, each party must determine the extent to which it wishes to take certain positions. While lawyers generally defend the idea that any argument must be developed, even though they are sometimes a lost cause, others (often among university professors) are reluctant to use 'fall back' arguments that may seem to contradict the main reasoning. *In fine*,

> [i]t is not unusual for States to present a maximum, or even exaggerated, position with the aim of securing a final result that meets its objectives … However, in doing so, States must be careful to ensure that their positions remain legally and technically coherent and credible: otherwise, the court or tribunal may depart altogether from their positions and "formulate its own solution independently of the proposals made by the parties" (Fietta and Cleverly, 2016, 155, referring to *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada/United States of America*, 1984, para 190).

80 Consistency and credibility considerations go beyond the limited perspective of the specific case at issue:

> All positions taken by the Respondent should be considered … also from a broader perspective, in light of positions taken by the State in past or other on-going cases, the tenability of any position taken by the State, and its consistency with the State's policy objectives (ICSID, 2015, 11).

81 Other questions raised by pursuing every possible claim include whether it will 'be worth the cost in terms of time, resources, or outcome, or it may distract from focusing on the bigger picture of the case' (ICSID, 2015, 11).

82 Sometimes the best way not to 'lose it all' is actually to leave the court or tribunal with an alternative (see eg the alternative to the status quo given by Hungary in the *Gabčíkovo-Nagymaros* case; Crawford, Pellet, and others, 2013, 735, or the easing of India's position relating to the temporary relaxation of the bail conditions of the Italian Marines detained in New Delhi at the very end of the oral proceedings in *The Enrica Lexie Incident, Italy v India*, 2016, paras 46–47 and 123–24).

83 However, temperance seems to be generally less prevalent in oral pleadings which aim at providing 'an opportunity for those representing the State in litigation to put over the essentials of its argument in an appealing and dramatic, if not melodramatic way. [On the other hand,] more emphatic and nuanced exposition of a State's case orally may bring out elements rather hidden in the dry language of the written pleadings' (Shaw, 1997, 857).

84 Substantially, litigants must keep in mind that arguments are both about law and facts. Courts and tribunals are expected to know the law (→ *Jura novit curia*) but in some circumstances, it might be imprudent to count on it! In this respect, one can cite the controversial finding of the ICJ according to which it 'cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence' (*Legality of the Threat or Use of Nuclear Weapons*, 1996, paras 97 and 105). It is true that this kind of position has been taken on the occasion of an advisory opinion but such reluctance to decide on the law can also be apparent in

contentious cases. Thus, in recent cases concerning the application of the Convention on the Elimination of All Forms of Racial Discrimination (1965), the ICJ refused to make a pronouncement on whether negotiations and recourse to the procedures referred to in Article 22 of that Convention constitute alternative or cumulative preconditions to be fulfilled before the seisin at the provisional measures stage (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v United Arab Emirates*, 2018, para 39; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, Ukraine v Russian Federation*, 2017, para 60).

85 As for the facts, it is for the parties only to elucidate them (→ *International Courts and Tribunals, Evidence*). They must thus consider the scope and timing of document production as part of their overall case strategy. For instance, the ICSID Practice Notes for Respondents encourages States to ask themselves whether they need to request documents in the Claimant's possession and are ready to produce relevant documents that might be requested by the Claimant or be required to substantiate their defence (2015, at 12). The parties may also use expert witnesses for different aspects of the case (→ *Expert witness*); they should be carefully chosen to maximize their usefulness while minimizing costs (→ *Experts*; → *Experts: Investment arbitration*).

E. Post-Litigation Strategy

86 The 'life' of the litigation strategy does not necessarily end with a final decision on the merits. On the one hand, before such a decision is reached, it may be that the goals originally pursued by litigation are already fulfilled, in which case the Applicant or the parties jointly will consider terminating the proceedings (→ *International Courts and Tribunals, Discontinuance of Cases*; eg see para 14 above). On the other hand, when such a decision is actually reached and a party considers it disadvantageous, it may envisage initiating another kind of procedure—where it exits: a request for interpretation, revision, or annulment (→ *Judgments of International Courts and Tribunals, Interpretation of*; → *Judgments of International Courts and Tribunals, Revision of*; → *Judicial and Arbitral Decisions, Validity and Nullity*; → *International Courts and Tribunals, Appeals*).

87 In extreme cases, often following the refusal to participate in the proceedings, parties sometimes consider not complying with the decision (see China's defying position in the *South China Sea Arbitration*, Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (2016); Croatia's reaction in its *Territorial and maritime dispute* against Slovenia, Statement of the Government of the Republic of Croatia on the Arbitral Tribunal's Award of 29 June 2017 (2017) which led Slovenia to initiate proceedings against Croatia under Article 259 Treaty on the Functioning of the European Union; or Colombia's categorical rejection of the ICJ's Judgment of 19 November 2012 in the *Territorial and Maritime Dispute* with Nicaragua, Press release by the President of Colombia (2012)). Such defiance generally boils down to a most debatable sovereigntist display of power which is sometimes caught up by other considerations, mixing legal obligations together with diplomatic pressure and leading eventually to at least partial compliance. Indeed, governments who choose not to comply will have to potentially deal with domestic opposition and a damaged international reputation. In the *Nicaragua* case for instance, the United States ('US') vowed not to comply with the Judgment and withdrew from the ICJ's compulsory jurisdiction altogether. Nicaragua went to the UN Security Council to demand the implementation of the ruling, but the US vetoed the proposal. Nicaragua appealed to the UN General Assembly ('UNGA') to secure a resolution calling for compliance and succeeded (see UNGA Res 41/31 (1986)). The US Congress eventually aligned itself with the ICJ and cut off funding for the Contra

rebels as required by the Judgment, but the US President continued to extend support covertly. With the electoral win of George HW Bush in 1989 and the defeat of the Sandinistas in 1990, the US finally lifted its trade embargo against Nicaragua, also as required by the Court (see also the attitude of Russia with regard to the *Arctic Sunrise* case).

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