

Esmé Shirlow. ***Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication***. Cambridge: Cambridge University Press, 2021. Pp. 338. £95. ISBN: 9781108490979.

1 Introduction

Growth in international adjudication, the broadening and deepening of international legal norms and the proliferation of ‘inward-looking’ obligations¹ have all generated new opportunities for international adjudicators’ and domestic actors’ decisions to interact. In recent years, the relationship between international adjudication and freedom of action at the domestic level has often been cast in terms of conflict,² and diverse international adjudicators have been accused of ‘overreach’ or ‘activism’ or of inappropriately constraining governments’ autonomy.³ Given its potential to impact governments’ capacities to freely define and pursue the public interest and to delimit and regulate the state–market relationship, international law on the protection of private property has unsurprisingly stood out in this respect. Disputes between property owners and their home states and foreign nationals and their host states have raised time and again significant questions about the proper locus of decision-making authority, especially when determining when the ‘private’ should give way to the ‘public’.

It has thus become commonplace when discussing the proper role of international adjudicators in such cases for commentators, officials and practitioners to draw on a concept familiar in domestic public law discourse – ‘deference’ – and for states to request that adjudicators recognize their superior competence or legitimacy to, for example, interpret domestic law, determine facts, construe legal obligations, set policy or define societal values.⁴ There has been a corresponding explosion of academic interest in deference’s role in international adjudication within and beyond disputes involving

¹ For an elaboration of this concept, see Tzanakopoulos and Tams, ‘Introduction: Domestic Courts as Agents of Development of International Law’, 26(3) *Leiden Journal of International Law (LJIL)* (2013) 531.

² See, e.g., discussion in Madsen, Cebulak and Wiebusch, ‘Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts’, 14(2) *International Journal of Law in Context (IJLC)* (2018) 197; Pauwelyn and Hamilton, ‘Exit from International Tribunals’, 9(4) *Journal of International Dispute Settlement (JIDS)* (2018) 679.

³ See, e.g., Stiansen and Voeten, ‘Backlash and Judicial Restraint: Evidence from the European Court of Human Rights’, 64(4) *International Studies Quarterly* (2020) 770; Caserta and Cebulak, ‘The Limits of International Adjudication: Authority and Resistance of Regional Economic Courts in Times of Crisis’, 14(2) *IJLC* (2018) 275; Lovat, ‘International Adjudication and Its Discontents: A Pluralist Approach to International Tribunal Backlash’, 53(3) *Israel Law Review* (2020) 301.

⁴ See illustratively PCA (UNCITRAL), *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India – Award*, 21 December 2020, PCA Case no. 2016-7, paras 840–846, 863–865; ICSID, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay – Award*, 8 July 2016, ICSID Case no. ARB/10/7, especially para. 399; PCA (UNCITRAL), *Windstream Energy LLC v. Government of Canada – Counter-Memorial of the Government of Canada*, 20 January 2015, PCA Case no. 2013-22, paras 161–162; ECtHR, *Case of Lindheim and others v. Norway*, Appl. nos. 13221/08 and 2139/10, Fourth Section, Judgment of 12 June 2012, paras 90–95. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

states' treatment of property owners or debating the degree of deference due to domestic decision-makers in particular circumstances.⁵ In much of this literature, deference is understood as a tool that adjudicators can employ to save international adjudication, essentially, from itself.

Deference promises to address perceived inequities in the distribution of authority and autonomy and thereby to enhance international adjudication's (sociological) legitimacy. It describes a position adopted (or not adopted) in a negotiated (political) relationship between an international adjudicator and a domestic official, court or agency that has made a prior decision on the same subject matter. An international adjudicator exercises deference when it recognizes that, for whatever reason, it is more appropriate for the domestic decision-maker than for itself to decide how to determine the issue. By contrast, it declines to defer whenever it determines the issue itself.

