

Index

- accountability
 in domestic procedures, 28
 of domestic procedures, 158
 of judges, 28
- admissibility of claims, 54, 96–97, 131, 202, 242
- agents vs. trustees
 international courts as, 33
 States as, 227
- analogies to domestic law
 administrative law analogies, 21, 106, 208,
 222–229
 constitutional law analogies, 222–229
 federalism, 80, 223, 228
 impact on analysis of deference, 65, 77, 85,
 208, 222–229, 239
 limits of, 208, 222–229
 private international law, 223, 228, 234
 private law, 21, 222, 229, 239–240
- appellate function
 of international courts, 104, 106, 147–148,
 186, 188, 243
- arbitrariness
 and public purposes, 97
 as connected to deference, 100, 121, 159, 165,
 178, 182–183, 188–189, 191–192, 227
 obligation to avoid, 97, 121–122, 172, 175–176,
 182–183, 255–257
- attribution of conduct to States, 85, 102–103,
 122–123, 173, 256, 259
- authority
 accounts of, 15–35
 leader conception, 26–31; *see also* second-
 order reasons – instrumental
 non-instrumental reasons for recognising.;
see second-order reasons – non-
 instrumental
- prudential reasons for recognising; *see*
 second-order reasons – prudential
 service conception, 20–25; *see also*
 second-order reasons – instrumental
 and deference, 2, 5, 8, 15–41, 44–69, 80, 87,
 93, 129–152, 153–193
 and sovereignty, 6, 224, 268
 identifying approaches to authority in
 adjudicative reasoning, 69–89, 93–112,
 200–207
 structures of, 35, 106–110, 257, 264; *see also*
 second-order reasons
 conclusive authority, 3, 8, 36–38, 93,
 106–110, 113–128, 130, 152, 153, 171, 176,
 200–207, 208, 213–216, 221, 230–232, 235,
 238, 244, 266, 273, 274–275
 concurrent authority, 3, 8, 36–38, 93,
 106–110, 153–193, 200–207, 208, 213–216,
 221, 235–237, 238, 244, 266, 269, 271, 273
 suspensive authority, 3, 8, 36–38, 93,
 106–110, 129–152, 153, 155, 171, 176, 193,
 200–207, 208, 213–216, 233–235,
 236–237, 238, 244, 252–253, 266, 273,
 274–275
- autonomy
 and deference, 6, 9, 35, 40, 41, 94, 106, 149,
 152, 158, 167, 250, 251, 269
 of disputing parties, 138, 148, 150, 255
- balance
 and deference, 5, 35–36, 97–98, 107–110, 158,
 164, 184, 266
 and reasonableness, 187–188
 between domestic actors and international
 adjudicators, 12, 25, 158–159, 205, 212,
 269, 275

- balance (cont.)
 between first and second order reasons,
 18–19, 35–38, 107–110, 153, 189, 205, 253
 between law and politics, 65
 of power between States, 270–272
 of rights or interests, 96–99, 164, 184, 187,
 234–235, 241, 252
- comity, 33, 78–79, 137, 150, 157–158, 168, 228
- compensation
 claims by individuals for, 1
 connection to deference, 67–68, 103,
 134–138, 185
 double recovery, 137–138, 150
 rules applicable to analysing, 67–68, 103
- complementarity, 3, 5, 106, 109, 110, 135,
 139–141, 150–151, 193, 237, 238
- consensus, impact on deference of, 144,
 163–164, 175, 250–252
- contractual choice of forum, 79–80, 138, 148
- correctness review, 17–19, 20–25, 106, 110,
 124–126, 147, 157, 159, 160, 161, 175,
 185, 191
 distinguished from deference as
 abstention, 147
 distinguished from deference as respect, 175,
 185, 191
 distinguished from deference as restraint,
 157, 159, 160, 161
- crisis
 deference in situations of crisis, 34, 125,
 142–143, 170, 178
 legitimacy crisis, 2, 31
- customary international law, 95, 156, 170
 and diplomatic protection, 44–45, 46–47,
 57, 157
 and exhaustion of local remedies,
 132–135
