

Introduction

Deference and the International Adjudication of Private Property Disputes

While working as a government lawyer in 2011, my team received a letter advising that the Philip Morris tobacco company had decided to sue Australia under a bilateral investment treaty. The company contended that Australia's tobacco plain packaging requirements breached its intellectual property rights, entitling it to billions of dollars in compensation under international law. This news was not particularly shocking to the small team of which I was part, which had been assembled within the government's Office of International Law to respond to these types of claim. The news *was* shocking, however, to the wider Australian public. Over the ensuing months, public disbelief became better-articulated in the press: how can an international tribunal sit in judgment over a measure that the Australian parliament had decided was in the public interest after extensive scientific enquiry and public consultation? Could an international tribunal really reverse the finding of Australia's highest court that the legislation was lawful?

These concerns about the appropriate reach of international law and about the appropriate relationship between international adjudicators and domestic decision-makers are longstanding. In 1927, for example, an Australian professor, William Sutton Cumberae-Stewart KC, contended that: '[T]he League of Nations is doomed to failure if it attempts too much in the way of being busy about other people's business.'¹ Some thirty-five years later, an American professor, Richard A. Falk, echoed this sentiment, observing that: '[I]nternational law, in contrast to domestic law, is much like a Victorian lady and must depend upon an excess of self-restraint to achieve virtue.'² Such concerns have gained traction in recent years as the expansion of international law has prompted qualitatively different and quantitatively increased opportunities

¹ Brisbane Telegraph (1927).

² Falk (1964), pp. 53–4.

for overlap and interaction between domestic and international decision-making.

International adjudication remains a central focus in these debates. In more recent times, Australia's 2011 Trade Policy Statement, for instance, indicated 'Australia's view that domestic courts, not investment tribunals, are the appropriate bodies to resolve investment disputes between domestic states and foreign investors.'³ Lord Sumption in 2013 similarly argued that the European Court of Human Rights ('ECtHR') 'undermines the democratic process'.⁴ And a key concern reported by stakeholders in the European Union's 2016 consultation process on the proposed Transatlantic Trade and Investment Partnership concerned the relationship between domestic judicial systems and investor-State dispute settlement.⁵ Such concerns have produced mounting calls for the abolition of certain international adjudicative mechanisms entirely or modifications to how international adjudicators decide disputes.⁶ Deference is also increasingly invoked as a tool capable of responding to the perceived 'legitimacy crisis' affecting international adjudication.⁷ This is unsurprising given that deference is a key means by which international adjudicators recognise, accommodate, and constrain State decision-making authority. This book focuses on this role of deference in settling the interface between domestic and international decision-making authority.

FRAMING THE INTERFACE BETWEEN DOMESTIC AND INTERNATIONAL DECISION-MAKING

This book investigates how courts in four international regimes use deference to recognise the decision-making authority of domestic actors in cases concerning alleged State interferences with private property. The book focuses principally on two interrelated questions. It first considers when and how international adjudicators defer to States. Second, it analyses the implications of deference in international adjudication and of differences in approaches to deference in different times and contexts. I use these cross-cutting enquiries to develop a theory of deference as an adjudicative practice. To make this

³ Trakman (2012), p. 981. See: Australia, Department of Foreign Affairs and Trade (2011). Similar concerns have been raised by other States, see for example: United States of America, Department of State (2005); Republic of South Africa, Department of Trade and Industry (2013); Embassy of the Netherlands in Jakarta, Indonesia (2014).

⁴ Sumption (2013), p. 11.

⁵ European Commission (2015), p. 3.

⁶ See, further, Caron and Shirlow (2018); Kyriakou (2007).

⁷ See, especially, Burke-White (2008a); Vadi and Gruszczynski (2013); Dzehtsiarou and Greene (2011); Kwiecien (2012); Leonhardsen (2012); Henckels (2013), p. 200; Roberts (2011).

investigation of deference in international adjudication manageable, the book explores how the Permanent Court of International Justice, the International Court of Justice, the European Court of Human Rights, and investment treaty tribunals have used deference to recognise the decision-making authority of domestic actors in international cases concerning alleged State interferences with private property rights. The cases form a particularly useful empirical focus and backdrop for the broader conceptual questions explored in the book. They have been adjudicated under international law for a long period of time and in different regimes and therefore lend themselves to comparative analysis. Furthermore, property claims – as explored in more detail in what follows – very frequently raise State requests for deference because they concern matters in respect of which States might expect to hold authority to make final decisions.

