

## Deference and the Practice of International Law

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I am grateful to the *Law and Practice of International Courts and Tribunals* for collating this series of reviews and to the reviewers for their thoughtful contributions. It is truly gratifying as an author to have had the opportunity to read the considered reviews prepared by the contributors to this symposium, which offer both thought-provoking and varied perspectives on the two books under review. Having worked on the topic of deference for many years – first in practice, and then as a doctoral and later monograph project – I have also appreciated the opportunity to engage with Johannes Henrik Fahner’s book. Our accounts of deference differ not so much because of their focus on different dispute settlement mechanisms,<sup>1</sup> but rather because of how they organise the analysis of deference and for what purposes.

As the reviews in this symposium highlight, our books adopt different choices in relation to focus, methodology, and analysis, reflecting their different aims. *Judging at the Interface* develops a conceptual account of deference which it then uses as the basis for an empirical and inductive study of how deference manifests in international adjudication despite different doctrinal labels.<sup>2</sup> The analysis focusses upon organising approaches to deference by reference to their underlying structure,<sup>3</sup> in order to identify differences in how deference is conceptualised in different regimes and time periods.<sup>4</sup> This empirical analysis is then used to evaluate the systemic implications of deference in public international law and to develop a framework to guide the analysis of deference in practice.<sup>5</sup> In *Judicial Deference in International Adjudication*, Fahner focusses by contrast on “explicit statements on the appropriate intensity of

1 Cf. Boisson de Chazournes and Jason Rudall in this symposium.

2 See Esmé Shirlow, *Judging at the Interface. Deference to State Decision-Making Authority in International Adjudication* (2021), Chapters 1–4.

3 *Ibid.*, Chapters 4–7.

4 *Ibid.*, Chapter 8.

5 *Ibid.*, Chapters 9–10.

review” which he organises first on a regime-by-regime basis,<sup>6</sup> then by reference to the types of decisions to which deference might attach,<sup>7</sup> and later by reference to the reasons for – rather than structure of – deference. In particular, Fahner identifies two forms of deference which he terms “epistemic” and “constitutional”.<sup>8</sup> This analysis supplies the basis for a normative assessment of deference, with Fahner concluding that – outside of certain circumstances – “constitutional deference” should serve a more limited role in international adjudication.<sup>9</sup>

The reviews highlight several key differences, connections, and complexities emerging from our work. While it is impossible to respond or do justice to the full range of views canvassed, in this short response I hope to offer several brief comments to build upon and respond to the reviews. I will focus, particularly, on issues related to the structure of deference as well as its implications for international adjudication and the practice of international law.

## 1 An Inclusive Concept of Deference versus a Focussed “Core”

As both Legg and Paine note, one of the difficulties animating the research design underpinning both books is the necessity of striking a balance between being under-inclusive (such as to avoid presenting an account of deference that does not “encompass all the different ways the term is used in practice”) and over-inclusive (such as to risk conflating deference with different concepts). Cognisant of this tension, the methodology underpinning *Judging at the Interface* is, as Paine notes, deliberately more inclusive than former studies. Despite this inclusive design, however, deference is distinguished throughout the book from analogous concepts and doctrines by reference to its conceptual and structural features.

Legg is correct to note, in particular, that deference must be distinguished from various related concepts, including jurisdiction and (at least some forms

6 Johannes Hendrik Fahner, *Judicial Deference in International Adjudication. A Comparative Analysis* (2020), Chapter 2.

7 *Ibid.*, Chapter 3.

8 *Ibid.*, Chapter 4. The account of deference in *Judging at the Interface* proceeds on the basis that the reasons for deference may be broader than those highlighted in Fahner’s work (see especially Chapter 1), and that a single manifestation of deference may be justified by various rationales (rather than singly, as developed by Fahner) both conceptually (e.g. at 30–31), doctrinally (e.g. Chapter 7.3 highlights how various markers of authority might prompt different standards of review in practice) and empirically (at 208–211).

9 Fahner, *supra* note 6, Chapter 4.3.

of) justiciability.<sup>10</sup> Indeed, as I explain in Chapter 1, where an adjudicator decides that it lacks formal authority to determine a matter, it is not “deferring” but is instead merely recognising the limits of its own jurisdictional competence.<sup>11</sup> As such, and as Paine observes, “where an adjudicator adopts a narrow interpretation of an applicable legal norm, or makes a finding that a State’s measure did not breach international law, this does not necessarily indicate that the adjudicator has afforded any deference to the State”.<sup>12</sup> Deference, instead, arises where an adjudicator has formal jurisdiction to determine a matter but nonetheless decides in exercising that “formal authority” to give some weight or relevance to another actor’s authority.