 and necessity, 99, 117, 118, 125, 145,
 169–170, 184
 and protection of private property, 44–45,
 46–47, 49–50, 57, 97, 98, 99, 247, 249
- deference
 and authority. *See* authority
 and backlash against international
 adjudication, 2, 31–32, 212, 271
 and conclusive approaches to authority. *See*
 authority
 and concurrent approaches to authority. *See*
 authority
 and correctness review. *See* correctness
 review
 and decisional discretion. *See* discretion
 and dualism. *See* dualism
 and exhaustion of local remedies. *See*
 exhaustion of local remedies
 and expertise. *See* authority
 and fork-in-the-road clauses. *See* fork-in-the-
 road
 and forum non conveniens. *See* forum non
 conveniens
 and injunctive relief. *See* injunctive relief
 and institutional design, 10, 19–35, 53–68,
 258–261, 265–266
 and international obligations, 56–59,
 175–177, 178–179, 185–190, 248–257
 and justiciability. *See* justiciability
 and legitimacy. *See* authority
 and lis pendens. *See* lis pendens
 and margin of appreciation. *See* margin of
 appreciation
 and monism. *See* monism
 and non-instrumental reasons. *See* authority
 and pluralism. *See* pluralism
 and presumptions or argumentative
 burdens. *See* presumption
 and prudential reasons. *See* authority
 and referring matters for domestic
 determination, 138–139
 and res judicata. *See* res judicata
 and restrictive interpretation. *See*
 interpretation
 and self-judging clauses. *See* self-judging
 clauses
 and sovereignty. *See* sovereignty
 and stays of proceeding. *See* stays of
 proceeding
 and suspensive approaches to authority. *See*
 authority
 and thresholds for breach, 110, 157–159, 176,
 178, 207, 260
 as abstention, 109, 131, 139–152, 160, 169,
 235, 255
 as control/dismissal, 106–111, 123–128,
 175, 193
 as deferral, 106–111, 129–139, 202, 235
 as reference, 106–111, 170–174, 248
 as respect, 106–111, 174–193, 216–218, 251,
 266, 270
 equivalence review, 106, 110, 177,
 190–193, 217

- good faith review, 106, 110, 116, 175, 177–179, 182, 189, 216–219, 245, 248, 250, 251
- procedural review, 27–29, 106, 110, 175, 179–185, 216–219
- substantive review, 4, 30, 100, 106, 110, 125, 147, 175, 176, 178, 180, 185–190, 216–219, 226–227, 240, 248, 250, 251, 264
- as restraint, 106–111, 153–170, 176, 186, 207, 251, 266
- as submission, 3, 106–111, 113–123, 128, 129–130, 146, 152, 178, 199–205, 209, 214–216, 228, 232, 238, 243, 245, 248, 251, 273
- changes over time, 4, 9, 33, 62, 64, 68, 78, 117, 141–142, 211–219, 236, 253, 266, 269, 272–274
- comparison of approaches to deference in different regimes, 51–68, 69–89, 197–220
- degrees of, 35–38, 109–110
- distinguished from a lack of jurisdictional capacity to decide, 38–41
- dialogue
about deference, 9, 232
judicial dialogue with other arms of government, 29, 235–237, 245–246
- diplomatic protection. *See* customary international law
- discretion
and deference, 78, 100, 106, 110, 125, 140, 153–154, 159–166, 168, 186, 189, 248, 249–251, 264
of international adjudicators, 71, 95, 100, 114, 141, 171, 248, 251
of States, 39, 100, 125, 143, 153–154, 158, 159–166, 168, 178, 180, 185, 186, 189, 248, 249–251, 264
- discrimination, 28–29, 49, 98–99, 102–103, 172, 177–179, 186, 189, 191, 192
- domestic courts
and denial of justice, 41, 44, 94, 138, 149, 167, 191–192
comparison to international adjudication, 29, 121, 221–238
