UNIVERSITY OF AMSTERDAM

UvA-DARE (Digital Academic Repository)

Intensity of review in international courts and tribunals

A comparative analysis of deference

Fahner, J.H.

Publication date
2018
Document Version
Other version
License
Other

Link to publication

Citation for published version (APA):
Fahner, J. H. (2018). *Intensity of review in international courts and tribunals: A comparative analysis of deference*. [Thesis, fully internal, Universiteit van Amsterdam, Université du Luxembourg].

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (https://dare.uva.nl)

Download date:05 Jun 2023

2 Judicial Deference in International Practice

2.1 Introduction

This chapter discusses the practice of a wide range of international courts and tribunals with regard to judicial deference. The inquiry seeks to identify the explicit positions adopted by these institutions regarding their intensity of review. The investigation focuses on the legal reasoning expressed in the decisions, and not on the actual degree of deference accorded in the case under review, because the purpose is to identify the doctrinal positions adopted by the adjudicators. Moreover, the actual degree of deference granted by an adjudicator is difficult to measure, for various reasons.

Adjudicators may adopt a deferential approach without explicitly saying so; alternatively, they may agree with a respondent State because they are convinced by its arguments on the merits. In such circumstances, it is difficult to distinguish between deference and agreement. It is difficult to distinguish between strict scrutiny and disagreement.[1] Complicating things even further, adjudicators may include deferential language for rhetorical reasons, before proceeding with an intrusive review of the issue at stake. As pointed out by Janneke Gerards in the context of the ECtHR, 'there does not always appear to be a close correspondence between the language of deference and the actual test applied by the court'.[2] The same form of criticism has been raised with regard to various investor-State arbitration awards. For instance, the tribunal in *Continental*

[1] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US – Lamb)*, WTO DS177, AB Report of 1 May 2001, para 107: '[i]f a panel concludes that the competent authorities, in a particular case, have *not* provided a reasoned or adequate explanation for their determination, that panel has not, thereby, engaged in a *de novo* review. Nor has that panel substituted its own conclusions for those of the competent authorities'.

[2] Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 Eur L J 80, 106. See also *Odièvre v France*, ECtHR (GC) 42326/98, Judgment of 13 February 2003, Concurring Opinion of Judge Rozakis: '[i]t clearly transpires from the above analysis of the elements taken into consideration that the Court dealt substantively with the merits of the case and that, in real terms, the margin of appreciation played a relatively marginal role in this assessment.' Saïda El Boudouhi, 'A Comparative Approach of the National Margin of Appreciation Doctrine Before the ECtHR, Investment Tribunals and WTO Dispute Settlement Bodies' (2015) EUI Working Paper RSCAS 2015/27, 21: the margin 'appears as a political banner by which judges not only show deference, but want to be seen as showing deference. Rather than a sound standard of review, it is a tool of political deference'.

Casualty v Argentina said it would grant the respondent 'a significant margin of appreciation', but the award has been identified as the most intrusive out of a series of awards concerning the Argentine crisis.[3] According to José Alvarez, 'ironically, the decision that arguably interferes the most with the sovereign right to regulate is the one that on the surface appears to be the most deferential to it, namely *Continental Casualty*'.[4] Likewise, the NAFTA tribunal in *Gemplus v Mexico* explicitly granted to the respondent 'a generous measure of appreciation', but according to Gus van Harten it only expressed *faux* restraint, as 'the tribunal professed in passing that it would show deference but appeared to proceed with categorical review of whether the state violated the treaty'.[5]

Assessments of the intensity of review exercised in a specific case become easily intertwined with normative evaluations of the final decision. It is tempting to rephrase dissatisfaction with a concrete result as an argument that the standard of review was overly intrusive.[6] This chapter, however, will not engage in discussing the actual degree of deference accorded by reviewing institutions,[7] but instead focus on explicit statements on the appropriate intensity of review. The purpose is to identify the adjudicators' doctrinal view of deference, rather than the amount of deference granted in individual cases.[8]

---

[3] *Continental Casualty Co v Argentina*, ICSID ARB/03/9, Award of 5 September 2008, para 181.

