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Schill, S.W.B.

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DEFERENCE IN INVESTMENT TREATY ARBITRATION: RE-CONCEPTUALIZING THE STANDARD OF REVIEW THROUGH COMPARATIVE PUBLIC LAW

STEPHAN W. SCHILL, LL.M, DR IUR
SENIOR RESEARCH FELLOW, MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW, HEIDELBERG

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C/O LAW DEPARTMENT
London School of Economics
Houghton Street
London
WC2A2AE

Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review through Comparative Public Law

Stephan W. Schill[*]

Abstract

The standard of review to be applied by investment treaty tribunals when reviewing host state conduct is a crucial, but still insufficiently analyzed issue. Although tribunals frequently make reference to "deference" as the applicable standard, the criteria they apply to concretize that concept remain uncertain and little predictable. What is more, the conceptual foundations of granting deference to host states are opaque. The present paper focuses on these foundations and argues that they are intrinsically connected to how investment treaty arbitration is qualified as either a form of commercial arbitration, a means to settle disputes under public international law, or as an internationalized form of judicial review in public law disputes. Siding with the latter, the present paper proposes to conceptualize the standard of review within a separation of powers framework that fuses domestic and international legal considerations in allocating power between states and arbitral tribunals. Within this framework, considerations originating from both international dispute settlement and comparative public law interact to determine and concretize the standard of review.

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[*] Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg; Rechtsanwalt (admitted to the bar in Germany); Attorney-at-Law (New York); LLM International Legal Studies (New York University, 2006); Dr iur (Johann Wolfgang Goethe-Universität Frankfurt am Main, 2008). He can be contacted at schill@nyu.edu.

I. Reinjecting Legitimacy: The Role of Deference

Investment treaties not only empower foreign investors by granting them protection against host state conduct independent of domestic law and domestic courts; they also grant considerable powers to arbitral tribunals to review government conduct, including central public policy decisions, under broadly formulated standards of treatment. The breadth and depth of arbitral powers and their impact on domestic law and policy-making become apparent in numerous cases. Prominent examples are investment arbitrations involving Argentina's economic crisis in 2001/2002,[1] water concessions in Bolivia, Argentina, and Tanzania,[2] an affirmative action program aiming to remedy injustices of the apartheid system in South-Africa,[3] bans of harmful chemicals in the United States and Canada,[4] protection of the environment in Germany, Canada, or Mexico,[5] anti-tobacco legislation in Uruguay and Australia,[6] or Germany's nuclear energy phase-out.[7]

These cases illustrate how deeply decisions of investment treaty tribunals can penetrate into the domestic legal sphere and redefine the relationship between private rights and public interests, locally as well as globally. It is for this reason that investment treaty arbitration has attracted a plethora of criticism by states, public interest NGOs, and academics in both public law and international law. One central concern – among others – is that arbitral tribunals use the vague standards of investment protection to intrude into the regulatory space of host states and become the ultimate controller

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[1] See, e.g., *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; *Continental Casualty Company v Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008; *National Grid Plc v The Argentine Republic*, UNCITRAL, Award, 3 November 2008; *Total SA v The Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010; *Impregilo SpA v Argentine Republic*, ICSID Case No. ARB/07/17; *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 [all decisions and awards connected to investment treaty arbitrations are available, unless stated otherwise, either on the Investmentclaims website at http://www.investmentclaims.com or the Investment Treaty Arbitration website at http://italaw.com].

[2] See, e.g., *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2004; *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19 and *AWG Group v Argentine Republic*, Decision on Liability, 30 July 2010.

[3] *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, 4 August 2010.

[4] See, e.g., *Methanex Corporation v United States*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; *Chemtura Corporation (formerly Crompton Corporation) v Government of Canada*, UNCITRAL (NAFTA), Award, 2 August 2010.

[5] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co KG v Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration, 30 March 2009; *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award, 30 August 2000; *SD Myers, Inc v Canada,* UNCITRAL (NAFTA), Partial Award, 13 November 2000.

[6] *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Notice of Arbitration, 19 February 2010 (pending); *Philip Morris Asia Limited v Australia,* UNCITRAL, Notice of Arbitration, 21 November 2011 (pending). See further Tania Voon and Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims against Plain Tobacco Packaging in Australia', 14 J Int'l Econ L (2011) 515; Valentina S. Vadi, 'Global Health Goverance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law', 48 Stanford J Int'l L (2012) 93.

[7] *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, registered 31 May 2012 (pending).

of central public policy decisions as they limit domestic courts and domestic regulators of exercising jurisdiction.[8] These concerns, critics point out, reflect in state practice, including in the withdrawal of some states from the ICSID Convention and international investment treaties,[9] in some reluctance to comply with awards of investment tribunals,[10] in a recalibration of central provisions of investment treaties and model treaties,[11] and in calls for replacing investment arbitration with dispute settlement in domestic courts,[12] in a to-be-established standing international investment court,[13] or in state-to-state arbitration.[14]

Yet, in order to channel the powers given to arbitral tribunals and to prevent them from interpreting investment treaties as overly restrictive of state sovereignty one should not only consider how to renegotiate, and thus recalibrate, investment treaties. It is equally important to reconsider the role of arbitral tribunals. Thus, apart from the question of how substative investment law should be interpreted and concretized, a still not sufficiently studied issue is the level of scrutiny or standard of review that arbitral tribunals should apply when reviewing host government conduct.[15] Such standards can range from complete deference under non-justiciability-doctrines resulting in an absence of arbitral review to reconsidering any factual or legal determinations made at the domestic level *de novo*.[16] Finding the appropriate place for arbitral tribunals on this scale, and developing standards of review that balance protection of foreign investors and public interests, is one way, amongst others, of (re-)injecting legitimacy into in-

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[8] See, for example, the recently published Public Statement on the International Investment Regime, 31 August 2010, http://www.osgoode.yorku.ca/public_statement/documents/_Public%20Statement.pdf; Muthucumaraswamy Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration', in Karl P. Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (2008), at 39-45.

[9] Cf UNCTAD, Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims, IIA Issue Note No. 2 (December 2010), http://www.unctad.org/en/Docs/webdiaeia20106_en.pdf.

[10] On non-compliance with investor-state arbitration see Loukas Mistelis and Crina M. Baltag, 'Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices', 19 Am Rev Int Arb (2009) 319, at 354–61; Crina M. Baltag, 'Enforcement of Arbitral Awards against States', 19 Am Rev Int Arb (2009) 391.

[11] See Peter Muchlinski, 'Trends in International Investment Agreements, 2008/2009: Review of the Model Bilateral Investment Treaties of Norway, South Africa and the United States', in Karl P. Sauvant (ed), *Yearbook on International Investment Law and Policy 2009-2010* (2010) 41; José E. Alvarez, 'Why are we 'Re-calibating' our Investment Treaties?', 4 World Arbitration & Mediation Review (2010) 143.

[12] See Public Statement (n 8), at para. 14.

[13] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (2007), at 180-184.

[14] In April 2011, Australia announced that it will discontinue including investor-State dispute settlement provisions in future investment treaties. See Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and prosperity-pdf, at 14.

[15] For the nascent literature on this issue see William Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations', 35 Yale Journal of International Law (2010) 283; William Burke-White and Andreas von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations', in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (2010) 689; Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', 15 J Int'l Econ L (2012) 223; Anthea Roberts, 'The Next Battleground. Standards of Review in Investment Treaty Arbitration', in Albert Jan van den Berg (ed), *ICCA Congress Series no. 16* (2012) (forthcoming); Rahim Moloo and Justin Jacinto, 'Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law', in Karl P. Sauvant (ed), *Yearbook on International Investment Law and Policy 2011-2012* (2012) (forthcoming).

[16] See Henckels (n 15), at 238 (with further references).

vestment treaty arbitration.[17] It may contribute to ensuring the system's long-term viability without the imminent need to redraft investment treaties or to make institutional changes to investment treaty arbitration as it currently stands.

Investment treaty tribunals are aware of the task they face and, to a large extent, are receptive to granting deference to host state institutions. Yet, to the extent they invoke the notion of deference, they attribute different meanings to it. Moreover, they treat it as a mantra rather than develop it as part of a theoretical framework structuring the power relations between states and tribunals (see Part II). The conceptual foundations of granting deference to host state conduct therefore remain unclear. Accordingly, it is my objective in the present article to lay out these foundations and indicate the pillars upons which the standard of review in investment treaty arbitration should rest. By contrast, I do not aim at providing an exhaustive account of how the standard of review should be concretized and applied to individual cases.

Considering the conceptual foundations for a theory of deference is all the more important as competing views exist on the function and nature of investment treaty arbitration that affect the standard of review. As I will argue, investment treaty arbitration is neither a form of commercial arbitration nor a traditional institution of dispute settlement under public international law. Instead, it constitutes an internationalized form of judicial review that has both a domestic public law function and a function for international investment law as a whole (see Part III). Investment treaty tribunals function both as substitutes for domestic courts in reviewing government conduct and as law-makers at the international level in concretizing and further developing international investment law through their jurisprudence. They do not function as simple *bouches de la loi*, but themselves exercise public authority in interacting with other public decision-makers at the domestic and the international level. This setting suggests that deference, or more generally the standard of review, should be framed as a public law concept connected to the separation of powers-doctrine. Exercising deference then finds its justification in the idea of constraining public power by allocating it among different actors. Investment treaty tribunals, in turn, should apply some degree of deference because because domestic and international courts equally do so when reviewing acts by other public decision-makers.

