Intensity of review in international courts and tribunals

A comparative analysis of deference

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1. Introduction

1.1 Research Questions

International adjudicators are more and more often requested to pass judgement on matters that are traditionally considered to fall within the domestic jurisdiction of States.[1] Especially in the fields of human rights, investment law, and trade law, international tribunals are nowadays commonly required to evaluate decisions of national authorities that have been made in the due course of democratic procedures and public deliberation.[2] This poses a challenge for international adjudicators, as they need to exercise meaningful supervision while recognising the expertise and legitimacy of domestic decision makers.

Whereas the reach of international review has expanded over the past decades, criticism of international courts and tribunals has also intensified,[3] as demonstrated by the following three examples. In the field of human rights, the jurisprudence of the European Court of Human Rights (ECtHR) has provoked increasingly strong criticism in States party to the Convention.[4] In late 2014, the British Conservative Party issued a strategy paper, entitled 'Protecting Human Rights in the UK', which accused the ECtHR of 'mission creep' and expressed 'mounting concern at Strasbourg's attempts to overrule decisions of our democratically elected Parliament and overturn the UK courts' careful applications of Convention rights'.[5] Similar concerns in several other

[1] Jan Klabbers *et al*, *The Constitutionalization of International Law* (OUP 2009) 126.

[2] Gary Born distinguishes between the 'first generation of international adjudication', comprising older inter-State courts, and the 'second generation', including notably investment tribunals and the WTO. Gary Born, 'A New Generation of International Adjudication' (2012) 61 Duke L J 775.

[3] See the special issue 14 Int'l J of L in Context (2018), 'Resistance to International Courts', introduced by Mikael Madsen *et al*; Laurence Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102 Columbia L Rev 1832.

[4] See, generally, Patricia Popelier *et al* (eds), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia 2016). For the United Kingdom, see Alice Donald and Philip Leach, *Parliaments and the European Court of Human Rights* (OUP 2016) 224, noting an 'increasingly tempestuous relationship with the Convention system (including unprecedented attacks on the legitimacy and authority of the Court)'. See for Russia, Lauri Mälksoo, 'Introduction', in Lauri Mälksoo (ed), *Russia and the European Court of Human Rights. The Strasbourg Effect* (CUP 2017) 6: 'there is a strengthening ideological countermovement in Russia to aspects of the ECHR as interpreted by the ECtHR'.

[5] Conservative Party, 'Protecting Human Rights in the UK. The Conservatives' Proposals for Changing Britain's Human Rights Laws' (2014).

Member States have resulted in the Copenhagen Declaration of April 2018, which emphasises the subsidiarity of the Court's role. In the field of investment law, various States have recently withdrawn from the Convention on the Settlement of Investment Disputes (ICSID Convention) or denounced the practice of investor-State dispute settlement in other ways.[6] In the field of trade law, the US representative to the World Trade Organization (WTO) complained in 2016 that 'WTO adjudicators overstep the boundaries agreed by WTO Members' and that they show 'disregard for the proper role of the Appellate Body (AB) and the WTO dispute settlement system'.[7] Dissatisfaction with the intensity of review exercised in WTO adjudication has undoubtedly contributed to the current assault by the US on the AB.[8]

Among the potential responses to the challenges raised against review by international adjudicatory bodies is a recourse to deferential standards of review. In many national legal orders, judicial authorities do not exercise *de novo* review with regard to legislative and administrative decisions, as this would allow them to supplant the powers of other branches of government. Instead, courts exercise judicial restraint by applying a deferential standard of review. They limit the intensity of their review by granting deference to the institutions whose decisions are under review, which mean that extra weight is given to their assessments and conclusions. Potentially, a similar approach could be adopted by international adjudicators when evaluating State conduct.

In this study, I investigate to what extent international adjudicators have adopted doctrines of deference and whether they should do so when evaluating State conduct against international legal norms. The *descriptive* part analyses to what extent international courts and tribunals have developed structural approaches regarding the intensity of their review and how they justify their adoption or rejection of doctrines of deference. I conclude that the practice of the institutions investigated in this study shows a great variety of practices, which refutes claims that a general doctrine of deference exists in international law.

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[6] Generally, see Michael Waibel *et al* (eds), *The Backlash against Investment Arbitration. Perceptions and Reality* (Kluwer 2010); Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016); Malcolm Langford *et al*, 'Backlash and State Strategies in International Investment Law' in Tanja Aalberts and Thomas Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (CUP 2018).

[7] Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 23 May 2016. The US concerns are long-standing. See Richard Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 AJIL 247, 270.

[8] Pieter Jan Kuijper, 'From the Board: The US Attack on the WTO Appellate Body' (2018) 45 Legal Issues of Economic Integration 1.

The *normative* part of the project seeks to answer the question of whether international courts and tribunals should limit the intensity of their review by granting deference to domestic authorities. I propose to distinguish between epistemic deference, based on the superior capacity of domestic-makers to make factual and technical assessments, and constitutional deference, based on the democratic legitimacy of domestic decision-making. I conclude that epistemic deference is a prudent acknowledgement of the limited expertise of adjudicators. Constitutional deference, however, relies on a questionable comparison with domestic judicial review that overstates the impact and purpose of international review. I argue that the principle of the separation of powers, which counsels a degree of judicial deference in domestic courts, justifies strict scrutiny on the international level, except in the context of human rights law. In combination with the conceptual confusion that deference causes, this brings me to conclude against the adoption of constitutional deference by international adjudicators other than the human rights courts.

1.2 Relevance

The concept of deference is of growing importance in international litigation, as respondent States increasingly demand judicial restraint when their decisions are under review by an international tribunal.[9] Such demands raise questions that are not directly related to the merits of the specific case but instead focus on the institutional relationship between domestic authorities and international adjudicators. This study presents a comprehensive analysis of the different arguments involved and provides answers concerning the prevalence and desirability of deference. This may prevent litigating parties and adjudicators from revisiting the same questions over and over again.

On a more theoretical level, the concept of deference is relevant to discussions concerning the so-called constitutionalisation of international law.[10] These debates seek to describe,

[9] eg *Whaling in the Antarctic*, ICJ, verbatim record of 4 July 2013, CR 2013/15; *Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v Uruguay*, ICSID ARB/10/7, Award of 8 July 2016, para 418.

[10] eg Thomas Cottier, 'Limits to International Trade: The Constitutional Challenge' (2000) 94 ASIL Proceedings 220; Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907; Jeffrey Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law' (2006) 17 EJIL 647; Nicholas Tsagourias (ed), *Transnational Constitutionalism. International and European Perspectives* (CUP 2007); Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International and Global Governance* (CUP 2009); Thomas Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law' (2012) Nordic J of Int'l Law 79;

legitimise, and criticise the exercise of power at the international level by using concepts and principles drawn from domestic constitutional law and theory.[11] To some scholars, the expansion of the jurisdiction of international courts and tribunals over matters traditionally considered as domestic affairs is already evidence of constitutionalisation.[12] Others, however, wonder to what extent the exercise of power at the international level, including by courts and tribunals, should be restrained by checks and balances comparable to those found in national constitutional frameworks.[13] Judicial deference is a concrete example of a constitutional arrangement common in domestic schemes, which recalibrates the balance of power between courts and other actors.[14] This study investigates its actual and potential relevance for international courts and tribunals.

Hélène Ruiz Fabri and Michel Rosenfeld (eds), *Repenser le constitutionnalisme à l'âge de la mondialisation et de la privatisation* (Société de Législation Comparée 2011); Peter-Tobias Stoll, 'Constitutional Perspectives on International Economic Law' in Marise Cremona *et al* (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Brill 2013); Anne Peters, 'Fragmentation and Constitutionalization' in Anne Orford and Florian Hoffmann, *The Oxford Handbook of the Theory of International Law* (OUP 2016); Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Elgar 2017). See also the special issue 6 Int'l J of Const L 3-4 (2008), introduced by Michel Rosenfeld and Hélène Ruiz Fabri, 'Preface: Rethinking Constitutionalism in an Era of Globalization and Privatization', 371.