To illustrate using examples drawn from *Judging at the Interface*, should an international adjudicator merely accept a state's categorization of a particular measure as aimed to achieve a public purpose? Or should it reassess that determination and, if so, how intensively?⁶ In determining whether limitations of the free use of intellectual property are justified by a countervailing need to protect consumers from the devastating health effects of tobacco consumption, should it be for the state or an international tribunal to assess the likely effectiveness of various alternative measures?⁷ Should it be for an international tribunal or the local and national governments to determine whether citizens' concerns justify terminating a licence to run a landfill site?⁸ And should an international court or tribunal accept a state's contention that certain conduct was consistent, or inconsistent, with domestic law, or should it make its own determinations on the issue?⁹

⁵ Of this voluminous literature, see especially E.H. Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis* (2020); Fukunaga, 'Margin of Appreciation as an Indicator of Judicial Deference: Is It Applicable to Investment Arbitration?', 10(1) *JIDS* (2018) 69; Zürn, 'International Courts: Command v. Reflexive Authority', in Alter, Helfer and Madsen (eds), *International Court Authority* (2018) 382; Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015); see also the various contributions to Gruszczynski and Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014); Henckels 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration', 4(1) *JIDS* (2013) 197; Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013); Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review', 3(3) *JIDS* (2012) 577; von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review', 10(4) *International Journal of Constitutional Law (IJCL)* (2012) 1023; Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint', 2(2) *JIDS* (2011) 471; Guzman, 'Determining the Appropriate Standard of Review in WTO Dispute Resolution', 42(1) *Cornell Journal of International Law* (2009) 45, especially at 48–73.

⁶ See, e.g., *Oscar Chinn*, 1934 PCIJ Series A/B, No. 63, at 78–79, 88.

⁷ See, e.g., *Philip Morris Brands*, *supra* note 4, especially paras 305–307.

⁸ See, e.g., ICSID, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States – Award*, 29 May 2003, ICSID Case no. ARB(AF)/00/2, paras 115–179.

⁹ See, e.g., ECtHR, *Case of Kotov v. Russia*, Appl. no. 54522/00, Grand Chamber, Judgment of 3 April 2012, paras 122–123; ECtHR, *Case of Kopecký v. Slovakia*, Appl. no. 44912/98, Judgment of 28 September 2004, para. 56.

However, despite its prevalence in debate, deference remains a rather fluffy analytical tool. Precisely what deference entails, and when and why it is due, remain contested and are, perhaps, interminably contestable. Much of the existing literature has adopted an ‘I know it when I see it’ approach and, rather than developing an analytical or predictive theory of deferential reasoning, has focused on identifying and critiquing purported manifestations of deference in practice. It has thus largely focused on adjudicative techniques like the margin of appreciation,¹⁰ or proportionality or reasonableness analysis,¹¹ alleged or assumed to promote deference. Debate has also proven (seemingly unavoidably) normative, subjective and prescriptive, with scholars presenting the case for or against certain approaches to deference, invoking certain conceptions of authority and the optimal relationship between international and domestic decision-makers.¹² This has meant, however, that our understanding of the concept itself, and of how, why and when adjudicators employ deferential reasoning in practice, remains rather incomplete.

In *Judging at the Interface*, Esmé Shirlow sets out to address these deficiencies and to sharpen the concept’s edges by providing a laboriously researched empirical account of deference in international dispute settlement. By examining deferential

