

# LAW 5477 | International Dispute Resolution

## Spring 2023 Syllabus

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LAW 5477 | Course Code 84745 | 2 credits

**Class Meetings:** Tuesdays 4- 6 pm, Room 4700/4750

**Office Hours:** Mondays 2:00-4:00 pm and as scheduled

*“There never was a good war or a bad peace.”*

-Benjamin Franklin

### Introduction

In this course we will study how legal, commercial, and political disputes (so both private and public international law are implicated here) are resolved when the disputes involve nations, entities or individuals from different (national) jurisdictions.

Some of the themes of this course will be:

1. What source of law regulates the behavior of states, organizations, or individuals?
2. What institutions are available to make, interpret, or enforce the relevant law?
3. Who or what institution has jurisdiction or power over the parties or the activities in question?
4. What happens when there are multiple sources of law or various loci of law making and enforcement? (What we will call “legal or process pluralism” in this course.)
5. What other forces or incentives (e.g., economic, social, cultural, military and political, violence) affect behavior, besides laws and legal institutions? How do those other domains interact with laws and legal institutions?

As states, organizations, and individuals interact across borders the questions of what guides transnational behavior and how that behavior can be regulated or controlled are central concerns for the modern lawyer. In this course, we will study a variety of institutions and processes that have been developed to deal with a variety of “transnational,” and “international” issues, including some that will seem more “national” or domestic or “municipal” (such as in the aftermath of civil wars, genocides, or “internal” conflicts that may become international for a variety of reasons, including treaties, international customary law or just plain politics). We will look at issues that affect states (generally called “public international law”) and those that affect private parties (commercial dealings, generally called “private international law”) and a new breed of more hybrid disputes (such as when private investors have disputes with states, or when states attempt to delegate state functions to private actors such as with private contractors in war settings or when individuals try to bring actions against states for violations of international treaties, as in human rights litigation). International disputes are both civil (involving contracts, commercial relations, and various torts and injuries, as well as involving employment and family law) and criminal (human rights violations, international kidnapping, economic crime, terrorism), as well as “diplomatic,” involving state-to-state relations.

Differences in legal regimes, such as between civil law (“code”) and common law (“case law”) systems may be

seen as international dispute institutions are developing more “hybridized” forms of both procedural and substantive justice.

The potential scope of this course is large -we will treat some of the major issues and look at some major case studies to survey some of the variety of legal and quasi-legal processes that have been developed in recent decades. There will undoubtedly be further development of new processes and institutions, perhaps some of your own making, depending on the nature of new international and transnational disputes, interactions, transactions and new units of legal formation (such as regional, multi-national, and international alliances in a variety of new domains, such as environmental, anti-terrorism, human rights, and economic cooperation networks). Wherever there is international collaboration, as well as international conflict, there will also be international dispute activity.

There are some key issues and themes that you should consider as we approach a variety of different kinds of disputes, conflicts, processes and institutions in this course:

