Deference and Other Standards of Review in International Adjudication

Joshua Paine | ORCID: 0000-0002-1373-2441
Senior Lecturer in Law, University of Bristol, Bristol, UK
joshua.paine@bristol.ac.uk

The two books that are the subject of this symposium, Judicial Deference in International Adjudication: A Comparative Analysis by Johannes Hendrik Fahner and Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication by Esmé Shirlow, make substantial contributions to the existing literature on judicial deference in international adjudication. In this short essay, I consider the descriptive contribution of both books in mapping practices of deference by international adjudicators to domestic decision-makers. I then analyse how both books address the relationship between the content of the applicable law and deference, and what they add to our understanding of certain more specific standards of review (e.g., review for reasonableness or good faith). Finally, I discuss the contribution of both books in questioning the analogy between domestic judicial review and international adjudication that has underpinned much of the existing literature on deference in international adjudication.

1 Mapping Deference in International Adjudication: The Descriptive Contribution of Both Books

One of the challenges of the topic is that a vast array of legal doctrines and adjudicatory practices can potentially be understood as instances of judicial deference. Shirlow’s book, in particular, makes an important taxonomical contribution, whereby she classifies a vast range of doctrines and practices into seven different “modes” of deference, which she then assigns to three different conceptions of the relationship between international and domestic decision-making authority. These are: conclusive authority (either conclusive domestic or conclusive international decision-making authority); suspensive authority, which precludes an international adjudicator’s exercise of authority
either for a limited time or in relation to particular issues; and concurrent authority, where international adjudication is complementary to domestic decision-making authority.\textsuperscript{1} Later in the book, these three conceptions of the relationship between international and domestic decision-making authority are shown to reflect three different theories of the interactions between international and domestic law: monism, dualism, and pluralism.\textsuperscript{2}

It is true that, as Shirlow notes, the connection between different “devices” of judicial deference in international law is “under explored”.\textsuperscript{3} Against this background, Shirlow defines deference in broad, conceptual terms as “techniques used by international adjudicators to recognise a domestic actor’s superior ‘authority’ to decide issues relevant to the settlement of the dispute brought before the international adjudicator”.\textsuperscript{4} She employs a functional comparative approach, whereby the different regimes studied are taken to encounter a common problem – the overlap of international and domestic decision-making authority – and deference serves the function of providing “devices to determine where final decision-making authority lies”.\textsuperscript{5} Shirlow rightly designed her study on the basis that deferential reasoning may manifest itself “under different labels”.\textsuperscript{6} Shirlow’s study is very successful in its descriptive aim of identifying “instances of deference from a more conceptual and inclusive perspective” than prior contributions, and explaining the connections between different manifestations of deference.\textsuperscript{7} Shirlow’s perspective is “inclusive” because, as noted above, it does not limit itself to focusing on particular legal doctrines or labels in searching for examples of judicial deference. The book also claims to be inclusive in that rather than focusing on deference within a particular regime, it focuses on cases concerning alleged State interferences with private property to analyse the role of deference across the jurisprudence of four different institutions: the Permanent Court of International Justice, the International Court of Justice, the European Court of Human Rights, and investment treaty arbitration.\textsuperscript{8} Shirlow’s perspective is “conceptual” in that after an initial chapter that analyses the notions of deference and authority from a theoretical perspective, the book proceeds to classify the wide variety of instances of judicial deference, identified in the case law, to develop a taxonomy of what

\begin{thebibliography}{8}
\bibitem{1} Shirlow, 3, 107–110.
\bibitem{2} Ibid., 229–237.
\bibitem{3} Ibid., 76–77, 105.
\bibitem{4} Ibid., 16.
\bibitem{5} Ibid., 52–53, 80.
\bibitem{6} Ibid., 77–78.
\bibitem{7} Ibid., 4.
\bibitem{8} Ibid., 2–4, 51.
\end{thebibliography}
these suggest about the relationship between international and domestic authority. Shirlow’s use of a partly empirical methodology also allows her to make a novel contribution in Chapter 8, which employs “descriptive statistics” to begin to explore whether adjudicators’ approaches to deference have differed over time or between the different institutions considered.

While Fahner does not explicitly address methodological considerations from comparative law, his study also adopts a functional comparative approach. For example, in justifying his adoption of a comparative approach, he rightly notes that “different international courts and tribunals face similar challenges” given the sensitivities around international review of domestic public policies, and debates concerning deference “often involve arguments that are relevant to more than one specific field of international law”. By analysing certain common standards of review, such as review for reasonableness or good faith, Fahner aims “to establish whether they have a similar meaning across different regimes”. The range of courts and tribunals whose case law is analysed in Fahner’s study is impressive: beyond the institutions focused on by Shirlow, Fahner also considers World Trade Organization (WTO) dispute settlement, the Inter-American Court of Human Rights, the African Court on Human and Peoples’ Rights, and, to a lesser degree, the International Tribunal for the Law of the Sea.