deference to, 2, 65, 79, 94–96, 104, 120–123, 127, 132–138, 144, 148, 150–151, 157, 166, 167, 172, 183–184, 188, 191, 192, 208, 242, 254–257
role under forum selection clauses. *See* contractual choice of forum
- domestic law
analogies. *See* analogies to domestic law and ad hoc judges, 25, 64–66
and dualism. *See* dualism
and monism. *See* monism
and pluralism. *See* pluralism
as fact or law, 101–105
breaches of domestic law as breach of international law, 41
interpretation of. *See* interpretation of domestic law
relationship to international law, 54–55, 101–105, 203, 244–245, 255–256, 268. *See also* monism; dualism; pluralism
- domestic policy
and domestic courts, 95
deference to public purposes, 18, 23–24, 64, 79, 96–101, 114, 116, 117–120, 124, 140–148, 154, 160, 166, 177, 182, 184, 185, 199, 226, 250, 253–254, 259, 264, 274
on deference in international adjudication, 12
on international adjudication of private property claims, 2, 134, 141
- dualism
and approaches to deference, 3, 221, 229–230, 233–235, 238, 255
and domestic law, 104
compared to monism. *See* monism compared to dualism
compared to pluralism, 236–237
- equality
as a consideration relevant to deference, 28, 30, 35, 134
as a result of deference, 106, 234
of disputing parties, 67, 239–241
- European Court of Human Rights
and democracy, 2, 29, 48, 64
and margin of appreciation, 16, 78; *see also* margin of appreciation
approaches to deference of, 2, 16, 113–193, 197–220, 241–243
acting as a ‘first-instance’ decision-maker, 134, 146–150, 203
decisional discretion, 159–166. *See also* discretion
equivalence or *solange* review, 190, 192. *See also* deference as respect, equivalence review
exhaustion of local remedies, 132–135. *See also* exhaustion of local remedies

- European Court of Human Rights (cont.)
 justiciability and self-judging clauses, 116–117. *See also* justiciability
 justiciability and the ‘right to regulate’, 144–146. *See also* justiciability
 presumptions and argumentative burdens, 167–168. *See also* presumption
 procedural review, 181, 182, 184–185, 216–219. *See also* deference as respect, procedural review
 reference to domestic decisions, 95, 97, 98, 99, 101, 102, 103, 172, 173
 referral of matters to domestic decision-makers, 139
 reform of, 242–243
res judicata and related approaches, 121–122. *See also* *res judicata*
 second-guessing domestic decisions, 146–148
 stays of proceeding, 136
 substantive review, 185–190. *See also* deference as respect, substantive review
 as a trustee court, 33
 caseload of, 67
 development of, 47–48, 62
 features of, 59–68
 pilot judgments procedure, 106, 110, 127, 136–137, 203
 private property cases of, 82–83
 exhaustion of local remedies, 87, 95, 106, 110, 132–135, 202, 242, 248
 expertise. *See* second-order reasons, instrumental
 fair and equitable treatment, 49, 94, 158, 161, 186, 188, 248–249
 fairness
 role in analysis of deference, 28, 30, 34–35, 180, 191
 first instance decision-maker
 role of international adjudicator as, 106, 110, 132–135, 140, 149–150
 fork-in-the-road clauses, 95, 106, 110, 139–140, 150–152, 235
 forum non conveniens, 106, 110, 139, 150–151, 235
 fourth instance doctrine. *See* appellate function
 fragmentation of international law, 55–59, 229, 273
 full protection and security, 49
 good faith review. *See* deference as respect
 governance, 10
 conceptions of good governance, 182
 injunctive relief and deference, 106, 110, 126–128, 260–261