[11] For a synthesis of the extensive literature on constitutionalisation, see Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2010) 28-57. Other elements often considered in the constitutionalisation debate are the role of *jus cogens*, human rights, and community interests in international law. Bardo Fassbender, 'The Meaning of International Constitutional Law', and Wouter Werner, 'The Never-Ending Closure: Constitutionalism and International Law' in Tsagourias, *Transnational Constitutionalism* (n 10). An alternative approach that relies stronger on examples from administrative law is 'global administrative law'. See eg Daniel Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 Yale L J 1490.

[12] Anne Peters, 'Are we Moving towards Constitutionalization of the World Community?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 125-126; Karen Alter, 'National Perspectives on International Constitutional Review: Diverging Optics' in Erin Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Elgar 2018 forthcoming).

[13] Klabbers *et al*, *The Constitutionalization of International Law* (n 1) 127: '[t]his raises the question whether international tribunals should be subject to democratic control and constitutional guarantees comparable to what is known from national constitutions'.

[14] But see Geir Ulfstein, 'The European Court of Human Rights and National Courts: a Constitutional Relationship?' in Oddný Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection. Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge 2016) 52: '[t]he margin of appreciation may be seen as representing a de-constitutionalisation rather than a constitutionalisation of the relationship between national courts and the ECtHR if we consider that an essential aspect of a constitutional system is its legal consistency.

Finally, the concept of deference is relevant to the design of new supervisory mechanisms. The inclusion of such mechanisms in future free trade agreements and investment protection agreements is currently one of the most controversial topics in international economic law.[15] While proponents consider that such mechanisms are crucial for the effective implementation of the agreements, opponents fear that they grant unaccountable adjudicators an unchecked power to interfere with domestic decision-making. A clear understanding of the relevance of deference in international adjudication can be helpful to a constructive conclusion of these debates and inform the drafting of new dispute settlement clauses.

This study provides a *comparative* investigation of deference in international adjudication. I believe that a comparison across different fields of international law is useful for several reasons. First, many different international adjudicators are commonly requested to evaluate domestic public policies against international standards. Even though the substance of these disputes differs, all of them raise similar questions related to deference. Indeed, as demonstrated by the examples mentioned above, different international institutions engaged in the review of State conduct face similar critiques raised by and within States against the legitimacy of their review. A comparative investigation of deference acknowledges that the challenges related to the intensity of international review are shared across regime boundaries.

Second, discussions about deference often concern arguments that are applicable in more than one specific field of international law, as they touch upon general issues such as democratic accountability, State sovereignty, and regulatory autonomy. It has even been suggested that judicial deference towards a State's application of certain international rules is mandated by general international law,[16] and that most international adjudicators indeed exercise deferential review.[17] The accuracy of such claims can only be verified on the basis of a wide comparison across different regimes.

Third, a comparison between the approaches adopted by various different tribunals serves to evaluate to what extent cross-regime borrowing is appropriate with regard to deference.

The margin of appreciation may instead lead to legal fragmentation, allowing different application of the ECHR in different national jurisdictions'.

[15] eg Stephan Schill, 'Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals' in Stefan Griller *et al* (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017).

[16] eg *Continental Casualty Co v Argentina*, ICSID ARB/03/9, Award of 5 September 2008, fn 270.

[17] *Volga (Russia v Australia)*, ITLOS No 11, Judgment of 23 December 2002, Separate Opinion of Judge Cot, para 16. Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 EJIL 907.

Adjudicators sometimes explicitly borrow from institutions in a different field when they determine the appropriate standard of review, and this approach is regularly advocated by commentators.[18] Borrowing can only be legitimate, however, if the differences between the various fields of law do not influence the appropriateness of deference. The comparative analysis serves to identify potential differences that are relevant to the appropriateness of deference.

Finally, a comparative study allows the disentanglement of questions of deference from normative views on the objectives of individual regimes of international law. Arguments for and against judicial deference are often informed by such views.[19] For that reason, it can happen that the same normative position produces a defence of deference in one regime but provides an argument against deference in another. For instance, deference in investor-state arbitration could be justified by a concern for the host State's ability to protect the human rights of its population, whereas the same concern for human rights could lead to an argument against deference in the regional human rights courts if they are seen as the ultimate protectors of human rights. The comparative analysis provided in this study allows for a discussion of deference independent of normative perspectives on the separate regimes.

1.3 Current State of Research and Contribution

The topic of deference in international adjudication has received wide academic attention, but most contributions have focused on separate fields of international law. A large share of the research has been devoted to the margin of appreciation as developed by the ECtHR[20] and the standard of

[18] William Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: the Standards of Review in Investor-State Arbitrations' (2010) 35 Yale J of Int'l L 283; Valentina Vadi and Lukasz Gruszczynski, 'Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal' (2013) 16 JIEL 613. For examples from practice, see eg *Camouco (Panama v France)*, ITLOS No 5, Judgment of 7 February 2000, Dissenting Opinion of Judge Wolfrum, para 11; *Continental Casualty v Argentina* (n 16) para 192; *Philip Morris v Uruguay* (n 9) para 399.

[19] Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalism: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 Int'l Criminal L Rev 665, 679.

[20] The main monographs are Howard Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Nijhoff 1996); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002); Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012); Josephine Asche, *Die Margin of Appreciation. Entwurf*

review applied by the dispute settlement system of the WTO.[21] More recently, the issue of deference has become topical in international investment law as well.[22]

The start of a comparative approach to judicial deference in international courts and tribunals can be found in Yuval Shany's 2006 article in the *European Journal of International Law*, entitled 'Toward a General Margin of Appreciation in International Law?'.[23] In this article, Shany argues in favour of a 'general margin of appreciation doctrine' to be applied by international courts.

> The increased power of judicial review exercised by international courts over national decision-makers raises a host of problems, mainly involving legitimacy and capacity concerns (for instance, perceived inadequacies in the quality of international judicial decisions, democratic deficits in the operation of international courts, resource limitations which limit the ability of international courts to handle an increased caseload). A general margin of appreciation doctrine responds to some of these concerns through the development of less intrusive and, by implication, more politically acceptable and cost-effective standards of review of national decisions.[24]

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einer Dogmatik monokausaler richterlicher Zurückhaltung für den europäischen Menschenrechtsschutz (Springer 2018). See the section on the ECtHR for further references.

[21] The main monographs are Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (OUP 2003); Daniel Lovric, *Deference to the Legislature in WTO Challenges to Legislation* (Kluwer 2010); Ross Becroft, *The Standard of Review in WTO Dispute Settlement. Critique and Development* (Elgar 2012). See the section on the WTO for further references.

[22] See eg Burke-White and Von Staden, 'Private Litigation in a Public Law Sphere' (n 18); Anthea Roberts, 'The Next Battleground: Standards of Review in Investment Treaty Arbitration' (2011) Int'l Council for Commercial Arbitration Congress Series No 16; Stephan Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2012) 3 J of Int'l Dispute Settlement 577; Gus van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP 2013); Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (CUP 2015); Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Arbitration* (Elgar 2018). See the section on investment arbitration for further references.

[23] Shany, 'Toward a General Margin of Appreciation Doctrine' (n 17). Some comparative remarks can also be found in Thomas Cottier and Matthias Oesch, 'The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework' in Thomas Cottier and Petros Mavroidis (eds), *The Role of the Judge in International Trade Regulation. Experience and Lessons for the WTO* (Michigan 2003); Burke-White and Von Staden, 'Private Litigation in a Public Law Sphere' (n 18). A comparative study focused on proportionality review is Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review. A Theoretical and Comparative Study* (Europa Law 2013).

[24] Shany, 'Toward a General Margin of Appreciation Doctrine' (n 17) 908-909.