¹⁰ See, e.g., Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’, 31 *New York University Journal of International Law and Politics* (1999) 843; Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’, 16 *European Journal of International Law* (2005) 907; Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’, 17(1) *European Law Journal* (2011) 80; Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012); Arai-Takahashi, ‘The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry’, in Føllesdal, Peters and Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013) 62; Arnardóttir, ‘The “Procedural Turn” under the European Convention on Human Rights and Presumptions of Convention Compliance’, 15 *IJCL* (2017) 9; Fukunaga, ‘Margin of Appreciation as an Indicator of Judicial Deference: Is It Applicable to Investment Arbitration?’, 10(1) *JIDS* (2018) 69; Benvenisti, ‘The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy’ 9 *JIDS* (2018) 240; Dothan, ‘Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies’, 9(2) *JIDS* (2018) 145; Muhammad, ‘A Comparative Approach to Margin of Appreciation in International Law’, 7(1) *Chinese Journal of Comparative Law* (2019) 212. Cf. also the recent exchange in Føllesdal, ‘International Human Rights Courts and the (International) Rule of Law: Part of the Solution, Part of the Problem, or Both’, 10(1) *Global Constitutionalism* (2021) 118, especially at 127ff; Palombella, ‘Non-arbitrariness, Rule of Law and the “Margin of Appreciation”: Comments on Andreas Føllesdal’, 10(1) *Global Constitutionalism* (2021) 139.

¹¹ See e.g., Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (2018); Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015); Bücheler, *Proportionality in Investor-State Arbitration* (2015); Dyzenhaus, ‘Proportionality and Deference in a Culture of Justification’, in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) 234; Cohen-Eliya and Porat, *Proportionality and Constitutional Culture* (2013); Kingsbury and Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality’, in Schill (ed.), *International Investment Law and Comparative Public Law* (2010) 75; Ortino, ‘Investment Treaties, Sustainable Development and Reasonableness Review: A Case against Strict Proportionality Balancing’, 30(1) *LJIL* (2017) 71. On the relationship between, for example, *Wednesbury* reasonableness review and proportionality analysis, cf. especially Taggart, ‘Proportionality, Deference, *Wednesbury*’, 2008(3) *New Zealand Law Review* (2008) 423; Craig, ‘Proportionality, Rationality and Review’, 2010(2) *New Zealand Law Review* (2010) 265.

¹² Cf. Henckels, ‘Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration’, 4(1) *JIDS* (2013) 197, especially at 203–213; Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis* (2020), at 149–216.

reasoning across four jurisdictional regimes and developing a nuanced taxonomical framework, Shirlow dismantles some of the roadblocks that have so far obstructed the concept's analytical utility. Although she focuses on disputes involving international law's protection of private property, her analysis and findings provide important insights for international adjudication as a whole. While not all readers will agree with all of Shirlow's methodological and analytical choices, the depth and maturity of her account mean her book will be of great use and interest for anyone concerned with adjudication's place in the contemporary international legal and political orders. Although it is at times highly complex, and its empirical focus means the big picture can often overwhelm more granular case-by-case analysis, this intricately researched book is well worth the effort and deserves and rewards close and repeat reading.

2 From Theory to Practice to Policy

Claiming that 'deference is a key means by which international adjudicators recognise, accommodate, and constrain State decision-making authority', Shirlow sets out to consider the concept's role 'in settling the interface between domestic and international decision-making authority' (at 2) and highlight its role 'as a tool for flexible interface management' (at 10). She expressly disavows existing approaches to deferential reasoning, which she considers focus on 'conceptions' of deference rather than on the concept of deference, often putting the (prescriptive) cart before the (descriptive) horse. Shirlow instead attempts to work 'from theory to practice to policy' (at 4). Her stated aim is thus to inductively build an account of deference's manifestations in practice and to focus on structures of reasoning rather than on labels. With certain caveats, explored below, she is largely successful.

Shirlow investigates adjudicative practice across four 'international regimes' in decisions concerning international law's protection of private property: the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR) (in respect of Article 1 of Additional Protocol 1) and tribunals settling disputes arising under international investment agreements (at 2).¹³ These regimes were chosen, Shirlow explains, in part because the application of international law on the protection of property will often generate 'overlap' between domestic and international adjudicators' determinations of legally relevant issues (especially at 7, 80–83).

In Part 1, Shirlow sets out a 'meta-definition' of deferential reasoning (at 16), drawing on, and often rearranging, existing theoretical approaches to deference and authority at the domestic and international levels (Chapter 1),¹⁴ and she develops a novel

¹³ Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3.