 International Court of Justice
 and justiciability, 114–117
 and margin of appreciation, 78, 165
 and public purposes, 96, 97
 approaches to deference of, 78, 113–193, 197–220, 241–243
 development of, 47–48, 62
 engagement with domestic law, 101–103, 118–119
 features of, 59–68
 private property cases of, 82–83
 Investment treaty arbitration
 advantages of, 25
 and domestic law. *See* domestic law
 and private property, 56–59, 82–83
 and public purposes. *See* domestic policy
 approaches to deference in, 16, 78, 113–193, 197–220, 241–243
 criticisms of, 2
 development of, 49, 62
 empirical studies of, 4, 71, 72, 77, 116
 features of, 59–68
 reform of, 25, 242–243, 245
 interpretation
 and authority, 21, 24, 62
 and deference, 4, 35, 40–41, 64, 74, 79, 100–105, 106, 110, 116, 121, 125, 133, 141, 142, 147, 148, 149, 153–157, 158, 159, 201, 226, 228, 240–241, 242, 249–251, 252–253
 and first-order reasons, 35, 69–70, 79, 97, 100, 159–161, 163–164, 176, 240
 and the margin of appreciation, 162–164
 and the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties
 of domestic law, 24, 65, 94–96, 100–105, 106, 110, 114, 115, 118–119, 121, 122, 123, 124, 144, 145, 147, 148, 149, 165, 167, 170–174, 183, 188, 189, 190–191, 211, 243, 254–256, 260
 of international law, 40–41, 57, 70, 94–95, 96, 97, 125, 133, 141, 142, 149, 153–154, 155–157, 158, 159, 160, 161, 163, 171, 173, 267
 of self-judging clauses, 116, 248
 restrictive interpretation, 4, 40–41, 106, 110, 155–157, 249

- judicial dialogue. *See* dialogue
- jurisdiction
 and deference, 35, 38–41
 domestic jurisdiction, concept of, 6, 47, 115,
 119, 130, 134, 136, 140–146, 178
 of courts vs. other decision-makers, 23
 of domestic courts, 137–138, 151
 of international adjudicators, 35, 38–41,
 46–49, 54, 58, 60–61, 63, 96–97, 103, 114,
 119, 123, 132–133, 140, 150, 155, 157, 166,
 178, 211
 European Court of Human Rights,
 48
 International Court of Justice, 47
 Permanent Court of International Justice,
 46–47
 justiciability, 38–40, 87, 96–97, 106, 110,
 113–117, 123–124, 139, 140–146, 228
- legislation
 international review of, 1, 22, 23–25, 27,
 37, 38, 73, 80, 93, 100, 102, 119, 127,
 140–141, 142, 145, 146, 147, 152, 154, 160,
 161, 167, 173, 180, 188, 189, 208–209,
 225–227, 232, 257, 259, 261
- legitimacy. *See* second-order reasons
 and deference, 19–20, 26–31, 32, 36–38, 42,
 67, 100, 104, 111, 118, 120, 130, 133, 136,
 137, 138, 139, 140, 143, 148, 152, 158, 161,
 171, 176, 180, 182, 186, 209–211, 212, 219,
 240, 252, 257, 258, 261, 262, 265, 267, 270,
 271, 272
 and public purposes, 48, 99, 162, 163
 crisis. *See* crisis
 of international courts and tribunals, 2,
 31, 67, 87, 100, 134, 136, 140, 171, 271
- lex posterior, 232
 lex specialis, 232
 lex superior, 232
 lis pendens, 106, 110, 139, 150–151, 235
- margin of appreciation, 4, 16, 77–78, 80, 87,
 106, 110, 125, 143–144, 158, 159, 160,
 162–166, 168–169, 177, 181, 182, 185, 186,
 210, 242, 243, 245, 248
- methodology, 70–89
 empirical vs. doctrinal approaches, 4–5, 8–9,
 16, 51–52, 69–80, 105–110
 inductive vs. deductive approaches, 76–80,
 84–88, 107–110, 197
 qualitative analysis, 11, 76–80, 84–88, 197
 quantitative content analysis, 87–88, 197–220
 thematic analysis, 87–88
- monism, 3, 221, 229, 230–232, 238
 compared to dualism, 234
 compared to pluralism, 235–237
- nationality
 discrimination on the grounds of. *See*