The Relationship between Deference and the Content of the Applicable Law

Both books address the question of the relationship between deference and the content of applicable international legal norms. Within the broad theory of authority that both books draw on, legal norms supply adjudicators with “first-order reasons”, which are “reasons related to the merits of deciding (or not deciding) in a particular way”. In contrast, deference by international adjudicators to domestic decision-makers is often driven by “second-order reasons”. These are “reasons to act or to refrain from acting on one’s own assessment of the first-order balance of reasons’. They operate as ‘content-independent’ reasons to reach a particular decision, having ‘nothing to do with the substance

9 See ibid., 4 (“The book works from theory to practice to policy ... I adopt an inductive approach to identifying deference in international adjudicative reasoning”).
10 Ibid., 197.
11 Fahner, 17–18.
12 Ibid., 89.
13 Shirlow, 17.
or merits of the mandated action”. Examples of second-order reasons that may cause an adjudicator to defer to a domestic decision-maker include the greater expertise or legitimacy of the latter to make certain determinations. Importantly, as Shirlow notes, 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. Instead, it may simply reflect the adjudicator’s own assessment of the first-order reasons, or merits of the case, in light of the applicable law.

However, as Shirlow also highlights, international adjudicators often use second-order reasons in order to adopt “a less restrictive understanding of what is required by an international obligation” from among several possible interpretations. The example Shirlow uses to illustrate this point, the denial of justice obligation, is illuminating. Anyone who has spent time reading investment treaty awards concerning denial of justice claims will recognise that adjudicators’ interpretation of the content of this norm is frequently intertwined with discussion of second-order reasons, such as the concern that international tribunals should not become “courts of appeal” on points of domestic law.

Like Shirlow, Fahner also examines the relationship between deference and interpretation of the content of applicable legal norms. He questions whether there is always a distinction between the two, as the use of a deferential standard for determining State compliance with a norm could “be read as a minimalist interpretation of the applicable rule”. Nevertheless, he ultimately favours retaining a distinction between the content of the applicable norm and the standard of review. He explains that “the adoption of a lenient standard of review does not necessarily affect the substantive content of the treaty obligation”, but simply limits the extent of supervision exercised by the international adjudicator, thus leaving some aspect(s) of the interpretation and application

---

15 Shirlow, 18, 40.
16 Ibid., 18, 40.
17 Ibid., 40–41, 250–251.
18 Ibid., 41.
20 Fahner, 130.
exercise to be decided by domestic authorities.\footnote{Ibid., 130–131, 148.} An example discussed by Shirlow illustrates this point well. An international obligation may require a State not to impose unreasonable or arbitrary measures on property owners. There are a range of ways, involving different degrees of deference, that compliance with such an obligation might be assessed. For example, at the most intrusive end of the spectrum, an adjudicator might determine compliance “on the basis of a standard of correctness or by reference to what the adjudicator itself views to be” unreasonable or arbitrary. Alternatively, an adjudicator may choose, due to second-order reasons, to confine its scrutiny under such an obligation to checking whether a “State acted in good faith, provided reasons for its decision, used a particular decision-making procedure, or can demonstrate a logical connection between the measure and the aim”\footnote{Shirlow, 175–176 (emphasis in original).}.

### 3 Deference and other Common Standards of Review

Both books analyse a wide range of more specific standards or methods of review that are familiar across various international courts and tribunals, including review for good faith, reasonableness, and procedural forms of review. In this respect, the contributions of both books are complementary. Shirlow’s key contribution is again taxonomical and explanatory. She shows how these standards or methods of review all reflect a “concurrent view of authority” whereby decision-making power is exercised by international adjudicators alongside domestic decision-makers.\footnote{Ibid., 110–111, 153.} Shirlow further divides her category of “concurrent authority” into three different “modes of deference”, namely deference as restraint, deference as reference, and deference as respect.\footnote{Ibid., 110, 153.} It is the latter category of deference as respect that is of particular interest here, as it encompasses practices such as good faith review, procedural review, or review for whether a measure is reasonably or rationally connected to its purpose. By linking these common adjudicatory practices to a theory of concurrent authority, Shirlow highlights how, under all these doctrines, “deference must be earned for each particular domestic decision”.\footnote{Ibid., 174 (emphasis in original).} As Shirlow notes: “[t]he criteria selected to identify [domestic] decisions worthy of respect disclose the international adjudicator’s views on how States should exercise...
their decision-making authority”.

