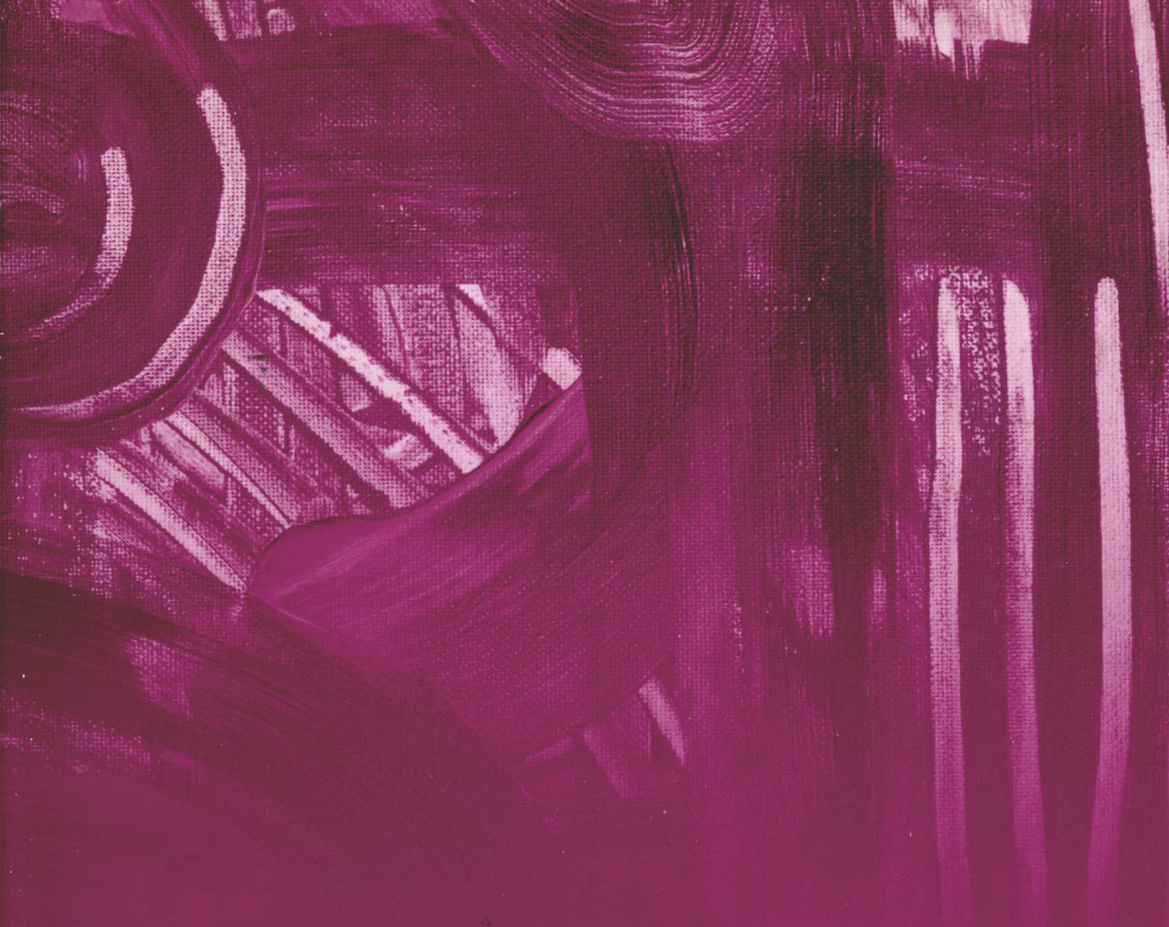

International Law and Dispute Settlement

New Problems and Techniques

Edited by
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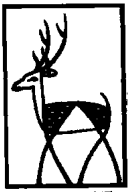

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List of Abbreviations

AAT	Australian Antarctic Territory
ADR	Alternative dispute resolution
ATA	Antarctic Treaty Area
ATCM	Antarctic Treaty Consultative Meetings
ATS	Antarctic Treaty System
AU	African Union
BERR	Department for Business, Enterprise and Regulatory Reform (UK Government)
BIT	Bilateral investment treaty
CAT	Committee Against Torture
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CEDAW	Committee on Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CFI	Court of First Instance (of the ECJ)
CFSP	Common Foreign and Security Policy
CITES	Convention on International Trade in Endangered Species
CoE	Council of Europe
COP	Communications on Progress
CORE	Corporate Responsibility Coalition
CRAMRA	Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington Convention)
CSR	Corporate social responsibility
CSW	Commission on the Status of Women
DAW	Division for the Advancement of Women
DPRK	North Korea (Democratic People's Republic of Korea)
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council of the UN
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques

