JUDGING AT THE INTERFACE

This 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 States. It analyses the approaches to deference taken by these four international courts and tribunals in 1,714 decisions produced between 1924 and 2019 concerning alleged State interferences with private property. 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 reflecting differently structured relationships between international adjudicators and domestic decision-makers. These differing approaches to deference are shown to hold systemic significance. They reveal the shifting nature and structure of adjudication under international law and its relationship to domestic decision making authority.

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Judging at the Interface

DEFERENCE TO STATE DECISION-MAKING AUTHORITY IN INTERNATIONAL ADJUDICATION

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Foreword by Judge James Crawford

State sovereignty, 'the fundamental principle ... on which the whole of international law rests',[1] has long exerted a significant constraint on international lawyers. Seen as the State's plenary and exclusive legal competence (externally as well as internally), sovereignty is at once the vehicle enabling the creation of international law and the outer limit of its reach. Both attributes were affirmed by the first permanent international court in its early days, which shows the importance paid to international dispute settlement institutions for as long as the system of international law creation and enforcement remains substantially decentralised. The key question is that of the relationship between international and domestic legal competence, and to what extent it entails a pattern of deference. It is that question that Esmé Shirlow examines in this work.

There are two types of risk with such a challenging project. The first relates to focus. Some studies of this kind craft elaborate theoretical accounts of the normative vices and virtues of various models already identified; others engage in a scrupulous analysis of the textual and contextual data extracted from the body of case law. Yet both approaches are likely to present a distorted image of the subject under scrutiny. The second risk, associated with the first, concerns lighting, or colouring. It may be tempting to treat indeterminate concepts such as 'deference' in dispositive terms, painting a black-and-white image of instances in which the concept is either observed or not; this might help to handle an otherwise untameable concept and to fit practice into preconstructed charts and tables. Yet such an approach ignores subtle variations in the use of the concept and different shades of the case law.

[1] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), Merits, Judgment, ICJ Reports 1986, p. 14 (para. 263).

Dr Shirlow skilfully avoids both these risks, adopting instead a more nuanced approach both as regards her methodology and her conclusions. With respect to methodology, the study scrutinises an impressive pool of case law from four judicial regimes, extrapolating elaborated yet recognisable patterns on the question of deference. With respect to substance, Dr Shirlow insightfully traces the doctrinal and theoretical underpinnings of each of these identified patterns, assessing the implications of the various approaches to deference for the structure of the international legal system.

In his Lalive Lecture delivered a decade ago, David Caron pictured international courts as partners with domestic organs – notably domestic courts – in upholding the rule of law, and hailed the margin of appreciation and the degree of discretion as avenues to acknowledge the States' role in this collective enterprise.[2] The functions of international courts had long been at the heart of his interests, as a key to appreciate their performance and interactions with other institutions, international and domestic. Dr Shirlow builds upon his collaborative view of international and domestic institutions and demonstrates that international and domestic decision-making are not – or do not need to be – antagonistic but instead can complement one another, benefitting from their relative strengths.

In doing so she affirms that the concept of decision-making authority, and of sovereignty upon which it rests, constantly evolves. She reminds us as international lawyers – whether government officials, international adjudicators, academics, or practitioners – of our shared duty to help it ensure that it evolves in desirable directions.

James Crawford

International Court of Justice

[2] D Caron, 'International Courts and Tribunals: Their Roles amidst a World of Courts' (2011) 26 *ICSID Review Foreign Investment Law Journal* 1, 12.

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I have been privileged to have had several professional opportunities that have informed the development of the ideas in this book. I worked at the

Australian Attorney-General's Department's Office of International Law prior to undertaking my doctoral studies and thereafter continued my work with the Office in a consultancy capacity during the first two years of my PhD. My work at the Office informed my choice of topic and provided a valuable opportunity to see the practical impact of the issues I was researching. I am grateful to the many colleagues I worked with, and particularly to John Atwood and Bill Campbell AO QC, from whom I learnt a great deal about both public international law and public service. I am also grateful to the members of the investor-State tribunals for which I have acted as an assistant during the writing of this work. I learnt much about the mechanics of arbitral decision-making from these appointments and am extremely grateful for these opportunities. I have also been fortunate to work in a number of advisory roles in investment treaty claims during the writing of this work, alongside, in particular, Sam Wordsworth QC and Professor Chester Brown. These two incredibly gifted and generous lawyers have taught me much, and I am grateful to have had opportunities to learn from them. Finally, I had the opportunity to teach at both King's College London and the Australian National University during the writing of my doctorate and then book. Teaching has clarified elements of my thinking, and also provided a welcome distraction during long months of coding.

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