While such criteria are influenced by the content of applicable legal norms, there is often significant discretion left to adjudicators in interpreting and applying a norm.

Fahner also analyses the relationship between deference and commonly encountered concepts, such as reasonableness, good faith, and procedural review. He views these concepts as attempts by adjudicators to formulate a more precise standard of review in situations where deference is partial, that is, where it does not entirely exclude scrutiny by an international adjudicator. Fahner’s critique of these notions is that they do not actually provide greater precision in defining the standard of review and clarifying the impact that deference should have upon an adjudicator’s assessment. Instead, he argues they “often boil down to a replacement of one indeterminate concept by another” and “their conceptual value seems limited to expressing some degree of deference ... a certain willingness to accept the assessments made by domestic authorities”.

I agree with Fahner’s point that concepts such as reasonableness or good faith, often invoked by adjudicators to afford some deference to a respondent State, may not provide much more clarity about the impact that deference should have upon an adjudicator’s assessment, and can themselves be applied in more or less stringent ways.

Interestingly, Fahner advocates addressing concerns around State sovereignty and the greater legitimacy of domestic authorities by adjudicators adopting an approach of restrictive interpretation of applicable international obligations, rather than deference and the development of more detailed standards of review. Fahner’s rationale is that deference involves an adjudicator leaving certain issues of interpretation and application, involved in determining the compliance of a State’s measure with an international obligation, to be determined by the respondent State itself. In contrast, he sees restrictive interpretation as providing “clarity about the content and scope of international obligations, in accordance with the adjudicator’s judicial task”.

One of the examples used by Fahner to illustrate his proposal is the Philip Morris
v. Uruguay award, where he criticises the Tribunal’s reference to a “margin of appreciation”.35 As an alternative, Fahner proposes that a restrictive interpretation might have concluded:

that the fair and equitable treatment [FET] standard does not protect against loss of profits caused by non-discriminatory regulations that verifiably benefit public health. Such an approach would have been preferable over the tribunal’s adoption of the margin of appreciation because it would have provided clarity about the scope and content of the relevant legal rule.36

To my mind, Fahner’s claim that restrictive interpretation by adjudicators would lead to greater clarity regarding the content of international obligations than existing practices of deference raises certain questions. For example, in adopting a restrictive interpretation of the content of applicable treaty obligations, might adjudicators end up invoking some of the familiar notions, such as reasonableness or good faith, which he already critiqued on the basis that they do not provide greater clarity? The Philip Morris v. Uruguay award is arguably an example of this, since beyond the reference to the margin of appreciation, in interpreting and applying the FET obligation the Tribunal referred inter alia to the notions of reasonableness, disproportionality, good faith, gross unfairness and arbitrariness, with only the latter term defined in any detail.37

4 Questioning the Analogy between International Adjudication and Domestic Judicial Review

While both books draw upon the large literature from domestic public law contexts concerning deference, they also question the analogy between judicial review as practiced in many domestic systems of public law and international adjudication. As Shirlow notes, much of the existing literature on deference in international adjudication has either explicitly or implicitly drawn upon a functional analogy between international adjudication and judicial review in

35 Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 388, 398–399.  
36 Fahner, 223.  
the domestic public law context.38 Shirlow, in my view correctly, highlights that using the paradigm of domestic judicial review, particularly in an administrative law context, implicitly assumes that “States hold ‘delegated rather than original authority’”.39 In this paradigm, an international adjudicator is seen as “empowered to police the boundaries of that delegated State sovereignty”; and, might, for example, find that sovereignty must be exercised reasonably, or only for the particular purposes for which sovereign powers were delegated.40 The issue is that while this paradigm makes sense in a domestic context, where an administrative agency has been delegated certain powers by the legislature, it does not necessarily capture accurately the nature of sovereignty and limitations on domestic decision-making power under international law, as well as the limited jurisdiction of international adjudicators.41 Shirlow also highlights that domestic public law approaches to deference have developed to “regulate conflicting claims to authority within unitary domestic systems, rather than conflicting claims to authority emanating from separate systems”.42 The latter characterisation arguably better captures the relationship between international adjudicators and domestic decision-makers. Accordingly, Shirlow identifies certain approaches that may be useful to explore in further thinking about deference in international adjudication, such as private international law techniques for “addressing interactions between decision-making authority exercised by actors operating in separate legal orders”.43 Fahner also makes an important contribution by questioning the tendency, within much existing literature on deference in international adjudication, to view international courts and tribunals as performing a comparable function to domestic judicial review. To do this, Fahner interrogates the rationales for deference by international adjudicators, distinguishing between epistemic deference, “based on the expertise of domestic institutions ... in matters that

