

Diplomatic and Judicial Means of Dispute Settlement

Edited by

Laurence Boisson de Chazournes

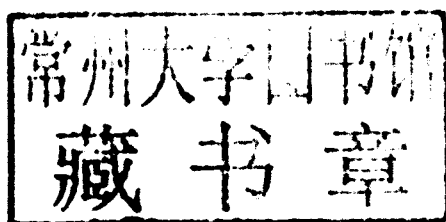
Marcelo G. Kohen

Jorge E. Viñuales

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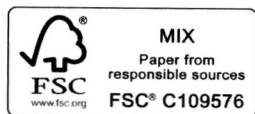
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Diplomatic and Judicial Means of Dispute Settlement

Biographical Notes

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Antonella Angelini is a PhD candidate at the Graduate Institute of International and Development Studies (IHEID) as well as a teaching and research assistant at the Law Faculty of the University of Geneva. An Italian national, she completed her bachelor and master studies in international relations at the Sant'Anna School of Advanced Studies (Pisa). She also earned a Master in International Studies from the IHEID. Her main interests derive from the field of legal theory, in particular legal hermeneutics and interdisciplinarity, as well as the law of international organizations with a focus on issues of judicial interactions and human rights.

Kofi A. Annan was the seventh Secretary-General of the United Nations, serving two terms from 1 January 1997 to 31 December 2006 and was the first to emerge from the ranks of United Nations staff. In 2001 Kofi Annan and the United Nations were jointly awarded the Nobel Prize for Peace with the citation praising his leadership for "bringing new life to the organisation." In 2007, Kofi Annan established the Kofi Annan Foundation to promote better global governance and strengthen the capacities of people and countries to achieve a fairer, more secure world. He continues to use his skills and experience to mediate and help resolve conflict through private diplomacy, political advice and mentoring. In Kenya in early 2008, Mr Annan led the African Union's Panel of Eminent African Personalities to find a peaceful resolution to the post-election violence and continues to support the reconciliation and

reform process in the country. In addition to his work with the Kofi Annan Foundation, Mr Annan serves as the Chairman of the Alliance for a Green Revolution in Africa (AGRA), and of the Africa Progress Panel (APP). He is also a Board Member, Patron or Member of a number of philanthropic organisations, including the United Nations Foundation and The Elders. Mr Annan currently holds a number of academic positions at universities around the world, including as Chancellor of the University of Ghana.

Dolores Bentolila is a PhD candidate and teaching assistant at the Graduate Institute of International and Development Studies (IHEID). She worked as an associate attorney for M & M Bomchil in Buenos Aires and as a consultant for the World Intellectual Property Organization. She is the manager of the study groups of the Latin American Society of International Law (LASIL) and the author of many publications in the field of investment arbitration in both English and Spanish.

Laurence Boisson de Chazournes is Professor of International Law and International Organization at the University of Geneva. She was a Senior Counsel to the World Bank between 1995 and 1999. Professor Boisson de Chazournes serves as a counsel and arbitrator in various dispute settlement procedures, including at the International Court of Justice, WTO and ICSID. Furthermore, she is a member of the Permanent Court of Arbitration's list of arbitrators. She is also an advisor to various international organisations, including the World Bank, the World Health Organization, the United Nations Development Programme, and the International Labour Organization. Professor Boisson de Chazournes is the author and editor of fourteen books and many other publications.

Lyne Calder obtained a Masters in International Law from the Graduate Institute of International and Development Studies (IHEID). Her research has centred on human rights law, the law of armed conflict and international criminal law. She also holds a Bachelor in Law degree from the University of Warwick in the United Kingdom.

Pierre-Marie Dupuy is Professor of International Law at the Graduate Institute of International and Development Studies (IHEID). Prior to that he has held teaching positions at the University of Strasbourg, Paris Val-de-Marne University, the University of Paris II (Panthéon-Assas) and the European University Institute, Florence. Professor Dupuy has also given the General Course at The Hague Academy of International Law. In addition, he has published many leading texts and articles on various aspects of public international law. Pierre-Marie Dupuy is also a distinguished practitioner

having represented numerous sovereign clients before the International Court of Justice and acted as an arbitrator in many well-known international arbitral proceedings, including at the International Centre for the Settlement of Investment Disputes (ICSID) and Permanent Court of Arbitration (PCA).