EU	European Union
EUFOR	EU Force
FAO	Food and Agriculture Organization (of the UN)
GA	General Assembly
GAOR	General Assembly Ordinary Resolution
GATT	General Agreement on Tariffs and Trade
GC	Global Compact
GEF	Global Environment Facility
HRC	Human Rights Commission
IAATO	International Association of Antarctic Tour Operators
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPDR	International Commission for the Protection of the Danube River
ICRW	International Convention for the Regulation of Whaling
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFOR	Implementation Force
IGO	Inter-governmental organisation
IGY	International Geophysical Year
ILC	International Law Commission
IMO	International Maritime Organization
INGO	International non-governmental organisation
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, unreported and unregulated
IWC	International Whaling Commission
KFOR	Kosovo Force
LRTAP	Convention on Long-range Transboundary Air Pollution
MARPOL	International Convention for the Prevention of Pollution from Ships
MTBE	Methyl tertiary-butyl ether
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NCP	National Contact Points (ch 4); Non-compliance procedure (ch 9)
NGO	Non-governmental organisation
OAU	Organization of African Unity

OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OP	Optional Protocol
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PDVSA	Petróleos de Venezuela SA
PJC	Police and Judicial Cooperation
RAID	Rights and Accountability in Development
RFMO	Regional Fisheries Management Organisation
SADC	Southern African Development Community
SC	Security Council
SFOR	Stabilisation Force
SME	Small and medium enterprises
STL	Special Tribunal for Lebanon
TEU	Treaty on European Union
TNC	Trans-national corporation
TUC	Trades Union Congress
UDHR	Universal Declaration of Human Rights
UNCITRAL	UN Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTC	UN Commission on Transnational Corporations
UNEP	United Nations Environment Programme
UNIFIL	United Nations Interim Force in Lebanon
UNMIK	United Nations Mission in Kosovo
UNSC	UN Security Council
UNTS	UN Treaty Series
WHO	World Health Organization
WTO	World Trade Organization

Introduction

DUNCAN FRENCH, MATTHEW SAUL
AND NIGEL D WHITE

DISPUTE RESOLUTION IS a crucial aspect of any legal system or legal order, and in the international legal order there are numerous different means and methods, including a growing number of judicial mechanisms (courts, tribunals, arbitral panels) and more widely what can be labelled other quasi-judicial, legal or extra-legal means (committees, inspection panels, ombudsmen, etc). The growth and complexity of judicial and legal methods of dispute settlement reflects the evolution of the international legal order, arguably towards further entrenchment of the rule of law, though the centrality of courts and other legal mechanisms in the international legal order continues to be the focus of detailed consideration. This entails not only looking at quite specific issues of legal dispute settlement in particular areas of international law—more specifically in environmental law, human rights law, trade law, law of the sea, and collective security—it also requires a consideration of a number of more far-reaching conceptual issues.

The book includes analyses of aspects of the work of the leading tribunals, but the wider purpose is to consider the trends and developments in the area of dispute settlement. To provide focus the book does not have specific chapters on political, non-legal means, such as diplomacy and negotiation, though these form the backdrop of all the contributions. The very presence of legal means of dispute settlement may well encourage parties to the dispute to settle by means of negotiation.

The aim of the book is to explore developments and trends in judicial, legal and what may be called extra-legal means and methods of international dispute settlement. By focusing on legal means, the book comes squarely into wider debates about the direction and development of international law. The contribution of both courts and alternative legal methods to the development of international law and to methods of dispute settlement, in areas such as responsibility and accountability, are considered throughout the book, but are raised in particular in Part 1. Part 2 focuses on dispute settlement in substantive areas of international law, including private international law, while Part 3 contains discussion of judicial methods in the regional domain.

