Intensity of review in international courts and tribunals

A comparative analysis of deference

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5. Final Conclusions

In the early days of the contemporary world of international dispute settlement, Sir Hersch Lauterpacht described the dilemma faced by an international adjudicator. He noted that international courts and tribunals depend on the voluntary choice of States to submit to their jurisdiction. Ambitious rulings might compel States to withdraw or to refuse execution of a judgment. At the same time, Lauterpacht considered that there was a great need for 'bold judicial action' in the international sphere, because of the limited possibilities for international law-making.[1] The dilemma resulted in both a 'tendency to caution' and an 'apparent desire to create the appearance of caution' in international courts and tribunals.[2]

International law has substantially changed since the days of Lauterpacht. While the possibilities and varieties of international law-making have multiplied, the number and reach of international courts and tribunals has also expanded. Nowadays virtually any aspect of domestic policy can fall within the jurisdiction of one international court or another. This expansion has not occurred without protest; on the contrary, States have voiced increasing criticism against some of the institutions regularly involved in the review of domestic policies. In response, academic observers have called for judicial deference; for caution instead of bold judicial action. In this study, I have provided a comparative analysis of the current status of judicial deference in the practice of international courts and tribunals. This inquiry answers the question of whether international adjudicators indeed defer to domestic decision-makers when reviewing State conduct.

The comparative analysis undertaken here reveals a wide variety of approaches adopted by international courts and tribunals concerning their standard of review. Some adjudicators have expressed deference in one way or another, referring to the superior capacities of domestic institutions, to the direct democratic legitimacy of their decisions, and to the open-ended character of many international legal rules. Yet a critical eye is warranted when assessing judicial deference, because deference is not always 'caution', but can also be 'the appearance of caution'. Numerous international judgments and decisions emphasise that the adjudicators do not want to step into the

[1] Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge 1982) 77. The original version was published in 1958.

[2] ibid.

shoes of domestic decision-makers. They do not seek to substitute their own view on matters of public policy for that of a respondent State, because their only task is to review compliance with treaty standards. Such deference, however, is merely rhetorical. No-one contests that international adjudicators ought to assess treaty compliance; the crucial question is whether in doing so, they leave a certain freedom to respondent States to advance their own interpretation and application of international law.

Some international adjudicators have expressed more substantial forms of deference and made efforts to clarify its impact on their reasoning. They have specified the particular assessment that would be left, in whole or in part, to the domestic decision-maker. Common examples of such assessments are the establishment of facts, the resolution of technical questions, and the interpretation and application of domestic law. Sometimes, adjudicators have directed their deference to specific domestic actors, such as parliaments, administrative agencies or courts. Insofar adjudicators justify this deference by reference to the greater expertise of domestic institutions, I describe it as 'epistemic deference'. It acknowledges the limits of the adjudicators' expertise, and allocates non-legal assessments to other authorities. More controversial is 'constitutional deference', which expresses that adjudicators should leave certain assessments to domestic institutions, since it is more legitimate for them to make those assessments, primarily because of their greater democratic accountability. Few adjudicators would grant complete deference on such grounds, but a willingness to accord some degree of deference has been expressed by a variety of international adjudicators.

In practice, the difference between total and partial deference is of limited use. Beyond the increased likelihood that the adjudicator will accept the arguments made by the respondent State and conclude that the impugned measure does not violate international law, it is difficult to understand the impact of partial deference on a legal assessment. The fate of Article 17.6(ii) of the WTO Antidumping Agreement, adopted as an attempt to limit the intensity of review exercised by the WTO dispute settlement system, demonstrates how difficult it is to combine a limited degree of deference with meaningful review. Some adjudicators have tried to formulate specific standards of review, verifying whether an impugned measure was at least reasonable or adopted in good faith. Yet closer inspection of these standards raises only further questions as to the exact contents of these different tests. Indeed, attempts to create clarity about the contents of deferential standards of review produce unsatisfactory results, often replacing one indeterminate notion with another. Conceptually, partial deference can express only a certain decrease in the adjudicator's intensity of review; it seems difficult to quantify or qualify this effect in greater detail. Moreover, the more nuanced and refined a standard of review becomes, the more closely it becomes intertwined with

the interpretation of the applicable rule of international law and the assessment of the merits of an individual case. The conflation of the interpretation of a legal rule on the one hand and the formulation of a standard of review on the other decreases the relevance of the latter as a separate analytical exercise.

