SSM

**Global Administrative Law:**
**Resolving Disputes Beyond the State**

Spring 2025

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*Days*: March 17, 2025, 11:00-13:00
March 24, 2025, 11:00-13:00
March 31, 2005, 11:00-13:00
April 7, 2025, 11:00-13:00
April 28, 2025, 11:00-13:00
May 5, 2025, 11:00-13:00
May 12, 2025, 11:00-13:00
May 19, 2025, 11:00-13:00
+ one meeting to discuss response papers, in June* (TBD)

## I. Introduction

This course examines the institutions and processes of globalization, from a public law perspective. The focus is on how disputes are solved beyond the State:

- within administrative procedures, for example within UNESCO;
- within arbitral proceedings, such as those of ICSID;
- within judicial proceedings, such as those of the European Court of Human Rights and the International Court of Justice.

The course employs a variety of legal sources, including treaties, quasi-legislative rules, and general principles of law. It also includes both legal academic writing and social science literature that illuminate the disputes that arise beyond the State. Methodologically, the course intends to provide all participants with opportunities to apply their critical skills to the analysis of various issues concerning globalization. Each session will thus be based on various texts and materials previously circulated. There will be also some indications for further reading. Finally, after the six sessions

(between March and May) illustrated here, there will a session for the discussion of the papers elaborated by participants, in May or June.

## II. Course assessment

Classroom participation is an important part of the assessment, though most of the assessment (70%) is based on the papers that each participant will elaborate on a topic chosen together with the teacher. There is a set of guidelines for this purpose.

## III. General resources

General resources on public law and globalization include:

- J.B. Auby, *Globalization, Law and the State* (Hart, 2019, 2nd edn)
- S. Cassese, *The Global Polity. Global Dimensions of Democracy and the Rule of Law* (The Global Polity, 2012), accessible at http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf
- P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (OUP, 2015)
- G. della Cananea, *Due Process of Law Beyond the State* (OUP, 2016)
- G. della Cananea, *Understanding Global Administrative Law* (Brill, 2025, forthcoming)
- R.B. Stewart, R. Kingsbury and N. Krisch, *The Emergence of Global Administrative Law*, 68 *L*aw and *C*ontemporary *P*roblems 15 (2005)
- A. Stone Sweet & C. Ryan, *A Cosmopolitan Legal Order. Kant, Constitutional* Justice*, and the European Convention on Human Rights* (OUP, 2018)

## IV. Structure of the course

The course is structured as follows:

1. Disputes beyond the State: an Introduction
2. Conflicting interests and administrative procedures: the World Heritage List
3. The World Trade Organization: shrimps, turtles, and administrative procedures
4. Foreign investments and ICSID arbitration
5. Transnational disputes before the European Court of Justice: anti-terrorism measures without due process of law?
6. Transnational disputes before the European Court of Human Rights: a Kantian justice?
7. Looking ahead: climate change litigation

## 1. Disputes beyond the State: an introduction

International dispute resolution tends to be associated with judicial proceedings affecting the states, in particular before international courts and tribunals, that is, international judicialization. For our purposes here it is helpful to put things in perspective, historically, and to make a distinction between different types of conflict resolution processes, including the following: i) decision-making procedures within regional or global regimes, ii) interstate dispute resolution, within which only states have the status of parties, iii) transnational dispute resolution, where individuals and nongovernmental entities have access to courts and tribunals. Overall, these types of disputes enhance the prospects for widening of international legalization. This is not without problems, though, as will be seen.

Readings:

R.O. Keohane, A. Moravcsik and A.M. Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, in International Organization 54 (2000)

## 2. Conflicting interests and administrative procedures: the World Heritage List

If we focus more broadly on disputes concerning conflicting interests, as distinct from judicial proceedings (they are the *genus* and the *species*, respectively), it soon becomes evident that there is a number of bodies that are not courts, but instead panels, commissions and boards charged with administrative functions, including decision-making, oversight and control. It can be helpful to focus on one of these functions, which concerns the de-listing of cultural or natural sites previously included in the World Heritage List.

Materials:
- Unesco's operational guidelines
- Unesco's decision on the Dresden Elbe Valley (2009)

Reading:
S. Battini, *The procedural side of legal globalization: the case of the World Heritage Convention*, I-Con (2011)

## 3. The World Trade Organization: shrimps, turtles, and administrative procedures

The establishment of the WTO marked another important step towards international legalization. By creating institutions and processes for resolving disputes between the contracting parties, including the panels and the Appellate Body, the founders of the WTO have deviated from previous diplomatic processes. These institutions and processes have been regarded by many as being accessible only to the contracting parties, that is, the states and other entities such as the European Union. However, some NGOs filed *amici curiae* briefs. This raised debate in institutional and academic circles. The decision of the Appellate Body in the *Turtle/Shrimp* is both interesting and important for more than one reason: i) the conflict between trade and environmental protection, ii) access of NGOs, iii) procedural issues concerning the conduct of state bodies. Moreover, this decision shows the impact of global law on national legal systems.

