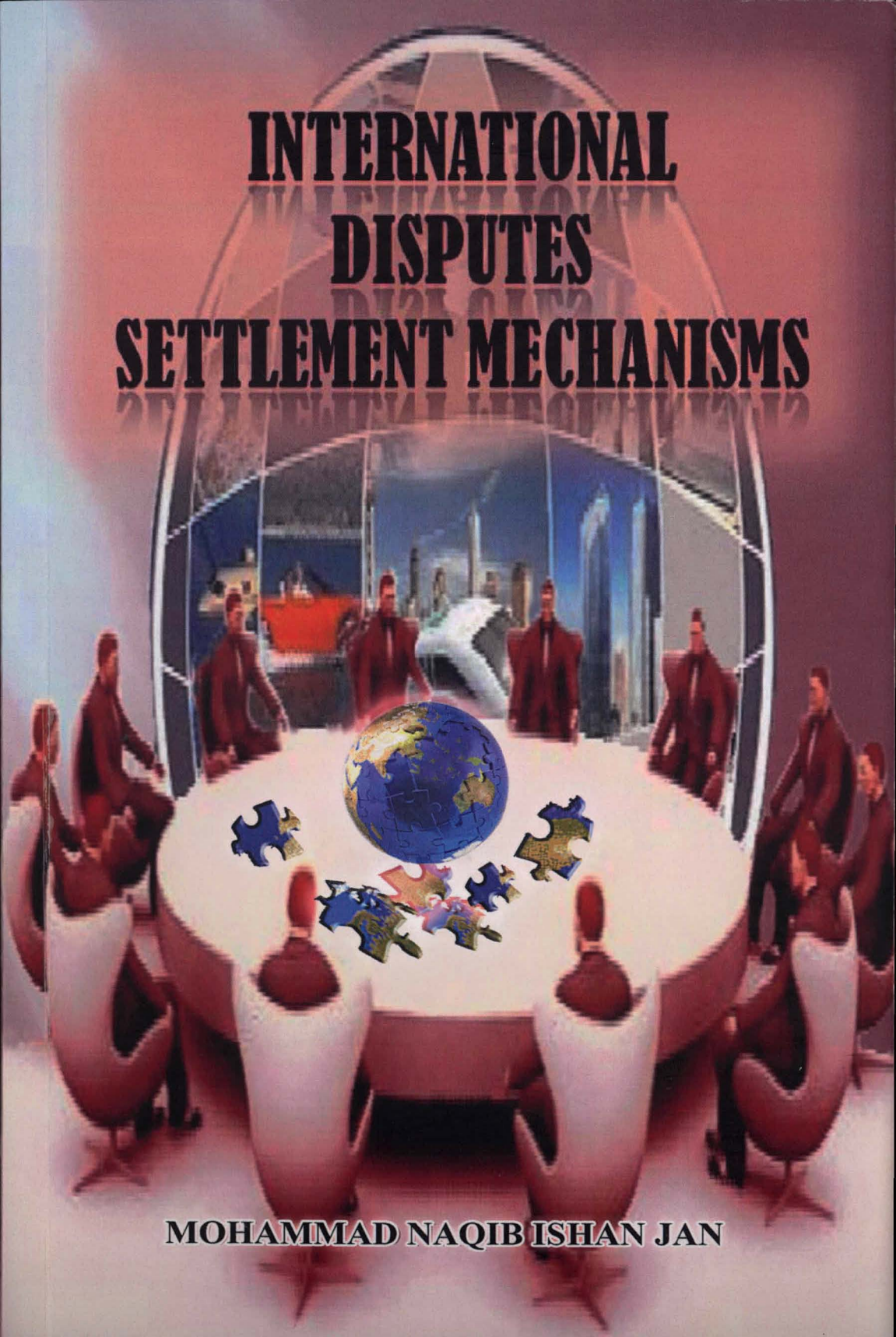


INTERNATIONAL DISPUTES SETTLEMENT MECHANISMS



MOHAMMAD NAQIB ISHAN JAN

INTERNATIONAL DISPUTES SETTLEMENT MECHANISMS

MOHAMMAD NAQIB ISHAN JAN

LLB (HONS) (IIUM), MCL (IIUM),

PHD (IIUM)

ASSOCIATE PROFESSOR AND
COORDINATOR OF ALTERNATIVE DISPUTE
RESOLUTION UNIT,

AHMAD IBRAHIM KULLIYAH OF LAWS
(AIKOL)

INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA



IIUM Press

Published by:
IIUM Press
International Islamic University Malaysia

First Edition, 2011
©IIUM Press, IIUM

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without any prior written permission of the publisher.