Determining the precise degree of deference in investment treaty arbitration must take account of the dual function arbitral tribunals have as public bodies at the domestic and the international level. The standard of review applied by arbitral tribunals, in consequence, must fuse domestic and international legal considerations (see Part IV). It cannot be developed, as is often done, in a comparative fashion solely by drawing on the standard of review applied by either domestic or international courts. Instead, in concretizing the standard of review one must draw on both international and domestic law and practice regarding the allocating of power between public institutions in a separation of powers framework. Only then will it be possible to do justice to the specificities of investment treaty arbitration and its differences with both domestic and international judicial review and dispute settlement.

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[17] See further Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach', 52 Va J Int'l L (2011) 57.

II. The Mantra of Deference in Investment Treaty Arbitration

Investment treaty tribunals do not ignore that the standard of review in relation to host state conduct is an important concern for understanding their role vis-à-vis states. In fact, a review of arbitral jurisprudence suggests that the concept they use to fashion the standard of review is deference. Yet, the term itself is not used in a uniform fashion and often repeated in a mantra-like fashion (A.). Furthermore, arbitral tribunals do not always agree on what degree of deference is appropriate under which circumstances (B.). This suggests that there is continued uncertainty as to conceptual foundations of deference as the standard of review in investment treaty arbitrations.

A. Different Notions of Deference

Investment treaty tribunals often refer to the notion of deference, but attribute different meanings to it. First, deference can refer to the idea that international courts and tribunals have to respect the treaty-making power of states, including authoritative interpretations by contracting parties,[18] and that tribunals should not rewrite treaty-obligations they disagree with for policy reasons.[19] This meaning of deference concerns the limits of a court's or tribunal's power to interpret the governing law vis-à-vis states as the masters of the treaty in question. Conceptually, this notion of deference is embedded in the traditional framework that international law and national law are strictly separate spheres and that international dispute settlement bodies are to give effect to the common will of the contracting states parties, of which they are agents.

Second, deference can refer to an interpretive principle for interpreting international treaties, including investment treaties, in a state-friendly (or sovereignty-friendly) manner. This *in dubio mitius*-principle has occasionally been applied by international courts and tribunals,[20] including by investment treaty tribunals,[21] but is rightly rejected in the great majority of cases as a principle alien to the Vienna Convention on the Law of Treaties and to customary law principles of treaty interpretation.[22] It is inappropriate

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[18] Consider how various tribunals, some deferential, others not, have dealt with the FTC Note of Interpretation on fair and equitable treatment under Article 1105(1) NAFTA. See Stephan W. Schill, *The Multilateralization of International Investment Law* (2009), at 268-275.

[19] See *Siag and Vecchi v Republic of Egypt*, ICSID Case No ARB/05/15, Decision on Jurisdiction, 11 April 2007, para.127 ("On the matter of interpretation of the international instruments involved in this case it was submitted that the Tribunal should give *deference* to the negotiated language of the treaty, including how Egypt and Italy chose to define 'natural person' and 'protected investment.' The Tribunal should not rewrite the BIT to achieve policy ends. If it did so, the Tribunal would be replacing its judgment for that of the Contracting States.").

[20] See generally Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)', 21 EJIL (2010) 681.

[21] See, for example, *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 171 (pointing out that "the appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*").

[22] See *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, 13 July 2009, para. 48, available at http://www.icj-cij.org (pointing out that "[w]hile it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way"). For cases in investment arbitration rejecting this principle see, for example. *The Loewen Group, Inc and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, para. 51; *Ethyl Corporation v Canada*, UNCITRAL/NAFTA, Award on Jurisdiction, 24 June 1998, para. 55; *Eureko v Poland*, Partial Award, 19

as a principle of treaty interpretation because being deferent to one contracting state's sovereignty means disregarding the other contracting state's entitlement to have its treaty rights enforced. Conceptually, this notion of deference is equally grounded in the idea of an international legal order that is strictly separate from domestic legal systems.

Finally, and that is the relevant concept in the present context, deference is used to designate a margin of appreciation, a space for maneuver, within which host state conduct is exempt from fully fledged review by an international court or tribunal.[23] Here deference refers to a limitation in a court's or tribunal's level of scrutiny concerning decisions taken or determinations made by a host state institutions because the adjudicator respects the reasons for a state's decision or conduct even if its own assessment might be different.[24] The resultant standard of review can range from full deference, where the assumptions and determinations underlying the decision under review, as well as the decision itself, are not questioned, to *de novo* review, where the decision and its motivation are fully scrutinized and taken anew by the reviewing body.[25] Deference therefore concerns the institutional relationship between the decision-making body and the reviewing body and has to be distinguished from the normative flexibility, or content, given to the substantive obligations at stake.[26]

Deference can involve several dimensions. It can refer to the respect an arbitral tribunal pays to the determination of facts by a domestic agency or a domestic court, to the state's substantive policy choices, including the weight attributed to non-investment interests, and to the interpretation of law, both domestic and international, by the decision-making body whose decision is under review. The Tribunal in *S.D. Myers v. Canada* perhaps most clearly caught these different dimensions when it stated that investment treaty tribunals

> d[o] not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimate-

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August 2005, para. 258; *United Parcel Service of America, Inc v Government of Canada*, UNCITRAL/NAFTA, Award on Jurisdiction, 22 November 2002, para. 40; *Mondev International Ltd v United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 43; *Amco Asia Corporation and Others v The Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para. 14(i); *Siemens AG v The Argentine Republic,* ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 81.

[23] See Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law', 16 EJIL (2005) 907.

[24] Cf in the context of UK constitutional adjudication Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication', in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (2008) 184, at 185–186.

[25] Cf Kavanagh (n 24), at 186; Henckels (n 15), at 238.

[26] Both substantive and procedural aspects are sometimes considered together under the notion of standard of review. See, for example, Moloo and Jacinto (n 15). For present purposes and despite a close mutual interrelationship between substance and procedure the concept of standard of review is understood in the present article as a matter concerning the institutional and procedural relations between different decision-making bodies, namely that between reviewing and reviewed institution. In this sense also Kavanagh (n 24), at 190; Henckels (n 15), at 239. This does not mean, however, that the standard of review is entirely independent of the substantive standards of treatment or additive to it. Instead, the substantive standards of treatment often influence, or even determine, the standard of review. Cf. *Glamis Gold Ltd v United States of America*, UNCITRAL/NAFTA, Award, 8 June 2009, para. 617.

> ly ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[27]

B. Different Degrees of Deference

Although many investment treaty tribunals share this conceptualization of deference, they differ as to the degree of deference they accord to government conduct. At one end of the spectrum, many tribunals depart, in scrutinizing government conduct, from a presumption of deference. For them, according deference is an underlying principle of international dispute settlement. For example, the Tribunal in *S.D. Myers v. Canada*, followed by a number of other tribunals, stated that the determination of whether a state has violated the fair and equitable treatment standard

> must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.[28]

Deference, in that understanding, is a parameter of the relationship between international and domestic law and protects a state's domestic policy space against control by international law and international tribunals.

Likewise, the Tribunal in *Tecmed v. Mexico* observed that, in determining whether a regulatory act constituted an indirect expropriation,

> the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining […] whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation.[29]

Similarly, as regards decisions by domestic courts, several investment treaty tribunals have emphasized that they are not court of appeals, but have a more limited mandate that requies deference vis-à-vis domestic courts. Thus, the Tribunal in *Azinian v. Mexico* observed:

> The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. […] What must be

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[27] *SD Myers Inc v Canada* (n 5), para. 261.

[28] Ibid., para. 263. Similarly, *Saluka Investments BV (The Netherlands) v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 304 et seq.; *Continental Casualty v Argentine Republic* (n 1), para. 181; *Glamis Gold v United States* (n. 26), para. 617; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 505; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C. V. and Talsud S.A. v. The United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, para. 6-26.

[29] *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 122.

> shown is that the court decision itself constitutes a violation of the treaty.[30]

As these examples show, many investment treaty tribunals consider that in devising the appropriate standard of review they need to depart from a considerable degree, if not even a presumption, of deference towards host state conduct.

This position, however, is not uniformly held among investment treaty tribunals. Other tribunals suggest a more differentiated approach. The Tribunal in *Chevron v. Ecuador*, for example, distinguished in a case dealing with denial of justice for undue delay and manifestly unjust judgments of domestic courts as follows:

> […] the uncertainty involved in the litigation process […] is taken into account in determining the standard of review. […] if the alleged breach were based on a manifestly unjust judgment rendered by the Ecuadorian court, the Tribunal might apply deference to the court's decision and evaluate it in terms of what is "juridically possible" in the Ecuadorian legal system. However, in the context of other standards such as undue delay […] no such deference is owed.[31]

Thus, while denial of justice for manifestly unjust decisions mandated considerable deference vis-à-vis domestic courts, denial of justice for of undue delay merited no such deference. The difference between both situations, it seems, is that the former situation concerned the interpretation by the domestic court of its own domestic law, whereas the latter concerned a state's obligations under international law in regard of the duration of domestic court proceedings.

