

## TRANSNATIONAL PRIVATE-PUBLIC ARBITRATION AS GLOBAL REGULATORY GOVERNANCE: EXPLORING THE *LEX MERCATORIA PUBLICA*

Amsterdam Center of International Law (ACIL) & University of Amsterdam, Faculty of Law

### Call for Papers

#### WORKSHOP: ENGAGING WITH DOMESTIC LAW IN INTERNATIONAL ADJUDICATION: FACT-FINDING OR TRANSNATIONAL LAW-MAKING?

27 February – 1 March 2019

Keynote address: Professor H el ene Ruiz Fabri

#### 1. Theme of the Workshop

International law today is marked by ‘judicialization’ as a result of the unprecedented proliferation of international courts and tribunals. Great emphasis in this context has been put on how international courts and tribunals engage with – interpret, apply and further develop – international law, both general and specific, such as human rights, foreign investment or international trade law. Scholars have analyzed this engagement from various theoretical and methodological angles. One conclusion they share is that international courts and tribunals do more than passively find and apply international law; they actively make international law.

By contrast, what is often neglected, is that international courts and tribunals regularly engage with domestic law. This can concern incidental questions, such as the determination of nationality, the validity of domestic property rights, or the legality under domestic law of government conduct. In some cases, domestic law even constitutes (or forms part of) the applicable law to an international dispute. Under Article 42(1) of the ICSID Convention, for example, the law of the respondent state is the default option. However, even when the applicable law is exclusively international law, international courts and tribunals regularly have to engage with domestic law to assess whether States have breached their international obligations. This is the case in all international dispute settlement fora. The assessment of (the exhaustion or non-exhaustion of) domestic legal remedies by the International Court of Justice (ICJ), the review of domestic trade regulations by the WTO Dispute Settlement System, the scrutiny of domestic legal proceedings by the European Court of Human Rights (ECtHR) and the examination of domestic fisheries legislation (and related enforcement actions) by the International Tribunal for the Law of the Sea (ITLOS) are but a few examples.

A pivotal, yet underexplored question is *how* international courts and tribunals engage with domestic law and what effect that engagement has on the domestic law in question. Do international courts and tribunals only passively ‘find’ the law by treating it itself as a fact and apply it to the facts of the case at hand? Or do international courts and tribunals creatively work with, perhaps even further develop it? Moreover, when engaging with domestic law, do international courts and tribunals try to mimic the engagement with domestic law of the courts of the state in question? Or do they approach the interpretation, application and further development of the law independently, perhaps even by looking beyond the legal system, jurisprudence and scholarship of the State in question and examining how similar issues are dealt with in other domestic legal systems? Do they, in other words, adopt a *transnational* and *comparative* approach in relation to domestic legal issues?

Beyond the empirical question concerning the *how*, the *why* is of interest. If international courts and tribunals take a transnational approach, what are the reasons for it? Does it reflect the fact that – more often than not – international adjudicators often lack the legal expertise and qualification in the domestic law they apply? Or does this have to do more with the fact that international courts have consent-based rather than compulsory jurisdiction, and form part of a different (non-domestic) public international legal order?

Finally, normative questions as to what the appropriate approach to dealing with domestic law is impose themselves. Is it appropriate for international courts and tribunals to take a transnational approach, perhaps even further develop the law in question by setting precedent? Or is there a duty to treat domestic law as a fact and to exercise deference towards the views on the interpretation and application of international law of domestic actors? Similarly, what is the role of experts on domestic law for the engagement of international courts and tribunals with domestic law?

Seeking to further explore and shed light on these empirical, analytical and normative questions, the Workshop will focus on the approach(es) adopted by international and regional courts and tribunals in dealing with issues of domestic law, or certain aspects of it. We therefore invite proposals for papers that can either deal with the approaches of specific international courts and tribunals to domestic law, such as the ICJ, the WTO Dispute Settlement System, ITLOS, the ECtHR, the Court of Justice of the European Union (CJEU), international criminal courts or tribunals, investment tribunals, or commercial arbitral tribunals, or that take approaches that deal with the engagement with domestic law, or certain aspects of it, from a cross-cutting perspective.

## **2. Submission of proposals and timeline**

Scholars, practitioners, international judges or arbitrators, and state- and international organization officials are invited to submit proposals addressing issues falling within the scope of the Workshop’s theme. Proposals including abstracts of no more than 500 words and the speaker’s contact details and CV (including affiliation, relevant experience and publications) or inquiries regarding the workshop should be sent to [lex-merc-pub-fdr@uva.nl](mailto:lex-merc-pub-fdr@uva.nl).

The **deadline for the submission** of paper proposals is **15 September 2018**.

Successful applicants will be informed by 30 September 2018 and must submit papers (between 5,000 and 10,000 words, including footnotes) by 1 February 2019. The Workshop itself will take place during the last week of February 2019.

Limited funding is available to support travel expenses on a needs basis. Selected papers will be included in an edited volume to be published by a leading academic publisher in the course of 2019. All submissions and finalised papers must be written in English.