More importantly, not only the operation of deference but also its impact on international law is confusing. If an adjudicator fully defers to the respondent State, this results in a finding that the measure under review is not in breach of international law. Yet a judgment based on deference does not affirm that result explicitly; rather, the decision is left to the respondent State. Indeed, deference is close to a *non liquet*: the adjudicator does not respond to the legal question, but instead expresses uncertainty, which results in the respondent State's choice being upheld. Specific standards of review create similar confusion, since they suggest an identification of the minimum standards embodied in the applicable rule, but couched in language that does not define the contents of the norm but divides interpretative authority between the adjudicator and the respondent State.

Leaving aside the conceptual ambiguities inherent in the notion of judicial deference, several adjudicators have found other reasons to reject constitutional deference. They have emphasised that international courts and tribunals have been given the duty to interpret and apply the relevant rules of international law and that deference would be a deviation from this task. Only a few treaties contain provisions imposing deferential standards of review, which suggests that *de novo* review is the default configuration. Scholars have provided further arguments against deference, pointing out that it jeopardises the neutrality and impartiality of international review, destabilises the equality of disputing parties, and threatens the uniformity of the domestic interpretation and application of international law. These arguments are counterbalanced by claims that deference protects democratic decision-making, respects State sovereignty, and gives effect to the principle of subsidiarity and its preference for decision-making at the local level.

Many of the various arguments raised for and against constitutional deference do not exhaust the debate. In response to the democratic argument, it can be argued that judicial review provides a check on majoritarian decision-making, something that is widely accepted in domestic legal systems in order to protect minority interests. Moreover, in a well-functioning democracy, the State's decision to subject itself to the jurisdiction of an international court or tribunal is a form of self-binding that can have full democratic support. A similar argument can be made with regard to sovereignty: the assumption of international obligations is by definition a limitation of sovereignty but this choice is in itself an exercise of sovereignty. Consequently, the acceptance of the jurisdiction of an international adjudicator who enforces limits on domestic democracy and

sovereignty can be a democratic, sovereign choice. In response to arguments concerning subsidiarity, one could argue that the mere establishment of international courts and tribunals suggests that international supervision has advantages that local mechanisms do not have; otherwise, States would not have created such institutions in the first place. Apparently, they saw a need to create an international judiciary that could resolve disputes between sovereign States and evaluate domestic measures having an impact on foreign interests.

This is not to say that the claims against constitutional deference provide conclusive arguments. References to the principle of equality of arms assume an equality between disputing parties that does not exist as a matter of fact and law when one of them is a State. Deference is an acknowledgement of the special responsibilities that distinguish a State from a private actor. Neither can the principle of equality provide a convincing argument when both disputing parties are States, because the applicant State would benefit from the same deference if, in another dispute, its own policies came under review. Arguments based on the universality and uniformity of international law disregard the importance of adapting international norms to local circumstances, which is explicitly required by many of these norms. Finally, the argument that deference constitutes an abdication of the judicial task overstates the effect of deference. Certainly, the creation of international jurisdiction implies that international courts and tribunals ought to exercise their judgment but it does not mean that the task of interpreting and applying international law can never be shared with domestic authorities.

Several of the arguments mentioned so far are rather ambiguous. The same reasoning that justifies deference in the eyes of some provides a reason against deference for others. Whereas some consider it problematic that international courts subject domestic democracy to review, others advocate such review as an indispensable prerequisite for legitimate governance. Likewise, whereas some denounce the risk that deference poses to a uniform application of international law, others appreciate the diversity and pluralism that deference permits. The complexity and controversy of the different arguments involved 'neither permits nor calls for excess of assurance'.[3] Yet in order to avoid a 'non liquet' on the normative question, I propose to focus on the principle of the separation of powers as the decisive rationale underlying judicial deference. This leads to a novel argument against constitutional deference in international courts and tribunals, except in the field of human rights.

[3] Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Ybk Int'l L 48, 82.

In the domestic context, the principle of the separation of powers requires courts to fulfil a delicate role: on the one hand, they must review the conduct of other branches of government, restricting their exercise of public power; on the other, courts must refrain from accumulating too much power themselves, as this would also jeopardise the separation of powers. Constitutional deference is a response to this conundrum, allowing courts to control but not to replace other institutions. On the international level, the same rationale does not apply in the same way: since international courts and tribunals exercise only weak review, there is no need for constitutional deference.