1. Is the transnational issue a *dispute* or conflict, or a *transaction* or joint venture?
2. Is the focus on making something new for *the future* or adjudicating or healing something from the past?
3. Is the matter one of *private law* (e.g. commercial relations across borders), *public law* (state or diplomatic relations) or *mixed law* (private investor-state)?
4. Who are the *parties* or actors in the legal issue? States, political leaders, private organizations, private individuals, non-governmental or quasi-governmental organizations, social or other groups, formal international institutions?
5. Have the parties *agreed in advance* how they will deal with disputes or conflicts? By contract? By treaty? By customary law? By membership in some organization or entity (e.g. a regional economic network, like the EU, Mercosur or NAFTA)? Or, has the dispute settlement mechanism been developed *after* the legal dispute has ripened? (e.g., the Nuremberg trials)
6. What kind of *process* is being used -voluntary negotiation, third party mediation or conciliation, third party judgment, multi-party joint action, final or contingent action?
7. Who has *jurisdiction* or *power* over the dispute? What happens when more than one body or unit of government has jurisdiction? Are there rules or orders for *conflicts of processes and law* or process pluralism?
8. Is the dispute settlement process a *formal* one (such as court adjudication, e.g., the International Court of Justice) or a *less formal* one (such as administered international commercial arbitration) or an *informal* one (mediation, or “good offices”)?
9. Does the dispute settlement process have any formal *enforcement* mechanism (courts, trade sanctions, UN action, treaties) or is *compliance* voluntary (or politically or economically enforced)? What happens where there is no compliance?
10. Should “*similar*” disputes be treated “*similarly*” (e.g., should all war crimes and genocides be prosecuted in court-like tribunals, like the International Criminal Tribunal for the Former Yugoslavia) or is it wise to use a *variety of dispute resolution processes*, depending on the conflict or culture involved (e.g., the International Criminal Tribunal for Rwanda, along with Rwandan *gacaca* and local courts)?
11. What are the *purposes* of “dispute settlement”? Adjudicating rights? Easing transition to new governance? Punishment? Facilitating future relations? Making efficient economic relations? Implementing a new “rule of law” regime?
12. How do “transnational” or “international” dispute processes differ from domestic or “local” state based or informal processes?

In this course we will be focusing on several different levels of analysis at once, including important jurisprudential and theoretical issues of governance, the relationship of peace to justice and vice versa, as well

as more practical issues like the rules and laws that govern conflict resolution institutions, and how effective conflict resolution processes are in resolving disputes. You should always be asking yourself, “What might be the most effective dispute mechanism for a particular legal problem or issue?”

## Course Requirements

We will meet Tuesdays 4-6pm in seminar style. 20% of your grade will depend on participation in mandatory class simulations and discussion and 80% of your grade will be based on a final paper, as we will discuss in class. Each of you will be assigned (after you have an opportunity to choose) one topic/class in which you will be an “expert” and responsible for presentation of the material with me. The paper should be 10-15 pages with topic approval from the instructor. *You may obtain upper-level writing credit for this course by writing a longer paper (20-25 pages, 7000 words) with a draft submitted for comment and feedback and then a final paper submitted by the last day of exams.*

Readings will be placed on CANVAS, many of which are excerpts from the draft text I am working on: C. Menkel-Meadow and A. Kupfer Schneider, ***International Conflict Resolution*** (Carolina Press, forthcoming) and C. Menkel-Meadow, ***Very Short Introduction to Negotiation*** (Oxford U. Press 2022, available at bookstore and Amazon). For some background reading, you could consult ***International Dispute Settlement, 7th ed.*** (2022), by J.G. Merrills and Eric de Brabandere (Cambridge University Press, available for purchase or rental on Amazon). There will be additional assignments of case studies, articles, rules and cases, commentaries, and critical materials, which will be available on the CANVAS course page. I am writing a new text in this field and may ask you to read and give comments on some of the material. Some of the classes will consist of simulated exercises (e.g. a diplomatic negotiation exercise and an arbitration exercise) which will require you to perform a role in an international dispute process or negotiation.

The basic schedule is produced below, but there may be alterations to the calendar depending on how we proceed and the availability of some other teaching modalities (film and video).

It is helpful to have some basic understanding of international law for this course, so for those of you who have not formally studied international law (anyone who was not a IL at UCI), you might want to do some supplemental reading in one of the leading texts or outlines of basic international law. The processes we are studying here are both formal, legal, and adjudicative processes, and less formal, non-mandatory, and more conciliatory processes.

## Learning Outcomes

In this course you should be able to:

1. Identify what kinds of dispute resolution mechanisms are available for a particular multi-jurisdictional problem -both formal and informal;
2. Identify what laws might be applicable to resolving the dispute;
3. Develop skills in diplomatic negotiations;
4. Develop skills in mediation;
5. Develop skills in argumentation and writing appropriate for more formal hearings, e.g. international arbitration or international tribunals;
6. Learn how to design and configure dispute processes which are appropriate for particular kinds of problem;
7. Understand the legal complexity of legal pluralism -multiple systems of law operating at the same time.
8. Develop analytic and reasoning skills in legal materials and
9. Complete a research paper demonstrating knowledge of the variety of dispute processes available for

multi-national legal and political disputes.