Differences in how investment treaty tribunals devise the standard of review can also be seen in other cases. Thus, the arbitral tribunals in *CMS v. Argentina*,[32] *BG v. Argentina*,[33] *Sempra v. Argentina*,[34] and *Enron v. Argentina*[35] did not grant Argentina much policy space in examining whether Argentina's emergency legislation constituted the "only way" to react to its economic and financial crisis under the international law concept of necessity, while other tribunals were more deferential, notably the tribunals in *LG&E v. Argentina*,[36] *Continental Casualty v. Argentina*,[37] and *Total v. Argentina*.[38]

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[30] *Robert Azinian, Kenneth Davitian & Ellen Baca v The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Final Award, 1 November 1999, para. 99. See also *ADF Group Inc v United States*, ICSID Case No. ARB (AF)/00/1, Final Award, 9 January 2003, para. 190; similarly concerning the restriction of a NAFTA Chapter 11 tribunal to find breaches of NAFTA, not of general international law or domestic law *Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Jurisdiction, 6 December 2000, para. 61; *Mondev v United States* (n 22), para. 136.

[31] *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador,* UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, para. 379. Critical also *Chemtura v Canada* (n 4), paras. 123 and 134 (no deference with regard to fact-finding, but deference as regards science-based decision-making of domestic administrative agencies).

[32] *CMS v Argentina* (n 1), paras. 304-394.

[33] *BG Group Plc v Argentina*, UNCITRAL, Award, 24 December 2007, paras. 381-387, 407-412 (the award has meanwhile been set aside in first instance by a US Court).

[34] *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras. 325-397 (this award has meanwhile been annulled).

[35] *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 288-345 (this award has meanwhile been annulled).

[36] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc v The Argentine Republic* (n 1), paras. 201-266.

As the above mentioned statements show, the notion of deference is frequently used in investment treaty arbitration. Yet, arbitral jurisprudence is unsettled on how to conceptualize deference, on what degree of deference to accord when reviewing host state conduct, and on the factors that should influence the appropriate standard of review. Above all, arbitral tribunals do not explain why deference should be paid to certain acts and determinations of host states but not to others, and how to distinguish between them. All in all, to the extent deference is mentioned as influential in the decision-making of investment treaty tribunals,[39] it reminds more of a mantra that is repeated incessantly, than the result of well-reasoned reflection. This does not only compromise the predictability in decision-making of arbitral tribunals, but indicates a more general insecurity as to the conceptual foundations of deference and the appropriate standard of review to be applied in investment treaty arbitration.

III. Conceptual Foundations of Deference in Investment Treaty Arbitration

Any inquiry into the conceptual foundations of deference in investment treaty arbitration quickly encounters the difficulty of determining the nature of investment treaty arbitration. Currently, different approaches compete that either understand investment arbitration as a species of commercial arbitration, as part and parcel of traditional public international law dispute settlement, or as a public law discipline similar to judicial review in domestic or international courts dealing with relations between private actors and governments.[40] Distinguishing between these approaches is important as they all have different perspectives on how to conceptualize the standard of review, and accordingly which level of deference to accord to host state conduct.

While commercial arbitration approaches to investment treaty arbitration with their focus on contract-based horizontal ordering structures are unable to grasp the concept of deference to host state conduct in a meaningful way (see A.), public international law approaches have greater value for understanding why states deserve deference (see B.). Yet, a classical public international law perspective also has weaknesses, above all because it disregards the function of investment treaty tribunals as domestic courts. The most convincing approach therefore consists of understanding international investment law as a public law discipline and investment arbitration as an internationalized form of judicial review that fuses the domestic and the international and accepts that investment treaty arbitration has a dual function as both a domestic and an international court (see C.). In that context, deference can be understood through the idea of the separation of powers to restrict the exercise of power by allocating it to different institutions that exercise mutual control.

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37 *Continental Casualty v Argentina* (n 1), paras. 160-236.

38 *Total v Argentina* (n 1), paras. 135-184, 219-231.

39 See supra notes 27-29.

40 See Stephan Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law', 22 EJIL (2011) 875, at 887-890, 894-902. Sometimes these different approaches are also designated as analogies; see Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 106 AJIL (2012) (forthcoming).

A. Deference: An Arbitral Heresy?

If investment treaty arbitration is understood as a specialized form of commercial arbitration, as done by a significant number of those who practice in the field,[41] according deference to only one party, the host state, but not to the other, the investor, could be considered in breach of a fundamental principle of arbitration - the equality of the parties - and hence constitute an arbitral heresy.[42] In fact, it would be difficult to reconcile the principle of party equality with a tribunal limiting its level of scrutiny in relation to conduct of the state party to the dispute, but not in relation to the foreign investor.[43] Party equality would thus translate into a "no deference"-paradigm.

However, investment treaty arbitration is not a form of commercial arbitration. Although investment treaties make use of the arbitral process to resolve investment disputes, and employ procedural rules that are either directly made for commercial arbitrations, or tailored after the model of commercial arbitration,[44] investment treaty arbitration differs from commercial arbitration in several regards. Crucial differences exist in relation to the subject matter of disputes, the applicable law and resulting causes of action, the relationship of the parties, and the nature of consent. Above all, unlike the private law disputes we regularly see in commercial arbitration, investment treaty arbitrations are mainly concerned with resolving what are in essence public law disputes, that is, disputes about the lawfulness of the exercise of public authority of states.[45]

In fact, many disputes settled in investment treaty arbitration can be characterized, from the perspective of the disputing state, as administrative or constitutional law matters.[46] The proceeding in *CMS Gas Transmission Company v. Argentina*[47] for breach of the bilateral investment treaty (BIT) between the United States and Argentina, for example, raised the question of whether Argentina was permitted, in order to tackle its se-

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41 See Barton Legum, 'Investment Treaty Arbitration's Contribution to International Commercial Arbitration', Disp Resol J, Aug.–Oct. 2005, at 71, 73; Andrea K. Bjorklund, 'Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working', 59 Hastings L J (2007) 241, at 251.

42 Accordingly, the words "deference", "margin of appreciation", or a comparable term regularly do not appear in the indexes of treatises on international commercial arbitration. See Gary Born, *International Commercial Arbitration* (2009), Vol. II; William W. Park, *Arbitration of International Business Disputes* (2006); Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (2003).

43 In more detail on the interrelations between procedural equality, deference, and assymmetries in investment arbitration Thomas W. Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State', 26 Arb Int'l (2010) 3.

44 See Bjorklund (n 41), at 251.

45 See *International Thunderbird Gaming Corp v United Mexican States*, UNCITRAL/NAFTA, Arbitral Award, 26 January 2006, Separate Opinion by Thomas Wälde, paras 12-13; Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 EJIL (2006) 121, at 139–40, 144-145; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (2007) 58 ff ; Thomas W. Wälde, 'The Specific Nature of Investment Arbitration' in Philippe Kahn and Thomas W. Wälde (eds), *Les Aspects Nouveaux du Droit des Investissements Internationaux/New Aspects of International Investment Law* (2007) 43, 112 *et seq*.;. Santiago Montt*, State Liability in Investment Treaty Arbitration – Global Constitutional and Administrative Law in the BIT Generation* (2009), at 1-17; Stephan W. Schill, 'International Investment Law and Comparative Public Law - an Introduction', in Schill (n 15), at 3, 12.

46 Note that this may be different with contract claims entertained by an investment treaty-based tribunal. Yet, these type of claims are not dealt with in the present article as they partly raise different issues also in regard of the standard of review.

47 *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005.

vere financial and economic crisis in 2001/2002, to adopt emergency legislation that lifted the Peso convertibility into U.S. dollars, transformed all internal U.S. dollar denominated claims into Peso, and abrogated the tariff adjustment clauses granted in the privatization process in the gas distribution sector. For Argentina, this legislation was justified as an act of necessity under both its constitutional law and customary international law. From its perspective, the arbitration concerned the scope of the government's emergency powers and therefore had a constitutional law dimension.

Other investment treaty arbitrations, in turn, qualify as administrative law disputes. The (meanwhile settled) arbitration for breach of the Energy Charter Treaty in *Vattenfall v. Germany*,[48] for example, concerned the question of whether representations made during negotiations about the grant of a permit to construct and operate a coal-fired power plant in the City of Hamburg prevented the city government from imposing, in the final operating license, additional environmental obligations that aimed at protecting fauna and flora in the adjacent Elbe river. From the perspective of German law, this raises primarily questions of the proper application of administrative law.