Paola Gaeta (PhD in Law, European University Institute) was Assistant Professor (1998), Associate Professor (2001) and then Professor (2001–2010) of Public International Law at the University of Florence. She is currently Professor of International Criminal Law at the Law Faculty of the University of Geneva and Adjunct Professor of International Criminal Law at the Graduate Institute of International and Development Studies (IHEID). Since 2007, she has been Director of the LL.M. Programme in International Humanitarian Law at the Geneva Academy of International Humanitarian Law and Human Rights and, since 2011, Director of the Academy itself. She is a Member of the Editorial Board of the *Journal of International Criminal Justice* and of the Editorial Board of the *European Journal of International Law*. Her publications include *The UN Genocide Convention: A Commentary* (ed.) (2009), and *The Statute of the International Criminal Court: A Commentary* (co-editor with A. Cassese and J. R. W. D. Jones) (2001).

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Jennifer Angline Hamaoui joined the Legal Affairs Division of the WTO in 2010. Prior to joining the WTO, Jennifer worked at Covington & Burling, Brussels in the international trade and litigation team, where she was involved in several anti-dumping proceedings before the EU institutions, represented European industries in the course of investigations and the Council of the European Union in the phase of judicial review before the Court. Ms Hamaoui obtained her LL.M. from the IELPO program of the University of Barcelona where she also graduated in law with distinction. Ms Hamaoui is a member of the Barcelona Bar Association.

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Gabrielle Kaufmann-Kohler is a professor at the University of Geneva Faculty of Law and Director of the Private International Law Department as well as the Geneva LLM in International Dispute Settlement (MIDS). She is a partner at Lévy Kaufmann-Kohler, Geneva. She is also Honorary President of the Swiss Arbitration Association and was its President from 2001 to 2005. She is a Member of the International Council for Commercial Arbitration, Court of Arbitration of the International Chamber of Commerce, Board of the American Arbitration Association, and Advisory Board of the Hong Kong International Arbitration Centre. She teaches and publishes in the area of international dispute settlement (list available on www.lk-k.com) and practices in international commercial, investment and sports arbitration.

Marcelo G. Kohen is Professor of International Law at the Graduate Institute of International and Development Studies (IHEID). He is an Associate Member of the Institut de Droit international and acts as legal counsel and advocate for a number of States before the International Court of Justice.

Magnus Jesko Langer is currently Teaching and Research Assistant and a PhD candidate at the Graduate Institute of International and Development Studies (IHEID). He has worked on a number of cases before the International Court of Justice, including the *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay). His research focuses on the fields of international environmental law and international investment law, as well as international dispute settlement. His thesis analyses the question of how international environmental law has impacted the entitlements that States enjoy over their natural resources. He holds graduate degrees in international law (IHEID) and international relations (HEI), and a Bachelor in Law (University of Geneva).

Gabrielle Zoé Marceau (PhD) is Counsellor in the Legal Affairs Division of the WTO, which she joined in September 1994. Her main function is to advise panellists in WTO disputes, the Director-General's Office and the Secretariat

on WTO matters. From September 2005 to January 2010, Gabrielle Marceau was a member of the Cabinet of the WTO Director-General Pascal Lamy. Dr Marceau is also Associate Professor at the Law Faculty of the University of Geneva and at the Graduate Institute of International and Development Studies (IHEID), where she teaches WTO law and dispute settlement. Before joining the GATT/WTO, Gabrielle Marceau worked in private practice in Quebec, Canada, mainly in the sectors of labour law and insurance law. Professor Marceau has published extensively on WTO-related matters.

Nicolas Michel is Professor of Public International Law at the Law Faculty of the University of Geneva, at the Graduate Institute of International and Development Studies (IHEID), and at the Academy of International Humanitarian Law and Human Rights in Geneva, since 1 September 2008. Prior to this, and for four years, he served as Under-Secretary-General for Legal Affairs, the Legal Counsel of the United Nations. From 1987 to 2004, he was Professor of Public International Law and European Law at the Law Faculty of the University of Fribourg, Switzerland. Between 1998 and 2003 he joined the Federal Department of Foreign Affairs as the Director of the Public International Law Directorate, and from 2003 to 2004 he was the “Jurisconsulte” of the Ministry. Professor Michel holds law degrees from the University of Fribourg, an attorney’s license, and a master’s degree in international relations from the University of Georgetown, Washington, D.C. He also holds a *honoris causa Doctorat* from the University Robert Schuman of Strasbourg.