I. THE CHANGING FACE OF INTERNATIONAL ADJUDICATION

In chapter 1 Vaughan Lowe sets the scene by examining the choices of dispute settlement made by governments, particularly in bilateral investment treaties, whereby governments bind their freedoms by giving rights in private law—if not in international law—to foreign individuals and companies investing in their countries, and by providing for dispute settlement, ultimately by arbitral tribunal. This is a development that reflects the *de facto* power of private corporations on the international stage. Orthodoxy speaks about international law made by States *for* States, but the reality is very different. The chapter considers the issue of whether the arbitral hearings arising from bilateral investment disputes should be held in private, allowing of no public interest representations, in effect reflecting the private legal nature of the dispute. However, given that these disputes can, and often do, involve environmental and human rights issues, the chapter critically evaluates the trend towards allowing *amicus* briefs, by inter alia non-governmental organisations. This also calls into question the limited use of *amicus* briefs in the WTO settlement system. In raising the issues of 'public participation in private dispute settlement' (more widely 'whether private justice could adequately secure public interests'), concepts that can be applied to more traditional cases between States before inter alia the International Court of Justice, the chapter provides a suitably thought-provoking entry into the book. Later chapters therefore consider the contribution of such bodies as the International Court, the Dispute Settlement Body of the WTO and the dispute settlement mechanisms under the Law of the Sea Convention, as well as noting the role of an increasingly diverse array of litigants in utilising (and by utilising, thus defining the relevance of) international adjudication. Vaughan Lowe's chapter causes us to think about the nature of the international legal order and whether it is suited to secure public interests through legal dispute settlement.

In chapter 2, by Malgosia Fitzmaurice, the work of the International Court of Justice is appraised with reference to a particular area of international law, namely the protection of the environment. Does the ICJ help to shape a legal framework to protect the environment in cases that are essentially settling disputes between States? Malgosia Fitzmaurice discusses this from the perspective of the infringement of rights in multilateral treaties within the context of the 'inherent bilateralism of relations between States'. Does bilateralism constitute a 'stumbling block in cases in which the vindication of wider community values is at stake'? Or to re-phrase this, have dispute settlement techniques been adapted to take full account of community values? The chapter considers these issues in the light of the doctrines of obligations *erga omnes* and *erga omnes partes*,

and the question of third-party intervention in International Court cases through the 1974 and 1995 *Nuclear Test* cases. The author concludes that 'the limited scope of the right of intervention ... makes it a rather ineffective tool for the redress of community concerns regarding environmental issues before the ICJ'. Having said that, the author then reviews the Court's contribution to the development of general principles of environmental law such as sustainable development, the precautionary principle, environmental impact assessment and intergenerational equity, in looking at contentious cases and advisory opinions in nuclear law, water law, transboundary air pollution and damage to land. The chapter contains a wealth of discussion of cases, which show the Court applying and developing principles of environmental law, including the yet to be decided *Aerial Herbicide Spraying* case arising out of the use of toxic herbicides on illicit coca and poppy plantations by Columbia on its frontier with Ecuador, a case that promises to further develop the seminal arbitral judgment in the *Trail Smelter* case. The chapter finishes with an analysis of the best judicial forum for the settlement of environmental disputes—the ICJ or a specialised international tribunal? The lengthy process of adjudication by the ICJ and the problem it has in fairly addressing shared and community interests, have to be balanced against the fragmentary problems that creating alternative fora will cause.

The limitations on the International Court, and to a lesser extent other State-based methods of dispute settlement, are reflected in Duncan French and Richard Kirkham's account, in chapter 3, of complaint and grievance mechanisms. These accountability techniques, such as the ombudsman and inspection panels, represent a 'transformation from a model premised upon a narrow conception of inter-governmentalism and formal legalism to one that is increasingly receptive to broader constitutional notions, including ideals such as enhancing legitimacy and promoting good governance'. By seeking to 'engage a range of communities beyond the intergovernmental level' such techniques, emerging primarily though not exclusively in the World Bank and other international financial institutions, have rebalanced to some extent the hitherto domination of dispute settlement by governments. The authors point out that such techniques not only provide means of securing redress for individuals but also serve the wider more constitutional purpose of holding organisations to account and thereby helping to develop better governance within those bodies. Though the 'grievance' (perhaps more technically accurate than 'dispute') is normally bilateral, between the individual or group and the organisation, the public interest can be served by these techniques in a way that traditional techniques of dispute settlement may not. The argument for creating an institution-wide UN ombudsman, with a wide-reaching remit, though undoubtedly radical and with many obstacles towards its implementation, is strong.