[4] José Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law 2011) 370.

[5] *Gemplus SA et al and Talsud SA v Mexico*, ICSID ARB(AF)/04/3, Award of 16 June 2010, para 6.26. Gus van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP 2013) 94.

[6] cf Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art* (CUP 2013) 455: '[i]t is notoriously difficult to determine the level of activism of a court. Obviously, parties whose preferred interpretation was rejected by a tribunal tend to argue that the tribunal got it wrong and that it engaged in impermissible activism. The other side, of course, will take the view that the tribunal's interpretation is exactly what the parties intended and that no judicial activism took place.'

[7] Example of such an analysis are William Davey, 'Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques' (2001) 4 JIEL 79; Dragoljub Popović, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2008-2009) 42 Creighton L Rev 361; Van Harten, *Sovereign Choices* (n 5). Tools for an empirical study of deference can be found in Stefanie Lindquist and Frank Cross, *Measuring Judicial Activism* (OUP 2009).

[8] Consequently, the analysis also leaves aside non-legal explanations for deference or its absence. Such explanations from the fields of political science or sociology can be found, for the ECtHR, in Mikael Madsen, 'The Protracted

2.2 The International Court of Justice

The ICJ applies a broad spectrum of international legal sources to a wide variety of interstate disputes, which do not often concern domestic public policies. Consequently, the Court 'will not commonly need to address the question of whether it must defer in any way to the decision-making processes of a State'.[9] Nonetheless, several cases before the Court have evoked questions related to its intensity of review.[10]

First of all, the appropriate intensity of review has been discussed in several cases concerning security and necessity defences. In *Nicaragua*, the Court found that a trade embargo imposed by the United States on Nicaragua, amongst other things, violated the 1956 Treaty of Friendship, Commerce and Navigation between the two States. In response to the argument that the US considered the embargo necessary to protect essential security interests under the treaty's security exception, the Court held that this assessment was not 'purely a question for the subjective judgment of the party'.[11] It noted that the review of such assessments formed part of the Court's jurisdiction to 'interpret and apply' the treaty and that the security exception was not phrased as a

Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in Jonas Christoffersen and Mikael Madsen (eds), *The European Court of Human Rights Between Law and Politics* (OUP 2011) 43. Madsen argues that the Court initially engaged in 'legal diplomacy', carefully balancing the objective of providing justice to individuals against both national and geopolitical interests, whereas in the second half of the 1970s, the Court delivered a series of judgments which resulted 'in several high-profile clashes with a number of the top legal and political institutions of the Member States'. Madsen's explanation points to the emergence of international human rights as 'a substantive issue of international law and politics', in correlation with a *détente* in the Cold War, a closure of the most violent colonial wars, and an increasing European economic integration. For the WTO AB, see Shoaib Ghias, 'International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body' (2006) 24 Berkeley J of Int'l L 534.

[9] Ross Becroft, *The Standard of Review in WTO Dispute Settlement. Critique and Development* (Elgar 2012) 24.

[10] Chiara Ragni, 'Standard of Review and Margin of Appreciation before the International Court of Justice' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation* (OUP 2014). See also Cameron Miles, 'Provisional Measures and the Margin of Appreciation before the International Court of Justice' (2017) 8 J of Int'l Dispute Settlement 1. For an assessment of the Court's jurisprudence in terms of activism and restraint, see Pieter Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judical Policy' (2007) 56 ICLQ 741; Robert Kolb, *The International Court of Justice* (Hart 2013) 1174-1182.