Lucy Reed is a partner in the international law firm Freshfields Bruckhaus Deringer LLP, where she co-heads the global international arbitration group. A specialist in investment treaty arbitrations and other public international law disputes, Ms Reed is Adjunct Professor at the Arbitration Institute of the University of Miami Law School and has published widely on international dispute resolution. She served as a Commissioner of the Ethiopia-Eritrea Claims Commission (an IHL tribunal) and co-director of the Claims Resolution Tribunal for Dormant Accounts in Switzerland (a Holocaust tribunal). She delivered private international law lectures at The Hague Academy of International Law in 2001. Her positions with the Department of State’s Legal Adviser’s Office included Legal Counselor at the Embassy in The Hague and the US Agent to the Iran-United States Claims Tribunal. She was also general counsel of the international organisation the Korean Peninsula Energy Development Organization (KEDO), in which capacity she led negotiations with North Korea. Ms Reed received her law degree from the University of Chicago Law School in 1977 and her BA *magna cum laude* from Brown University in 1974.

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Michael E. Schneider has been engaged in the practice of international arbitration for more than 35 years. He is now the President of the Swiss Arbitration Association (ASA) and Vice Chair of the ICC Commission on Arbitration, and has been a member of several of its working groups (1998 and 2011 Revision of the ICC Rules, Construction, Pre-Arbitral Referee); he also is a member of the Executive Committee of the Dubai International Arbitration Centre (DIAC). From 2006 to 2010 he chaired the UNCITRAL WG II (Arbitration), revising the Arbitration Rules and now participates in its work on an international standard for transparency in investor-State arbitration. He practices arbitration as a Partner of Lalive in Geneva, acting as counsel or arbitrator in proceedings in Switzerland and other parts of the world and under various rules, including those of the ICSID, UNCITRAL, ICC, LCIA, Stockholm Institute, the Cairo Regional Centre for International Commercial Arbitration (CRCICA), European Development Fund (EDF), and before other international bodies, including the WTO Appellate Body and the United Nations Compensation Commission (UNCC).

Judge Bernardo Sepúlveda-Amor was elected Vice-President of the International Court of Justice in February 2012, where he has been a judge since 2006. Prior to that he has served as the Secretary of Foreign Relations of Mexico (1982–1988), Ambassador of Mexico to the United States (1982) and to the United Kingdom (1989–1993), a Member of the United Nations International Law Commission (1997–2005), and Professor of International Law at

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Jorge E. Viñuales is the Pictet Chair in International Environmental Law and an Assistant Professor of Public International Law at the Graduate Institute of International and Development Studies (IHEID). He is currently active both as an academic and a practitioner in the fields of international environmental law and foreign investment law. Professor Viñuales has substantial experience as a practicing international lawyer in his specialty areas. He has worked on many cases under ICSID, UNCITRAL, PCA, ICC or LCIA rules, including several high profile inter-State, investor-State, and commercial disputes, and he also has experience advising companies, governments, international organisations or major NGOs on different matters of international law. Professor Viñuales was educated in France (Doctorate – Sciences Po, Paris), the United States (LLM – Harvard Law School), Switzerland (Licence and Diplôme d'études approfondies in international relations – HEI; liz jur – University of Freiburg; Licence and Diplôme d'études approfondies in political science – University of Geneva), and Argentina (Abogado – UNICEN).

Acknowledgments

The American Society of International Law (ASIL), the European Society of International Law (ESIL) and the Latin American Society of International Law (LASIL), as well as the Faculty of Law at the University of Geneva and the Graduate Institute of International and Development Studies jointly organised a Symposium dedicated to diplomatic and judicial means of dispute settlement on 23 October 2010 in Geneva. The present volume is built upon the insights gathered during that Symposium.

The conference brought together many experts, academics and practitioners. This facilitated a comprehensive illumination of the varied and diverse interactions that take place between judicial or arbitral means and diplomatic or political means of dispute settlement. This volume includes the contributions of the Symposium speakers as well as of other authors.

The editors are grateful to the Swiss Federal Department of Foreign Affairs for its generous support that made the organisation of the Symposium possible.

Thanks are also due to the participants of the Symposium for sharing their ideas and comments during the discussions, as well as to Antonella Angelini, Edouard Fromageau and Pablo Sandomato de León for their help in organising the conference.

