Roughly 90% of all international judicial decisions have been issued after 1990. New international courts and tribunals (ICTs) have emerged in the past two decades and old ones have been increasingly active. This development increasingly places ICTs at the centre of attention. ICTs are seen to be and do many things: perhaps they are part of a ‘civilizing process’ in which law substitutes power politics, they offer solutions to global coordination and cooperation problems, they are the long arm of powerful states and of strong economic interests. With increasing activity and arguably increasing clout, they are both the objects of praise and critique.

The course focuses on the law and politics of ICTs. It provides students with profound knowledge of the most pertinent legal issues of international adjudication relating to jurisdiction, admissibility, provisional measures, applicable law, and the effect as well as enforcement of international decisions. The court also draws attention to underlying policy issues and places the practice of ICTs within the setting of the international order. Students will refine their analytical frameworks in order to develop a thorough understanding of ICTs’ practice. The course will focus on the International Court of Justice, the International Tribunal for the Law of the Sea, the World Trade Organization, investment arbitration, and on criminal courts and tribunals.

The course will teach students to carve-out patterns and trends in third party dispute settlement. It will enable students to understand the specific features of individual courts and to assess broader institutional patterns and trends. Throughout the course, students will learn to see tensions, problems and possible solutions in the practice of international dispute settlement. Specific attention will be paid to multiple (and possibly competing) functions of international courts and tribunals, to different general understandings of their place in the international legal order, and, finally, to their exercise of authority. In addition to profound knowledge of law and practice, such systemic considerations will offer a solid basis for a comparative discussion and assessment.

Overall objectives:

• explain and compare various means of settling disputes and know the major ICTs;
• understand issues of jurisdiction, admissibility, provisional measures, applicable law, and the effect as well as enforcement of international judicial decisions;
• understand and contrast multiple (possibly competing) functions as well as conceptions of international courts and tribunals;
• analyse and evaluate trends and prospects in the practice of international courts and tribunals;
• assess the legitimacy of international adjudication;
• develop skills attendant upon writing a case note.

Examination

• Research Paper (80%): case note (3000 words including everything) on a judicial decision to be chosen with the approval of the course convenor during the course. The submission deadline will be roughly 4 weeks after the last session (to be specified in class).

• Short written assignment (10%): Answer the 7 brief questions at the end of this syllabus. You do not need to write more than ca. 800-1000 words in total. I will grade this on a pass/fail basis only. Send this to me by email before the first session with the subject line ‘written assignment TU Dresden’. [This is really to get you reading and thinking beforehand. Rest assured: Most of these questions do not have right answers.]

• Class Participation (10%).

Please read the required readings before the course begins (and do the short written assignment on that basis). I have tried my best to keep the readings to a minimum.

Course Overview

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General Introductions, Handbooks and Academic Resources

- Also consider the many pertinent keywords in the *Max Planck Encyclopedia of International Law* <www.mpepil.com>.

Blogs

- Opinio Juris - <http://opiniojuris.org>
- iLawyer: A Blog on International Justice - <ilawyerblog.com>

Also see

Course Outline and Required Readings

I. Background: Dispute Settlement Mechanisms and Countermeasures

The spectrum of dispute settlement mechanisms

The session introduces the spectrum of dispute settlement mechanisms. It then focuses on the default setting of resolving inter-state disputes in the absence of courts or tribunals—examining the United Nations Charter, the Vienna Convention of the Law of Treaties and the Draft Articles of State Responsibility. What does the situation in international law look like when there are no ICTs? What is the background/default position?

Objectives:
• describe different dispute settlement mechanisms and understand their differences;
• analyse and assess the law of state responsibility and countermeasures.

Read:
• Convention for the Pacific Settlement of International Disputes (Hague I), signed 18th October 1907, parts I-III;
• Arts 2, 33-38 UNC;
• Arts 60-62, 70, 72, 73 Vienna Convention on the Law of Treaties (VCLT) from <http://www.iilj.org/courses/InternationalLaw-Unit4.asp>;
• Draft Articles on State Responsibility.

Countermeasures and arbitration

The session turns to arbitration as a first step towards adjudication, in contrast to conciliation or mediation. It approaches the basic features and problems of arbitration in view of a concrete example: the Aviation Dispute between the United States and France. How do dispute settlement mechanisms, the law of treaties, and the law of countermeasures interact?