¹⁴ In forming her views of authority and deference (and their mutually dependent relationship), Esmé Shirlow draws, rather eclectically, on a vast range of domestic and comparative public law scholarship, legal theory and sociological research, citing and combining insights from the work of authors as diverse as Joseph Raz, John Finnis, Philip Soper, Max Weber, Anne-Marie Slaughter, Alison Young, David Dyzenhaus and Eoin Carolan. Shirlow's underlying conception of authority is, however, distinctly 'Razian' (at 15–42).

methodology to identify, qualify and quantify practical approaches to deference through an empirical study of 1,714 decisions (at 83; Chapters 2–3). In Part 2, the results of this study, presented in Chapters 4–7, generate an intricate taxonomy of deferential reasoning. Eschewing viewing deference as an ‘on-off’ concept, Shirlow identifies a spectrum of approaches, consisting of seven ‘modes’ of deference, each representing one of four conceptions of the relative authority of international and domestic decision-makers, and manifesting certain doctrinal ‘devices’ (especially at 105–112). In Part 3, Shirlow presents a quantitative and qualitative analysis of the results of her empirical study and compares and contrasts approaches to deference across the four regimes studied, identifying changes in adjudicators’ approaches over time (Chapter 8). She then considers the systematic and conceptual implications of adjudicative approaches to deference for the distribution of authority in the international and domestic legal orders (Chapter 9). In doing so, Shirlow maps her taxonomy on to the three principal theoretical approaches to the international-domestic interface: monism, dualism and pluralism (especially at 230–238). In Chapter 10, Shirlow presents something of a how-to guide of the ways in which disputing parties might use argumentative ‘levers’ to nudge adjudicators’ approaches towards, or away from, certain modes of deferential reasoning.

3 Towards a Taxonomy of Deferential Reasoning

Within Shirlow’s understanding, an adjudicator will exhibit a degree of deference whenever ‘second-order reasons’ concerning relative authority – for example, considerations of competence or legitimacy – impact first-order reasoning – that is, considerations related to the ascertainment, interpretation or application of law or exercise of (established) jurisdiction (at 17–19). For Shirlow, deference does not arise whenever an adjudicator favours a state party’s construction of first-order reasons, decides an issue or dispute in favour of a State or deems that it lacks jurisdiction (at 35) but, rather, only where recourse is made to second-order reasons (especially at 19). To illustrate, if an adjudicator decides that a host state’s interference with private property was not unlawful because it pursued a public purpose for which the relevant treaty contains an express exception, they will have made their decision based on first-order reasons. However, if, in doing so, they hold that it is for the host state alone to determine whether a measure pursues such a purpose because the state is more competent to make such a determination, they will have resorted to second-order reasons. In other words, first-order reasons concern the legal merits of a decision, and second-order reasons concern the merits of making a decision at all and who should make it.¹⁵

Shirlow groups such second-order reasons into three categories: ‘instrumental’ reasons, pertaining to relative competence and legitimacy; ‘prudential’ reasons, pertaining to adjudicators’ perception of the likely political consequences of exercises of authority;

¹⁵ Shirlow draws heavily in this respect on Raz, *Practical Reason and Norms* (1999); Dan-Cohen, ‘In Defense of Defiance’, 23 *Philosophy and Public Affairs* (1994) 24; Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012).