Where Legg and I differ is in how we draw the conceptual boundary between deference and these related concepts. Legg, for his part, emphasises that the conceptual “core” of deference is “linked both to the court making a decision, and doing so by giving weight to relevant second-order reasons”. In *Judging at the Interface*, I seek to demonstrate that deference can arise also in other situations, including where second-order reasons influence the identification and interpretation of relevant first-order reasons for decision<sup>13</sup> or cut-off consideration of those first-order reasons entirely.<sup>14</sup> Legg disputes whether some such forms of reasoning can reflect (at least a “core” form of) deference because they do not involve an adjudicator making a decision, but rather signify an adjudicator abstaining from making a decision in recognition of a domestic actor’s authority. As I explain in Chapters 1 and 5–7, however, even in instances in which second-order reasons interact with first-order reasons other than through a “weighting” exercise as conceptualised by Legg, the adjudicator *does* make a decision. Indeed, as Harowitz explains, in instances of abstention and restraint the adjudicator “has some continuing authority to act, and does act; only its independent judgment is displaced, not its actual authority”.<sup>15</sup>

Paine, to this effect, draws out the importance of the conceptual understanding of deference developed in Chapter 1 for analysing the relationship between deference, jurisdiction, restraint, and restrictive interpretation. As Paine and Boisson de Chazournes and Rudall’s reviews, and indeed Fahner’s book, highlight, the relationship between these concepts is contested in practice.<sup>16</sup> Cognisant of such debates, *Judging at the Interface* purposefully

10 See Shirlow, *supra* note 2, at 38–41.

11 *Ibid.*

12 *Ibid.*, Chapter 1.

13 *Ibid.*, at 40–41, and Chapter 7.1.

14 *Ibid.*, especially, Chapters 5 and 6.

15 P. Harowitz, “Three Faces of Deference”, 83 *Notre Dame Law Review* (2008), 1061, 1077.

16 See, also, Shirlow, *supra* note 2, at 40–41, 155–157; cf. Fahner, *supra* note 6, at 212–215.

adopts an inclusive approach to identifying a conceptual “core” of deference. This allows the empirical study to accommodate the fact that – just as theorists differ in how they conceptualise the “core” of deference – so too do international adjudicators. This has significant implications for the utility of the analysis for practitioners, given, as Sulyok notes, the absence to date “of a common vocabulary and understanding of the fine-grained nature and the epistemic diversity of the modes and functions of deferential reasoning”.

Legg’s related point – that certain examples of deference included in *Judging at the Interface* “are best seen as peripheral to the core case of deference” – illustrates the implications of these conceptual debates and their potential impact on methodological design. Indeed, as Legg accepts, various approaches outside of the identified “core” “may peripherally or colloquially be regarded as deferential”. Excluding such approaches from the focus of a comprehensive and inductive study of deference *a priori* risks bringing in assumptions about how deference is structured in practice that should themselves be empirically tested. A more open approach to defining the concept of deference better captures its “multifaceted” function (Boisson de Chazournes and Rudall), and “the complex and dynamic exercise of deference ... in its various forms and as manifested in different linguistic formulations” (Sulyok).

As such, even if conceptually a “core” of deference could be identified in the way that Legg suggests, the utility of using this as the basis for an empirical study of deference is questionable in circumstances where international adjudicators themselves are not exclusively adopting a coherent or consistent approach to navigating these conceptual issues. Instead, a range of different techniques (beyond those reflecting the “core” conceptual structure identified by Legg) have been associated with the concept of deference in the practice of international adjudication.<sup>17</sup> Chapter 1 demonstrates that such techniques can each be conceptually linked to deference in a principled way. This broader concept of deference allows the question of whether these are “peripheral” or “core” approaches to be reframed from a conceptual question (as Legg suggests) into an empirical one (as explored in Chapter 9).

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17 See, especially, Shirlow, *supra* note 2, at 15–16 (“The different definitions of ‘deference’ in existing literature reflect that much existing scholarship has focused on specific manifestations of deference”.... “Compared to these ‘conceptions’ of deference, a ‘concept’ of deference provides a ‘meta-definition’ capable of encompassing ‘as many of the different conceptions’ of deference as possible”) (citations omitted).