[11] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ, Judgment of 27 June 1986, para 282.

self-judging clause.[12] Similarly, in *Gabčíkovo-Nagymaros*, the Court asserted that 'the State is not the sole judge of whether the conditions of necessity have been met'.[13] In both cases, the ICJ rejected the idea that States should be granted total deference in making the assessments at stake, but it did not subscribe to the other extreme either, according to which the Court would have the exclusive authority.[14] Such an approach, however, was adopted in *Oil Platforms*, a case concerning attacks by the United States against several Iranian oil installations, which according to the US had been undertaken in self-defence. In this context, the US argued that '[a] measure of discretion should be afforded to a party's good faith application of measures to protect its essential security interests'.[15] The Court replied: 'the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion"'.[16]

Different questions related to the Court's role were raised by the General Assembly's request for an Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Some States argued that in answering the questions posed, 'the Court would be going beyond its judicial

[12] ibid, para 222. For self-judging clauses, see section 3.2.3.2

[13] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ, Judgment of 25 September 1997, para 51.

[14] cf *Oil Platforms (Iran v United States)*, ICJ, Judgment of 6 November 2003, Separate Opinion of Judge Buergenthal, para 37: 'The *Nicaragua* Court's suggestion that it may not be "purely" a matter of the subjective judgment of a party, implies that while a Government's determination is ultimately subject to review by the Court, it may not substitute its judgment completely for that of the Government which, in assessing whether the disputed measures were necessary, must be given the opportunity to demonstrate that its assessment of the perceived threat to its essential security interests was reasonable under the circumstances'.

[15] *Oil Platforms* (n 14) para 73.

[16] ibid. See also the Separate Opinion of Judge Kooijmans, para 44-46, and of Judge Buergenthal, para 37. According to Shany, the Court's reasoning in *Oil Platforms* was a regrettable deviation from earlier case law. Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 EJIL 907, 933. Among the cases analysed by Shany are the so-called consular assistance cases, in which the ICJ left it to the respondent State to choose an appropriate remedy for the identified violations of international law. *LaGrand (Germany v United States)*, ICJ, Judgment of 27 June 2001, para 125; *Avena and Other Mexican Nationals (Mexico v United States)*, ICJ, Judgment of 31 March 2004, para 131. But see Enzo Cannizzaro, 'Proportionality and Margin of Appreciation in the *Whaling* Case: Reconciling Antithetical Doctrines?' (2017) 27 EJIL 1061, 1065, arguing that the Court's rejection of a measure of discretion in *Oil Platforms* followed logically from the existence of a strict and objective standard of necessity, which 'leaves unprejudiced the question of whether states enjoy a larger discretion in the implementation of international norms where a looser international standard applies'.

role and would be taking upon itself a law-making capacity'.[17] The Court, however, rejected this argument:

> It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons.[18]

Another issue raised in the *Nuclear Weapons* Advisory Opinion concerned the evaluation of scientific and technical evidence. The Court considered that the questions posed did not require it 'to evaluate highly complex and controversial technological, strategic and scientific information'.[19] Instead, it would 'simply address the issues arising in all their aspects by applying the legal rules relevant to the situation'.[20]

In several subsequent cases, the Court was again confronted with scientific and technical questions.[21] In the case of *Gabčíkovo-Nagymaros,* which concerned the construction of a system of locks in the Danube, the Court held that:

> Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that … it is not necessary

[17] *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para 18.

[18] ibid. See also para 13, where the Court rejected the argument that it should not answer the question because of the political aspects of the issue. cf *Nicaragua* (n 11) Judgment of 26 November 1984, para 89-98, where the Court dismissed the claim by the US that disputes concerning the use of force should be left to the UN's political, as opposed to judicial, organs. See also *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, ICJ, Advisory Opinion of 20 July 1962, 155: '[i]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision'; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004, para 41.

[19] *Nuclear Weapons* (17) para 15.

[20] ibid.

[21] Makane Mbengue, 'Scientific Fact-finding at the International Court of Justice: An Appraisal in the Aftermath of the *Whaling* Case' (2016) 29 Leiden J of Int'l L 529.