Materials:

- GATT 1994, Article XX
- WTO, Appellate Body, *Import prohibition of certain shrimp and shrimp products* (AB-1998-4) (excerpts)
- European Parliament, *World Trade Organization Appellate Body crisis and the multi-party interim appeal arbitration arrangement* (2024)

Readings:

- S. Cassese, *Global Standards for National Administrative Procedure*, Law & Cont. Probl. 2005
- B.S. Chimni, *WTO and Environment: Legitimisation of Unilateral Trade Sanctions*, in Economics and Political Weekly (2002)

## 4. Foreign investments and ICSID arbitration

Unlike interstate dispute resolution, within which states have the status of parties, there is a form of transnational dispute resolution, arbitration, which is accessible to a particular class of individuals, foreign investors. The International Centre for Settlement of Investment Disputes (ICSID) provides a global forum to conciliate and arbitrate these disputes. It was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), a treaty that entered force in 1966, and which today has been signed and ratified by 156 States. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, maintaining a balance between the interests of investors and host States. There has been no lack of criticism, however, as far as such balance is concerned and some countries have left that arbitral regime.

Materials:

- ICJ (Arbitral Chamber), the ELSI case (*US v Italy*, 1989)
- Germany - India BIT (1994)
- *Deutsche Telecom v. India*, interim award (2017)

Readings:

A. Stone Sweet *et al., Arbitral Lawmaking and State Power: An Empirical Analysis of Investment Arbitration*, Journal of International Dispute Settlement, 2017

## 5. Transnational disputes before the European Court of Justice: anti-terrorism measures without due process of law?

There are several connections between international and supranational authorities, both institutional and functional. But there are also some important differences, concerning their values. The latter have become evident, for example, in the context of the 'fight against terrorism'. In this respect, there is a complex interplay between collective and individual interests, including global security and the protection of property and reputation, as well as a different interpretation of the rule of law. The *Kadi* saga, which involved national, EU and UN law, is a good example of this.

Materials:
- United Nations Security Council Resolution 1373 (2001)
- Advocate-general Maduro, Opinion issued in case C-402/05, *Kadi*
- European Court of Justice, Judgment in case C-402/05, *Kadi*

Readings:
- G. della Cananea, *Global Security and Procedural Due Process of Law between the United Nations and the European Union*, 15 *Columbia Journal of European Law* 511 (2009)
- G. de Burça, *The European Court of Justice and the International Legal Order after Kadi*, 51 *Harvard Journal of International Law* 1 (2010)

### 6. Transnational disputes before the European Court of Human Rights: a Kantian justice?

No regional judicial body organization has attracted as much scholarly attention as the European Court of Human Rights. Its mission is to impose the respect of certain values and rights, enshrined into the European Convention of Human Rights. It has an original and well-functioning judicial system for the protection of individual rights and liberties, with effects that transcend the regional dimension. For some, this realizes the Kantian conception of justice. For a better understanding of this transnational mechanism, it can be helpful to consider both the Convention and some significant rulings, such as that issued in the *Jabari* case.

Materials:
- European Convention on Human Rights (1950)
- European Court of Human Rights, *Jabari v. Turkey* (2000)

Readings:
- I. Kant, *Perpetual Peace: A Philosophical Sketch* (1795, reprinted Project Guthenberg, 2016)
- A. Stone Sweet and C. Ryan, *A Cosmopolitan Legal Order* (CUP, 2018), chapter 3.

### 7. Ensuring compliance: the Aarhus Convention

As the focus of this course is not on enforcement, but on how disputes can be either prevented or resolved, it is helpful to consider a way to ensure compliance that differs from the use of judicial proceedings, sanctions and the like. This way consists, rather, in the use of negotiations, with a distinctive trait Such distinctive trait is that negotiations are inscribed in an institutional framework that favors them. A particular global regime will be examined. This global regime has been established by the Aarhus Convention (1998). Such regime is both important and interesting for two reasons. First, it applies not only to the EU and its Member States, but also to some neighbour countries. Second, since its main goal it to improve the public's right to know about environmental policy, as well as to be involved in decision-making processes.

Materials:
- Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998)
- Aarhus compliance mechanism: Committee's decision on Turkmenistan

Readings: M. Macchia, *Public Administration and International law: should or shall? The review of compliance in the Aarhus Convention*, in Eur. Rev. Public Law, 2008.

### 8. Looking ahead: climate change litigation

This session addresses a currently controversial issue; that is, climate change litigation. Unlike the more general – if not generic – term 'environmental justice', climate change litigation concerns on the consequences that follow from climate change. The focus will be on the action and inaction of public bodies in light of the obligations stemming from international treaties, including the '*Urgenda*' case before Dutch courts and the recent ruling of the European Court of Human Rights concerning Switzerland.

Materials:

- Dutch Supreme Court, *Urgenda v. The Netherlands* (2020)
- European Court of Human Rights, Grand Chamber, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* (2024)

Readings:

- J. Peel, *Issues in Climate Change Litigation*, in Carbon & Climate Law Review, 2011