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Introduction

Laurence Boisson de Chazournes, Marcelo G. Kohen and Jorge E. Viñuales

The settlement of international disputes has been one of the most researched fields of international law since the adoption of the Charter of the United Nations. The obligation to settle international disputes through peaceful means, raised to the category of one of the fundamental purposes and principles of the Organisation,¹ has contributed to the development of the practice of traditional means and the multiplication of new ones. Consequently, doctrine has followed this path. Indeed, major studies exist on both diplomatic and judicial means of settling disputes. Some have a general scope, covering the full array of available means² or a significant portion of them.³ Others focus on a specific method (e.g. mediation⁴ or inquiry⁵) or on a given area of international law (e.g. human rights,⁶ environmental law,⁷ international trade⁸

¹ Article 1, paragraph 1 and Article 2, paragraph 3 of the UN Charter.

² See e.g. J. G. Merrills, *International Dispute Settlement* (Cambridge University Press, 5th ed., 2011); J. Collier, A. V. Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999); United Nations, *Handbook on the Peaceful Settlement of International Disputes between States* (New York: United Nations, 1992).

³ See e.g. R. Mackenzie, C. Romano, Ph. Sands, Y. Shany, *The Manual on International Courts and Tribunals* (Oxford University Press, 2010); C. Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007); C. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1990).

⁴ See e.g. J. Bercovitch (ed.), *Resolving International Conflicts: The Theory and Practice of Mediation* (London: Lynne Rienner, 1996).

⁵ See e.g. N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry* (Oxford University Press, 1974).

⁶ See e.g. L. Burgorgue-Larsen, A. Úbeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary* (Oxford University Press, 2011); P. Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press, 2nd ed., 2005).

⁷ See e.g. T. Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009).

⁸ See e.g. D. Palmeter, P. C. Mavroidis, *Dispute Settlement in the World Trade Organization. Practice and Procedure* (Cambridge University Press, 2nd ed., 2004); E.-U. Petersmann, *The GATT/WTO Dispute Settlement System* (Dordrecht: Kluwer, 1997).

or foreign investment⁹). Yet, relatively little attention has been devoted specifically to the interaction between diplomatic and judicial means of international dispute settlement.

This basic observation lies at the origin of the symposium held in October 2010 at the Graduate Institute of International and Development Studies, Geneva, on '*Diplomatic and Judicial Means of Dispute Settlement: Can They Get Along?*', co-organised by the American Society of International Law (ASIL), the European Society of International (ESIL), the Latin-American Society of International Law (LASIL), the Faculty of Law of the University of Geneva, and the Graduate Institute, Geneva. The ground to be covered was vast and challenging, but we were fortunate enough to have the presence of many distinguished academics and practitioners who, thanks to their expertise, addressed a wealth of issues with great insight. The present volume is a revised and expanded version of the proceedings of that Symposium. Its purpose is to provide academics and practitioners with a tool that lays the ground for the analysis of the interaction between diplomatic and judicial means of settling international disputes as well as to offer an initial assessment of its implications for several areas of international law. Its structure and content are based on three main considerations.

First, to facilitate the observation of the interaction between diplomatic and judicial means, it seemed reasonable to take the temporal sequence typical of judicial means as a matrix of reference. For clarity, this choice neither implies nor amounts to establishing a hierarchy of relevance between these two types of means. Rather, it acknowledges a fairly structured framework of reference common and familiar to both academics and practitioners and employs it as an observational standpoint.

Thus, the book uses this sequence as its backbone. The first section explores interactions at the initiation of proceedings, whereas the second and third sections dwell, respectively, on such interactions during judicial proceedings and at the time of implementing a judicial/arbitral decision. The fourth section offers a variety of transversal perspectives cutting across more than one of the preceding sections.

The second consideration underlying the conception of the present volume stems from the crucial challenge of identifying the substantive areas most concerned by the interactions between diplomatic and judicial means. In order to be comprehensive, one would have to cover all areas of international law, which was of course not possible within the limits set for this book. A selection was therefore necessary. In this regard, acknowledging the importance of the proliferation of international courts and tribunals

⁹ See e.g. D. Bishop, J. Crawford, M. Reisman, *Foreign Investment Disputes: Cases, Materials and Commentaries* (The Hague: Kluwer Law International, 2005).