Perpustakaan Negara Malaysia

Cataloguing-in-Publication Data

Mohammad Naqib Ishan Jan
International Disputes Settlement Mechanism
Include index
Bibliography

ISBN: 978-967-0225-42-5

Member of Majlis Penerbitan Ilmiah Malaysia – MAPIM
(Malaysian Scholarly Publishing Council)

Printed by :
IIUM PRINTING SDN. BHD.
No. 1, Jalan Industri Batu Caves 1/3
Taman Perindustrian Batu Caves
Batu Caves Centre Point
68100 Batu Caves
Selangor Darul Ehsan

CONTENTS

<i>Authors' Profile</i>	i
<i>Preface</i>	v
<i>Contents</i>	vii
<i>Table of Cases</i>	xv

Chapter 1 **The Concept of Pacific Settlement under** **International Law: An Overview**

INTRODUCTION	1
NATURE AND CONCEPT OF PACIFIC SETTLEMENT	2
The Necessity of the Pacific Settlement.....	3
Pacific Settlement in a Historical Perspective	4
METHODS OF PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES	6
An Overview of Diplomatic Methods	7
An Overview of Legal Methods.....	24
CONCLUSION	35

Chapter 2 **The Diplomatic Means of Settling International** **Disputes**

INTRODUCTION	45
NEGOTIATION	46
Forms of Negotiation	47

Substantive Aspects of Negotiation	48
Limitations of Negotiation	49
Selected Case Studies	49
The United States - China dispute over the NATO bombing of China's Embassy in Balgrade: A Success story of negotiation.....	49
MEDIATION	51
Definition of Mediation	51
Mediation as a Means of Settling International Disputes Sanctioned by Treaties	52
Mediator	53
Functions of Mediator	55
Attributes of a Successful Mediation	55
GOOD OFFICES	57
INQUIRY	58
CONCILIATION.....	62
Definition of Conciliation	62
Conciliation as Enshrined in International Treaties	63
Conciliation in Practice	64
CONCLUSION	66

Chapter 3

Referral to Arbitration and Negotiation: Modern Trends in International Dispute Resolution Institutions

INTRODUCTION	71
RELEVANCE OF ARBITRATION AND NEGOTIATION IN INTERNATIONAL DISPUTE SETTLEMENT	73
DISPUTE SETTLEMENT AND NOTABLE INTERNATIONAL BODIES.....	76
Permanent Court of Arbitration.....	76
The International Court of Justice	78
Dispute Settlement System of the World Trade Organization	80

International Tribunal for the Law of the Sea and Dispute Settlement of UNCLOS	85
The International Centre for Settlement of Investment Disputes	87
INSTANCES OF COURT REFERRALS TO NEGOTIATION AND ARBITRATION	89
Reference to Amicable Settlement by an International Treaty or Convention	90
Direct Reference to Amicable Settlement by the International Dispute Settlement Body	92
Reference to Negotiation or Arbitration after a Decision	94
Out-of-court Settlement on the Volition of the Parties to the Dispute	96
CONCLUSION.....	98

Chapter 4

The World Court: A Bulwark of International Justice

INTRODUCTION	109
ORGANIZATION OF THE COURT	110
Election of judges	110
<i>Ad hoc</i> judges	111
Chambers of the Court	111
JURISDICTION	112
Access to the Court (jurisdiction <i>ratione personae</i>)	113
Contentious cases	113
Advisory opinions	113
Contentious Jurisdiction	114
Consent is the basis of Court's jurisdiction	114
Various ways of expressing consent	116
Consent given by special agreement (<i>Compromis</i>).....	116
<i>Forum prorogatum</i>	116
Consent given by a compromissory clause in a	

treaty	117
Accepting compulsory jurisdiction under Article 36(2) of the Statute	118
Non-appearance of the respondent	121
Incidental Jurisdiction	121
Preliminary Objections: Decisions on Jurisdiction and Admissibility	122
Interim measures of protection (Provisional measures).....	124
Intervention by third States	126
Revision of a judgment	126
Advisory Jurisdiction	127
HOW A CASE IS TRIED	128
ENFORCEMENT AND COMPLIANCE	130
ROLE OF COURT AS THE PROTECTOR OF INTERNATIONAL JUSTICE	132
CONCLUSION.....	135