According to Shany, the margin of appreciation doctrine involves two principal elements, judicial deference and normative flexibility, and should be applied to three categories of international law norms: standard-type norms such as proportionality and reasonableness; discretionary norms; and result-oriented norms.[25] Shany argues that the use of the margin of appreciation is justified by the institutional advantages and democratic accountability of national actors in comparison to international courts. In addition, the use of the margin of appreciation would increase fairness in the attribution of State responsibility as well as inter-institutional comity.[26] Moving to current practice, Shany notes a 'growing acceptance of the doctrine or comparable decision-making methodologies' in the practice of a variety of international courts and tribunals.[27] The longest part of the article, however, is devoted to the International Court of Justice (ICJ), whose practice, according to Shany, is 'out of sync with the general trend of gradual acceptance of the doctrine'.[28]

Shany's discussion of the practice of international courts and tribunals other than the ICJ is short, and his conclusion that their case-law is 'indicative of a "margin of appreciation type" decision-making methodology', 'compatible with the margin of appreciation doctrine', and 'generally supportive of the doctrine'[29] requires more substantiation. This study seeks to build on Shany's work in order to provide a more detailed analysis of current practice. In doing so, I will not focus exclusively on the notion of the margin of appreciation, but instead investigate expressions of judicial deference broadly speaking, irrespective of the terminology used by the adjudicators.

In 2014, Lukasz Gruszczynski and Wouter Werner published an edited volume entitled *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation*.[30] In their introduction, the editors provide four comparative observations based on the other chapters of the book. First, they point out that '[t]he position adopted by courts and tribunals is partly determined by the specific legal framework of a functional regime and the

[25] ibid 914-917.

[26] ibid 918-922.

[27] ibid 939.

[28] ibid.

[29] ibid, 928, 929.

[30] Lukasz Gruszczynski and Wouter Werner, 'Introduction' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation* (OUP 2014). Reviewed by Maria Alcover (2015) 14 World Trade Rev 733; Adrien Faeli (2015) 28 Rev Quebecoise de Droit Int'l 313; Filippo Fontanelli (2016) 7 Eur J of Risk Regulation 230; Andrew Legg (2016) 17 J of World Investment and Trade 159.

history, main concerns, expertise and vocabularies that come with it'.[31] Second, the editors note that 'even within one and the same court or tribunal it is not uncommon to see diverging positions towards the question of judicial review'.[32] Third, it is argued that 'approaches towards the intensity of review often transcend particular functional fields'.

> Across international law, courts and tribunals use overlapping criteria to determine the intensity of judicial review. Whether it is human rights law, trade law, investment, the law of the sea, European law or general international law, courts tend to rely on more or less the same tropes to delineate the scope of their own review. Criteria that come up across virtually all functional fields include the importance of the legal provision in question, the openness of the provision concerned, proportionality, reasonableness, good faith, and the soundness of procedures to establish scientific expertise. In addition, across functional fields overlapping reasons for deference or intrusive review are offered, including epistemic limitations, democratic legitimacy, separation of powers, the integrity of the legal order, and the need to protect the values laid down in legal documents.[33]

Finally, Gruszczynski and Werner demonstrate the 'existence of a practice of cross-referencing across international law'.[34]

Apart from the Introduction by Gruszczynski and Werner, the different chapters of the volume deal largely with separate fields of international law. As such they provide an important source of data used for this study, in which I provide an updated overview, including an analysis of the jurisprudence of the African Court on Human and Peoples' Rights (ACtHPR), whose approach of judicial deference has not yet been studied before.[35] At the same time, I aspire to provide a more detailed comparative analysis, going beyond the observations made by Gruszczynski and Werner. I distinguish between various different types of assessments made by different domestic actors that are the subject of deference by international adjudicators. This enables a more diversified analysis, recognising that different forms of deference have different

[31] Gruszczynski and Werner, 'Introduction' (n 30) 13-14.

[32] ibid 14.

[33] ibid.

[34] ibid.

[35] A normative argument is provided by Solomon Ebobrah, 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations' (2011) 22 EJIL 663; Frans Viljoen, *International Human Rights Law in Africa* (2nd edn OUP 2012) 462-464.

justifications. Moreover, on the basis of my comprehensive overview of current practice, I provide a normative argument assessing the legitimacy of different types of deference. In doing so, I link debates about judicial deference in international courts and tribunals to discussions in legal and political theory about the legitimacy of judicial review. Embedding the deference debate in this theoretical background provides me with a novel argument against constitutional deference in international courts and tribunals, focusing on the notion of the separation of powers and its different implications on the domestic and the international level.

1.4 Method

The first step of this research project is a compilation of explicit statements made by various international courts and tribunals concerning their intensity of review. The study discusses the practice of six permanent courts and tribunals as well as different trends in investment arbitration. The six permanent institutions are the ICJ, the ECtHR, the Inter-American Court of Human Rights (IACtHR), the ACtHPR, the WTO, and the International Tribunal for the Law of the Sea (ITLOS). In making this selection, I have sought to strike a balance between the practical limits of a PhD research project on the one hand and the objective of providing a comprehensive overview of international practice on the other. The selection aims to cover international adjudicators who undertake review of domestic policies, at least occasionally, and therefore face questions related to the intensity of their review. All of the institutions discussed have the formal power to issue legally binding decisions against respondent States. Questions of deference are also relevant to institutions that issue non-binding decisions,[36] but the advisory character of their supervision is likely to mitigate State concerns over the intrusiveness of their review.

[36] For the Human Rights Committee, see Dominic McGoldrick, 'A Defense of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 ICLQ 21; Yuval Shany, 'All Roads Lead to Strasbourg? Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2017) 9 J of Int'l Dispute Settlement 180. For the Committee on the Elimination of Discrimination against Women, see Yvonne Donders and Vincent Vleugel, 'Universality, Diversity, and Legal Certainty: Cultural Diversity in the Dialogue Between the CEDAW and State Parties' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels. Contestations and Deference* (Hart 2016).

The descriptive part starts with the oldest institution included, the ICJ, because of its traditional authority in developing international law.[37] Although the Court hears only inter-State disputes, which do not often concern domestic affairs, it has been faced with requests for deference from disputing parties in various cases. The section continues with the regional human rights courts, starting with the ECtHR, which has provided the earliest and most elaborate contribution to the discussion on deference in international adjudication. The Inter-American and African courts provide parallels from other parts of the world and their statements on deference contrast with those of the ECtHR in interesting ways. Like the ICJ, the panels and AB of the WTO hear only inter-State disputes (or disputes between Members), but these cases commonly concern regulatory measures, whose review by the WTO has given rise to repeated discussions about deference. The intensity of review is a controversial issue also in the field of investment law, since investor-State arbitration tribunals are commonly requested to review all sorts of domestic public policies. Finally, the ITLOS has not dealt with many cases that raised questions of deference, but several of its judges have provided comprehensive discussions of the issue in their individual opinions.

Admittedly, the selection leaves out many international adjudicators.[38] For instance, the study does not engage with inter-State arbitration. Yet even if questions of deference may occasionally come up before inter-State arbitral tribunals,[39] the absence of both a standing institution and a fixed body of applicable law makes it difficult to study the practice of these tribunals in a coherent manner. Another notable exclusion is the CJEU, which has developed an extensive case-law explaining its intensity of review, albeit mostly with regard to EU institutions

[37] Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' (2017) 28 EJIL 13, 24: 'the ICJ is likely something akin to a *primus inter pares* in that it has a special status in the fabric of international dispute settlement'.

[38] For the Economic Community of West African States (ECOWAS) Court of Justice, the East African Court of Justice, and the Tribunal of the South African Development Community, see Andreas von Staden, 'Subsidiarity, Exhaustion of Local Remedies, and the Margin of Appreciation in the Human Rights Jurisprudence of African Sub-Regional Courts' (2016) 20 Int'l J of Human Rights 1113.