Unlike the decisions of domestic courts, decisions of international courts and tribunals rarely have an immediate impact on the domestic legal order. On the contrary, most international adjudicators issue only declaratory judgments, leaving States the freedom to decide on whether to remove or to adapt an impugned measure when found unlawful by an international adjudicator. Moreover, several international regimes prioritise or permit the payment of compensation, enabling States to retain a contested policy and still remain compliant with international law. Consequently, international law allows States to mediate the effects of adverse rulings. In addition, apart from the lawful options that States have to respond to international judicial decisions, the reality of international affairs demonstrates that States can choose to ignore judgments, refuse compliance, or withdraw from treaty regimes. The point of this observation is not to justify non-compliance, but to demonstrate the limited powers of international courts and tribunals which removes the need for judicial deference.

Whereas domestic courts exercise their review as part of a constitutional framework that legitimises the exercise of public power, most international adjudicators have a more instrumental purpose. Except for the regional human rights courts, international adjudicators serve a relatively narrow purpose of supervising compliance with sectoral rules of international law. Even if international courts and tribunals review the legality of government conduct, this serves an instrumental aim in the interest of different forms of international cooperation. It is therefore unsurprising that international adjudicators possess only the limited power to issue judgments whose implementation depends on the cooperation of States. The role of international adjudicators is not to counterbalance domestic decision-makers in order to ensure a legitimate distribution of public power between different institutions.

The logic of judicial deference, however, is interwoven with the constitutional role of courts. It enables them to provide a check on other branches of government, without arrogating the powers of these other branches. International courts and tribunals do not share this delicate responsibility, nor do they have the power to impose their preferences on the domestic legal order

to the same extent as domestic courts. The legal and factual distribution of powers between international courts and States favours the latter to such an extent that fears of judicial overreach do not provide a convincing cause for constitutional deference in international courts and tribunals.

The different arguments adopted in light of the separation of powers play out differently in the human rights context. The jurisprudence of human rights courts tends to have a larger impact on domestic legal orders than that of other international adjudicators. Human rights law covers potentially any aspect of public policy, while some regional human rights courts have become increasingly assertive in the remedies they order. Accordingly, concerns about overly intrusive judicial review have more pertinence in this context. Unlike other international courts and tribunals, the human rights courts share the constitutional purpose of domestic courts in securing the legitimate exercise of public power. States that accede to regional human rights regimes outsource part of this constitutional mandate to international adjudicators, conscious that domestic institutions may not always be able to execute their mandate as they should. Consequently, human rights courts are faced with the same challenge as domestic courts, namely to provide a form of review that limits but not replaces the powers exercised by other institutions. Constitutional deference is a solution to this dilemma. Finally, whereas the uncertainty created by deference is problematic in other fields of international law, it is less so in human rights law. In accordance with the principle of subsidiarity, international human rights law is not primarily effectuated through a top-down imposition of decisions on domestic institutions, but through an internalisation of human rights at the local level. The States party to the European Convention on Human Rights repeatedly insist on the importance of subsidiarity, encouraging the Court to give continuous effect to its own margin of appreciation doctrine.

My rejection of constitutional deference outside the human rights context does not mean that other international adjudicators should never consider some of the interests commonly invoked in favour of constitutional deference, such as the democratic legitimacy of a contested measure under review. Yet they are advised to take such interest into account when making their assessment of the merits, and not when determining the intensity of their review. A recognition of the legitimacy of domestic decision-making might compel adjudicators to interpret a treaty provision in a narrow way, and to affirm that the contested measure is not in breach of international law. The crucial difference between constitutional deference and restrictive interpretation, even if both have the same practical result, is that in the latter case, the adjudicator provides a conclusive answer to the legal question before it, whereas deference refers the question back to the respondent State, perpetuating uncertainty about the content of the international obligation. For that reason, a restrictive interpretation is preferable over constitutional deference.

The normative findings of this study require some clarification of their practical impact in concrete cases. For that reason, I conclude with a reconsideration of some of the decisions adopted by the different courts and tribunals discussed in this study. The first example is the *Whaling* case, in which the ICJ was requested to review whether the respondent State's whaling programme was 'for the purposes of scientific research'. This assessment inevitably involved judgement that was of a scientific rather than a legal character, and therefore required technical expertise. Following my conclusions, the Court should have introduced epistemic deference in that regard. This deference would not necessarily have led to limited intensity of review, as advocated by Japan. It could have been accorded to the experts appointed by the parties or to experts to be appointed by the Court itself. In either way, epistemic deference would acknowledge that the judges of the Court are not equipped to make scientific and technical assessments, even if a case requires such assessments. The Court's insistence on an 'objective standard of review' conceals the limits of the Court's abilities and the actual need for epistemic deference.