Chapter 5

The International Tribunal for the Law of the Sea and the Significance of Urgent Proceedings

INTRODUCTION	142
COMPOSITION AND STRUCTURE	144
JURISDICTION OF THE TRIBUNAL	146
Access to the Tribunal	146
Contentious jurisdiction	147
How can a dispute be submitted to the Tribunal	148
Advisory jurisdiction	149
THE POPULARITY OF URGENT PROCEEDINGS	150
PROVISIONAL MEASURES	152
PROMPT RELEASE OF VESSELS AND CREWS	157
CONCLUSION	164

Chapter 6

Settlement of International Trade Disputes

INTRODUCTION	171
THE GATT AND ITS DISPUTE SETTLEMENT MECHANISM	172
THE WTO DISPUTE SETTLEMENT MECHANISM	173
The Dispute Settlement Understanding (DSU)	174
Main Features of the DSU.....	174
DSU provides for intergovernmental and mandatory process	175
DSU a quasi judicial system	175
DSU requires adherence to the principles of GATT 1947 and rules of public international law	176
DSU provides security and predictability to the multilateral trading system	177
Stages in a WTO Dispute Settlement	179
Consultation	179
Good offices, conciliation and mediation	181
The panel stage	181
Appellate review	184
Adoption of panel and Appellate Body reports	186
Implementation of rulings and recommendations	187
REGIONAL TRADE DISPUTE SETTLEMENT SYSTEMS	189
The Proliferation of RTAs	189
RTAs permitted by WTO under exceptional circumstances	202
RTAs dispute resolution mechanism	203
CONCLUSION	204

Chapter 7

Settlement of International Investment Disputes

INTRODUCTION	213
--------------------	-----

THE ROLE OF ICSID IN THE SETTLEMENT OF INVESTMENT DISPUTES	214
ICSID's Methods of Dispute Settlement	215
The ICSID's jurisdictional requirements	215
ICSID's voluntary character	217
ICSID's Arbitration	218
Parties to the ICSID arbitration proceedings	219
Natural person	219
Legal person	222
The issue of shareholders.....	224
Exhaustion of local remedies	226
The law to be applied	227
ICSID's Award	228
MIGA's ROLE IN THE SETTLEMENT OF INVESTMENT DISPUTES	230
CONCLUSION	233

Chapter 8

Settlement of Politico-Legal Disputes through the United Nations: Analyzing the War in Bosnia and Herzegovina

INTRODUCTION	241
THE FIVE STRATEGIES OF DISPUTE SETTLEMENT	243
THE BOSNIAN QUAGMIRE	247
Preventive Diplomacy	250
Peace Keeping	251
Peace Enforcement and Peace Making	254
Peace Building	256
CONCLUSION.....	258

Chapter 9

The Arab League: A Bitter Harvest in Regional Conflict Resolution

THE ARAB LEAGUE: AN OVERVIEW	263
THE ARAB LEAGUE AND REGIONAL CONFLICT RESOLUTION.....	268
No Intervention At All	273
Conflicts/Crises Where the League Intervened Without Success.....	274
Conflicts/Crises Where the League Intervened with Limited Success.....	275
Conflicts/Crises Where the League Intervened Successfully.....	276
CONCLUSION.....	279

Chapter 10

Coercive Means of Settlement

INTRODUCTION	283
RETORSION	284
REPRISAL	284
UNILATERAL USE OF FORCE	286
CONCLUSION.....	288
APPENDIX 1.....	291
APPENDIX 2	303
APPENDIX 3	331
APPENDIX 4	353
APPENDIX 5	409
APPENDIX 6	455
INDEX	485

CHAPTER 7

SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES

by

MOHAMMAD NAQIB ISHAN JAN

INTRODUCTION

A stable international investment environment necessitates the existence of a special and well structured dispute settlement mechanism to settle disputes between host States and foreign investors. The presence of such mechanism is crucial because in the absence of such mechanism investment disputes may become politicized leading to, as it did in the past, to the frequent exercise of diplomatic protection and even the use of force¹. The need for such mechanism was felt by the World Bank² in the 960s. Subsequently, on 18th March 1965 the text of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the ICSID Convention or the Washington Convention) was adopted by the Executive Directors of the World Bank³. The main purpose of the ICSID Convention is to encourage foreign investments which play a pivotal role in economic development. It particularly