## 2 Deference and Overlapping Decision-Making Authority

Several of the reviews engage with the linkage I draw in *Judging at the Interface* between deference and authority, including my claim that a question of deference arises wherever the decision-making authority of two actors overlap.<sup>18</sup> As I explore in detail in the book, in situations in which two actors may make decisions on the same issues, authority supplies a principled reason for one to defer to the decisions of the other. Deference is “principled” in such circumstances because it supports the capacity of a decision-maker to reach a correct or more appropriate answer on a given question (by deferring to a more expert or legitimate actor), or provides an opportunity to reduce inefficiencies (by avoiding a situation in which two equally expert or legitimate actors decide the same question).<sup>19</sup> Deference can also be principled because it conveys attitudes of trust, respect, or empathy that may serve broader systemic or relational goals.<sup>20</sup> As Boisson de Chazournes and Rudall note, deference in this sense “helps to ensure the coherence, efficacy, and legitimacy of the international dispute settlement system”.

Several of the reviews engage with this argument, to query how – or in what way – the authority of States and international adjudicators overlap. Fukunaga, in particular, queries whether there is – truly speaking – an overlap between the authority of international adjudicators and domestic officials. As she notes in respect of private property, “the decision-making authority of international adjudicators is different in scope and effect from that of States”. In particular, whereas States have “broad” regulatory decision-making authority to “regulate private property in a comprehensive manner”, the authority of international adjudicators “is more limited in scope” and focussed on the settlement of the disputes that come before them.

There is no doubt that the legal basis, focus, and impact of the decisions made by international adjudicators and domestic officials differ. Fukunaga is right to note – in particular – that States often make broad, comprehensive, regulatory choices,<sup>21</sup> whereas international adjudicators typically make more

18 See, especially, Shirlow, *supra* note 2, at 19, 240, 253–257. *Ibid.*, at 253 (“A need for some approach to deference will arise wherever international adjudicators are empowered to decide empirically or normatively contestable matters *in respect of which domestic decision-makers might also expect to make determinations*”) (emphasis in original). On the link between deference and authority generally see *ibid.*, Chapters 1 and 10.

19 *Ibid.*, pp. 19–33.

20 *Ibid.*, pp. 33–35.

21 It is important to note the possibility that deference can also arise in relation to non-regulatory decisions, including domestic judicial decisions. Even in such circumstances,

narrowly focussed determinations in relation to specific disputes.<sup>22</sup> The role and authority of domestic officials and international adjudicators therefore need not be, and are not likely to be, coextensive. I do not, however, draw the same implications from this fact as does Fukunaga (or, indeed, Fahner<sup>23</sup>). Rather, the identification of overlapping decision-making authority underpinning the analysis in *Judging at the Interface* depends on a more granulated enquiry into the various sub-determinations that States and international adjudicators may make in exercising these broader functions. It is at this latter level that overlaps between decision-making authority may be found in practice.<sup>24</sup> Importantly, this more granular analysis of authority and deference also produces more principled and coherent decision-making, including because it allows the specific questions of authority giving rise to deference to be appraised more concretely in practice.<sup>25</sup>

Fukunaga is therefore correct to emphasise later in her review the “significance of the overlap in *subject matter* as between international adjudication and States”. It is this overlap which the analysis of *Judging at the Interface* targets. As I explain:

One possibility is that there will be total overlap between the two exercises of decision-making authority because the international adjudicator perceives that it is tasked with determining a matter identical to that already determined by the domestic court. This might be the case, for instance, where the adjudicator is applying domestic law as the applicable law – and so must interpret what that law requires – but a domestic court has already performed that interpretation by reference to the facts now before the international adjudicator.... Such overlaps may also arise in circumstances where the domestic court has made findings of fact that are directly in issue before the international adjudicator.... Another possibility is that a domestic court decision on a matter of domestic law (for example, whether a measure is consistent with domestic law or whether

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however, Fukunaga’s point holds: the basis, scope, focus and impact of a domestic court’s authority will likely differ in important respects from the authority exercised by international adjudicators.

22 Cf. Boisson de Chazournes and Rudall in this symposium.

23 Compare, especially, Shirlow, *supra* note 2, at 67–68 and Fahner, *supra* note 6, at 196–205. See, also, Paine in this symposium.

24 See, especially, Shirlow, *supra* note 2, Chapter 10. See, further: Esmé Shirlow, “Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Frameworks for Future Analysis”, 29(3) *ICSID Review – Foreign Investment Law Journal* (2014), 595–626.