Objectives:
• know the main features of arbitration;
• understand the interplay between the law of treaties, the law of countermeasures, and mechanisms of arbitration;
• start evaluating main contributions, challenges, and drawbacks of international adjudication.
Read:
- Excerpt from *Air Services Agreement Case* (5p), prepared by B Kingsbury at <http://www.iilj.org/courses/documents/AirServicesCase.pdf>

Additional references, not required:
[*" suggests pieces that might especially be worth your while]
- L Fisler Damrosch, *Retaliation or Arbitration – Or Both? The 1978 United States-France Aviation Dispute*, 74 American Journal of International Law 785-807 (1980), available electronically in databases such as HeinOnline
II. Contexts: Political and Sociological

Why do(n’t) States Create International Courts and Tribunals?

What are the reasons leading governments to create international courts and tribunals? What are the factors that have dissuaded them from doing so? Two complementary perspectives help to understand those reasons. The first is historical. It shows still salient controversies and offers context. The second takes a more pronounced political science perspective. Both required readings are expected to stir discussion. Read critically.

Objectives:
• identify the main reasons governments have for and against creating international courts and tribunals;
• evaluate the conditions under which they are more or less likely to create independent institutions.

Read
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Additional references, not required:
• J Crawford, Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture, 1 Journal of International Dispute Settlement 3–24 (2009).
Functions of International Courts and Tribunals

Traditionally, international legal doctrine would only see one function of ICTs, that of dispute settlement. The multiplication of international judicial institutions and the swelling stream of international judicial decisions questions that view. What are the functions of international courts and tribunals?

Objectives:
- define and identify judicial functions;
- apply a multi-functional analysis to judicial institutions;
- evaluate what are the implications of judicial functions beyond the settlement of disputes.

Read:

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Additional references, not required:
• Georges Abi-Saab, *The International Judicial Function* [Audio Visual Library of International Law].


III. The Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA)

The Permanent Court of Arbitration is the oldest still existing judicial institution or, better framework for settling disputes. It has undergone significant transformations over time, adapting to new circumstances.

Objectives:
- identify the rules and functions of the PCA;
- understand its transformation.

Read:
- Convention for the Pacific Settlement of International Disputes (Hague I), signed 18th October 1907, parts IV-V [see Session I];
- Browse through the website of the PCA, <http://www.pca-cpa.org/> (you may also watch introductory video);
- By way of example, read excerpts from Romak S.A. (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280, 26 November 2009, pp. 1-5, 18-21 and 40 (para 171) [in substance, the case is a one of investor-state arbitration and it turns on investment protection; all of the seventh session is dedicated to that].

Additional references, not required:
- The Government of Sudan / The Sudan People’s Liberation Movement/Army (Abyei Arbitration), see material at <www.pca-cpa.org>.
- T van den Hout, Resolution of International Disputes: The Role of the Permanent Court of Arbitration – Reflections on the Centenary of the Convention for the Pacific Settlement of International Disputes, 21 Leiden Journal of International Law 643-661 (2008);
IV. International Court of Justice (1)

This session covers the first half of most important procedural and policy issues as they relate to jurisdiction, admissibility, and provisional measures. Especially:
What are bases for jurisdiction? How is jurisdiction different from admissibility? Under what conditions and with which reach can the ICJ issue provisional measures? Discussion and analysis will use the famous Nicaragua judgment on admissibility as a case study.

Objectives:

• contrast the ICJ with the PCA;
• explain and assess the procedural law on jurisdiction, admissibility, and provisional measures;
• further develop analytical framework to discuss judicial policy.

Read:

• ICJ-Statute, (pay particular attention to Arts 36, 41 and 61) [attached to UN Charter, Session I];
• Arts 92-96 UNC;
• Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States Of America), Jurisdiction of the Court and Admissibility of the Application, (1984) ICJ Reports 392, Excerpt (13p);

Additional references, not required:

• Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment of 4 May 2011.
• LaGrand (Germany v. United States of America), Merits, (2001) ICJ Reports 466, paras 98-109 (5p).
• K Oellers-Frahm, Expanding the Competence to Issue Provisional Measures—Strengthening the International Judicial Function, 12 German Law Journal 1279 (2011).