> in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.[22]

In the case of *Pulp Mills on the River Uruguay*, both parties provided the Court with 'a vast amount of factual and scientific material' related to the quality of the water of the river Uruguay, as well as with reports, studies and testimonies by experts.[23] The Court held that:

> [D]espite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.[24]

The Court's ruling was widely criticized, including by several dissenting judges. Judges Al-Khasawneh and Simma complained that 'the Court has evaluated the scientific evidence brought before it by the Parties in ways that we consider flawed methodologically'.[25] According to them, the Court's 'traditional methods of evaluating evidence are deficient in assessing the relevance of such complex, technical and scientific facts', risking doubts 'in the international legal community whether [the Court], as an institution, is well-placed to tackle complex scientific questions'.[26]

---

[22] *Gabčíkovo-Nagymaros* (n 13) para 54.

[23] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ, Judgment of 20 April 2010, para 165.

[24] ibid para 168. cf *Armed Activities on the Territory of the Congo (Congo v Uganda)*, ICJ, Judgment of 19 December 2005, para 59: '[a]s it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value'. See also para 72, 130. See also various contributions in Richard Lillich (ed), *Fact-Finding Before International Tribunals. Eleventh Sokol Colloquium* (Transnational 1992); Ruth Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' (2007) 6 L and Practice of Int'l Courts and Tribunals 119; Loretta Malintoppi, 'Fact Finding and Evidence Before the International Court of Justice (Notably in Scientific-Related Disputes)' (2016) 7 J of Int'l Dispute Settlement 421. John Crook, 'Adjudicating Armed Conflict' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014) 341: 'I see fact-finding – particularly in the confused and murky circumstances of armed conflicts – as one of the Court's greatest challenges'.

[25] *Pulp Mills* (n 23) Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, para 1.

[26] ibid para 3.

Since '[t]he Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties', the judges argued that the Court should have had recourse to independent experts, as allowed under Article 50 of its Statute.[27]

Questions concerning the review of scientific and technical issues resurfaced in *Whaling in the Antarctic*, where the Court reviewed whether a Japanese research program involving the killing of whales was permissible under the International Convention for the Regulation of Whaling.[28] Japan had initially argued that 'matters of scientific policy cannot be properly appraised by the Court'.[29] Consequently, it advocated a deferential standard of review, which would limit the Court to reviewing whether Japan's assessments were '"arbitrary or capricious", "manifestly unreasonable" or made in bad faith'.[30] The Court did not accept this line of argument.[31] It held that while Japan was entitled to a measure of discretion under the treaty, the determination of 'whether the killing, taking and treating of whales (...) is for purposes of scientific research cannot depend simply on that State's perception'.[32] The Court further specified that:

[27] ibid para 4, 8. The Judges approvingly referred to the practice of the WTO, in para 16. Similar arguments as those made by Al-Khasawneh and Simma can be found in other Judges' opinions and declarations.

[28] *Whaling in the Antarctic (Australia v Japan)*, ICJ, Judgment of 31 March 2014. See the themed section in 6 J of Int'l Dispute Settlement 3 (2015): Stephen Tully, '"Objective Reasonableness" as a Standard for International Judicial Review', 546; Makane Moïse Mbengue and Rukmini Das, 'The ICJ's Engagement with Science: to Interpret or not to Interpret', 568; Guillaume Gros, 'The ICJ's Handling of Science in the Whaling in the Antarctic Case: a Whale of a Case?', 578; Lucas Carlos Lima, 'The Evidential Weight of Experts before the ICJ: Reflections on the Whaling in the Antarctic Case', 621. Enzo Cannizzaro, 'Margin of Appreciation and Reasonableness in the ICJ's Decision in the Whaling Case', in Pierre d'Argent *et al* (eds), *The Limits of International Law: Essays in Honour of Joe Verhoeven* (Bruylant 2015); Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic. Significance and Implications of the ICJ Judgment* (Brill 2016), notably the following contributions: Caroline Foster, 'Methodologies and Motivations: Was Japan's Whaling Programme for Purposes of Scientific Research?'; Shotaro Hamamoto, 'From the Requirement of Reasonableness to a "Comply *and* Explain" Rule: The Standard of Review in the *Whaling* Judgment'; Theodore Christakis, 'The "Margin of Appreciation" in the Use of Exemptions in International Law: Comparing the ICJ Whaling Judgment and the Case Law of the ECtHR'. See also the symposium in 27 EJIL 4 (2016), introduced by Enzo Cannizzaro, 'Whaling into a Spider Web? The Multiple International Restraints to States' Sovereignty', 1025.