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Sorcha MacLeod takes forward an examination of accountability techniques for transnational corporations in chapter 4. The concept of corporate social responsibility, signifying that 'businesses have obligations beyond the financial and commercial and which includes social obligations, particularly in the sphere of human rights and the environment', has 'developed steadily but the model adopted has not been that of ... a traditional adjudicatory framework—ie courts, tribunals or arbitration'. The move has not simply been away from traditional dispute settlement but towards 'alternative dispute prevention and settlement strategies with an emphasis on involving *all* of the relevant actors including States, business and civil society'. Corporate social responsibility approaches at the UN (principally the Global Compact) and the OECD (through the National Contact Points) have become more central in the international legal order. Despite this 'the provision of effective remedies for human rights violations by business is the area in most need of serious attention'. Though such developments are to be welcomed there is still a long way to go to ensure that they protect both the interests of the individual as well as the interests of the community.

II. PROBLEMS AND TECHNIQUES IN SUBSTANTIVE AREAS OF INTERNATIONAL LAW

Part 2 of the book contains evaluations of means of dispute settlement within key areas of public and private international law, developing the initial discussions of human rights law, environmental law, etc, found in Part 1. In chapter 5, Sandy Ghandhi, considers the practice and procedure of dispute settlement in individual communication cases within the Human Rights Committee and the Committee on the Elimination of Discrimination against Women. In it he considers whether the overlapping dispute settlement work of these quasi-judicial bodies is coherent, or whether it is an example of an issue of increasing concern to international lawyers, namely fragmentation. Contrary to some evaluations, and many expectations, the conclusion is that 'CEDAW is intent on developing a jurisprudence that is both congruent and consistent with that of the other UN treaty-monitoring bodies, especially the HRC'. Sandy Ghandhi does, however, contrast this congruence with divergence elsewhere in the human rights system, leading to calls for a unified standing treaty body. Giving remedies to individuals within the international legal order is crucial, but the enduring legitimacy of this development will only be ensured if there is consistency. On CEDAW itself, given the relative newness of its Optional Protocol, only 'time will tell whether CEDAW can vindicate the rights of women in the individual communication procedure as successfully as the HRC'. Again this chapter provides another view on

non-traditional methods that provide avenues for individuals seeking redress, in this case for human rights violations. In light of the limitations on this and the other non-traditional forms of dispute settlement considered in the course of this book, and in particular the *ex ante* requirement of State consent to many of these processes, this is a clear indication that such processes are grafted onto the existing system of international law, rather than being based on alternative precepts.

Once a State has signed up to an individual complaints procedure under a human rights treaty regime, then it has no choice but to answer the complaints brought against it. Though based on original consent, the element of compulsion is present thereafter, although as Ghandhi notes some governments have attempted to limit the competence of the relevant Committee through reservations to individual complaints procedures. Though the optional clause is present within the Statute of the International Court of Justice, its effects have been severely curtailed by States signing up to it, limiting the development of this type of quasi-compulsory competence within the leading international tribunal. In chapter 6, Robin Churchill shows how compulsory means of dispute settlement have developed and increased within an area in which the International Court of Justice has traditionally been concerned—the Law of the Sea. The methods of dispute settlement in this classic area of international law are predictably traditional in their form—judicial and quasi-judicial—but the move towards compulsion presses against the consensual nature of international law. The myriad of alternative choices within the Convention, including the International Tribunal for the Law of the Sea, and the International Court of Justice, does not detract from the fact that parties cannot escape appearing before a tribunal of some sort, given the fallback provided of an Annex VII arbitral tribunal. Despite this machinery, only just over a handful of cases have been subject to compulsory judicial settlement, which, given that there are over 200 unresolved maritime boundaries, seems to be a less than satisfactory record. Robin Churchill addresses this claim and also considers disputes which are more than bilateral and essentially private between States, namely those relating to mining in the International Seabed Area. Whether these methods are robust enough to cope with the wider community interests underlying these disputes remains to be seen, as the first contracts for the exploration of the Area were not signed until 2001. In considering dispute settlement mechanisms outside the Law of the Sea Convention, under fisheries and marine pollution treaties, the chapter shows the progress being made in dispute settlement, but also that the underuse of these mechanisms maybe due to a 'reluctance to use judicial means to settle disputes that have strong policy (rather than legal) content', as well as problems of *locus standi*, which does not seem to bode well in tackling the problems of over-exploitation of maritime resources, and increasing pollution of the seas.

However, although 'much of this diverse dispute settlement machinery is unused', a 'good deal of it is of very recent origin' and may well play a significant role, at least in resolving bilateral issues, in the future.