[39] An example of an award discussing judicial deference is the *Abyei Arbitration (Sudan v Sudan People's Liberation Movement / Army)*, PCA, Final Award of 22 July 2009, para 403: '[i]n public international law, it is an established principle of arbitral and, more generally, institutional review that the original decision-maker's findings will be subject to limited review only'. See also *Arbitration Concerning Heathrow Airport User Charges (United States v United Kingdom)*, Award on the First Question of 30 November 1992, para 2.2.6: 'in the view of the Tribunal a Party is entitled to recognise the normal margin of appreciation enjoyed by charging authorities in relation to the complex economic situation that is relevant to the establishment of charges'.

rather than Member States.[40] The reason for excluding the CJEU is the degree of legal integration of the European and domestic legal orders. In one of its foundational judgments, the CJEU declared that '[t]he Community constitutes a new legal order of international law'.[41] Indeed, through various procedural mechanisms such as the preliminary reference procedure and the infringement procedure, the European Union ensures a uniquely deep integration of European and domestic law.[42] Consequently, questions of deference towards States take on a different form in EU law than in other fields of international law.[43] Finally, this study does not deal with the International Criminal Court (ICC) or other criminal tribunals. Even if questions of deference may arise when the ICC evaluates national criminal proceedings in the light of the principle of complementarity,

[40] See for discussions of the CJEU's approach eg Paul Craig, 'Judicial Review, Intensity and Deference in EU Law' in David Dyzenhaus (ed), *The Unity of Public Law* (Hart 2004); M Schimmel and R Widdershoven, 'Judicial Review after *Tetra Laval.* Some Observations From a European Administrative Law Point of View' in Oda Essens *et al* (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law 2009); Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 Eur L J 80; Marc Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2 J of Eur Competition L and Practice 295; Herwig Hofmann *et al*, *Administrative Law and Policy of the European Union* (OUP 2011) 491-506; Paul Craig, *EU Administrative Law* (2nd edn OUP 2012) 400-445; Pieter van Cleynenbreugel, 'National Procedural Choices before the Court of Justice of the European Union' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 30). It is commonly considered that the CJEU is more deferential to other EU institutions than to member States. Patrycja Dąbrowska-Kłosińska, 'Risk, Precaution and Scientific Complexity before the Court of Justice of the European Union' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 30) 194; Alexia Herwig, 'Standard of Review for Necessity and Proportionality Analysis in EU and WTO Law' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 30) 213-216.

[41] *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, CJEU, 26/62, Judgment of 5 February 1963.

[42] cf Bernard Stirn, *Towards a European Public Law* (OUP 2017) 100: '[b]eing distinct both from domestic law and general international law, the law of the European Union has fashioned for itself a special kind of identity, sitting on the cusp of international law and domestic law'. The objective of European integration has been described as a 'foundational legal principle' of EU law, Timothy Moorhead, *The Legal Order of the European Union: The Institutional Role of the Court of Justice* (Routledge 2014) 8.

[43] cf Paolo Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions' (2016) 61 AJIL 51, 52: '[t]he EU is a sui generis amalgam of constitutional and international legal orders, and those features that make it more akin to a constitutional system - such as the supremacy of EU law over national law - are the same ones that most affect the applicability of subsidiarity to the relationship between the supranational legal order and the law of the constituent units'. It should also be noted that EU law is exceptionally extensive, which renders the CJEU's approach less suitable for a broad comparative study as this one.

these questions relate to a very specific assessment, namely whether the State concerned is unwilling or unable to prosecute genuinely.[44] For that reason, the issues involved are different from those evoked by more general forms of international review of State policies.

Even with the exclusion of the courts just mentioned, the selection of institutions covered in this study may seem ambitious already. It should be noted, however, that a considerable amount of empirical research has been conducted with regard to the intensity of review of some of these institutions. This research project utilises those studies in order to find the crucial decisions expounding on deference, which removes the need to review the case-law of these institutions in their entirety. Moreover, whereas some of the selected institutions, like the ECtHR, have developed an extensive case-law concerning their intensity of review, other institutions, like the ICJ, have discussed the issue only in a small number of cases. The field of international investment law poses the biggest methodological challenge, since it relies on *ad hoc* tribunals as the common means of dispute settlement. These tribunals do not produce a coherent jurisprudence with formal precedential value. However, it is commonly considered that international investment law is a systemic field of law,[45] and that tribunals in practice often rely on previous awards.[46] Accordingly, this study identifies different strands of reasoning that have been adopted by tribunals with regard to the issue of deference.[47]

In order to avoid imposing certain concepts or formulae on the case-law of the various institutions, I start with a descriptive overview of their practice. I survey the positions adopted by the various tribunals without translating their approaches into a common terminology. This approach acknowledges that institutions may use certain terms, such as 'deference', 'discretion'

[44] eg Diane Bernard, 'Beyond Hierarchy. Standard of Review and the Complementarity of the International Criminal Court' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 30).

[45] eg Stephan Schill, *The Multilateralization of International Investment Law* (CUP 2009) 367, describing 'tendencies to understand investment treaties as an expression of a treaty-overarching framework with uniform standards of investment protection'.

[46] Lucy Reed, 'The *De Facto* Precedent Regime in Investment Arbitration: A Case for Proactive Case Management' (2010) 25 ICSID Rev 95, 96: '[t]here is no denying that we operate in a *de facto* precedent regime in investment arbitration'; Patrick Norton, 'The Role of Precedent in the Development of International Investment Law' (2018) 33 ICSID Rev 280, 281, noting an 'extensive reliance on arbitral precedents'.

[47] In addition to reviewing awards mentioned in secondary literature, I have run a full text search of the database Investor-State Law Guide. I have searched for the term 'deference' in four categories of documents: Decisions of Annulment Committee; Decisions on Jurisdiction or Preliminary Questions; Final Awards on Jurisdiction, Merits or Damages; and Partial Awards or Decisions on the Merits. Up to September 2017, this search produced 105 documents. A search for 'margin of appreciation' produced 35 documents.

and ‘margin of appreciation’, in different and potentially conflicting ways. Only after having described the varied practice of the different institutions, do I proceed to a comparative analysis, which forms the second step of the research project.

The comparative part of the study compares the positions adopted by the different institutions as well as their arguments for adopting or rejecting a deferential standard of review. Based on the observation that most arguments in favour of deference are linked to particular assessments made by specific domestic decision-makers, the analysis provides separate discussions of deference in these different contexts. I distinguish between factual assessments, technical assessments, the interpretation and application of domestic law, public policy choices, and treaty interpretation. Moreover, the section discusses instances where deference is granted to specific domestic institutions, notably parliaments, courts, and administrative agencies. Finally, I analyse various expressions of deference, including specific standards of review, such as reasonableness and good faith. The purpose of this analysis is to verify to what extent international adjudicators use a ‘common vernacular’ to describe the intensity of their review, and to see whether specific terms and standards have the same meaning in different fields of law.[48]

The third step of the project is a normative assessment of the notion of deference in international adjudication. This part of the study discusses whether the relevant international institutions *should* accord deference to domestic authorities when reviewing their conduct against international norms. I will evaluate arguments derived from the context of domestic judicial review as well as arguments related to specific features of international law. In order to balance the diverse arguments involved, I identify the principle of the separation of powers as the crucial rationale underlying arguments in favour of deference. An analysis of its implications for the international context provides me with the conclusion that strict scrutiny is justified in international courts and tribunals, because of the limited impact of their decisions on the domestic legal order. International adjudicators have only minimal powers over States, who possess a variety of means to mediate the effects of decisions issued against them. For that reason, there is no need for structural deference in international courts and tribunals. The regional human rights courts form an exception, because their review, which potentially covers any field of public policy, tends to have a larger impact on domestic legal orders.

[48] Gruszczynski and Werner, ‘Introduction’ (n 30) 14.

1.5 Terminology

1.5.1 Intensity of Review and Deference

In this study, the intensity of review is understood as the rigour with which an adjudicator scrutinises the decision under review.[49] This intensity is envisaged as a variable factor, ranging from rigorous to lenient review.[50] The intensity of review affects the likelihood that the adjudicators will find that the decision under review is legal: if they exercise a low intensity of review, it is likely that the original decision will be approved; conversely, a high intensity of review increases the chances that the original decision is held to be illegal. A higher intensity of review implies that the adjudicator scrutinises the decision under review in more detail and poses higher standards, for example with regard to the quality and quantity of the reasons and evidence underlying the decision under review.

The concept of judicial deference is closely related to the concept of the intensity of review. In everyday language, 'deference' means 'polite submission and respect'.[51] The *New Shorter Oxford English Dictionary* defines 'deference' as 'submission to or compliance with the acknowledged superior claims, skill, judgement, or other qualities, of another' or as 'courteous regard; the manifestation of a disposition to yield to the claims or wishes of another'.[52] In the context of judicial review, 'deference' describes the respect that a judge gives to the findings of another institution.[53] If this institution is the one whose decision is under review, then deference corresponds to a decreased intensity of review.