 discrimination
 of adjudicators, 64–66, 260, 267
 of individuals
 role of deference in determining, 118–120,
 124, 135, 143–144, 168–169
 role of domestic law in determining, 101, 102
- necessity
 as an approach to review, 79, 98, 116–117, 125
 under customary international law. *See*
 customary international law
- pacta sunt servanda, 138
- parliament, deference to. *See* legislation
- Permanent Court of International Justice
 and justiciability, 115; *see also* justiciability
 and margin of appreciation, 78; *see also*
 margin of appreciation
 approaches to deference of, 78, 115, 117–119,
 122, 125, 132, 133, 135–136, 139, 144, 145,
 149, 151, 155, 170, 172, 173, 197–220
 compared to International Court of
 Justice, 47
 development of, 46–47
 engagement with domestic law, 101–105, 173
 features of, 59–68
 interaction with domestic courts, 94–96, 135
 private property cases of, 80–83
- pluralism, 3, 221, 229, 233, 235–237, 238
- plurality
 and comparison, 51–68
- precedent, 40, 70–71
- presumption
 and deference, 36–37, 110, 165, 166–169, 189,
 190, 261, 265
 and treaty interpretation, 156
 of competence or legitimacy, 22
- private property
 meaning of, 56–59, 80–83
 scope of international protection for, 43–51,
 94–105
- proportionality, 4, 97, 98, 99, 117, 126, 164, 184,
 187, 245, 250, 257, 264
- public purpose. *See* domestic policy

- rationality
 as an approach to deference, 106, 110, 111, 158,
 175–176, 178, 185–190, 217–219
 connection between an aim and a measure,
 100–101
 connection to arbitrariness, 175–176, 178, 257
 reasonableness review. *See* deference as respect
 remedies. *See* compensation
 exclusiveness of international adjudication
 as a remedy, 151
res judicata, 37, 106, 110, 114, 120–123, 150
 right to regulate, 87, 96–97, 99–100, 103, 110,
 139, 140–146, 178, 182, 191
- second-order reasons, 13, 15–42, 55, 64, 94–95,
 98, 100, 104–109, 113, 115, 118, 123, 126,
 128, 129–131, 133–136, 140, 143, 148, 151,
 152, 153–156, 160–161, 163, 165, 167,
 170–171, 173–174, 176–177, 185–186, 189,
 193, 210, 237, 250, 252–253, 256, 258, 260,
 266, 269, 270, 271, 274
 concept of, 15–42
 exclusionary vs. non-exclusionary, 35–38,
 106, 107, 108, 109, 118, 128, 129, 131,
 146, 152, 153, 170, 176, 237, 256–257,
 269, 275
 instrumental, 19, 27–31, 100, 115, 118, 126,
 130–135, 140, 148, 160, 165, 175, 185, 252,
 258, 271, 274
 non-instrumental, 33–35, 55, 129, 130, 133,
 140, 146, 160, 161, 180, 209–211, 212, 257,
 264, 269
 prudential, 31–33, 64, 68, 130, 133, 134, 136,
 140, 146, 160, 209–211, 212, 257–258, 259,
 264, 269, 271, 274
 self-judging clauses, approach to, 106, 110,
 114–117, 178, 245, 248
 separation of powers, 23, 55–56, 180
 sovereignty
 and ad hoc judges, 66
 and authority. *See* authority
 and deference, 9, 96, 117–120, 121, 126, 130,
 134–135, 147, 155–156, 167–168, 210,
 224–228, 249, 268–270
 and private property, 6–8, 46
 and public purposes, 100, 103
 legal and factist views of, 224–225
 meaning of, 6–8
 stays of proceeding, 101, 106, 110, 132, 135–138
 subsidiary
 principles of interpretation, 156
 sources of international law, 74
 subsidiarity and deference, 35, 105, 135, 136,
 192, 210, 242
- transparency
 of approaches to deference, 210, 239,
 267
 of domestic decision-making,
 179–185, 227
 triple identity test, 120–121, 150–151, 255
- Vienna Convention on the Law of Treaties
 (VCLT), 156, 163, 179, 240, 249, 251