A second example comes from the field of human rights. Different human rights courts have reviewed domestic legislation that obliged candidates for political office to be affiliated with a political party.[4] In accordance with my normative conclusions, a degree of constitutional deference would be pertinent here. These cases concern the choice and design of electoral systems and touch upon core features of a State's political structure which is embedded in a specific historical and cultural context. Accordingly, there is reason to engage the domestic authorities in the interpretation and application of the relevant international rules.

A final example concerns the review of tobacco packaging regulations against rules of international trade and investment law. Such cases evoke questions of epistemic deference, for example as to whether packaging requirements decrease tobacco consumption.[5] In addition, the tobacco disputes evoke questions of constitutional deference, raising doubts as to whether international courts and tribunals in the fields of international trade and investment law have the mandate to review measures adopted in the pursuit of fundamental interests such as the protection of public health. According to my conclusions, these cases do not ask for constitutional deference. Instead, the relevant adjudicators should exercise strict review to verify whether the impugned regulations complied with the relevant rules of international law agreed upon by the respondent

[4] *Gutman v Mexico*, IACtHR, Judgment of 6 August 2008; *Tanganyika Law Society* et al *v Tanzania*, ACtHPR, 009/2011, 011/2011, Judgment of 14 June 2013.

[5] *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Australia – Tobacco Plain Packaging)*, WTO DS467, Panel Report of 28 June 2018, para 7.514, 7.1026-7.1028.

State. It should be noted that such review, even if exercised in a rigorous manner, does not necessarily lead to the finding of a breach, as the outcome of the WTO case demonstrates.[6]

The investment arbitration tribunal ruling on *Philip Morris v Uruguay* had to evaluate the impugned regulations only to verify whether they complied with the protection owed by the State towards the claimant's investments.[7] The tribunal rejected the investor's claims, granting a 'margin of appreciation' to the respondent. The adjudicators could have reached the same outcome by adopting a restrictive interpretation of the fair and equitable treatment standard. They could have decided, for instance, that the fair and equitable treatment standard does not protect against losses incurred due to non-discriminatory regulations that verifiably benefit public health. Such an approach would have been preferable over the tribunal's adoption of the margin of appreciation because it provides more clarity about the scope and content of the relevant legal rule. The difference between a restrictive interpretation and constitutional deference is that in the former case the adjudicators provide an interpretation of the scope and content of international law, instead of leaving it to the respondent Member to define the meaning of its own obligations *in concreto*.

Questions of constitutional deference concern 'one of the most controversial and elusive problems of jurisprudence – the nature and the limits of the judicial function'.[8] It is therefore unsurprising that the intensity of the review exercised by international courts and tribunals evokes continuous debates, both in concrete disputes and in academic literature. The controversy acknowledges the difficulty of striking a balance between the aims pursued by a certain field of international regulation on the one hand and the prerogatives of sovereign States on the other. In this study, I have focused on the principle of the separation of powers to determine whether judicial deference is a helpful tool to strike this balance, and conclude that this is generally not the case. Once the intrusiveness of the remedies that can be ordered by the international adjudicator is identified as the relevant factor for deciding whether deference is due, it becomes clear that there is no need for constitutional deference in most regimes, because international law and politics leave States a wide range of options to mediate the consequences of international decisions.

[6] See for the panel's sparse comments on its standard of review eg para 7.215, and 7.2429-7.2431. The panel considered that it was itself entitled to a margin of appreciation in assessing the equivalence of the contribution to a legitimate objective of a measure under review and of a possible alternative. See eg para 7.1257, 7.1369, 7.1371, 7.1463, 7.1722.

[7] *Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v Uruguay*, ICSID ARB/10/7, Award of 8 July 2016.

[8] Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Ybk Int'l L 48, 82.

Moreover, in the interest of a clear understanding of international law, it is preferable that adjudicators provide a univocal interpretation of legal rules. Whereas in the human rights context a certain involvement of domestic authorities in the interpretation and application of the law is constructive, other international courts and tribunals should provide clarity on where the boundary between State sovereignty and treaty obligations lies.