25 See, for instance, Shirlow, *supra* note 2, at 207–211 and 259–261 (on the difference between analysing deference to “the State” versus its specific constituent decision-making organs).

there is a property right under domestic law), will be relevant – but not coextensive with – a matter of international law before an adjudicator (for example, whether a measure is arbitrary, whether there has been an expropriation).... It might alternatively be the case that a domestic court is considered to have decided topics *completely different* to those before the international adjudicator ... The extent of perceived overlap will thus determine how decisive deference will be to the outcome in a given case.<sup>26</sup>

Methodologically, then, the empirical study underpinning *Judging at the Interface* deliberately does not “presuppose that international adjudicators ... make decisions on the *same question*” as domestic actors. Instead, it focusses on a set of international claims that are particularly likely to raise questions for adjudicative determination that have been (or which could be) determined also at the domestic level.<sup>27</sup> I illustrate the role of deference in resolving these various potential overlaps by reference to a considerable corpus of international adjudicative decisions, each of which illuminate the existence in practice of various matters in respect of which both domestic actors and international adjudicators have claimed some degree of overlapping decision-making authority.<sup>28</sup> The analysis throughout the book highlights that, even though the role, focus, and scope of an adjudicator’s enquiry undoubtedly differs from that of a domestic official,<sup>29</sup> each may need to decide common sub-questions (or engage with overlapping *subject matters* to use Fukunaga’s term) in exercising their authority. Wherever such overlaps arise, deference may be invoked to settle the role of the two authorities *vis-à-vis* one another.

This finding that the incidence of deference depends on the extent of the perceived overlap between the decisions that have been, or could be, made by international adjudicators and States links to my analysis in Chapter 8 of the structural relationship between the domestic and international legal orders. That chapter highlights that, while the existence of overlapping spheres of authority between international adjudicators and domestic officials opens up a potential role for deference, broader systemic assumptions underpin the resolution of how such deference is (and should be) structured in practice. As Fukunaga notes, and as developed in Chapter 10, as the range of questions determinable by international adjudicators and domestic officials becomes

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26 *Ibid.*, pp. 255–256.

27 See, especially, *ibid.*, Chapter 2.

28 See, especially, *ibid.*, pp. 93–105.

29 And noting, further, that such roles may themselves be characterised in different ways and contested in practice (see, especially, Paine in this symposium).

“increasingly entangled” it will become ever more pressing to resolve whether the interface between these spheres of decision-making authority should be analysed in monist, dualist, or pluralist terms.

Fahner and Fukunaga themselves demonstrate the potential role of such systemic assumptions when drawing implications for the analysis of deference in international adjudication from constitutional considerations and, particularly, separation of powers theories.<sup>30</sup> This is a key difference between the two books, which several of the reviews highlight. Whereas *Judging at the Interface* adopts an explanatory lens to highlight what different approaches to deference reveal about the underlying structural relationship between the domestic and international legal orders, *Judicial Deference in International Adjudication* engages theories about the nature of international dispute settlement (including as judicial review<sup>31</sup>) to derive a normative argument as to which approaches to deference should find favour in practice. These different goals produce different emphases, particularly in their use of domestic analogies to derive theories of deference fit for international adjudication.<sup>32</sup> They also produce different findings and hold different implications for the practice of international law and our understanding of the nature of international adjudication.

### 3 Deference in Practice

Providing “guidance to judicial actors facing questions of deference”, as noted by Boisson de Chazournes and Rudall, is one of the key goals of Chapter 10.

<sup>30</sup> See, especially, Fahner, *supra* note 6, at 192–205. The role of separation of powers theories for developing approaches to deference in international adjudication is a topic I develop in more detail in: Esmé Shirlow, “The Rule of Law, Standards of Review, and the Separation of Powers”, in A. Reinisch and S. Schill (eds.), *Investment Protection Standards and the Rule of Law* (forthcoming 2022).

<sup>31</sup> In this respect, see, especially: Caroline Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence* (2022) (taking issue with the phrases “standards of review” and “judicial review” for analysing international adjudication, given its primarily dispute settlement function). Compare, also: Johannes Hendrik Fahner, “From Dispute Settlement to Judicial Review: The Deference Debate in International Investment Law”, in M. Duchateau, S. Fikkers and L. Lane (eds.), *Evolution in Dispute Resolution: From Adjudication to ADR?* (2016).