and non-instrumental' reasons, pertaining to moral or ethical values (at 19–35). Adjudicators' first-order reasoning can be simultaneously affected by several categories of second-order reasons (at 211), which may exclude the consideration of first-order reasons or be considered alongside such reasons, thus modifying their operation (at 35–38). Deference, within Shirlow's model, is therefore not an on-off binary but, rather, a reflexive activity, occurring whenever an adjudicator situates their own authority to make decisions on issues 'relevant to the settlement of the dispute' relative to domestic decision-makers' authority (at 16, 274–275). It depends on an adjudicator's unavoidably subjective constructions of 'the relationships between national and international decision-makers, between national and international law, and between law and politics' (at 275). Shirlow argues that, because such constructions necessarily vary from adjudicator to adjudicator, context to context and over time, approaches to deference will always 'remain in flux', which is not 'necessarily undesirable': deference allows adjudicators 'to negotiate and readjust the national/international interface dynamically as circumstances change' (at 273, 275). Its value 'lies not in *resolving* but rather in *creating space* for debate about the relationships between States and international adjudicators' (at 273; emphasis added). Deference is thus viewed as a way for adjudicators to respond to external signals concerning the acceptable bounds of their authority.

This brings us to *Judging at the Interface's* most significant contribution. To illustrate the many ways in which second-order reasons influence or displace first-order reasons in practice, and to equip us to assess the circumstances in which this is likely to occur, Shirlow presents an innovative conceptual taxonomy of deferential reasoning based on empirical analysis of around 1,700 individual decisions concerning international law's protection of private property. Whereas many existing approaches to deference use express references to the concept or stand-in concepts (like margin of appreciation) to identify deferential reasoning, Shirlow develops her taxonomy as a result of – not prior to – her empirical study of adjudicative practice (at 83–86). Adapting qualitative content analysis – a methodology typically used in sociological and socio-legal research – Shirlow read and coded 1,714 majority and individual decisions of the PCIJ, ICJ, ECtHR and investment tribunals in order to 'identify "indicators" of deference' – signals that an adjudicator resorted to second-order reasoning (at 84).¹⁶

Rather than following a predetermined coding scheme, Shirlow identified instances of deference and coded 'inductively' in response to four guiding questions: (i) the 'doctrines or structures' 'used to attribute weight or relevance to domestic decision-making'; (ii) the 'rationales', if any, provided to justify the use of such structures or doctrines; (iii) any legal bases invoked to justify the use of such structures or doctrines; and (iv) the domestic decision-makers 'granted or denied deference' (at 85).

¹⁶ Shirlow's approach seems to be partly inspired by, for example, Jeff Dunoff and Mark Pollack's interdisciplinary turn and the empirical aspects of Greg Shaffer's and others' 'new legal realism'. See especially the contributions to Dunoff and Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012); Shaffer, 'A New Legal Realism: Method in International Economic Law Scholarship', in C.B. Picker et al. (eds), *International Economic Law: The State and Future of the Discipline* (2008) 9; Shaffer and Ginsburg, 'The Empirical Turn in International Legal Scholarship', 106 *American Journal of International Law* (2012) 1.

The results were ‘sorted ... into meaningful groups describing distinct approaches to deference’ and recoded thematically (at 87–88), facilitating both the development of Shirlow’s conceptual taxonomy (presented in Chapters 4–7) and her quantitative analyses of deference in the four bodies of practice studied (Chapter 8).

While Shirlow’s method happily moves us away from focusing too closely on a narrow range of legal concepts, despite the inclusion of many tables and figures, she never quite fully articulates her process for identifying ‘indicators’ of deference, and we are not provided with the initial or final coding schemes. Readers must therefore accept it on faith that all of the instances cited resemble deferential reasoning.

Shirlow’s taxonomy comprises numerous interlinked parts. Its central feature is the identification of seven ‘modes of deference’ – deference as (from most to least deferential): submission, deferral, abstention, restraint, reference, respect and control/dismissal (at 107–111). These modes correspond to four conceptions, or ‘structures’, of relative authority: conclusive domestic authority, suspensive authority, concurrent authority and conclusive international authority (at 108–110). In turn, Shirlow identifies 24 doctrinal and procedural ‘devices’ through which these modes are commonly expressed – for example, the principles of *res judicata* or *forum non conveniens*, structural or substantive margins of appreciation, restrictive interpretation of obligations or rationality, reasonableness, procedural or good faith review (at 106, 110). Once again, each device, mode and structure of authority correlates to one of three conceptions of the nature of international and domestic actors’ relationship (vertical, horizontal or overlapping) and a theory of the international and domestic legal orders (monism, dualism and pluralism) (at 238). While complex, the features of this taxonomy are introduced progressively and logically, with each element building on and adding to the last. Nevertheless, many readers (myself included) will likely need to frequently refer to the tables and diagrams provided until they make sense of the relationships between the taxonomy’s various moving parts.