V. The International Court of Justice (2)

The session will first follow up on issues of jurisdiction and admissibility by focussing on one specific decision: *Case Concerning Application of the International Convention on the Elimination of All Form of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011. What explains the outcome of this judgment in terms of law and politics? Could the court have decided otherwise? Should the court have decided otherwise? If you were to write a hypothetical appeal of the judgment, what would you argue?

We will then continue the discussion of most important procedural issues, focussing on the intervention of third parties, the making of judgments, and the effects as well as enforcement of judgments. Under what conditions are third parties allowed to intervene? How do judges arrive at majority judgments? Are judgments final and how are they enforced?

Objectives:
- identify decisive junctures in judicial reasoning;
- contrast complementary legal and political perspectives on judicial reasoning;
- develop skills attendant upon writing a case note;
- explain and assess the procedural law on intervention and enforcement;
- understand the making of judgments.

Read:
- *Case Concerning Application of the International Convention on the Elimination of All Form of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011 (focus on paras 115-184);
VI. The International Tribunal for the Law of the Sea

While the International Tribunal for the Law of the Sea is similar to the ICJ in many respects, dispute settlement on the basis of the United Nations Convention of the Law of the Sea (UNCLOS) also shows a number of particular features. For instance, UNCLOS knows an array of different dispute mechanisms. This session strengthens the knowledge of core procedural principles. It then focuses on provisional measures in law of the sea disputes to highlight the interplay between adjudication and negotiation. It does so with the Land Reclamation Case at hand. How do judicial mechanisms interact with negotiation and other processes in this case?

In a more detailed analysis of one case (Land Reclamation) the interplay between dispute settlement mechanisms and diplomatic processes will be further analyzed. What is the relationship between adjudication and negotiation? We then use simmering disputes in the South China Sea to play through different scenarios of adjudication on the basis of UNCLOS.

Objectives:
- explain the variety and interplay of dispute settlement mechanisms under UNCLOS;
- analyse the practice of ITLOS;
- appraise the strengths and weaknesses of adjudication in light of the specific case;
- develop a more nuanced understanding of the interplay between different mechanisms and see adjudication in its broader context.

Read:
- Arts 279-296 UNCLOS;
- Arts 20-34 ITLOS-Statute;

Additional references, not required:
- The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Merits, Judgment of 1 July 1999 [up to para. 102];
- Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, (17p).
- R Beckmann et al., Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources (2013).
- N Hong, UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea (Routledge, 2012).


VII. The World Trade Organization

Adjudication in the WTO distinguishes itself from other inter-state mechanisms of dispute settlement not least due to its compulsory jurisdiction. The judicial process in the WTO is structured according to the Dispute Settlement Understanding (DSU). Its adjudicating bodies are among the most prolific in the international legal order. This session focuses on applicable law, appellate review, and enforcement. It sets out to discuss strength and weaknesses in comparison with other institutions. What accounts for the success and failure of WTO adjudication?

Questions of this session will include:

• What are the main policy concerns that underlie the dispute settlement process? How are they given effect and are they actually met in practice?
• What is the relationship between the WTO and regional trade agreements including their dispute settlement provisions?
• Whose rights are protected? What would it mean to give individuals direct access to international adjudication in trade matters? Is that advisable?

Objectives:

• know the main features of procedural law in the WTO and contrast them with other institutions;
• identify the main demands of a system with compulsory jurisdiction;
• evaluate main strengths and weaknesses.

Read:

• Arts XXII and XXIII GATT;
• Dispute Settlement Understanding (DSU) [Excerpt];

Additional references, not required:

• Meredith Kolsky Lewis ‘Plurilateral Trade Negotiations: Supplanting or Supplementing the Multilateral Trading System?’, 17 (17) ASIL Insights, 12 July 2013 <http://www.asil.org/insights130712.cfm>;
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VIII. Investor-State Arbitration

Investor-state arbitration is one of the most vivid fields of international adjudication. Much is in flux. What is the trajectory of this field? What are its main challenges, what is its future?

Objectives:
• identify the main and unique features of investor-state arbitration in comparison with other institutions;
• assess the advantages and disadvantages of the investment arbitration ‘system’.

Read:
• ICSID-Convention, focus on Articles 48-54.