Both *CMS* and *Vattenfall* are representative for the type of disputes heard in investment treaty arbitration. Unlike in commercial arbitrations, which primarily involve disputes between private actors about contractual rights and duties, investment treaty arbitrations are characterized by the following distinctive features:[49] First, different from typical commercial arbitrations, one party to an investment treaty arbitration, usually the respondent, is a state or state agency; second, investment treaty arbitrations regularly involve questions not of private, but of public law, that is, disputes about the limits of the state's administrative, legislative, or judicial powers; third, investment treaty arbitrations do not primarily involve questions of contractual liability under domestic law, but of state responsibility under international law; fourth, the parties to an investment disputes are not equals: instead, investors and host states stand in a relationship of super- and subordination with the state being able to impose binding decisions on a foreign investor; and fifth, investment treaty arbitration is "arbitration without privity":[50] the host state's consent is not based on contract, but on a unilateral offer in an investment treaty in generalized and prospective form, which any investor covered by the treaty can accept simply by initiating arbitration.

As prior recourse to domestic courts is usually not required, investment treaty tribunals functionally assume the role of, and to a large extent replace, domestic courts in public law disputes.[51] Like courts, investment treaty tribunals, based on their impartial and independent judgment, review government conduct as to its legality and engage in the finding of facts and the application of the governing law to those facts. Investment treaty arbitration thus is an adjudicatory process that has little in common with

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48 *Vattenfall v Germany* (n 5).

49 Van Harten and Loughlin (n 45), at 140–5.

50 See Jan Paulsson, 'Arbitration Without Privity', 10 ICSID Rev. - FILJ (1995) 232; Bernardo Cremades, 'Arbitration in Investment Treaties: Public Offer of Arbitration in Investment-Protection Treaties', in Robert Briner, L. Yves Fortier, Klaus Peter Berger and Jens Bredow (eds), *Law of International Business and Dispute Settlement in the 21st Century* (2001) 149; Andrea K. Bjorklund, 'Contract Without Privity: Sovereign Offer and Investor Acceptance', 2 Chicago Journal of International Law (2001) 183.

51 The reason for this is that foreign investors, in particular in developing and transitioning economies, often have reservations about the neutrality, impartiality, and independence of the host State's courts to settle disputes with the government. See Stephan W. Schill, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement', in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010) 29.

commercial arbitration, where the parties under the principle of party autonomy have full liberty to determine not only which law arbitrators should apply, but also whether they should render a decision based at all in law or instead *ex aequo et bono*.[52] Because of this critical difference, the "no deference"-paradigm of commercial arbitration cannot be transposed to investment treaty arbitration. Instead, the domestic court parallel would rather suggest that deference in investment treaty arbitration is justified because domestic courts, when reviewing government conduct, regularly apply a certain degree of deference to implement the idea of separation of powers.

B. Massaging Sovereignty: Investment Arbitration's Public International Law Pedigree

Investment treaty tribunals are not only functional substitutes for domestic courts. They are also part of the universe of dispute settlement mechanisms under public international law, above all because they determine the international legality of a state's conduct. Thus, instead of looking at the commercial arbitration model, and in addition to domestic analogies, the concept of deference also has to be seen as part of the public international law underpinnings of investment treaty arbitration. In that perspective, deference granted by investment treaty tribunals can be seen as a facet of the relationship between states and international courts and tribunals more generally.

Granting deference builds on several debates that have ensued over time about the relationship between international dispute settlement and unilateralism, starting with the question, much-discussed at the end of the 19th and during the first half of the 20th centuries, about what type of "political" disputes were unsuitable for submission to an international court;[53] about the inclusion of "vital interest"-clauses in inter-state arbitration agreements that allowed states to exclude, more or less unilaterally, certain disputes from a tribunal's jurisdiction;[54] about the attachment of reservations to Optional Declaration under Article 36 of the ICJ Statute, such as the now withdrawn one of the United States (the so-called Connally Amendment);[55] and about the inclusion of self-judging essential interest-clauses in multilateral and bilateral treaties in various subject areas.[56] Quite similary, deference is an element of institutional restraint that regulates the relation between states and international dispute settlement organs and ensures that interna-

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[52] See Susan D. Franck, 'International Arbitrators: Civil Servants? Sub Rosa Advocates? Men of Affairs?: The Role of International Arbitrators', 12 ILSA Journal of International and Comparative Law (2006) 499, at 503.

[53] See Hersch Lauterpacht, *The Function of Law in the International Community* (1933), at 139-165. For a more recent sighting of this argument see *Prosecutor v. Tadić*, ICTY IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 23-25.

[54] See Karl J. Partsch, 'Vital Interests', 10 EPIL (1986) 526 (discussing the development of vital interests clauses in arbitration treaties and related reservations to the jurisdiction of the PCIJ and ICJ). See further *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Dissenting Opinion of Judge Oda, ICJ Reports 1986, 224, para. 25 (discussing 29 bilateral treaties concluded from 1907 to the 1920s containing such reservations).

[55] See on the Connally Amendment: Arthur Larson, 'The Facts, the Law, and the Connally Amendment', 1961 Duke L J (1961) 74; Robert Y. Jennings, 'Recent Cases on "Automatic" Reservations to the Optional Clause', 7 Int'l & Comp L Quart (1958) 349; C. H. M. Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals', 31 Brit Ybk Int'l L (1954) 96; Hubert H. Humphrey, 'The United States, the World Court and the Connally Amendment', 11 Va J Int'l L (1971) 310.

[56] See Stephan Schill and Robyn Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement', 13 Max Planck UNYB (2009), 61.

tional courts and tribunals exempt certain decisions of states from review or limit their level of scrutiny.

Deference, in consequence, is a concept that is deeply rooted in the public international law framework structuring the relationship between states and international courts and that every international dispute settlement body has to grapple with. A considerable degree of deference, in that sense, characterized the application of the customary international law minimum standard for the protection of aliens by international tribunals as circumscribed by the United States-Mexican General Claims Commission in the 1926 *Neer* case.[57] But also modern international courts and tribunals reflect on the standard of review to be applied and develop criteria and argumentative frameworks for conceptualizing the appropriate degree of deference.[58]

In fact, the level of scrutiny applied, or the amount of deference granted, is among the criteria determining the success and acceptance of an international court or tribunal. The WTO Appellate Body, for example, is often considered as one of the most successful and accepted international dispute settlement bodies not least because of its "massaging sovereignty".[59] Similarly, the European Court of Human Rights (ECtHR) has arguably developed into a widely respected adjudicatory institution because of its margin of appreciation framework under which it allows states to implement policy choices that serve the public interest without in-depth court scrutiny.[60] Investment treaty tribunals, as creatures of public international law, cannot escape this context. In consequence, one conceptual foundation for deference, and also a source of inspiration for developing criteria for the appropriate standard of review, can be found in the practice of other international dispute settlement bodies and how they understand their relationship with states.

However, there are also significant differences between investment treaty tribunals and more traditional international courts and tribunals. These involve several dimensions of functional differences between investment treaty tribunals and other international courts: first, as regards the access modalities for disputing parties; second, in relation to states as contracting parties and law-makers under international law; and third, as regards the perspective on and treatment of the state in investment treaty disputes. Ultimately, these differences militate against a one-to-one transposition of stand-

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[57] *L. F. H. Neer and Pauline E. Neer (United States) v Mexico*, Opinion, 15 October 1926, U.N.R.I.A.A., Vol. IV, at 61-62 (holding that "[t]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.").

[58] See further Shany (n 23).

[59] Georges Abi-Saab, Presentation as part of the Panel 'What Makes the WTO Dispute Settlement Procedure Particular: Lessons to be Learned for the Settlement of International Disputes in General?', in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations* (2012) (forthcoming). On the standard of review applied in WTO dispute settlement see further Claus-Dieter Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law', 7 JIEL (2004) 491; Steven P. Croley and John H. Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Government', 90 AJIL (1996) 193; Matthias Oesch, 'Standards of Review in WTO Dispute Resolution', 6 JIEL (2003) 635; Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (2003).

[60] On the margin of appreciation doctrine applied by the ECHR see Howard C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002); Jeffrey A. Brauch, 'Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', 11 Col J Eur Law (2005) 113.

ards of review from other international legal regimes, for example human rights or international trade law, to the investment arbitration context.

First, drawing analogies between investment treaty arbitration and traditional inter-state dispute settlement has limits as the type of disputes entertained in investment treaty arbitration is considerably different from those heard in other international courts. Whereas traditional international dispute settlement plays out between states, investment treaties grant direct access, regularly without the exhaustion of local remedies, to foreign investor to an international forum. This transforms international investment law into a law that directly governs the relations between states and private individuals.[61] Investment treaty tribunals in turn assume a governance function for investor-state relations that is more immediate than the goverance function exercised by international courts and tribunals in cases of diplomatic protection, or of the European Convention on Human Rights in regard of human rights, where the exhaustion of local remedies is required. This underscores the considerable power of investment treaty tribunals, but also indicates that their position is different from classical international courts who regularly only come into play after the government conduct in question has been pre-screened by domestic courts under domestically applicable standards. Conceptualizing the standard of review in investment treaty arbitration should take this difference into account.