Applying her taxonomy to the four studied regimes, Shirlow concludes (in her quantitative assessment in Chapter 8) that ‘adjudicators applied at least one mode of deference’ in some way in 42 per cent of the decisions analysed (726 out of 1,714) (at 198). This finding included some 1,009 individual instances where the majority of the court or tribunal employed second-order reasoning when deciding the dispute (at 200). This seems like a strikingly high proportion – and it is given that Shirlow investigated only a portion of the entire corpus of adjudicative practice – but we must recall that these figures include both instances where the court or tribunal adopted a domestic decision-maker’s decision or abstained from making a determination (that is, decided that a high degree of deference is due) and those instances where international adjudicators remade or dismissed a domestic decision (that is, decided that little or no deference is due). Shirlow usefully demonstrates, however, that, across all four jurisdictional regimes in the overwhelming majority of instances where second-order reasoning was employed, adjudicators referred to domestic actors’ decisions to guide or inform their own decision-making (deference as reference) or endorsed domestic actors’ decisions after subjecting them to limited – procedural or minimally substantive – inquiry (deference as respect) (at 200–207). She contends that this shows that

the PCIJ, ICJ, ECtHR and investment tribunals, on the whole, have framed their authority as concurrent to domestic decision-makers' authority rather than conclusive or suspensive (at 204–207).

4 What We Gain and What We Lose from Shirlow's Inductive, Empirical and Comparative Approach

No book will ever please everyone. There are undoubtedly things we gain and things we lose from Shirlow's empirical methodology.¹⁷ Shirlow's commitment to bringing conceptual clarity to deference by tying it to discernible and measurable trends in adjudicative practice should be lauded. Too often various reasons – the nature of legal argument, constraints of time and resources, the pressure to publish or lack of ambition, to name a few – mean that we work deductively, focusing on a narrow range of (often unrepresentative) decisions, or use labels as convenient shorthand for structures of reasoning. Shirlow largely succeeds in her goal of avoiding these pitfalls (at 77–80) and comprehensively and systemically assesses a large body of diverse practice. By developing her taxonomy of deference from identified patterns in practice, and then reapplying that taxonomy to practice to generate quantitative insights and identify trends in the four regimes studied over time, Shirlow presents a well-developed 'zoomed-out' picture of adjudicative practice, without shoehorning approaches into artificial taxonomical categories.

Her taxonomy provides us with a comprehensive and generalizable toolset that will enable lessons to be transferred to contexts beyond international law's protection of private property. Shirlow's careful cataloguing and footnoting provides a rich lode to mine for a more detailed view. Further, by examining practice through the lenses of the 'mode' of deference and conception of authority adopted rather than considering each 'regime' individually, Shirlow avoids siloing and clearly identifies commonality and diversity in adjudicative approaches over time, meaningfully comparing, for example, PCIJ judges' approaches in the 1920s and 1930s with investment arbitrators' almost a century later. This is most clear in Chapter 8, in which Shirlow assesses and compares how adjudicators in each of the four studied regimes have employed various modes and techniques of deferential reasoning and how approaches within each regime have developed over time as the politics of international adjudication have changed.