38 Shirlow, 222–223.
39 Ibid., 226 (internal citations omitted).
40 Ibid., 226–227.
41 My terminology here partly draws on Shirlow, 224–227. Recently, Caroline Foster has also insightfully identified the implicit use by various international courts and tribunals, in adjudicating upon States’ regulatory powers under international law, of one aspect of the doctrine of abuse of rights, focusing on misuse of power or détournement de pouvoir. Similarly to Shirlow, Foster also suggests that this development assumes a paradigm of the State possessing conferred powers, an idea taken from the domestic public law context, and queries whether it fits the international context: Caroline E. Foster, Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence (2021), 30–32, 294–298, 307–309.
42 Shirlow, 228.
43 Ibid., 228.
are not of a primarily legal character”, and what he terms “constitutional deference”, which is motivated by the potentially greater accountability and legitimacy of domestic decision-makers.44 For Fahner:

A crucial difference between epistemic and constitutional deference is that the former suggests that the question at issue has a right answer but that an international court or tribunal is not well qualified to find that answer. Constitutional deference, however, is based on the idea that the question at issue does not have a single right answer, or at least allows for legitimate disagreement, and that an international tribunal should not impose its own preference.45

Fahner notes that in a domestic context such “constitutional deference” is motivated by separation of powers concerns, with deference enabling the judiciary to police the powers of other branches of government without itself “becoming monocratic”.46 Fahner argues that this threat of “monocracy” or “a gouvernement des juges” “is less persuasive with regard to international than domestic courts” because international courts and tribunals, unlike domestic courts, generally lack “the power to strike down legislation or annul other acts of government”.47 He supports this claim through a brief review of remedies granted by the international courts and tribunals he studied.48 Fahner appropriately adapts this argument for regional human rights courts, which have developed remedial and certain other practices that have a more intrusive impact on domestic legal orders, and he thus argues that constitutional deference is relevant for regional human rights courts.49

Fahner supports his claim about the limited relevance of constitutional deference to international courts and tribunals by making a complementary claim about the limited purposes of international courts and tribunals. He argues “that international courts and tribunals, with the exception of the human rights courts, do not share a fundamental purpose of domestic judicial review, which is to legitimise the exercise of state power”.50 For Fahner, international courts, besides regional human rights courts, “are not empowered to review the legitimacy of state conduct in a [broad] constitutional sense”, meaning

44 Fahner, 149–150.
45 Ibid., 150.
46 Ibid., 190–191.
48 Ibid., 196–205.
50 Ibid., 207.
that they cannot be accurately described as conducting “judicial review” in a manner comparable to domestic courts. Instead, he argues that international courts exist “to settle disputes within sectoral fields of international law that have more instrumental aims” and advocates distinguishing “between international dispute settlement on the one hand and the judicial review exercised by domestic and human rights courts on the other.”

An obvious counter-argument to Fahner’s claim in this respect, which he addresses briefly, is that some of the literature on the functions of international courts argues that certain international tribunals beyond regional human rights courts – e.g., WTO dispute settlement – do exercise the function of controlling and legitimating “the exercise of power by state institutions.” Essentially, Fahner argues that this feature is not sufficient to warrant equating international adjudication with domestic judicial review, since international adjudicators are generally tasked with reviewing domestic measures against obligations of sectorial regimes, rather than assessing “domestic policies in a comprehensive manner ... in light of a complete legal framework.” I agree with Fahner’s claim in this part of the book that, with the exception of regional human rights courts and certain courts of regional integration, international courts are not tasked with reviewing the “legitimacy of state conduct in a broad, constitutional sense”. Yet I doubt that this aspect of Fahner’s book will put an end to discussion of potential functional similarities between domestic judicial review and international adjudication. Even if international courts are not tasked with ensuring the legitimacy of State conduct in a broad constitutional sense, part of the reason States create tribunals within international

51 Ibid., 207–209.
52 Ibid., 205, 212. Caroline Foster has also frequently resisted the tendency to think of international adjudication as comparable to domestic judicial review: e.g., Foster, supra note 41, at 306, 312–313; Caroline E. Foster, “Diminished Ambitions? Public International Legal Authority in the Transnational Economic Era”, 17 Journal of International Economic Law (2014), 355-357, 373–374.
55 Fahner, 208.
regimes, as opposed to other kinds of institutions, is to legitimise the regime, and to provide an independent oversight mechanism for determining whether States have stayed within the room for manoeuvre left to them by the regime’s obligations. In such a scenario, a tribunal is essentially charged with making findings over the legality and procedural propriety of State conduct, rather than determining whether the State adopted an optimal policy. This is not so different from more limited forms of judicial review in certain domestic systems, often in an administrative law context.

