

**Call for papers**  
**Standard of Review in International Courts and Tribunals**  
**Rethinking the Fragmentation and Constitutionalization of International Law**  
**26-27 October 2012**

**Sponsored by:**

**COST Action IS1003, International Law Between Constitutionalization and  
Fragmentation**

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and

**University of Seville  
Faculty of Law**

The fragmentation of international law is conventionally studied in terms of compartmentalization of different sets of norms created within specialized legal regimes. However, this phenomenon may be also approached from a different perspective, which concentrates not so much on substantive rules but on methodologies used by specific international courts, tribunals or other supervisory organs. One of the recurrent questions these bodies are confronted with regards the assessment of measures taken at the national level. These measures often involve highly political or scientific questions that are not always easily translated into the language of international law. By developing detailed testing methods for assessment of states' conduct, supervisory organs can weaken (if their methods converge) or strengthen (if they diverge) the fragmentation effects.

The crucial role in this context is played by the applicable standard of review. In practice, such a standard is rarely determined by the relevant legal provisions (e.g. a treaty constituting a particular court), and it remains a task of a specific court or tribunal to develop an appropriate methodology. The concept as such is understood as 'the nature and intensity of review by a [international] court or tribunal of decisions [or other actions] taken by [national] governmental authority' (Bohanes & Lockhart 2009). The applicable standard of review may concern either factual determinations (e.g. deciding whether a national measure is supported by sufficient scientific evidence) or political and legal determinations made at the national level (e.g. whether a measure is necessary to attain specific objective). Consequently, standard of review determines the extent of discretionary powers enjoyed by national authorities in making certain determinations. In theory, standard of review may range from restrictive (or *de novo*) review to full deference with many intermediate variations. In some international legal contexts, it may be also referred to as margin of appreciation that is defined 'as the breadth of deference that the court is willing to grant to the decisions of national legislative, executive, and judicial decisionmakers' (Burke-White & von Staden 2010).

The deference that is shown by some international tribunals is justified on different grounds. In general, it flows from the idea that national governments are better placed and have greater expertise (epistemic superiority) to make policy and factual determinations as compared to international tribunals. As far as the legal determinations are concerned, this approach also reflects the recognition that normative requirements in international treaty can be met by a range of measures that are still within the legal parameters of international obligations (normative flexibility).

### **Main questions**

This workshop intends to analyze different approaches taken by international courts and

tribunals when confronted with factual, political and legal determinations made at the national level. The workshop will concentrate on two interrelated aspects: (i) standard of review applied by international courts to municipal measures (actions) that are based on prior complex factual determinations and (ii) standard of review applied by international courts to political decisions that involve trade-offs between different competing values (and corresponding legal determinations).

The specific questions that we would like to address include:

- To what extent different international tribunals operating in different functional regimes apply the same/similar standard of review when confronted with complex factual issues, political choices and normative flexibilities?
- If there are differences, what may explain them? Is specific institutional setting relevant? Political context? Values that are protected by particular functional system? Or maybe subject matter of a dispute?
- If there are similarities, can we identify some meta-norms of constitutional character? What can explain existing (if any) convergences?
- What are the consequences of differences (if any) in applicable standards of review used by various international tribunals? Do they contribute to fragmentation of international law?
- Is there uniformity or divergence between standards of review applied by international courts to factual and legal determinations?
- What is the connection between applicable standard of review and legitimacy of decisions rendered by international courts and tribunals?

An non-exhaustive list of international tribunals or other supervisory organs that are of our interest includes: WTO panels and the Appellate Body, the European Court of Human Rights, the International Court of Justice, the Tribunal for the Law of the Sea, NAFTA panels, arbitration tribunals and ad hoc panels under investment treaties, the Court of Justice of the European Union, the EFTA Court and the Inter-American Court of Human Rights.

Authors of selected papers will be invited to publish their works in an edited volume with a renowned international publisher. Invitations to contribute to the edited volume will depend on the quality of the work presented at the conference.

## Venue

The workshop is organized by Prof. Dr. Daniel García San José and it will be held at the Faculty of Law of the University of Seville.

## Applications

Applicants should send in a 250-500 words abstract no later than **15 June 2012** to:

Dr. Lukasz Gruszczynski, [lukasz.gruszczynski@gmail.com](mailto:lukasz.gruszczynski@gmail.com)

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Prof. dr. Wouter Werner, [w.werner@rechten.vu.nl](mailto:w.werner@rechten.vu.nl)

*Participants from countries participating in COST Action 1003 can apply for funding for this workshop. As a rule, COST reimburses a flat rate of €120,- per night for accommodation and travel costs for two participants per participating country. For more information on COST Action 1003, please check the website: <http://www.il-cf.eu>. If you would like to receive COST funding, please attach a short request (max 150 words) to your paper proposal.*