Achieving all of this has nevertheless come at a price. Shirlow expressly recognizes some of the limitations of employing empirical methodologies, including the tendency to 'eschew analysis of the legal quality of legal texts, to explore instead their extra-legal implications and significance' (at 71) and adopt (or we might say generate) 'an "external" perspective to law': legal practice – whether as legal text, pleadings or adjudicative reasoning – is treated as mere social fact and instances of practice

¹⁷ On this theme, see Klabbers, 'Whatever Happened to Gramsci? Some Reflections on New Legal Realism', 28(3) *LJIL* (2015) 469, especially at 473–476.

as mere data points (at 71). The risk, as Shirlow sees it, is that ‘empirical studies of law risk becoming “law-blind”’ (at 72). She seeks to avoid these risks by developing a ‘third option’ that promotes both doctrinal and social understandings of deference in practice. To do so – and drawing especially on Jutta Brunnée and Stephen Toope’s and Ingo Venzke’s approaches¹⁸ – she adopts a ‘process-based’ theory of international adjudication in which adjudicators are ‘not merely ... neutral figures applying “the law”, but rather ... political actors implicated in its construction’ (at 76).¹⁹ Within this conception, the process and politics of international adjudication are as important as, or more important than, the identification and application of positive rules of law. Adjudicative decisions, and the reasons on which they are based, are the product of the political climate in which they occur, the positions adopted by the various interested parties (each with varied interests and influence) and the agency of the adjudicators themselves.

However, Shirlow is not entirely successful in ensuring that her analysis remains law internal. This is in part because her ‘third option’ – the use of a process-oriented approach that unshackles judicial decisions from the limited role envisaged in, for example, Article 38(1)(d) of the ICJ Statute – in fact sidesteps the problem by ‘socialising’ ‘law’.²⁰ By adopting a broader, more flexible approach to the law/non-law binary, however, the practical limitations of empirical research remain largely unaddressed. The intricacies of the legal questions addressed in the practice identified, the terms of the treaties or content of the customary rules being applied, the facts of the dispute and the arguments presented by the parties are often absent from, or given only minimal attention in, her account. This seems inherent to the type of large-corpus qualitative content analysis that underpins Shirlow’s account of practice. With over 1,700 decisions to consider (and many more instances of deferential reasoning identified), constraints of time and space mean that they cannot all be meaningfully analysed. Careful attention to the big picture means that we are often left with only snapshots of adjudicative practice, taken out of their normative and adjudicative contexts and devoted only brief analysis. For example, the *Occidental v. Ecuador* tribunal’s highly controversial and rather ambiguous engagement with Ecuadorian law is reduced to

¹⁸ In this respect, Shirlow draws especially on Venzke, ‘The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation’, 34 *Loyola of Los Angeles International and Comparative Law Review* (2011) 99; Brunnée and Toope, ‘International Law and Constructivism: Elements of an International Theory of International Law’, 39 *Columbia Journal of Transnational Law* (2000) 19; Brunnée and Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010).

¹⁹ Shirlow is highly critical of ‘positivistic’ approaches, without, however, considering whether contemporary (or even modern) positivism truly marginalizes adjudicative discretion and assumes determinacy in the ways claimed. Cf., e.g., the various contributions to Kammerhofer and d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (2014), especially Hernández, ‘Interpretation’, in Kammerhofer and d’Aspremont (eds), *ibid.*, 317, at 319–322; cf. also d’Aspremont, ‘Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules’, 13 *Melbourne Journal of International Law* (2012) 921; Kelsen, *Pure Theory of Law*, translated by M. Knight (2nd edn, 2005) at 351ff.

²⁰ Statute of the International Court of Justice 1945, 33 UNTS 993.

an example of ‘deference as reference’, without analysis of the validity or merits of the tribunal’s approach (at 173).²¹

Despite Shirlow’s best efforts, this tendency means adjudicators’ reasoning often resembles mere data, even when analysed qualitatively. It is often only by mining Shirlow’s detailed footnotes and going directly to the source material that we can understand the nuances of the doctrinal and interpretative questions under consideration, the significance of the factual determinations and the arguments being addressed – all of which seem vital to understanding the role played by second-order reasons. Throughout Chapters 4–7, where Shirlow elaborates adjudicative practice according to the four modes of deference she introduces in Chapter 3, and in Chapter 8, where she applies her taxonomy to quantitatively assess the entire corpus, often just a little further elaboration would have helped clarify her observations, thereby strengthening the taxonomy’s descriptive and analytical utility and helping to draw out the often-complex relationships that Shirlow suggests exist between first- and second-order reasons and between legal text, legal process and interpretive culture.