Second, even more than is the case with other international courts and tribunals, a degree of deference is also warranted in investment treaty arbitraiton because arbitral tribunals exercise a considerable law-making function. Although their primary function is to resolve the individual disputes before them, investment tribunals concretize, further develop, and ultimately shape in a highly self-referential manner through their jurisprudence the way investment treaty obligations are interpreted and applied.[62] This is all the more significant as substantive investment treaty standards exhibit a high degree of normative flexibility given their textual vagueness and ambiguity. In concretizing and further developing these principles through arbitral jurisprudence, tribunals exercise international public authority[63] and develop into global governance institutions that affect and forge the normative expectations of investors and states more generally.[64] Inevitably, this creates tensions with states as the principal, and traditionally exclusive, lawmakers in international law. Deference, in this perspective, may be needed to avoid that

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61 See Schill (n 45), at 12-14.

62 On the development of jurisprudence in investor-State arbitration into a highly self-referential system of persuasive precedent see Stephan Schill, *The Multilateralization of International Investment Law* (2009), at 321-357; see also Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' 23 Arb Int (2007) 357. Cf also the quantitative citation analyses conducted by Jeffery P. Commission, 'Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence', 24 J Int'l Arb (2007) 129; Ole K. Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis', 19 EJIL (2008) 301.

63 See Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 EJIL (2012) 1. On the notion of international public authority see Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) 3, at 11-16.

64 Benedict Kingsbury and Stephan W. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law', in Albert Jan van den Berg (ed), *50 Years of the New York Convention*, 14 ICCA Congress Series (2009) 5, also available as IILJ Working Paper 2009/6 (Global Administrative Law Series), http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf.

a single one-off arbitration tribunal, or arbitral tribunals together, de facto determine the content of international investment law as a whole. Exercising deference would then constitute self-restraint in regard of the law-making function of investment tribunals.

Finally, deference in traditional public international law dispute settlement is conceptualized in a dichotomist framework that empowers international courts or tribunals to draw the dividing line between sovereignty and restrictions of sovereignty. This somewhat simplifying structure disregards that states are not unitary actors, but consist of different intra-state organs whose respective conduct may have to be treated according to differentiated standards depending on the actor involved. Arguably, decisions by a democratically elected legislator demand a different degree of deference than that of an administrative agency. Differentiating between different actors at the domestic level in investment treaty arbitration is also important because investment tribunals influence immediately investor-state relations and hence penetrate deeper into the domestic realm than traditional inter-state dispute settlement bodies.

In sum, although public international law provides an explanation for why arbitral tribunals in certain circumstances should exercise deference and limit the scrutiny of government conduct, public international law analogies are often too schematic in conceptualizing standards of review. While traditional international courts and tribunals can rely on a more schematic vision of the state, investment treaty tribunals interact more immediately with different host state institutions. The resultant standard of review in investment treaty arbitration, in consequence, should be more differentiated than that applied by traditional international courts and tribunals. Furthermore, public international law analogies are insufficient insofar as they do not grasp the specific function of investment treaty tribunals to act not only as international dispute settlement bodies but also as domestic instances of judicial review that come into play without the exhaustion of local remedies. Treating investment treaty tribunals solely as international tribunals, in other words, disregards their function as domestic courts. This points to the need to complement the public international law framework with insights stemming from a domestic public law analysis.

C. International Investment Law as Public Law: Deference and the Separation of Powers

The arguments against conceptualizing deference in investment treaty arbitration under a commercial arbitration or a pure public international law framework converge in the emphasis on the public law nature and function of investment treaty arbitration. This function, however, is not to be located exclusively at either the domestic or the international level, but encompasses both domestic and international aspects. While investment treaty tribunals functionally replace domestic courts in reviewing the legality of government conduct, they elevate this function to the level of international law. Investment treaty arbitration as a public law discipline therefore constitutes an internationalized form of judicial review. Investment treaty tribunals, in turn, play the dual role of a domestic court reviewing state conduct and of an international tribunal determining the legality of the state's conduct under the applicable investment treaty.

In light of this dual role they face the task of responding simultaneously to demands for deference from two sources. First, as functional substitutes for domestic courts, they face demands for deference because domestic courts, for reasons related to their domestic concept of the separation of powers, apply some degree of deference to certain decisions by the other branches of government. Second, as international courts,

they face demands for deference because international courts and tribunals as well exercise, in certain circumstances, some degree of deference when reviewing governmental acts under international law and when concretizing and further developing international law. Both domestic and international considerations concern the search for an appropriate allocation of authority between "primary decision-makers and its adjudicators".[65] Deference, as well as the standard of review more generally, in turn, can be conceptualized as a function of the separation of powers between different actors that exercise public authority, namely arbitral tribunals, on the one hand, and host state institutions, on the other. The standard of review, in other words, can be thought of in terms of an albeit modified version of the constitutional law concept of separation of powers.

The precise meaning of such a framework, in turn, can be concretized by a comparative public law exercise that draws on how power in the relation between the primary decision-makers and their adjudicators is allocated in other public law systems. The comparison with other domestic and international courts, however, does not mean that specific domestic or international public law standards of review should be controlling for the standard of review in investment treaty arbitration; this would override often critical differences between investment treaty arbitration and other international courts and tribunals, on the one hand, and purely domestic adjudication, on the other. Instead, it means that comparative public law should serve as a method to help investment treaty arbitration benefit from the experience of more mature systems of public law adjudication in developing the appropriate standard of review.[66]

This requires sophisticated comparative analysis. Thus, domestic comparisons cannot be restricted to the legal order of the host state nor other singular domestic legal orders. At the same time, and given the dual function of arbitral tribunals as international and domestic courts, comparative inquiries should not only exclusively focus on how other international courts and tribunals think about and apply deference. Instead, it is necessary to look at how public law adjudicators both in different domestic administrative and constitutional systems, including those representative of the major legal systems of the world, and in supranational and international governance regimes, such as the WTO, human rights law, or the EU, fashion the standard of review in regard of government acts. The standard of review developed on the basis of such a comparative public law understanding of the separation of powers would therefore be based on an integrated vision of public law that encompasses both domestic and international public law. This would allow the development of a more differentiated, and hence more appropriate, relationship between arbitral tribunals and host state institutions than that offered by alternative conceptions of international investment law as either purely domestic or purely international.

In consequence, both the public international roots and the domestic public law function should shape the criteria influencing how much deference investment treaty tribunals should accord to acts of host states within a separation of powers framework that allocates public authority to different actors in order to reduce the potential for misuse of public authority. Ultimately, such an approach may even result in the develop-

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65 Henckels (n 15), at 239.

66 In depth on the how comparative public law can be used to concretize and further develop international investment law in light of its public law nature see Schill (n 45), at 23-35.

ment of general principles of law regarding the standard of review in public law adjudication.[67]

IV. From the Mantra of Deference Towards a Theory of Deference: Concretizing the Standard of Review

Having argued that the conceptual foundations of deference in investment treaty arbitration are closely connected to the question of allocating power between different actors exercising public authority, and thus are questions relating to the separation of powers, this section aims at clarifying how the standard of review to be applied in investment treaty arbitration should be further concretized by making use of comparative public law analysis. In doing so, I will not suggest an easy-to-apply formula, nor present an exhaustive account of how deference plays out in different situations. Instead, I will focus on two foundational considerations that influence how investment treaty tribunals should make use of comparative public law analysis in this context. These are first the way comparative public analysis is pre-structured by considerations of general international law and treaty law (A.); and second the public law values that derive from a comparative public law approach and that provide structural guidance for how power should be allocated between host state institutions and reviewing investment treaty tribunals (B.). Both issues should help to make determining the standard of review in concrete circumstances more predictable and acceptable for all actors involved.

A. The Interplay between International Law and Comparative Public Law

When considering investment treaty arbitration as a public law discipline that fuses public international law and domestic public law and that should be concretized and further developed by means of comparative public law, the interaction between international law and comparative public law is a crucial element. After all, it is important that comparative public law does not lead to an unstructured pick and choose among domestic legal systems or international legal regimes if the purpose of using the comparative method is to concretize the lege lata, not to develop the lege ferenda. In that context, given that investment treaty tribunals are constituted under international investment treaties, public international law has a controlling function for how arbitral tribunals can make use of comparative public law. They can do so only to the extent to which the applicable international legal sources leave interpretive leeway to arbitral tribunals.[68] The interpretative framework in investment treaty arbitration when reviewing state conduct is influenced by a number of factors, including the text of investment treaties, the subject-matter of the host state's conduct at stake, the procedural posture of a case, the applicable law, and the structure of the state's obligation at stake.

First, the text of international treaties themselves can have controlling impact on the standard of review. Thus, a self-judging clause in an investment treaty that expressly grants the state discretion in living up to its international legal obligations[69] will require

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[67] Ibid., at 26-29.

[68] On the different ways that comparative public law can impact and interact with international investment treaty law see ibid., at 25-27.