Additional references, not required:
• * M Sornarajah, The International Law on Foreign Investment (Cambridge 2010), 306-323;
• Salini v. Morocco, Decision on Jurisdiction, 16 July 2001, (ICSID Case No. ARB/00/4);
• Abadat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 [skim quickly through section II.A].
• * UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS) (2013).
• SW Schill, The Multilateralization of International Investment Law (Cambridge 2009).
• F Orrego Vicuna, *Reports of [Maffezini’s] demise have been greatly exaggerated*, 3 Journal of International Dispute Settlement 299–327 (2012).


On the question of MFN clauses and more favourable dispute settlement procedures, contrast

• *Emilio Agustín Maffezini and The Kingdom of Spain, ICSID Case No ARB/97/7, Decision of the Tribunal on the objections of jurisdiction, 25 January 2000.*

• *Plama Consortium Limited and Republic of Bulgaria, ICSID Case No ARB/03/04, Decision on Jurisdiction, 8 February 2005.*
IX. International Criminal Law

The law and politics of adjudication in international criminal law is driven by distinct set of concerns and interests. This field is, after all, primarily concerned with the relationship between states and individuals when it comes to matters deemed to be of concern to ‘humankind as a whole’. What are the factors that influence procedural law and judicial politics?

Questions in this session will include: How do distinct features influence dominant interpretative methods? What is the basis of legitimacy?

Objectives:
• identify the main and unique features of adjudication in international criminal law (above all of the International Criminal Court);
• analyse and contrast interpretative techniques in this field of adjudication.

Watch:
• Judge Theodor Meron, President of the International Tribunal for the former Yugoslavia, recently appeared on BBC’s HARDtalk, http://www.youtube.com/watch?v=2BwOBsMuPy8 (25min).

Additional references, not required:
• ICTY, Prosecutor v. Kupreškić et al., Case No. IT - 95 - 16 - T, Trial Chamber, Judgment of 14 January 2000, para 510-542 (pp 199-216);
• * F Mégret, Beyond “Fairness”: Understanding the Determinants of International


• M Swart Is There a Text in This Court? The Purposive Method of Interpretation and the ad hoc Tribunals, 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 767 (2010).
X. Comparison and Discussion

The closing session will focus on comparison and discussion. Possibly I will supply a tentative list of questions to structure our exchange.

Read:

Additional references, not required:


Short Written Exam

- **Short written assignment** (10%): Answer the following 7 brief questions at the end of this syllabus. You do not need to write more than ca. 800-1000 words in total. I will grade this on a pass/fail basis only. Send this to me by email before the first session with the subject line ‘written assignment TU Dresden’.

- This is really to get you reading and thinking beforehand. Rest assured: Most of these questions do not have right answers.

1. On the basis of your reading of the Articles on State Responsibility, what can a ‘other than inured’ state (state C, see Art. 48) do if another state (state A) breaches an obligation that is owed to the international community as a whole (see Art. 42)?

2. What are the modes for establishing the jurisdiction of the International Court of Justice (ICJ)? Which mode served as a basis for jurisdiction in the Nicaragua-case?

3. In your assessment, what decided the Judgment on Preliminary Objections (Georgia v Russian Federation, 1 April 2011)? Why was it decided as it was? When you read the judgment, where are the pivotal decisions (about interpretative method and about what matters, for instance)? Could you point to some paragraphs that are really decisive, in your opinion? Again in other words: what is the decisive moment of the judgment, in your view? Why?

4. When you read the excerpt from the United Nations Convention on the Law of the Sea (UNCLOS), try to connect to what you already know (in particular about the ICJ). Try to compare when reading. When you have questions or the drafting is unclear to you – write that down (not here). Now: On the basis of the excerpt from UNCLOS, are state parties free to choose the means of dispute settlement? Is there compulsory dispute settlement, i.e. is it possible to not accept any means of dispute settlement? Please refer to the relevant Articles of UNCLOS.

5. In your opinion, what are the main interests that members of the World Trade Organization (WTO) have in the Dispute Settlement Understanding (DSU) (what do they expected from it)? How does the DSU respond to those interests and expectations?

6. With reference to the ICSID Convention, how can ICSID Awards be enforced and can they be reviewed (by whom)?

7. [Not related to any specific required reading] Why do you think that state parties set up international courts and tribunals? What are their main functions, in your view?