The book identifies a large number of techniques capable of achieving deference to domestic decision-making in international adjudication. It groups these techniques to identify seven distinct ‘modes’ of deference. These modes reflect relationships between international adjudicators and domestic decision-makers of submission, deferral, abstention, restraint, reference, respect, and control/dismissal. I demonstrate that distinct structures of authority underlie these seven modes of deference. The seven modes of deference differ structurally depending on whether they rely on a view of decision-making authority as conclusive, suspensive, or concurrent. Adjudicators adopting a conclusive view of decision-making authority favour categorical approaches to deference: one actor’s decision controls the outcome of another actor’s decision-making process. Suspensive authority, by contrast, precludes the exercise of one actor’s authority in favour of another, either for a limited period of time or in respect of particular subjects. Concurrent authority arises where two decision-makers work in tandem, their decision-making processes being viewed as complementary rather than incompatible or exclusive. The book shows that these differing structures of authority underpin international adjudicative approaches to deference. These three structures of authority, in turn, reflect three distinct theoretical paradigms concerning the relationship between the international and domestic legal orders. Whereas the conclusive views of authority underlying the modes of deference as submission and control reflect a monist view of this relationship, the suspensive views of authority underlying the modes of deferral and abstention reflect dualist paradigms, and the concurrent views underpinning the modes of restraint, reference, and respect reflect pluralist approaches. Differing approaches to deference in different regimes and time periods thus hold systemic significance. Studying deference in international adjudication

from this perspective brings into focus the shifting nature and structure of adjudication under public international law and its relationship to domestic decision-making authority.

This is by no means the first study of deference in international adjudication. Several scholars have examined how international adjudicators attribute weight to domestic decisions including through deferential proportionality balancing or reasonableness review,⁸ restrictive interpretation of treaties,⁹ and margin of appreciation ('MoA') analysis.¹⁰ These studies have each been informed by differing research goals and methodologies, encompassing doctrinal,¹¹ normative,¹² and statistical approaches.¹³ The present study complements and extends these previous studies in three principal ways. First, it moves past the question of whether international adjudicators *should* give deference to domestic decisions, to consider instead how they structure and analyse deference in practice. The book works from theory to practice to policy, rather than adopting an inverse, more normative approach. Second, instead of studying the approach of an individual regime to deference, the book compares the approaches taken to deference by adjudicators in four regimes.¹⁴ To do so, I adopt an inductive approach to identifying deference in international adjudicative reasoning, eschewing a search for formal labels and doctrines that have formed the focus of studies of deference in existing scholarship to instead identify instances of deference from a more conceptual and inclusive perspective. In so doing, the book brings into focus the function(s) of deference in international adjudication and the impact of institutional setting on that function. Finally, the book elaborates temporal developments in approaches to deference. These dynamic qualities of deference have not previously been empirically investigated and there is thus little understanding of whether approaches to deference have changed as international law has developed. Existing studies of deference have instead treated it as a fixed phenomenon.¹⁵ By contrast, this book examines whether – and how – approaches to deference change over time. This illuminates the dynamic properties of deference and the changing relationship between

⁸ Henckels (2014); Vadi and Gruszczynski (2013); Roberts (2011); Vadi (2018).

⁹ Van Harten (2013); Crema (2010); Orakhelashvili (2003).

¹⁰ Legg (2012); Duhaime (2014); Arai-Takahashi (2002).

¹¹ See, for example, Gruszczynski and Werner (2014).

¹² See, for example, Henckels (2014).

¹³ See, especially, Van Harten (2013).

¹⁴ Knight (2018) undertakes such a study across domestic common law regimes to develop a useful taxonomy of the approaches to deference adopted therein.

¹⁵ Some authors identify diachronic shifts, but tend not to draw broader implications from those changes. See, for example, Kratochvil (2011).

domestic decision-making and international adjudication. With this focus, the book demonstrates how deference mediates contestations and fluctuations in the interfaces between domestic and international decision-making authority. It demonstrates, in particular, that the domestic/international interface is both contested and in flux and is likely to remain so into the future.