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[69] An example of such as clause would be Article 22(2) of the Australia-United States Free Trade Agreement that provides that "[n]othing in this Agreement shall be construed to preclude a Party from applying measures that *it considers necessary* for the fulfilment of its obligations with respect to the

an international court or tribunal to be more respectful vis-à-vis the state's choice of action as compared to a situation where the governing treaty contains no self-judging clause. The self-judging nature of an international treaty norm therefore has immediate effects on the powers of an investment treaty tribunal by requiring it to limit its review to whether the host state invoked the relevant clause in good faith, as this is the accepted standard of review under a self-judging treaty provision.[70] Comparative public law, in turn, may be helpful in concretizing what good faith review of a host state's determination may mean, such as drawing on the criteria used in the judicial review of discretionary administrative decision-making, but it is not primarily decisive in reducing the standard of review from a normal level to that of good faith.[71]

Second, the circumstances of the state conduct under review can have direct impact on the standard of review to be applied by an international court or tribunal. For example, under international law the need for a state to take certain measures in order to react to an emergency or crisis situation, such as that faced by Argentina in 2001/2002, will affect the standard of review to be applied and demand more deference than measures taken during the regular course of things. Thus, the ICJ observed in the *ELSI* case, when determining the legality of Italian conduct under the Unites States-Italy Friendship, Commerce, and Navigation Treaty that affected U.S. investors:

> Clearly the right [to control and manage a company] cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like.[72]

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maintenance or restoration of international peace or security, or the protection of its own essential security interests," See Australian Treaty Ser. 2005, No. 1, signed 18 May 2004 (entered into force 1 Jan. 2005) (emphasis added).

[70] The applicable standard for self-judging clauses is generally accepted to be restricted to "good faith review", entailing significant deference to the State invoking the clause. See *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, 4 June 2008, para. 145 (noting that "while it is correct … that the terms of [the self-judging clause] provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties").

[71] On how comparative law can be used to concretized the standard of review under self-judging clauses see Schill and Briese (n **Error! Bookmark not defined.**), at 125-134. For an example how general principles of law have been used to concretize the meaning of a non-self-judging clause see *El Paso v. Argentina* (n 1), paras. 621-624.

[72] See *Elettronica Sicula SpA (ELSI) Case (United States of America v Italy)*, Judgment, 20 July 1989, ICJ Reports 1989, 15, at 81, para. 74; see also *National Grid PLC v Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 166; *Continental Casualty v Argentina* (n 1), paras. 160-236 (in the context of a so-called non-precluded-measures-clause); *Metalpar SA and Buen Aire SA v Argentine Republic,* ICSID Case No. ARB/03/5, Award, 6 June 2008, para. 201. Cf also *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para. 347 (concerning a case relating to an energy crisis and national supply shortage); *Total v Argentina* (n 1), paras. 135-184. See also *Ireland v United Kingdom*, Judgment, 1 January 1978, ECtHR Series A No. 25, at para. 207 (observing in regard of the emergency clause in Article 15 of the European Convention on Human Rights that "[i]t falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and

Third, the procedural situation in which an international court or tribunal reviews a government's act, will affect the standard of review to be applied. Procedure, in this context, refers to when and how an international court or tribunal can be accessed. Under international law, it has an effect on the standard of review, for example, whether the international level is only available after local remedies have been exhausted, as is the case before the ECtHR, or whether, as in investment treaty arbitration, there is direct access to an international forum. Arguably, when the exhaustion of local remedies is needed, and provided these remedies are brought in impartial, independent, and neutral domestic courts, an internatianal court or tribunal can apply a more deferential standard when reviewing host state conduct, because the conduct under review has already been reviewed by another independent instance. When no prior exhaustion of local remedies takes place, by contrast, it is difficult to justify an equally deferential standard because the international court or tribunal in question essentially serves as a first instance court that does not need to exercise restraint because its domestic brethrens have not reviewed the conduct in question.

Fourth, the applicable law in an international court or tribunal can affect the degree of deference accorded to government conduct. Thus, when the governing international legal instrument contains a renvoi to the domestic law of the host state, or requires that a preliminary issue is determined on the basis of that law, international courts or tribunals generally pay deference to how host state courts decide on requisite question of domestic law. As stated by the ICJ in the *Diallo* case:

> it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts. Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.[73]

Deference is therefore in principle due to a state's interpretation and application of its own domestic law. By contrast, when an issue is governed by international law, the interpretation of that law by domestic institutions, including domestic courts, cannot be

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scope of derogations necessary to avert it."). See further *Brannigan and McBride,* Judgment, 26 May 1993, ECtHR Series A No 258-B, at para. 43.

[73] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Judgment, 30 November 2010, at para. 70 (internal citation omitted). Similarly, *Fraport AG v the Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, at para. 236 (observing that "[t]o the extent of its applicability [i.e., domestic law], the Tribunal (whilst retaining its independent powers of assessment of the evidence and decision) should give particular consideration to municipal decisions as to the construction of the [domestic law] in determining how it would be applied within the municipal legal system. This was particularly important in the present case as it is recognised that the Tribunal had not been chosen for its knowledge of Philippine law." – internal footnotes omitted]; *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No. V 079/2005, Final Award, 12 September 2010, at para. 446 (observing that "[t]he Tribunal, having to consider only Respondent's alleged liability under the IPPA, is neither an appeal body for the determination of Russian tax law nor claims that it has expert knowledge of that law").

conclusive but has to be determined independently by an international court or tribunal.[74]

Finally, the degree of deference or standard of review applied by an international court or tribunal depends on the content of the international legal obligation at stake against which government conduct is reviewed. It affects the standard of review, for example, if an investor claims that a state has not fulfilled its obligation to grant foreign investments full protection and security by failing to enact legislation, a standard that subjects a state only to a duty of due diligence,[75] or whether a state is alleged to have actively discriminated against foreign investors and thus breached national treatment. In the former case, breach of a duty of due dilligence by omission may give rise to more limited standards of scrutiny of an international court or tribunal[76] than breach of an international treaty by deliberate and intentional discriminatory action. Similarly, the international legal obligation at stake determines at which levels deference to institutions of the host state play a role for the international level. Thus, when determining whether an indirect expropriation has occurred a certain degree of deference to determinations made by the host state may come in at different stages, that is, when determining the legitimacy of the public purpose, the suitability and necessity of the measure taken by the host states, and also when balancing investment protection and competing public interests.[77]

All in all, the above mentioned factors are influential in affecting the standard of review in any international court or tribunal. Given that investment treaty tribunals are creatures of public international law and serve a function as international tribunals, these factors are controlling in devising the standard of review in investment treaty arbitration. It is international law that determines and filters where investment treaty tribunals should grant deference to host state institutions and what degree of deference to accord. It is only in a second step that comparative public law can come in to concretize the interpretative framework set out by international law.

B. Comparative Public Law and the Separation of Powers Framework

The above mentioned criteria do not conclusively determine the standard of review, or level of deference, to be applied by investment treaty tribunals. They are in need of further concretization through a comparative public law analysis that not only has regard to how other international courts or tribunals fashion the standard of review, but also draws on how domestic courts review government acts under a separation of powers framework. Ultimately, such a comprehensive comparative analysis may result in destilling general principles of law in regard of standards of review in public law adjudication that concretize the often vague interpretative framework set out by international law

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[74] See, for example, *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, at para. 58-59.

[75] See in depth Helge Zeitler, 'Full Protection and Security', in: Schill(n 15), 183.

[76] See on the standard of review applicable in regard of duties of due diligence under international law *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 20 April 2010, ICJ Reports 2010, 14, at paras. 187, 197, 209-265; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Advisory Opinion, 1 February 2011, paras. 110-120, 131-132, 141-150, 189, 219, 239, available at http;//www.itlos.org.

[77] See in detail Henckels (n 15), at 245-254. See further on the interaction between substantive standards of treatment and the standard of review Moloo and Jacinto (n 15), Part B.

on how power should be allocated when investment treaty tribunals review host state conduct.

Although comparative public law analysis, in this context, should draw on both domestic and international public law, in the following, I concentrate primarily on constitutional law analysis, with only passing references to international courts. This does not reflect a general preference for domestic over international analogies, but is primarily due to the fact that the typical disputes in investment treaty arbitration functionally resemble domestic public law adjudication more closely than judicial review in international courts. In consequence, when asking for the public law values that determine when, and to which extent, adjudicators should exercise deference vis-à-vis primary decision-makers in a separation of powers-framework, domestic constitutional systems bring to bear the most advanced experience.

At the domestic level, there are usually three levels of scrutiny in judicial review that can be found in different shades in virtually any domestic legal system: (1) strict scrutiny, (2) intermediate scrutiny, and (3) rational basis review.[78] The choice which level of scrutiny to apply depends, similarly to the factors influencing the amount of deference international courts and tribunals pay to acts by states, on a number of factors, including the effect of a governmental measure on individual rights, the purpose of the measure, difficulties of fact-finding, etc. While it is not possible, in the present context, to go into the details of how domestic legal orders concretely handle the standard of review when reviewing specific measures affecting the interests of economic actors, I will focus on the underlying rationales, or public law values, that determine how power between courts and other public actors should be allocated.