## Course Schedule (subject to change)

<i>Date</i>	<i>Topic</i>	<i>Text Reading</i>	<i>Other Reading</i>	<i>Case Study/Simulation</i>
<b>Jan 10</b> <b>I. Introduction</b>	Introduction: What is IDR? Public vs. private; formal vs. informal	Ch. 1 Menkel-Meadow & Schneider; CANVAS		Class Exercises
<b>Jan 17</b> <b>II. Diplomatic Processes</b>	Negotiation: Theory and Practice	Ch. 2; Menkel-Meadow and Schneider; Menkel-Meadow on Kissinger (excerpt); Menkel-Meadow <i>VSI Negotiation</i>		Class Exercises
<b>Jan. 24</b>	Mediation and Good Offices  Inquiry and Conciliation	Menkel-Meadow, Uses of Mediation (on CANVAS)	Curran, et. al, Neg. J. "Two Paths to Peace"; European Directive on Mediation, 2008; Tesoro Petroleum v. Trinidad & Tobago, 1982	Dayton Accords, N. Ireland, Mid-east
<b>Jan. 31- Feb. 7</b>	Diplomatic Negotiation		<i>Distributed Problem Set</i>	COBIA simulation in class ( <b>Required</b> )
<b>Feb. 14</b> <b>III. Legal</b>	International Arbitration I- Public Int 'l Law; Hybrids, ICSID	Distributed Materials	<i>Rules</i> ; Paulsson, Arbitration in Three Dimensions	Exercise - Terms of Reference Conf.
<b>Feb. 21</b>	International Arbitration II (cont.)- Commercial		Dezalay and Garth, Dealing in Virtue, ch. 3 pp. 31- 62; Menkel-Meadow , <i>Ethics in International Arbitration</i>	
<b>Feb. 28</b>	Trade Disputes- WTO/GATT/NAFTA	New Yorker: The Loewen case; distributed material	<i>Loewen Group and USA-case materials</i>	<i>WTO Dispute Settlement; NAFTA Possible Guest: Prof Shaffer</i>
<b>March 7</b>	<b>Spring Break</b>	<b>HAVE PAPER TOPIC READY FOR DISCUSSION AFTER BREAK</b>		
<b>March 14</b>	Adjudication- International Courts- Civil, and Criminal	Menkel-Meadow and Schneider; Goldstone, distributed on CANVAS- International Tribunals	<i>Rome Statute of the International Criminal Court</i>	ICJ; Nuremberg Trials; ICTFY, ICTR

<b>March 21</b> <b>IV. Political</b>	Hybrids- International , National and Local Processes; Regional Bodies	Menkel-Meadow, Hybrids in Dispute Resolution, Comparative Research Handbook and Max Planck International Procedural Law	Stromseth et. al., Ch. 7, <i>Accounting for Atrocities</i>	Rwanda, E. Timor, Liberia, Cambodia etc.
<b>March 28</b>	Truth and Reconciliation Commissions and Restorative and Transitional Justice		Hayner, <i>Unspeakable Truths</i> pp. 24-49; Menkel-Meadow; <i>Restorative Justice</i> ; <i>Transitional Justice in Argentina &amp; Chile</i>	South Africa, Chile, Argentina, others
<b>April 4</b> <b>Human Rights</b>	Courts and other processes; amiable settlements	ECt. HR I-A Ct. HR	<i>Begum; Velasquez and other materials</i> ; Oquendo, distributed	“veiling” and other issues
<b>April 11- 18</b> <b>The Future of IDR</b>	Paper Presentations	Last class	Menkel-Meadow, <i>Ethics of Dispute System Design</i>	
<b>Final Papers Due May 5, 2023</b>				