<sup>32</sup> Compare, for example, the differing relevance to both accounts of deference of domestic analogies (Shirlow, *supra* note 2, at 222–229 and Fahner, *supra* note 6, at 7–13 and 149–215) and the different remedies that international adjudicators may order (Shirlow, *supra* note 2, at 67–68 and Fahner, *supra* note 6, at 196–205). See, also, Paine in this symposium.

That chapter provides a framework to guide the analysis of deference in international disputes in order to address concerns that approaches to deference in international adjudication are currently *ad hoc*, unpredictable and even contradictory. Chapter 10 develops an overarching framework embedded in empirical practice that aims to provide a basis for litigants and adjudicators to adopt more principled and structured approaches to deference in individual disputes. This specific guidance in Chapter 10 aside, and as noted in various of the reviews, both books also perform an important mapping function. They each highlight common approaches towards deference and examine which approaches have gained traction in different international adjudicative regimes. Given the ubiquitous nature of deference in international dispute settlement, *Judging at the Interface* aims in particular to draw connections between various deferential techniques hitherto analysed discretely and in doctrinal terms, to highlight through a structured approach the various options available to achieve deference in international adjudication and the systemic assumptions and reasoning lying behind them.

As Fukunaga observes, this means that *Judging at the Interface* “offers a map to navigate through the concept of deference” in concrete disputes. The framework developed in Chapter 10 – building on the book as a whole – encourages adjudicators, parties and other interested stakeholders to engage particular “levers” when assessing the extent to which deference may be relevant (and appropriate) for a given issue and, if so, the form (and structure) that deference may take. Such a framework recognises that approaches to deference will necessarily differ by time and context depending as they do on an adjudicative comparison of the relative strengths of international versus domestic claims to decision-making authority over particular subject matters.

One of the key advantages of the framework developed in Chapter 10 is that it holds the capacity to secure more transparent and justifiable decision-making in relation to matters of deference. It aims to provide litigants and adjudicators a means of navigating the “diversity and, even, confusion in the practice of deference in international adjudication”, as noted by Fukunaga. The framework moreover provides sufficient constraints to ensure that deference serves a meaningful function in international adjudication and to avoid the risk of deference “becom[ing] an unfettered means for international courts and tribunals to avoid complicated or controversial issues”, as stressed by Boisson de Chazournes and Rudall.<sup>33</sup>

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33 See, similarly, Sulyok in this symposium (deference might assist litigants to “insulate an element of their case from judicial review by presenting it as a ‘scientific assessment’”).

Another advantage of the approach to analysing deference proposed in Chapter 10 is its open-textured nature. Several of the reviews endorse, for example, particular manifestations of deference as particularly appropriate for widescale adoption in international adjudication. Boisson de Chazournes and Rudall, for example, note the potential utility of complementarity,<sup>34</sup> and Sulyok examines the role of “intermediate standards of review” for securing deference to scientific decisions.<sup>35</sup> While such approaches may indeed offer useful and appropriate methods for resolving certain overlapping authority claims, Chapter 10 explains why it is not necessarily possible (nor desirable) to tether deference to such singular manifestations in advance for all disputes. Instead, in light of the range of issues to which deference might attach, a range of approaches are needed to ensure that deference remains capable of mediating conflicting claims to authority in relation to different subject-matters, in different regimes, and between different decision-makers.

With this in mind, *Judging at the Interface* aims to bring into the spotlight the contents of international law’s deference “toolbox”. In doing so, it draws attention to the different approaches for analysing deference that have been adopted in international adjudication to date, their doctrinal structure and applicability, and their structural implications for the relationship between the domestic and international legal orders. The inclusive approach adopted in *Judging at the Interface* ensures that the analysis is not blinkered and limited to any one conception of (or label for) deference. Instead, the framework adopted aims to encompass various approaches to deference to demonstrate how they operate as part of a coherent whole and produce broad systemic impacts. While some of the reviewers may hope for an account of deference endorsing a single doctrinal approach, as I explain in Chapters 1 and 10, this is neither desirable nor useful and may in fact undermine the function to be played by deference in international adjudication. Deference necessarily tracks the changing nature and structure of authority in international adjudication. Approaches to deference cannot be fixed in circumstances where the scope and interrelationship of domestic and international authority remain multifaceted and unsettled.

34 See, especially, Shirlow, *supra* note 2, at 150–151.

35 Such approaches to deference are addressed at length in Shirlow, *supra* note 2, Chapter 7.3.