[49] cf Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law in Comparative Perspective' (2007) 42 Texas Int'l L J 370, 392: '[i]ntensity or standard of review determines how strictly courts assess the compliance of a domestic measure with the substantive requirements'.

[50] Hélène Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?' (2014) 25 EJIL 151, 161, referring to 'a scale going from full deference to judicial activism'.

[51] Catherine Soanes and Angus Stevenson (eds), *Concise Oxford English Dictionary* (11th edn OUP 2008).

[52] Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles* (OUP 1993).

[53] Eduardo Jordão, 'La dynamique de la déférence: création et évolution des modèles auto-restrictives de contrôle juridictionnel dans le droit comparé' (2015) 2 Revista de Investigações Constitucionais 111, 112, defines deference as 'une attitude ou un positionnement respectueux, une orientation auto-restrictive de juges'.

Deference can have an exclusionary function, replacing in its entirety the assessment by the reviewer.[54] It can also come in more limited forms, expressing a certain inclination to accept the determinations made by the original decision-maker, while the reviewers still make their own assessment. This form of deference is commonly understood as the assignment of special weight to the reasons provided by the original decision-maker.[55] In the words of the Supreme Court of Canada, deference 'does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations ... Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law'.[56]

Judges can express limited degrees of deference in different ways. First, deference can be translated into relative standards of review, premised on the idea that the intensity of review falls within a spectrum ranging from *de novo* review to total deference.[57] For example, United States constitutional law recognises standards such as 'intermediate scrutiny' and 'strict scrutiny', each

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[54] In this form, deference is reminiscent of the common law concept of non-justiciability. In my view, the difference between exclusionary deference and non-justiciability is that the latter translates into inadmissibility, whereas exclusionary deference would lead the judge to rule on the merits in favour of the original decision-maker. Tom Zwart, 'Deference Owed under the Separation of Powers' in John Morison *et al* (eds), *Judges, Transition, and Human Rights* (OUP 2007) 74; Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 Oxford J of L Studies 409, 421; Andrew Legg, 'Human Rights, the Margin of Appreciation, and the International Rule of Law' in Kanetake and Nollkaemper, *The Rule of Law* (n 36). For a distinction between deference and the absence of jurisdiction, see *X v United Kingdom*, ECtHR 7215/75, Judgment of 5 November 1981, para 43.

[55] Paul Daly, *A Theory of Deference in Administrative Law. Basis, Application and Scope* (CUP 2012) 7: 'Perhaps the most popular means of characterising deference is to associate it with the giving of weight'. Also outside the scope of judicial review this is how the functioning of deference is understood. Philip Soper, *The Ethics of Deference: Learning from Law's Morals* (CUP 2002) 24: 'Reasons for deference, in short, appear to influence decisions by assigning extra weight to the content-independent reason represented by the request'.

In this research project, the focus is on deference which is applied in the process of the interpretation and application of legal norms, thereby excluding broader approaches, 'such as deference in case outcomes (by upholding a government decision) or deference in the formulation of remedies (by handing down a remedy that affords the government room to refashion policies)'. Cora Chan, 'A Preliminary Framework for Measuring Deference in Rights Reasoning' (2017) 14 ICON 851, 854.

[56] *Dunsmuir v New Brunswick*, Supreme Court of Canada, Case No 31459, Judgment of 7 March 2008, para 48. cf Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222, 225: deference 'can range from treating those views or decisions as persuasive reasons (of various strengths), through to treating them as conclusive reasons'. Deference has also been described as 'a rebuttable presumption', *Pac Rim Cayman LLC v El Salvador*, ICSID ARB/09/12, Award of 14 October 2016, para 8.31.

[57] Oesch, *Standards of Review* (n 21) 15-16.

describing a different relative intensity of review. A second way to express deference is by adopting a standard of review that describes the specific test that the judge applies when exercising deferential review.[58] The standard of reasonableness is probably the best known example of such a standard.[59] A third way in which adjudicators can express deference is to limit themselves to procedural review as opposed to substantive review.[60]

In order to explain the concept of limited deference in more detail, reference has been made to Joseph Raz's work on second-order reasons.[61] In Raz's terminology, a 'second-order reason' is a 'reason to act for a reason or to refrain from acting for a reason'.[62] It is 'a reason for treating a first-order reason as having a greater or lesser weight than it would ordinarily receive'.[63] Raz gives the example of a soldier who disagrees with an order but nonetheless obeys because the order is given by a superior.[64] In Raz's terminology, the notion "orders from superiors should be obeyed" is a second-order reason which tips the normal balance of reasons. Judicial deference could be understood in a similar way. When judges accord deference, they increase the weight of the first-order reasons advanced by the original decision-maker in support of the contested decision on grounds of second-order reasons that do not directly concern the merits of the case but rather refer to institutional differences between courts and other branches of government.[65]

Judicial deference is a form of judicial restraint, which recognises that certain questions are inappropriate for judicial resolution, and that the limited competence of judges may militate against substituting their judgment for that of another institution.[66] As a consequence, many of the arguments commonly invoked in favour of or against deference overlap with arguments for

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[58] Brian Bix, *Law, Language, and Legal Determinacy* (OUP 1993) 92: '[a] cynical reading of deferential judicial review would view this language as saying to the initial decision-maker: "you can be wrong, as long as you are not *far* wrong ("clearly erroneous")"'.

[59] *Associated Provincial Picture Houses v Wednesbury Corporation*, Court of Appeal of England and Wales, Judgment of 10 November 1947. *Dunsmuir v New Brunswick* (n 56) para 47. See further section 3.3.2.

[60] See further section 3.3.5.

[61] Legg, *The Margin of Appreciation* (n 61) 17-23.

[62] Joseph Raz, *Practical Reason and Norms* (OUP 1999) 39.

[63] Stephen Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 Oxford J of Legal Studies 215, 223.

[64] Raz, *Practical Reason* (n 62) 42.

[65] Aileen Kavanagh distinguishes between 'substantive' and 'institutional' reasons in the context of judicial deference. She argues that judicial assessments involve both a substantive evaluation of the merits of the case and an institutional assessment concerning issues 'of relative competence, expertise and legitimacy'. Kavanagh, 'Defending Deference' (n 56) 231. Both Legg and Kavanagh compare the effect of deference to the effect of precedent on legal reasoning.

[66] King, 'Institutional Approaches' (n 54).

judicial restraint or its opposite, judicial activism.[67] At the same time, judicial restraint is a broader concept than deference. It can translate into other results than approval of the decision under review, such as a refusal to hear the case.

1.5.2 Deference in the Domestic Context

Judicial deference governs the institutional relationship between judges and the institution whose decision is under review. It is a common feature of domestic legal systems that allow for the judicial review of legislation against constitutional norms. The argument underpinning deference is that certain issues, notably controversial moral issues or questions involving the balancing of competing interests and rights, should be decided by the elected representatives of the people, rather than by judges.[68] When judges accord deference to decisions made by representative institutions, they 'acknowledge the authority of the political branches of state by resisting the temptation to substitute their own preferred solutions to questions of public policy'.[69] This form of deference seeks to preserve the separation of powers and to acknowledge the democratic legitimacy of other branches of government.[70]

An example of such deference is found in the judgment of the United Kingdom House of Lords in *R v Lichniak*. The Lords ruled: 'the fact that [the contested piece of legislation] represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree

[67] Even if the term 'judicial activism' is commonly used in a pejorative way, this should not necessarily be so. Keenan Kmiec has identified five core meanings of 'judicial activism': invalidation of the arguably constitutional actions of other branches; failure to adhere to precedent; judicial 'legislation'; departures from accepted interpretative methodology; and result-oriented judging. Rigorous scrutiny (as opposed to deference) is an aspect of several of these. Keenan Kmiec, 'The Origin and Current Meanings of Judicial Activism' (2004) 92 California L Rev 1441. See also Margit Cohn and Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18 Canadian J of L and Jurisprudence 333; Frank Cross and Stefanie Lindquist, 'The Scientific Study of Judicial Activism' (2007) 91 Minnesota L Rev 1752; Fuad Zarbiyev, 'Judicial Activism in International Law – A Conceptual Framework for Analysis' (2012) 3 J of Int'l Dispute Settlement 247.