A An Interface Contested

Conflict permeates law. It prompts litigation, but the management or settlement of conflict also runs through much of what law does. Several core conflicts confront international adjudicators, particularly those deciding private property claims. These include conflicts between individuals and the State, the local and global and conflicts between the protection of private property and other public interests. International adjudication may either settle these conflicts or provide an arena for their continued discussion. Deference performs a key function in these conflicts, because it determines who plays a role in settling them. Deference provides a tool to mediate, in particular, conflicting claims to national and international decision-making authority in respect of these issues. This book tracks the approaches adopted by international adjudicators to settling such conflicting claims to authority. I organise approaches to deference in international private property decisions into a taxonomy of seven distinct ‘modes’ of deference, to argue that different approaches to deference in international litigation signal fundamentally distinct views of the role of domestic decision-making authority under international law. I use this framework to track how international adjudicators invoke deference to settle conflicts about the interface between international and domestic decision-making authority. This analysis highlights approaches to deference variously favouring submission, cooperation, complementarity, and supremacy. It illuminates how deference performs the role of ‘frontier management’¹⁶ in international adjudication, constructing and regulating the interface between particular political and legal communities and sources of law.

This book focuses on how international courts and tribunals deciding claims relating to alleged State interferences with private property have used deference to manage these conflicts. The book focuses on this subset of international cases for a number of reasons, explored more fully in Chapter 2. A key reason for selecting this focus is that private property cases are particularly likely to raise the conflicts that may generate calls for deference. While private property is protected by various rules of international law, it

¹⁶ Walker (2013), p. 103.

subsists physically within a territorial space. This makes it a matter particularly apt for national regulation. In fact, territory, in turn, is ‘an organizing principle for political and legal authority’¹⁷ and is central to the notion of State sovereignty. Sovereignty reflects that the State is ‘master of its own territory’, holding exclusive powers to allocate, regulate, and administer property within that territory.¹⁸ ‘Sovereignty’ can be examined from two perspectives. ‘Internal sovereignty’ refers to the power or authority of States to regulate their own institutions.¹⁹ Internal sovereignty signifies a State’s ‘absolute and perpetual power’ over its territory and nationals.²⁰ From this internal perspective, the ‘sovereign’ is the entity with the final right to decide matters in a given territory or concerning particular individuals.²¹ ‘External sovereignty’ refers to the independence of the State in its relations with other States or external entities.²² It generates a ‘right to be left alone’,²³ permitting the State to decide ‘without interference from organizations or individuals external to the jurisdiction’.²⁴ Whereas ‘internal sovereignty’ describes a State’s *authority* to decide, ‘external sovereignty’ delineates whether it may exercise that authority *autonomously*. Holistically, then, sovereignty can be said to designate the extent of a State’s *autonomous authority* to decide.²⁵ Both facets of sovereignty describe the relationship of States to other entities.²⁶ The relational quality of sovereignty means that it ‘is acted upon, asserted, developed and limited within the context of a relationship with others’.²⁷ International adjudication provides a key forum for this ‘contestation of sovereignty’.²⁸ The decisions of international adjudicators impact the extent of State decision-making authority and therefore both construct and constrain State sovereignty.

Most theories of property draw on this close connection between property and sovereignty. For some theorists, private property is a foundation of

¹⁷ Brölmann (2007), p. 86.

¹⁸ Wortley (1956), p. 588. See, also, *Norwegian Loans (Dissent/SO-Lauterpacht)*, 6-Jul-1957 (ICJ), p. 52.

¹⁹ See, especially, McRae (1971), p. 82; Jennings (2002), p. 32; Hart (1994), p. 223; Schrijver (2000), p. 65.

²⁰ Bodin (1576). See, also, Kwiecien (2012), p. 52; Crawford (2014), p. 72.

²¹ Crawford (2014), p. 71; Wildhaber (1983), p. 441.

²² McRae (1971), p. 82; Olivier (1988), p. 86; Hart (1994), p. 223; Kwiecien (2012), p. 52.

²³ Kumm (2016), p. 239. See, also: Hathaway (2008); McRae (1971), p. 81; Schrijver (2000), p. 71.

²⁴ Drezner (2001), p. 323.

²⁵ See, similarly: Jackson (2003), p. 790; Grievos (1969), p. 2.

