



ACADÉMIE DE DROIT INTERNATIONAL

FONDÉE EN 1923 AVEC LE CONCOURS DE LA
DOTATION CARNEGIE POUR LA PAIX INTERNATIONALE

RECUEIL DES COURS

COLLECTED COURSES OF THE HAGUE
ACADEMY OF INTERNATIONAL LAW

2023

Tome 434 de la collection

BRILL | NIJHOFF

Leiden/Boston

CORTE SUPREMA BIBLIOTECA	
SIG. TOPOGRAFICA	INVENTARIO

GENERAL TABLE OF CONTENTS
TABLE GÉNÉRALE DES MATIÈRES

Applying Municipal Law in International Disputes, by Paul B. STEPHAN, Professor at the University of Virginia	9-214
La contribution des juridictions internationales au développement du droit de la mer, par Rafael CASADO RAIGÓN, professeur à l'Univer- sité de Cordoue	215-511



TABLE OF CONTENTS

Chapter I. Introduction – Municipal law in international disputes	23
A. International law as a self-contained legal system.	24
B. International legal disputes and their adjudication.	27
1. Informal international dispute resolution.	28
2. Enforcement mechanisms.	30
3. Reputational effects.	30
4. Janus effects and legitimacy.	32
C. The limits of hermeticism	34
1. The hermetic conception of international law	34
2. Historic context	37
3. Changes in practice	39
4. Conceptual challenges	43
a) Transnational law	43
b) Kelsen and legal orders.	46
D. Municipal law in international law: pooling, referral and nesting . .	50
1. Pooled law.	50
2. Referral from international law.	53
3. Nested municipal law.	54
a) Nested law as interpenetration of legal systems	54
b) Pooling, referral and nesting versus borrowing	55
E. Summary: the interpenetration of international and municipal law . .	58
Chapter II. Municipal law and general international law	59
A. Pooling	59
1. Pooling and the <i>domaine réservé</i>	60
a) Substantive reservations	62
b) Structural reservations	64
2. Transposition of municipal law into international law	66
3. Pooling and hermeticism	68
B. Referral in state consent	68
1. VCLT Article 46	69
2. The scope of referral	72
C. Nesting as implicit referral	75
1. Example 1: <i>OAO Neftyanaya Kompaniya Yukos v. Russia</i>	75
2. Example 2: <i>Loewen Group v. United States</i>	76
3. Nesting in the international legal context.	78
D. Deference to municipal lawmakers	79
1. Complete deference	81
2. Institutional deference	83
3. Qualified deference	85
4. No deference	89
E. Summary	90
Chapter III. Municipal law in practice: jurisdiction of international dispute settlement bodies	91
A. Jurisdiction and third-party dispute settlement	91

B. International dispute settlement in national courts: pooling	94
1. Municipal law of adjudicative jurisdiction as a constraint on international law	94
2. Sovereign immunity and municipal law	96
3. Prescriptive and enforcement jurisdiction	100
4. Rights of internationally protected persons	102
C. Municipal law and international jurisdiction: referral	105
D. Municipal law and international jurisdiction: nesting	110
E. Summary	112
Chapter IV. Municipal law in practice: rights and duties under international law	113
A. Pooling and the rights of persons	114
B. Referral	119
1. Vital state interests and self-judging under treaty law	120
2. WTO Article XXI	121
3. Investment law	127
4. Conformity clauses in human rights treaties	129
C. Nesting	133
1. Nondiscrimination as a general obligation under international law	133
2. Discrimination under WTO law	138
3. Municipal law and international human rights	144
4. Protection for foreign investors	147
a) Expropriation	149
b) Fair and equitable treatment	152
c) Full security and protection	156
d) Umbrella clauses	159
5. Municipal law in state responsibility	162
6. Municipal law in state secession	164
a) In general	164
b) Kosovo	168
c) Crimea, Donetsk, Luhansk/Lugansk, Kherson and Zaporizhzhia/Zaporozhe	172
d) Dispute resolution through argumentation	174
e) The promise of informality in international dispute resolution	177
D. Summary	178
Chapter V. The future of municipal law in international disputes	179
A. The challenge of relevance and the value of braiding	180
B. Pluralism and the rule of law: threat to legitimacy?	184
1. The problem of legitimacy costs	185
2. Self-judging under the WTO agreements	186
a) The position of DSB panels	187
b) Alternative paths to international cooperation	189
3. Self-judging in the UN Security Council	190
a) The permanent-member veto	190
b) The permanent-member veto as braiding	191
c) The impact of the Russian-Ukrainian war	192
d) Potential role of the ICJ	196
4. Summary	197
C. Veto points as threats to effectiveness	197

Applying Municipal Law in International Disputes

D. Static versus dynamic international law	200
1. Utopia	200
2. Decline	202
3. Contestation	204
E. Conclusion	205
Bibliography.	207