[68] The distinction between 'law' and 'politics' is sometimes used to identify the appropriate limits of judicial power. King, 'Institutional Approaches' (n 54) 415.

[69] Trevor Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 University of Toronto L Rev 41. Allan is critical of structural doctrines of judicial deference. See also Trevor Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 Cambridge L J 671.

[70] Zwart, 'Deference' (n 54) 73.

of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled'.[71] In a similar vein, the Supreme Court of India has held that:

> The fundamental nature and importance of the legislative process needs to be recognized by the Court and due regard and deference must be accorded to the legislative process. … The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.[72]

The extent to which judges in different jurisdictions defer to democratic institutions is closely related to more general questions about the legitimacy of judicial review and the proper role of judges in the constitutional order,[73] which remains a controversial topic in legal and political theory.[74] Indeed, the arguments for and against judicial review partly overlap with the arguments for and against deference. On the one hand, advocates of judicial review argue that courts provide a necessary check on the powers of other institutions, ensure the legality of government conduct, and protect the interests and rights of minorities against a potential tyranny of the majority. On the other hand, opponents of judicial review question why unelected individuals should be empowered to overrule decisions made by democratically accountable institutions, especially when they concern controversial questions of public policy. It is questioned why courts would make 'better'

[71] *R v Lichniak*, United Kingdom House of Lords, Judgment of 25 November 2002, para 14. See for a critical discussion, Liora Lazarus and Natasha Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference' in Murray Hunt *et al* (eds), *Parliaments and Human Rights. Redressing the Democratic Deficit* (Hart 2015) 389. See on the judicial review against human rights norm in the UK and the Netherlands, Hanneke van Schooten and James Sweeney, 'Domestic Judicial Deference and the ECHR in the UK and Netherlands' (2003) 11 Tilburg Foreign L Rev 439.

[72] *Dr Subramanian Swamy v Director*, Supreme Court of India, Judgment of 6 May 2014, para 48.

[73] Miguel Poiares Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism' in Dunoff and Trachtman (n 10) 359.

[74] eg John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard 1980); Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale L J 1346; Keith Whittington, *Political Foundations of Judicial Supremacy. The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton 2009); Richard Posner, *Reflections on Judging* (Harvard 2013) 149-177; Tom Clark, 'Judicial Review' in Lee Epstein and Stefanie Lindquist (eds), *The Oxford Handbook of U.S. Judicial Behavior* (OUP 2017); Paul Yowell, *Constitutional Rights and Constitutional Design. Moral and Empirical Reasoning in Judicial Review* (Hart 2018).

decisions than majoritarian institutions, in particular when courts themselves rely on voting to settle their own internal disagreement.[75]

Domestic constitutional systems have adopted divergent solutions to solve this conundrum and they balance judicial powers against majoritarian powers in different ways.[76] Domestic systems differ with regard to the forms of judicial review that are available, the type of courts to which this review is entrusted, and the sort of remedy that can be granted by judges overruling a legislative act.[77] Mark Tushnet has developed a distinction between 'strong' judicial review, which gives courts the power to make assessments of the constitutionality of legislation that are binding on the other branches of government, and 'weak' judicial review, which empowers courts to review legislation but makes it relatively easy for the other branches of government to displace judicial assessments of constitutionality.[78] The diversity of types of judicial review demonstrates that the extent to which judges should be able to overrule other institutions is controversial. At the same time, the various arrangements suggest that most jurisdictions have accepted the conclusion

[75] Jeremy Waldron, 'Five to Four: Why Do Bare Majorities Rule on Courts?' (2014) 123 Yale L J 1626.

[76] Susan Rose-Ackerman, 'Democratic Legitimacy and Executive Rule-making: Positive Political Theory in Comparative Public Law' in Joana Mendes and Ingo Venzke (eds), *Allocating Authority. Who Should Do What in European and International Law?* (Hart 2018); Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 Wake Forest L Rev 813; Tim Koopmans, *Courts and Political Institutions. A Comparative View* (CUP 2003); Lech Garlicki, 'La légitimité du contrôle de constitutionnalité: problèmes anciens c/développements récents' (2009) 78 Revue française de droit constitutionnel 227.

[77] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (OUP 2002); Michel Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts' in Georg Nolte (ed), *European and US Constitutionalism* (CUP 2005); S Galera, *Judicial Review. A Comparative Analysis inside the European Legal System* (Council of Europe 2010). Nuno Garoupa and Jud Mathews, 'Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review' (2014) 62 Am J Comp Law 1. Marlene Wind adopts Dworkin's distinction between constitutional democracies (with strong judicial review) and majoritarian democracies (without judicial review) to explain why courts in Scandinavian countries, where judicial review has traditionally been absent, are reluctant to make use of the preliminary ruling procedure before the CJEU. Marlene Wind, 'The Nordics, the EU and the Reluctance towards Supranational Judicial Review' (2010) 48 J of Common Market Studies 1039. See for the situation in the Netherlands, Jan ten Kate and Peter van Koppen, 'Judicialization of Politics in The Netherlands: Towards a Form of Judicial Review' (1994) 15 Int'l Pol Science Rev 143.

[78] Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 Michigan L Rev 2781, 2782-2786.

that 'there should be some judicial review, but not too much'.[79] The debate on whether judges should defer to legislatures is a variation on this debate.[80]

While judicial review of legislation is nowadays relatively widespread, judicial review of administrative action is even more common.[81] Deference in this context is justified by the argument that judges should acknowledge the delegation of certain powers by the legislature to executive agencies, and respect the autonomy that agencies need in order to execute their mandate effectively. Especially when administrative agencies are provided with discretionary powers, judges commonly consider that they should exercise only deferential review.[82] Examples of this practice can be found in French administrative law, which recognises an elaborate set of standards of review of different degrees of intensity in this context.[83] The notion of *Wednesbury* reasonableness, developed in the United Kingdom, has the same background.[84] In the *Wednesbury* case, the Court of Appeal for England and Wales reasoned that whenever the exercise of discretionary powers is challenged in court, judges should not substitute themselves for the original

[79] Martin Shapiro, 'Judicial Review in France' (1989-1990) 6 J of L and Politics 531, 535: '[q]uestions about the democratic legitimacy of judicial review have been raised continuously since its inception. It would be a great mistake to believe that they have been fully resolved today. The Americans resolve their democratic deficit question only by agreeing that there should be some judicial review, but not too much, and then conducting a never ending argument over how much is too much.' See for the American debate, Richard Posner, 'The Rise and Fall of Judicial Self-Restraint' (2012) 3 California L Rev 519.

[80] Brian Foley, *Deference and the Presumption of Constitutionality* (Institute of Public Administration, Dublin 2008) 14: 'the deference question focuses on how constitutional power should be shared between the legislature and courts'.

[81] cf Council of Europe, 'Recommendation 2004 (20) of the Committee of Ministers to member states on judicial review of administrative acts' adopted 15 December 2004. At the same time, Paul Craig points out that the implications of political constitutionalism for administrative law judicial review have received far less attention than constitutional review of primary statute. Paul Craig, 'Political Constitutionalism and Judicial Review' in Christopher Forsyth *et al* (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010) 24. But see Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017) 154: '[j]udicial deference, whether towards the executive or the legislature, shares the same conceptual core'. Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018), comparing judicial review of administrative action in England, Canada, New Zealand, and Australia.

[82] Bix, *Law, Language, and Legal Determinacy* (n 58) 94: '[j]udicial deference here is partly a recognition that the agencies have greater expertise in administrative decisions and partly a recognition that the legislative grant of power implied a certain amount of discretion'. Matthew Lewans, *Administrative Law and Judicial Deference* (Hart 2016).

[83] Jean-Marie Woehrling, 'Le contrôle juridictionnel du pouvoir discrétionnaire en France' (1999) 52 *La Revue administrative* 75. See also Armin Uhler, *Review of Administrative Acts. A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (Michigan 1942).