The values that structure the interaction courts and other branches of government in a separation of powers-framework can be summarized as the constitutional values of voice, expertise, and rights.[79] Voice, in this context, refers to the (democratic) mandate of the relevant institution to represent the relevant political will (1.); expertise refers to the superior knowledge or institutional capacity of an institution (2.); and rights refers to the better claim to protecting individual rights (3.).[80] These criteria affect the relation between different branches of government at the domestic level. But they also explain when, why, and to which extent public law adjudicators, including investment treaty tribunals, should exercise deference vis-à-vis the exercise of public authority by states.

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[78] The terminology used here is the one used by the US Supreme court for standards of review in litigation about constitutional rights; see Burke-White and von Staden, *Private Litigation* (n 15), at 315-316. Similar approaches, however, can also be found in other jurisdiction, for example in Germany (Inhaltskontrolle, Vertretbarkeitskontrolle, Evidenzkontrolle), see Burke-White and von Staden, *Private Litigation* (n 15), at 321, or France (contrôle maximum, contrôle normal, contrôle minimum); see Schill and Briese (n 56), at 132. While the emphases in different jurisdiction are not always comparable, many jurisdictions conceptualize the issue of deference as a question of the separation of powers between courts and the other branches of government.

[79] See in detail Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in Jeffery L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (2009) 326, at 328.

[80] *Ibid.*, at 337. For Halberstam, these criteria are used by different actors within a constitutional framework to support their legitimate claim to constitutional interpretation. I use them more broadly as factors that can explain the relation between different branches of government in a separation of powers framework, in particular between courts, on the one hand, and the legislator and the executive, on the other.

1. Voice

Voice concerns the claim to represent the relevant political will of the decision-making institution whose decision is reviewed. It concerns the question of who is better democratically legitimized, investment treaty tribunals or the domestic institution whose action is subject to scrunity? The criterion of voice generally would seem to mitigate for a large degree of deference to the acts of domestic institutions, because they are closer to the political will of the host state's population. Furthermore, among domestic institutions, voice militates for granting greater deference to the domestic legislator than to domestic administrations or domestic courts who are further removed from the expression of democratic choice.[81] Likewise, voice is one of the reasons why the ECtHR has developed its margin of appreciation-doctrine.[82] Similarly, the weight attributed by the WTO Appellate Body to decisions by "responsible and representative governments"[83] is an expression of paying deference to the specific democratic legitimacy of domestic institutions. Thus, voice militates for granting deference to a host state's determination of the content of domestic policies, such as the desired level of environmental protection,[84] of determining what is in the domestic public interest, whether an expropriatory measure served a public purpose, or whether a measure taken is generally suitable and necessary to achieve that aim. These considerations are rather straightforward.[85]

Yet, voice can also work in favor of investment treaty tribunals and against paying deference to host states. In fact, under certain circumstances one needs to consider that the host state's constituency is not always the relevant reference group that legitimizes a government acts. Instead, investment treaty arbitrations may also touch upon interests that transcend the host state. These can be concerns that are common to the two contracting states or interests of the international community, such as the interest connected to the functioning of the system of international investment protection as a whole.[86] Such a common interest is, for example, the interest in a uniform application and interpretation of international law. Thus, treating a host state's view of how questions of international law should be treated as conclusive, and hence paying deference to the views of that state, would disregard that that state cannot speak for the international community as a whole. When it comes to interpreting national law, by contrast, the criterion of voice militates for arbitral tribunals to pay deference to domestic institutions, above all domestic courts.[87]

Furthermore, in certain cases, even from a democratic perspective focusing on the population of the host state, arbitral tribunals may be able to invoke voice in favor of

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81 Henckels (n 15), at 244 (with further references).

82 Cf *Handyside v United Kingdom*, Judgment, 7 December 1976, ECHR Series A, No 24, paras. 47 *et seq.* See Halberstam (n 79), at 338-343.

83 *European Communities - Measures Concerning Meat and Meat Products* (EC-Hormones I), WTO Appelate Body Report, WT/DS26/AB/R, WT/DS/48/AB/R, 16 January 1998, at paras. 124 and 198; *United States – Continued Suspension of Obligations in the EC-Hormones Dispute* (EC-Hormones II), WTO Appelate Body Report, WT/DS320/AB/R, 16 October 2008, paras. 529 and 680; *EC - Measures Affecting Asbestos and Asbestos-containing Products*, WTO Appelate Body Report, WT/DS135/Ab/R, 12 March 2001, para. 178.

84 Cf *S.D. Myers v Canada* (n 5), para. 247.

85 Cf Henckels (n 15), at 247-249.

86 On public or community interests in international dispute settlement see further Markus Benzing, 'Community Interests in the Procedure of International Courts and Tribunals', 5 The Law and Practice of International Courts and Tribunals (2006) 369; Markus Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (2010).

87 See n 73.

not paying deference to a state's conduct. In cases of the retroactive application of domestic laws, for example, applying strict scrutiny can be justified by the consideration that the tribunal is enforcing the voice expressed by the host state's legislator at an earlier point against that of a present legislator, which attempts to extend its power into the past. This does not mean that retroactive legislation is always illegitimate, but that an arbitral tribunal should not accept it lightly by paying deference to the host state's reason-giving. A similar consideration would seem to play out, when a stabilization clause governs the relations between an investor and a host state and hence exempts an investor from certain future changes of the host state's domestic law.

Finally, voice may suggest that standards of scrutiny should depend on the internal structure of the host state, justifying differentiations between democratic and non-democratic states by arbitral tribunals.[88] Such considerations, however, would not only need to grapple with the principle that the internal political organization of states is a domestic matter;[89] they also raise the question of whether investment treaty tribunals are well-positioned to pass judgment on the democratic quality of domestic institutions. Furthermore, democracy in itself is not a guarantee against discrimination of minorities, including foreign investors. All of this would therefore militate against these tribunals linking the standard of review to the, however determined, democratic quality of the host state's domestic institutions. It suggest, however, that even when measures of democratic states are subject to arbitral review, tribunals have a case to distinguish between strict scrutiny in case of allegations of discrimination and cases where general regulatory measures that are claimed to contribute to the general public interest are at stake. Such measures would justify a broader degree of deference.

In sum, what arbitral tribunals should consider when devising the standard of review in a concrete case is the extent to which democratic legitimacy militates rather in favor of the host state, and thus for a larger degree of deference, or whether it militates for a stricter standard of review because the measure at stake does not align with the values democracy is based on, namely equality and participation.

2. Expertise

Whether and to which extent to pay deference to domestic institutions when reviewing their conduct also depends on the respective expertise of primary decision-makers and their adjudicator.[90] Expertise concerns the question of who has the better knowledge or institutional capacity to exercise public authority in a specific instance: the domestic institutions whose acts are subject to scrutiny in investment treaty arbitration or the investment treaty tribunal? Just as is the case with voice, expertise may favor either domestic institutions or arbitral tribunals in fashioning the standard of review depending on the circumstances of the individual case.

Where investment treaty arbitrators are "experienced in international law and investment matters," as required for example by Article 1124(4) of NAFTA, expertise favors that investment treaty tribunals interpret international law without granting deference to the views of domestic institutions on that interpretation. Yet, even in the absence of such expertise, an investment treaty tribunal has the mandate to interpret international

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[88] Cf Anne-Marie Slaughter, 'A Global Community of Courts', 44 Harv Int'l L J (2003) 191, at 210-213.

[89] On the gradual dissolution of this principle and the emerging right to democracy see Niels Petersen, *Demokratie als teleologisches Prinzip: Zur Legimität von Staatsgewalt im Völkerrecht* (2009).

[90] Cf. Halberstam (n 79), at 344-348.

law objectively without deferring to the views of either one of the parties. As regards the interpretation and application of domestic law, by contrast, expertise weighs in favor of domestic institutions, most importantly domestic courts. This militates for a greater degree of deference by arbitral tribunals.[91]

Expertise can also speak in favor of respecting factual determinations made by domestic institutions, rather than supporting full-blown review by investment treaty tribunals. Expertise, for example, will often militate for respecting science-based determination made by domestic agencies, for example about the effect and harmfulness of chemical substances that a state has decided to ban.[92] Regularly, arbitral tribunals will lack the specific knowledge to determine or review the substantive soundness of such science-based determinations even with the help of experts. This is particularly the case when an *ex ante* perspective, for example as regards the harmfulness of a substance, is relevant. Here, domestic agencies are in principle much better equipped and will usually possess a certain degree of discretion under a precautionary approach that suggests that reviewing courts or tribunals should grant more deference. Deference is all the more called for, similar to the situation under WTO law, when the state takes measures in order to meet internationally recognized standards of protection, but also when they base their risk assessment on another qualified and respected source.[93] States would then be entitled to determine the level of protection they wish to afford against certain substances as long as that level has no discriminatory effect.[94] Such determinations will usually have to be treated as conclusive by a reviewing court or tribunal provided the soundness of the scientific basis is shown.