²⁶ Kwiecien (2004), p. 88; Romano (2007), p. 793; Schrijver (2000), p. 71; McRae (1971), p. 83; Henkin (1990), p. 97; Kelsen (1960), p. 637; McCorquodale (2006); Fassbender (2003), p. 115; Wildhaber (1983), p. 441.

²⁷ McCorquodale (2006).

²⁸ Legg (2012), p. 58.

civilisation: State sovereignty arises to protect and preserve private property rights.²⁹ Locke, for example, derived State sovereignty from a pact to escape a state of nature that threatened the rights of life, liberty, and property.³⁰ For Locke, the first two rights were predicated on property rights, leading to the conclusion that: '[G]overnment has no other end but the preservation of Property.'³¹ For other theorists, private property is distributed by the sovereign and so follows and derives from the State. Hobbes³² and Austin³³ thus conceptualised the State as the entity with exclusive power to grant and recognise property rights. Private property might instead be linked to individual – rather than State – identity. Some theorists, for example, argue that a person has no concrete existence until they exercise their will on the outside world, making the creation of property a fundamental form of self-expression.³⁴ These theories indicate that questions of sovereignty are likely to be deeply implicated in private property cases. This is particularly so where private property cases are litigated internationally. The international adjudication of private property disputes deterritorialises the State's regulatory authority over property.³⁵ As such, and as developed further in what follows, international private property disputes are particularly likely to evoke claims of sovereign control and requests for deference to domestic decision-making authority. The international litigation of other rights might, of course, produce similar claims. To that extent, the conceptual analysis and framework presented in this book is likely to be generalisable to these other contexts. Private property disputes are simply used to illustrate the contours and role of deference in international adjudication, with this focus also keeping the empirical components of the book methodologically sound (and feasible)

The connection between deference, authority, and sovereignty explains in part why studies of deference have thus far been distinctly normative and hotly contested. As Chapter 1 argues, deference is a tool through which the concept of sovereignty is operationalised in international adjudication.³⁶ Ostensibly technical debates about deference reflect more fundamental debates about the delineation of sovereignty in the international system. As Part II shows,

²⁹ See, for example: de Vattel (1797); Ederington (1997), p. 266; Cohen (1927).

³⁰ Locke (1988), pp. 115–16, 315.

³¹ *Ibid.*, para. 94.

³² Hobbes (1996), p. 164.

³³ Austin (1885), p. 839.

³⁴ Radin (1982), p. 972.

³⁵ See, similarly, Brölmann (2007), pp. 86, 94; Sassen (2015), p. 61; *Barcelona Traction (Dissent/ SO-Padilla Nervo)*, 5-*Feb-1970* (ICJ), p. 249.

³⁶ On making sovereignty 'actionable', see, further, Viñuales (2014), p. 317; von Rosenvinge (2010), p. 2; Franck (1990), p. 26.

studying approaches to deference across different adjudicative regimes offers a means by which ‘the space left for sovereignty in different legal contexts can be specifically compared’.³⁷

B *An Interface in Flux*

This study builds on existing contributions, but addresses deference from a different perspective. Instead of considering a particular type or manifestation of deference in international adjudication, it considers instead the concept of deference and its function in international adjudication. It links deference to authority to highlight the different structures of authority represented by deferential reasoning. Linking deference to authority gives greater significance to differences in how deference is analysed by adjudicators operating in different times and regimes. It also provides a framework through which different approaches to deference can be conceptually analysed and understood. The linkage between deference and authority, coupled with the empirical study undertaken in Part II, reveals that approaches to deference differ depending on how international adjudicators conceptualise the structure of their relationship to domestic decision-makers. Whereas some adjudicators conceptualise the relationship between domestic and international decision-making in conclusive or suspensive terms, others conceptualise a shared and cooperative space of concurrent decision-making authority. These forms of authority are introduced in Part I and subsequently developed through the empirical study reported in Part II. That Part identifies ‘conclusive’, ‘suspensive’ and ‘concurrent’ views of authority through analysis of the seven different modes of deference that are present in international adjudicative reasoning in private property claims. It demonstrates that instead of distinguishing ‘deferential’ from ‘non-deferential’ approaches to international review, it is more fruitful to consider different approaches to deference as reflections of underlying international adjudicative assessments of domestic decision-making authority and of the structure of the domestic/international interface.