In contrast to the judicial means found in the Law of the Sea, in chapter 7, Surya Subedi considers the WTO dispute settlement mechanism to be 'neither fully judicial nor completely a non-judicial mechanism', more specifically describing this as a new technique for settling disputes in international law being a 'blend of diplomacy, negotiation, mediation, arbitration and adjudication'. It shares with the Law of the Sea mechanisms the element of compulsory jurisdiction, but in contrast to those methods outlined in the Law of the Sea, the popularity of the WTO dispute settlement machinery cannot be doubted with nearly 380 cases being referred to it. However, the weaknesses of the system must not be forgotten, especially 'when it come to enforcing the rulings of the [Dispute Settlement Body] against major powers', and further the contention that it 'does not provide an effective remedy for those non-State business actors which suffer from injustices and distortions in international trade'. Here we are reminded that business actors may well also be victims of violations of international law and should have access to justice in such disputes. The chapter also reminds us of the public interest issues that often arise in trade disputes in discussing the role of *amicus curiae.* Though restricted 'it should be noted ... that the issue relating to what kind of access the public might have to panel proceedings or their input into the procedure by means of *amicus curiae* briefs is one of the subjects being discussed within the DSB under the Doha mandate'. Nevertheless, the author concludes that while the DSB has performed well as a quasi-judicial mechanism for settling trade disputes it is debatable whether it can 'deliver justice in the broader sense of the term'.

A different blend of non-judicial features of dispute settlement can be found in the most ambiguous and powerful of all international bodies, the UN Security Council. In chapter 8, Nigel White and Matthew Saul consider what they broadly label as the quasi-judicial powers of the Security Council, within the context of its traditional dispute settlement techniques (contained in Chapter VI of the Charter) as well as its exceptional coercive powers (under Chapter VII). In considering the Security Council as an 'integral part of the post-1945 international legal order', and its powers to seize itself of disputes, of investigation, judgment, and implementation, the authors argue that 'in trying to achieve order in international relations, the Security Council must also strive to achieve justice, and it is this constant balancing which permeates all decisions on matters of collective security—where the security imperative meets the rights of States or individuals'. Given that the Security Council has the power to bind Member States and furthermore such binding decisions can, subject to limitations identified by the authors, override inconsistent treaty obligations and can

be enforced by the Security Council using Chapter VII, the potential of the Security Council as a 'settler' of disputes is huge, but it is a power that is accompanied by responsibility to act consistently, fairly (for instance by conforming with basic principles of natural justice when imposing measures upon States or individuals) and with respect to general axioms of international law.

One might wonder whether an all-powerful executive might have success in other areas such as international environmental law, which has been built on a multilateral treaty approach. By way of counter-argument to this in chapter 9, Karen Scott considers non-compliance procedures (NCPs) and dispute resolution mechanisms under multilateral international environmental agreements. Relatively unknown until recently, 'today there are over 20 non-compliance procedures that actively seek to support and facilitate compliance with international obligations in areas such as air pollution, climate change, marine environmental protection, biodiversity conservation, environmental impact assessment, fisheries management, freshwater resources and transboundary movement of chemicals, pesticides and waste'. One of the earliest developed under the 1979 Bern Convention on the Conservation of European Wildlife and Habitats 'remains innovative almost 30 years on owing to its status as one of the few NCPs to permit non-governmental organisations ... and individuals to indirectly initiate action against a [State] party in alleged non-compliance with their obligations under the Convention'. NCPs seem to be a combination of prevention of disputes by providing assistance to enable States to comply with their environmental treaty obligations, and the adoption of coercive measures if the facilitative approach fails—what Karen Scott labels the 'good-cop-bad-cop approach'. This is normally overseen by a compliance committee or similar, often consisting of representatives drawn from a small number of State parties. The remit of these committees can go beyond the individual cases to consider the implementation of treaty obligations more generally, raising the prospect of that body being able to consider the wider public interest. This prospect is enhanced given that 'many (but by no means all) non-compliance procedures permit some form of public participation within the procedure'. 'Non-compliance procedures have been developed in order to respond to the very specific challenges faced by traditional dispute resolution mechanisms within environmental regimes, which generally create *erga omnes*—as opposed to strictly reciprocal—obligations', thus contrasting NCPs and their accompanying compliance committees with the approach of the International Court of Justice considered by Malgosia Fitzmaurice in chapter 2.