[84] *Associated Provincial Picture Houses v Wednesbury Corporation* (n 59).

decision-maker. They should respect the choice made by other authorities, as long as the latter complied with certain principles, including the principle that 'discretion must be exercised reasonably'.[85] The Court then explained that this standard of reasonableness comprises various different elements, requiring judges to verify whether the original decision-maker has considered 'the matters which he is bound to consider' and excluded 'from his consideration matters which are irrelevant to what he has to consider'.[86] Moreover, the original decision should not comprise 'something so absurd that no sensible person could ever dream that it lay within the powers of authority'.[87] These three elements, and especially the last one ('Wednesbury unreasonableness'), have become widely influential.[88] In the United States, the judicial review of administrative action has given rise to the development of the so-called notion of *Chevron* deference. This notion concerns, specifically, the review of how an administrative agency interprets an ambiguous provision contained in the statute which it administers. In this context, according to *Chevron*, the only question for the court is 'whether the agency's answer is based on a permissible construction of the statute'.[89]

In an advanced administrative state, agencies make decisions on the basis of technical expertise that is not necessarily shared by judges. This provides another reason for deference in the context of the review of administrative action.[90] As a United States federal Court of Appeals

[85] ibid.

[86] ibid.

[87] ibid.

[88] cf *Dunsmuir v New Brunswick* (n 56) para 47-49. Nonetheless, the legacy of *Wednesbury* is not uncontested. See eg TR Hickman, 'The Reasonableness Principle: Reassessing its Place in the Public Sphere' (2004) 63 Cambridge L J 166; Shivaji Felix, 'Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka' [2006] Acta Juridica 95; Johannes Chan, 'A Sliding Scale of Reasonableness in Judicial Review' [2006] Acta Juridica 233; Paul Daly, '*Wednesbury's* Reason and Structure' [2011] *Public Law* 238.

[89] *Chevron USA, Inc v National Resources Defense Council, Inc*, United States Supreme Court, Judgment of 25 June 1984. Michael Tolley, 'Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective' (2003) 31 Policy Studies J 421; William Eskridge and Lauren Baer, 'The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*' (2008) 96 Georgetown L J 1083; Bradley Lipton, 'Accountability, Deference, and the *Skidmore* Doctrine' (2010) 119 Yale L J 2096. *Chevron* deference is a controversial feature of US administrative law. See Philip Hamburger, '*Chevron* Bias' (2016) 84 George Washington L Rev 1187. Hamburger argues that *Chevron* deference threatens the separation of powers, as it discharges judges from their constitutional duty 'to exercise their own independent judgment' and instead provides a 'systematic judicial bias in favour of the most powerful of parties'.

[90] See also Eduardo Jordão and Susan Rose-Ackerman, 'Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review' (2014) 66 Administrative L Rev 1.

held: '[w]e must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality'.[91] In the words of the Constitutional Court of South Africa, 'a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field'.[92]

In addition to the deference granted to legislatures and executive agencies, one final form of judicial deference in the domestic context should be mentioned, namely the deference accorded by a higher court to the judgment of a lower court.[93] Commonly, appellate judges do not reconsider first-instance decisions in their entirety, but accord a degree of deference, at least with regard to fact-finding. The reason behind this type of deference is judicial economy, which would be hampered by a duplication of proceedings.[94] In addition, there may be some recognition of the expertise of first-instance courts, if they possess wider and more direct means of fact-finding.[95]

It appears that the different forms of judicial deference in the domestic legal order depend on two different but related categories of reasons: reasons concerning institutional legitimacy or accountability, and reasons concerning institutional capacity or expertise.[96] The concern for institutional legitimacy is at play when judges consider that it is not appropriate for them to make

[91] *Ethyl Corp v EPA*, United States Court of Appeals DC Circuit, Judgment of 19 March 1976.

[92] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, Constitutional Court of South Africa, Judgment of 12 March 2004, para 48.

[93] Thomas Finlay, 'Judicial Self-Restraint' in Paul Mahoney *et al* (eds), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdall* (Heymanns 2000).

[94] See for the situation in the United States, J Dickson Phillips Jr, 'The Appellate Review Function: Scope of Review' (1984) 47 L and Contemporary Problems 1; Martha Davis, 'A Basic Guide to Standards of Judicial Review' (1988) 33 South Dakota L Rev 469; Martha Davis, 'Standards of Review: Judicial Review of Discretionary Decisionmaking' (2000) 2 J of Appellate Practice and Process 47.

[95] Maurice Rosenberg, 'Judicial Discretion of the Trial Court, Viewed from Above' (1971) 22 Syracuse L Rev 635, 663-665.

[96] Trevor Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) L Q Rev 96: '[t]he demand for judicial deference in public law has a dual basis. In the first place, judicial decisions affect matters of public policy and other political concerns on which we may accord primary authority to Parliament or the executive Government: judicial deference reflects considerations of constitutional legitimacy. Secondly, there are limits to judicial competence or expertise: both questions of fact and judgment may lie primarily with the political or administrative organs of state, qualified by experience and first-hand knowledge of relevant matters to make decisions about the public interest.'

a certain decision without deference to other, notably representative, institutions. The concern for institutional capacity appears when judges recognise that other institutions possess more relevant skills to decide a certain issue. The relevance of both types of concerns increases if a case evokes legitimate disagreement, for instance because of the political, social, or moral controversy of the issue. Moreover, the cause for deference is often related to the indeterminacy of the applicable legal norm: open-ended or discretionary rules are commonly considered to reinforce demands for limitations on the intensity of judicial review.[97]

1.5.3 Deference in the International Context

As in the domestic context, the concept of deference plays a role in various settings in international adjudication. Deference has been accorded by international judges to respondent States, to other international courts and tribunals, to other institutions within their own international organization, and to first-instance judges within an international appellate system. Whereas only the first type of deference is the topic of this project, the other three forms of deference will be briefly discussed here.[98]

The deference accorded by one international court or tribunal to another is often described in terms of 'judicial dialogue'.[99] In the fields of human rights, it is common for international courts

[97] But see the famous statement of Lord Simonds in United Kingdom House of Lords, *Magor and St Mellons Rural District Council v Newport Corp* (1952): 'The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on a voyage of discovery is strictly limited … It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation, and it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act'.

[98] See also Jenny Martinez, 'Towards an International Judicial System' (2003-2004) 56 Stanford L Rev 429.

[99] The same terms are used to describe interactions between domestic courts and between domestic courts and international courts. Christopher McCrudden, 'Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford J of Legal Studies 499; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard Int'l L J 191; André Nollkaemper, 'Conversations Among Courts' in Cesare Romano *et al* (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 523; Paula Almeida, 'The Challenges of the Judicial Dialogue in Mercosur' (2015) 14 Law and Practice of Int'l Courts and Tribunals 392; Katharina Berner, 'Judicial Dialogue and Treaty Interpretation: Revisiting the "Cocktail Party" of International Law' (2016) 54 *Archiv des Völkerrechts* 67; Michelle Zang, 'Judicial Interaction of International Trade Courts and Tribunals' in Rob Howse *et al* (eds), *The Legitimacy of International Trade Courts and Tribunals* (CUP 2018). Antônio Cançado Trindade

to refer to decisions adopted by other human rights adjudicators.[100] Investment arbitration tribunals also frequently refer to the case-law of the ECtHR and the WTO.[101] It should be noted, however, that such cross-referencing does not necessarily entail deference. Courts may have other reasons to refer to the case-law of other adjudicators, notably to strengthen the authority of their own decision.[102] Another notion often employed to describe the relationship between different international courts is that of 'comity',[103] which has a wider meaning than the concept of deference. Comity can compel courts not only to defer, but also to decline jurisdiction or to stay proceedings until another court has ruled on the matter.[104] For instance, the UNCLOS Annex VII tribunal hearing the *Mox Plant* case suspended the proceedings before it, 'bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States'.[105]

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gives ample examples of 'jurisprudential cross-fertilization' in his recurrent contributions in the Global Community Ybk of Int'l Law and Jurisprudence, eg 'Contemporary International Tribunals: Their Continuing Jurisprudential Cross-Fertilization, in their Common Mission of Imparting Justice' (2014) 1 Global Community Ybk of Int'l Law and Jurisprudence 2013 155.