This book does not propose to settle the contested interface between the domestic and international orders. Nor does it endorse a particular doctrinal approach to deference. The objective is instead conceptual, empirical, and explanatory. The book focuses on *who* is able to exercise their authority to determine key issues relevant to the outcome of international disputes and *what tools* are used to recognise that authority. The book develops a framework

³⁷ Viñuales (2014), p. 323.

to inform ongoing debates about the appropriate role of deference to domestic decision-making in international law. It moves beyond advocating a particular approach to settling conflicting claims to authority, to examine instead deference in different times and contexts. The book tracks international adjudicative approaches to deference from 1924 to 2019. It demonstrates that deference operates as a fundamental and inherent component of international adjudication. Despite this continuity, approaches to deference have been subject to constant change. Deference functions as a lever to make international law responsive to a broader and ongoing dialogue about the appropriate relationship between international adjudication and State decision-making autonomy and authority. Deference thus supports dynamism and flexibility in international law. International adjudicators use deference to claim decision-making authority and to recognise the decision-making authority of States. In spite of this, existing studies have treated deference as a fixed phenomenon, studying *'the'* approach to deference taken by a specific international adjudicative mechanism.³⁸ Few studies track approaches to deference over time, much less to consider what this reveals about the changing nature of international adjudication. This book extends understandings of deference through a comparative study analysing its incidence across a ninety-five-year period in adjudicative decisions from four international regimes. This brings into focus the systemic role of deference in international adjudication. This temporal and cross-institutional empirical analysis of deference is the first of its kind.

Deference reveals how international adjudication is evolving. Deference tracks both the development of international law and opposition to it. As international law evolves, so do perceptions of the proper relationship between domestic decision-makers and international adjudicators. This book uses deference to tell this story of international adjudication and its shifting relationship to domestic legal orders. Tracking evolution in approaches to deference brings into focus shifts in international adjudicative perceptions of the roles and competence of international adjudicators vis-à-vis domestic decision-makers. As conceptualisations of sovereignty evolve, so do approaches to deference. Deference widens and narrows as international adjudicative confidence 'simultaneously undergo[es] erosion with respect to many issues and reinforcement with respect to others'.³⁹ The book thus examines how adjudicators use deference to readjust the relationship between international and domestic decision-making authority dynamically over time and in different

³⁸ See, for example, Van Harten (2013), p. 48; Henckels (2015); Legg (2012).

³⁹ Rosenau (1997), p. 5.

regimes. This has practical implications. The book identifies the structural frameworks used by adjudicators to analyse questions of deference and brings into focus the underlying assumptions and theoretical paradigms that inform the approaches adopted in individual cases. This analysis has important consequences for the theory and practice of international law. The identification of how international adjudicators approach the issue of deference may assist litigants to international private property cases.⁴⁰ It may also assist States to structure domestic decision-making to better attract deference from international adjudicators. It may further inform system design, illuminating the features of international regimes that impact the analysis of deference in individual cases. The analysis of deference in these pages therefore raises questions of governance and institutional design, related to the allocation and contestation of authority in the international system.

My aim in this book is to highlight the role of deference in international adjudication as a tool for flexible interface management. Deference draws attention to the role of international adjudicators in settling contested questions about the authority of international and domestic decision-makers in respect of private property. This facilitates an investigation into whether international courts and tribunals adopt the restrained and deferential persona envisaged by Falk, bowing their heads to States by deferring to domestic decisions or whether they have instead become bothersome and ‘nosy neighbours’, as Cumbrae-Stewart feared, twitching their curtains to intervene and control how States regulate in their territories.

STRUCTURE AND APPROACH

The book is divided into three parts.

Part I introduces a conceptual framework for analysing deference, and the methodological approach informing the analysis of deference in Part II. The part consists of three chapters. Chapter 1 introduces the notion of deference and links it to the concept of authority. Characterising deference as a recognition of another actor’s decision-making authority underpins the book’s core conceptual contribution. Linking deference to authority provides a conceptual framework for analysing possible justifications for deference. It further explains why deference takes different structures, explaining why deference can be more or less categorical. Chapter 2 introduces the focus of the study. The chapter introduces the four courts and tribunals subject to

⁴⁰ While respondent States are particularly likely to seek deference, individuals may also seek deference to State decisions.