In an intriguing contribution in chapter 10 on the Antarctic treaty after 50 years, James Crawford looks at a treaty regime that seems to work in effect by suspending disputes, with little by way of formal dispute

resolution or any form of powerful executive. As the author states, the 'Antarctic Treaty is the reduction to writing of a disagreement about status; a truce called on claims'. In answer to the question of how the treaty works—how it is implemented—James Crawford identifies it as a 'system of self-policing in which under Article VII the parties could designate observers to carry out inspections'. While showing that a quite limited, in some ways traditional, treaty regime can work, the author is realistic about over-claiming on the value of the legal structures—'if the Treaty remains a success after 50 years, one major reason for its stability is the continued relative isolation of Antarctica and the relative absence of economically exploitable resources'. Should extraction of those resources become economically viable then the dormant claims to areas of Antarctic territory and underlying disputes will become live and another dispute settlement mechanism might have to be considered. This would encounter the range of legal issues that the present approach has left unresolved, such as whether the claimant States can legitimately be seen as 'coastal' States for the purposes of the Law of the Sea Convention, and, most fundamentally, whether Antarctica 'has the same characteristics as other terrestrial territories, including the character as a space capable of being subject to sovereignty'. Overall, the author concludes that 'legal difficulties have not stood in the way of the continuing political success of the Antarctic Treaty and its system'. Disputes have been avoided because the 'parties have managed to incorporate aspirants and even opponents into the system without—apparently—diluting it too much'. A combination of the economic realities of trying to extract the resources of the region and an unwillingness of the key actors to try and enforce their claims 'at the expense of the system as a whole' have meant that thus far formal disputes have been avoided and the treaty regime continues to successfully govern the Antarctic.

In chapter 11 the book takes what seems like a detour into the world of private international law, moreover into what we would label a non-legal means of dispute settlement—mediation. In her essay on cross-border family mediation, Kisch Beevers demonstrates that lessons for public international law can be learned from private international law (and vice versa), and also that the line between legal and non-legal means is far from clear. For instance, to claim that the non-compliance mechanisms in environmental protection are 'legal' is going too far, for as Karen Scott states in chapter 9, while they have become increasingly 'legalised' they are still political in origin. Furthermore, the chapter by Kisch Beevers gives further insights into the benefits of non-judicial methods of settlement, with mediation producing 'the facilitation of better communication and understanding between the parties in a safe environment and improvement in their ongoing relationship through the development of constructive workable solutions to their dispute'. Furthermore, the

'avoidance of litigation brings more than [these] practical benefits, for it reduces the conflict often attached to the adversarial process', which may further undermine the wider policies being sought to be protected, whether it be the best interests of the child or, by analogy, the protection of the environment. 'Moreover, if mediation achieves an agreed settlement, then this settlement is perceived to have been achieved through a self-determinative process: a process that the parties entered into voluntarily, participated in and ultimately resolved without that resolution being imposed by the courts'. Such an approach is important when the disputes involve individuals from different countries, given that 'cross-border mediation will often mean cross-cultural mediation where differing underlying traditions, presumptions, beliefs and expectations need to be dealt with sympathetically', elements that a court is not best suited for.

III. THE REGIONAL DIMENSION

Part 3 contains three chapters which consider trends and techniques within regional processes of dispute settlement, specifically looking at judicial means. In chapter 12 Gino Naldi considers the African Court of Justice and Human Rights. An African Court was agreed in principle as part of the OAU's successor the AU, which came into being in 2002, and which marked a departure from the original African Organization's 'hesitation to put in place a judicial body' for the resolution of inter-African disputes. A Protocol of 2003 which would have created a court with similar competence to the International Court of Justice in relation to inter-State disputes was 'stillborn, as the AU decided that the Court of Justice should be merged with the African Court on Human and Peoples' Rights into one single judicial body'—the African Court of Justice and Human Rights. The merger provides an interesting case study on whether such a court, dealing with inter-State disputes on the one hand, and cases brought by individuals and NGOs on the basis of alleged human rights violations by a State on the other, can work. Arguably though, the amalgamation gives the African Court a greater chance to play a constitutional role than does the International Court of Justice, a perception that is strengthened by the fact that the African Court is expressly given powers to review all acts, decisions, regulations and directives of the AU organs. Its model may thus be seen as the European Court of Justice rather than the International Court of Justice. As the Statute of the Court is not yet in force, the workability and effectiveness of such a court outside the European region however remains to be seen.

In the final two chapters the issue of judicial competence over human rights within the EU and Council of Europe, and the European Court of Justice's competence as a constitutional court, are considered. In

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