[100] Maria Papaioannou, 'Harmonization of International Human Rights Law through Judicial Dialogue: the Indigenous Rights' Paradigm' (2014) 3 Cambridge J of Int'l and Comp L 1037; Elena Maculan, 'Judicial Definition of Torture as a Paradigm of Cross-fertilisation: Combining Harmonisation and Expansion' (2015) 84 Nordic J of Int'l Law 456.

[101] Valentina Vadi, 'Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration' (2010) 39 Denver J Int'l L and Policy 67, 89-96; Jürgen Kurtz, *The WTO and International Investment Law. Converging Systems* (CUP 2016) 18-19; José Alvarez, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris 2017). See for 'deference to relevant statements by the ICJ', *Tulip Real Estate Investment and Development Netherlands BV v Turkey*, ICSID ARB/11/28, Decision on Bifurcated Jurisdiction Issue of 5 March 2013, para 47.

[102] Michelle Zang, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement' (2017) 28 EJIL 273, 291: referring to the 'purpose of consolidating their own legal arguments'. See also Michael Hamilton and Antoine Buyse, 'Human Rights Courts as Norm-Brokers' (2018) 18 Human Rights L Rev 205, analysing ECtHR references to the Inter-American system.

[103] Thomas Schultz and Niccolo Ridi, 'Comity and International Courts and Tribunals' (2017) 50 Cornell Int'l L J 577.

[104] Laurence Boisson de Chazournes, 'Plurality' (n 37) 66-69.

[105] *Mox Plant Case (Ireland v United Kingdom)*, UNCLOS Annex VII Arbitral Tribunal, Order No 3 of 24 June 2003, para 28. For a different result, see *CCL v Kazakhstan*, SCC 122/2001, Jurisdictional Award of 1 January 2003, para 39: '[t]he Arbitral Tribunal must agree with [Claimant-investor] that the concept of "comity" among states, in international law or practice, has no applicability in arbitration'; *Eureko v Slovakia*, PCA 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para 292.

Some international courts and tribunals have been requested to review decisions made by other decision-makers within their own international organisation.[106] A contentious issue, for example, concerns the extent to which the ICJ can review the legality of Security Council Resolutions.[107] Also within the WTO, the review by panels and the AB of decisions taken by other bodies is controversial.[108] In *India – Quantitative Restrictions*, India argued that the Panel was not empowered to review the justification of its balance-of-payments restrictions, because two political institutions within the WTO, the Balance of Payment (BOP) Committee and the General Council, were tasked with doing this. Referring to 'the constitutions of modern democracies' providing 'a separation of legislative, executive and judicial powers', India claimed that a 'principle of institutional balance' was applicable to the WTO.[109]

> India disagrees with the view of the Panel that assigning legal functions to other WTO bodies is only relevant if there is an express provision that limits the panel's competence. Domestic courts and the European Court of Justice have developed doctrines providing for deference by courts to political institutions without there being an explicit limitation on their competence. There is, therefore, no reason why panels and the Appellate Body could not do the same.[110]

The AB, however, rejected the principle of institutional balance advanced by India. Moreover, even if 'cognisant of the competence of the BOP Committee and the General Council', the AB did not see why such competence would exclude review by the panels, as long as the latter would 'take into account to deliberations and conclusions of the BOP Committee'.[111]

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[106] For the situation in the EU, see Alexander Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 Common Market L Rev 361.

[107] eg José Alvarez, 'Judging the Security Council' (1996) 90 AJIL 1; Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' (1999) 10 EJIL 517; Matthew Happold, 'Reviewing the Security Council' (2009) 103 ASIL Proceedings 481; Rosa Möhrlein, 'Act-Dependent Judical Review of Security Council and General Assembly Resolutions' in Giorgio Gaja and Jenny Grote Stoutenburg (eds), *Enhancing the Rule of Law through the International Court of Justice* (Brill 2014).

[108] Lorand Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism' (2004) 53 ICLQ 861.

[109] *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India – Quantitative Restrictions)*, WTO DS90, AB Report of 23 August 1999, para 9-10.

[110] ibid para 23.

[111] ibid para 103-5. The AB rejected India's claim for 'judicial restraint' because, first, this claim was inconsistent with India's claim that the panels lacked any power of review, and, second, because India was seen to believe that such restraint would in practice exclude review. See also *Turkey – Restrictions on Imports of Textile and Clothing*

A third institutional relationship in international law that is susceptible to considerations of deference is that between first-instance reviewers and appellate bodies in international courts and tribunals. Within the context of the ICSID Convention, arbitral awards can be annulled by an annulment committee in exceptional circumstances, including a 'manifest excess of powers' or a 'failure to state reasons'.[112] These standards oblige the annulment committee to limit the intensity of their review, although committees have found ways to criticise tribunals even if they did not see a reason to annul the original award.[113] The ICJ can also be seized to review the alleged nullity of arbitral awards, in which case it does not review whether the contested decision was 'right or wrong' but only whether the tribunal did not act in manifest breach of its competence.[114] Within the context of the ECtHR, parties to a case can request referral to the Grand Chamber of the Court after the delivery of a Chamber judgment. Whereas the Grand Chamber decides the case 'afresh by means of a new judgment' which replaces the judgment of the Chamber, in practice the Grand Chamber defers to the Chamber in various ways.[115] According to Article 17.6 of the WTO Dispute Settlement Understanding (DSU), appeals to the AB are 'limited to issues of law covered in the panel report and legal interpretations developed by the panel'. Consequently, parties have rephrased appeals concerning factual issues as a complaint against the panel's alleged failure to provide an 'objective assessment' of the case as required under Article 11 DSU, which forced the AB to develop a deferential standard of review in this context.[116]

Products (Turkey – Textiles), WTO DS34, AB Report of 19 November 1999, where the AB, unlike the Panel, assumed the competence to review the GATT compatibility of a customs union, which had traditionally been assigned to a committee.

[112] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 52 para 1. Jean-Christophe Honlet *et al*, 'ICSID Annulment' in Marc Bungenberg *et al* (eds), *International Investment Law. A Handbook* (Hart 2015).

[113] eg *CMS Gas Transmission Company v Argentina*, ICSID ARB/01/8, Annulment Decision of 25 September 2007.

[114] *Arbitral Award by the King of Spain of 23 December 1906 (Honduras v Nicaragua)*, ICJ, Judgment of 18 November 1960; *Arbitral Award of 31 July 1989 between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal)*, ICJ, Judgment of 12 November 1991.

[115] Başak Bağlayan and Johannes Hendrik Fahner, '"One Can Always Do Better". The Referral Procedure before the Grand Chamber of the European Court of Human Rights' (2017) 17 Human Rights L Rev 339. For the review of the IACtHR of findings of the Inter-American Commission on Human Rights, see Dinah Shelton, 'Judicial Review of State Action by International Courts' (1988) 12 Fordham J of Int'l L 361, 370-377.

[116] See *European Communities - Measures Concerning Meat and Meat Products (EC – Hormones)*, WTO DS26, AB Report of 16 January 1998, para 133; *European Communities – Measures Affecting Trade in Large Civil Aircraft (EC and certain member States – Large Civil Aircraft)*, WTO DS316, AB Report of 18 May 2011, para 1314, 1317. Simon

The category of deference that is the topic of this study concerns the relationship between an international court or tribunal and a respondent State. Some rationales for deference in this context, such as a concern for judicial economy and a recognition of another institution's expertise, overlap with the rationales applicable in the other three categories of deference. At the same time, it should be noted that the relationship between an international adjudicator and a respondent State is a vertical, hierarchical one, unlike the relationship between different international courts or between an international court and an international institution. In such a vertical relationship, the proper balance between the need for meaningful review on the one hand and an acknowledgment of the expertise and legitimacy of the original decision-maker on the other is particularly delicate. This study investigates the role of judicial deference in striking this balance in different regimes of international law.

Lester, 'The Development of Standards of Appellate Review for Factual, Legal and Law Application Questions in WTO Dispute Settlement' (2012) 4 Trade, L and Development 125.