However, in order to afford a minimum level of protection, and to mitigate the risk that science-based determinations are misused to discriminate between foreign and domestic investors, arbitral tribunals should compensate the broader degree of deference granted to domestic institutions with a stricter approach to assessing procedural propriety. This includes reviewing whether the host state has based its decision on relevant evidence, whether scientific determinations were made using state of the art scientific methods, and whether the decision was implemented without discriminatory effect. The *Chevron*-doctrine developed by the US Supreme Court, for example, may be a suitable guide as it is based on the idea that the higher technical expertise of certain administrative agencies corresponds with a relatively lower expertise of courts.[95] Courts, or investment treaty tribunals, as experts in determing what procedural safeguards the relevant legal standards require, however, should scrutinize the procedural propriety of the decision of a domestic institution.

Expertise, finally, can militate in favor of respecting certain policy choices made by domestic institutions. After all, it is domestic institutions that have the relevant societal knowledge and are usually better placed than investment treaty tribunals to assess the need for certain government measures or determine the suitability and effectiveness of means to address the identified need for government intervention. It is for the same reason that expertise plays an important role for the ECtHR when according Member

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91 See supra notes 73 and 74 and accompanying text.

92 This was done, for example, by the tribunal in *Chemtura v Canada* (n 4), para. 134.

93 In this context, parallels to the jurisprudence of the WTO Appellate Body under the SPS Agreement may be an appropriate parallel. See the references supra n. 83.

94 Cf. Article 5.5. of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

95 See *Chevron USA, Inc v Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); from a comparative perspective see Jan Oster, 'The Scope of Judicial Review in the German and U.S. Administrative Legal System', 9 German Law Journal (2008) 1267.

States a margin of appreciation as regards the determination of what is necessary in a democratic society.[96]

In sum, just as the question of who is better placed to assert public authority in democratic terms, the question of who has the better expertise to determine a certain issue should influence the way investment treaty tribunals handle deference when reviewing host government conduct. In this context, the interplay of difference areas of expertise of primary decision-makers and adjudicators should therefore lead to a balanced outcome that mitigates between different degrees of deference depending on the circumstances at play in an individual case.

3. Rights

Rights, finally, are the third value that plays a role in distributing authority in a separation of powers-framework between reviewing courts and other branches of governments and in affecting the degree of deference to be afforded to host state conduct. Rights generally militate in favor of courts,[97] respectively investment treaty tribunals, as they are the expert institutions to interpret and enforce the law. This is particularly the case as regards the protection of property interests of foreign investors against governmental interference. However, the dimension of rights does not always weigh in favor of the authority of courts or investment treaty tribunals to review host state acts that interfere with the rights and interests of foreign investors. Just as is the case with voice and expertise, the criterion of rights may therefore favor either a stricter standard of review or a broader degree of deference depending on the circumstances at stake.

Thus, the category of rights can also militate in favor of deference to host state conduct, for example, if that conduct has the objective to protect rights and interests of third parties affected by conduct of foreign investors, above all the host state's population. Thus, in many cases where investment protection competes with non-investment concerns and rights of third parties, investment treaty tribunals may not be as well placed as domestic institutions, in particular domestic courts, in protecting such interests. If a certain host state measure, for example, aims at protecting a non-investment-related right, a certain degree of deference appears appropriate when determining the legitimacy of the competing right and the suitability and necessity of the measures to interfere with investor interests.

Again, an appropriate counterweight in order to prevent abuse would be a stricter procedural scrutiny of how the measure in question came about and whether it strikes a proportionate and reasonable balance between competing rights and interests. Above all, the criterion of rights may, under certain circumstances, militate for restricting the standard of review by investment treaty tribunals in favor of domestic courts. If, for example, domestic courts that have entertained the dispute in question beforehand already provide an adequate level of investment protection, it may be appropriate for an investment treaty tribunal to exercise more deference than in cases where no such domestic review has taken place. This presupposes, however, that those courts have respected due process of law and have struck a reasonable balance between the interests of foreign investors and whatever competing interest may be at stake.

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[96] Cf *Handyside v United Kingdom*, Judgment, 7 December 1976, ECHR Series A, No 24, paras. 47–50.

[97] See Halberstam (n 79), at 348-353.

In sum, considerations relating to questions of rights will influence whether and to what extent investment treaty tribunals should pay deference to host state conduct and host state institutions or whether they should assert their authority to protect the rights and interests of foreign investors by applying a less deferential standard of review.

4. Summary

Together the criteria of voice, expertise, and rights will help investment treaty tribunals to adapt their standard of review to the concrete exigencies of the case at hand. In combination, these criteria anser the question of when and why arbitral tribunals should exercise deference and how they should conceptualize and concretize it in specific circumstances. More specifically, in devising the standard of review in a specific case, arbitral tribunals first need to determine whether public international law contains directly relevant criteria that influence the standard of review or set it at a specific level, such as the standard of good faith review under a self-judging clause. Subsequently, arbitral tribunals should draw on a broader comparative public law analysis to further concretize the standard as determined under public international law and analyze in a comparative fashion the standard of review other domestic and international courts use under similar circumstances and similar standards of review.

Such a comparative analysis can work in two ways. First, it may enable investment tribunals to positively determine how to devise the standard of review. A comparative analysis of other public law systems and their understanding of the separation of power may, for example, be used to develop a concrete understanding of the standard of review to be applied when reviewing non-discriminatory regulation passed by democratically elected legislators, or when reviewing discretionary decisions by domestic administrative agencies. Second, a comparative analysis of the standard of review may be used to justify the conduct of a state *vis-à-vis* a foreign investor and exempt it from arbitral review. Comparative public law can therefore help to establish both minimum[98] and maximum standards.[99] A comparative public law exercise might, for instance, result in the conclusion that courts when reviewing decisions by democratic legislators, for instance on the abandonment of nuclear power, may not question or second-guess the decision on the substance, but may review whether the procedure used was proper or whether the change in legislation permitted affected actors to adapt their behavior and struck a reasonable balance between competing rights and interests.

Ultimately, engaging in comparative analysis of standards of review under both domestic legal systems and other international law regimes may not only concretize the standard of review and hence increase the predictability of arbitral decision-making, but lead to the destillation of common public law principles. This may help to increase the legitimacy of how arbitral tribunals implement, interpret, and further develop international investment law in line with how other domestic and international legal systems construe the relations between primary decision-makers and their adjudicators in a separation of powers-framework.

[98] Cf Giacinto della Cananea, 'Minimum Standards of Procedural Justice in Administrative Adjudication', in Schill (n 15), at 39.

[99] Cf Montt, see above (n 45), at 74-82.

V. Conclusion

International investment law and investor-state arbitration perform the important function of protecting foreign investments against illegitimate government interference. At the same time, it is important that states do not feel unduly prejudiced by the system of international investment protection and continue to be able to both accept arbitration as a legitimate way for settling investment disputes and remain able to implement legitimate domestic public policies. Achieving this may not, as many critics argue, require a fundamental redesign of the institutional structure of international investment law. It does require, however, investment treaty tribunals to reflect more about their institutional role and their relationship to states and their legitimate power to regulate in the public interest. The reason why such reflections in the current practice are still scarce is arguably a certain dissonance between the commercial arbitration model, which stresses the function of investment arbitration to settle individual investor-state disputes, and the governance functions arbitral tribunals exercise beyond those disputes.

Thus, what currently is perhaps most needed in order to react to criticism of investment treaty arbitration are conceptual approaches that help parties, tribunals, and commentators to classify, evaluate, and form arbitral jurisprudence in ways that are sustainable for the system and acceptable for the system's environment. Such a system-internal approach, above all, would allow leaving untouched the trust investors have developed in international arbitration as an independent and impartial dispute resolution mechanism, while making necessary concessions towards demands coming from outside international investment law in terms of transparency and openness and as regards respect for non-investment concerns. The aim in this context must be to develop concepts that enhance the predictability of investment arbitration and make the decisions of investment tribunals comprehensible and acceptable for states and investors alike.

One element of such efforts consists in developing appropriate standards of review that balance deference and scrutiny in the relation between arbitral tribunals and states and reconcile tensions between the protection of foreign investments and the furtherance of competing public interests. Developing such standards has to build on recognizing the system's differences with both commercial arbitration and classical dispute settlement under public international law, its considerable public law implications, and the need to react to these implications with sophisticated public law concepts applied to and by investment treaty tribunals. In this context, comparative public law approaches that draw on the experience of how other more advanced public law systems, both at the domestic, but also at the international level, allocate power between primary decision-makers and their adjudicators appear most helpful in order to develop and concretize the standard of review in investment treaty arbitration. Such an approach may also be more objective than leaving the application of vague standards of treatment entirely to the subjective perceptions of arbitrators. In that sense, reconceptualizing standards of review in a separation of powers framework that understands investment treaty tribunals as having a dual function as domestic and international courts that need to balance their authority with that of states by recourse to comparative public law may be one piece in the puzzle in enhancing the legitimacy of the current system of international investment protection.