Similarly, Shirlow does not at any stage assess whether adjudicators’ approaches are justified (or justifiable), including by reference to customary rules on sources and interpretation; while maintaining that such first-order reasons ‘may well preclude the application of particular *doctrines* or *approaches* to deference’ (at 249; emphasis in original), she leaves such assessment for others. Relatedly, while Shirlow goes to great pains in Chapter 2 to justify the choice of her four comparator regimes and to highlight areas of similar diversity in the applicable law and their procedural and institutional frameworks, these often become rather washed out in the resulting accounts. Readers wishing to directly compare approaches to deference in the ECtHR’s practice concerning Article 1 of Protocol no. 1 to the European Convention on Human Rights with investment tribunals’ practice on indirect expropriation, for example, may be disappointed.²²

5 Conclusions and Final Reflections

The above consequences of Shirlow’s methodological choices do not detract much from the strength of *Judging at the Interface*’s contribution to our understanding of deference in international adjudication. Shirlow’s attention to detail, the analytical and predictive maturity of her conceptual taxonomy and her skill in meaningfully comparing a vast corpus of practice drawn from a diverse range of courts and tribunals mean that her work will be incredibly useful for anyone – judge, arbitrator, official, practitioner or scholar – interested in the roles of adjudication in the international legal and political orders. While her corpus consists only of decisions concerning

²¹ See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador – Award*, 5 October 2012, ICSID Case No. ARB/06/11, especially paras 397–409, 427.

²² Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952, ETS 9.

international law's protection of private property, Shirlow's study provides numerous important insights of general relevance. She has, further, largely succeeded in her aim of moving beyond current thinking on the nature and role of deference. Hers is a detailed study only possible through meticulous labour conducted over many years. It rewards careful reading (and rereading) in contiguous sessions.

I will end this review with a final reflection. Given her express eschewal of overtly 'normative' approaches, one might be forgiven for thinking that Shirlow presents no vision for how deference should shape the international-domestic interface. However, this is not so. Throughout her book, Shirlow subtly presents several claims with normative consequences and, in Chapters 9 and 10, not quite implicitly presents her vision of the appropriate role of deferential reasoning and the preferable modes of interrelation between domestic and international decision-making authority. Within this vision, authority in the international legal order is plural, adjudicators 'make' law and relative authority ought to be considered on a decision-by-decision basis against functional (rather than 'formal') criteria (especially at 262–263). As such, states should not attempt to lock in particular approaches to deference by amending primary rules (at 246) but, rather, should confine themselves to nudging adjudicative practice and demonstrating that they have 'earned' deference (at 263–267). Adjudicators, for their part, should adopt a presumption in favour of deference, balanced by a spirit of 'distrust' (at 265–266).

Implicitly or not, Shirlow's approach places international adjudicators firmly in the driving seat. Litigants can attempt to give direction or suggest a route, but, ultimately, it is for adjudicators to steer their own course by identifying and assessing the existence and relevance of any second-order reasons justifying recognition of domestic authority. As Shirlow acknowledges, much will continue to depend on largely immeasurable psychological and sociological factors: adjudicators' professional and personal backgrounds, training and underlying values and assumptions (at 69). Shirlow, however, conspicuously does not provide guidance on how adjudicators should approach this fraught task and – except with an implicit 'yes' – does not answer the 'meta-question' of whether they (or states) should be the ones to do so. Tied as they are to subjective understandings of legitimacy and authority, these questions are interminable, suggesting that no matter how rigorous our analyses, deference will always remain a fuzzy concept.

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