[29] *Whaling* (n 28) para 65. In the *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*, UNCLOS Annex VII Arbitration, Decision of 4 August 2000, para 40(a), Japan made a similar argument.

[30] *Whaling* (n 28) para 65. Para 66 summarises a slightly different argument adopted by Japan at a later stage.

[31] Although similar considerations can be found in Dissenting Opinion of Judge Hisashi Owada, para 19 ff.

[32] *Whaling* (n 28) para 61.

> When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is "for purposes of" scientific research by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one. (…) The Court observes that, in applying the above standard of review, it is not called upon to resolve matters of scientific or whaling policy. The Court is aware that members of the international community hold divergent views about the appropriate policy towards whales and whaling, but it is not for the Court to settle these differences. The Court's task is only to ascertain whether the special permits granted in relation to JARPA II fall within the scope of Article VIII, paragraph 1, of the ICRW.[33]

In sum, the Court applied two tests.[34] First, it verified whether Japan's whaling program actually entailed scientific research, a criterion that was easily fulfilled in the case at hand. The Court did not consider it necessary to devise specific criteria in this regard or to offer a general definition of 'scientific research'.[35] Second, the Court applied a standard of reasonableness to review the design and implementation of the program, but it did not explain the content of this standard in the abstract.[36] It did specify, however, that it would not 'pass judgment on the scientific merit or importance' of the research programme's objectives, or 'decide whether [its] design and implementation' were 'the best possible means of achieving' these objectives.[37] Moreover, the test of reasonableness was meant to be 'objective', meaning that the Court would not focus on 'the intentions of individual government officials'.[38] Consequently, even if some officials might have had motivations going beyond scientific research, this would not necessarily mean that the

[33] ibid, paras 67-9. See also para 82: the conclusions of scientific experts 'must be distinguished from the interpretation of the Convention, which is the task of this Court'.

[34] Cannizzaro, 'Proportionality' (n 16) 1062-1064.

[35] *Whaling* (n 28) para 86. See also para 127. Cannizzaro, 'Margin of Appreciation' (n 28) 454: '[t]he absence of an internationally agreed meaning led the Court to adopt a loose standard to interpret the notion of "scientific research". In practice, this entails that States enjoy a broad, albeit not unlimited, margin of manoeuvring to determine the objectives and scope of a research project'.

[36] Mbengue, 'Scientific Fact-finding' (n 21) 540.

[37] *Whaling* (n 28) para 88.

[38] ibid, para 97. See also para 88 for some specific aspects taken into account by the Court.

programme was not for purposes of scientific research, as long as the design and the implementation of the programme were 'reasonable' in relation to its stated research objectives.

It has been observed that in the *Whaling* case, the ICJ articulated for the first time an explicit standard of review.[39] Unfortunately, it is difficult to determine whether the Court intended this standard to be a deferential one, which would correspond to the common usage of 'reasonableness' as a deferential standard of review in domestic courts.[40] In an earlier case, *Navigational Rights*, the ICJ had considered that 'a court examining the reasonableness of a regulation must recognize that the regulator … has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet that need'.[41] Even though, surprisingly, the Court did not refer to this passage in the *Whaling* case, some elements of its reasoning suggest a deferential understanding of the standard of reasonableness, notably its contention that it would not review whether the programme was the 'best' way for Japan to pursue its research objectives. At the same time, the actual analysis undertaken in the *Whaling* case thoroughly scrutinised many aspects of Japan's research programme.[42] Moreover, the Court did not explicitly acknowledge its limited capacities in regard to scientific questions, but instead pretended that the dispute before it could be treated as a purely legal question. Indeed, the Court's approach in *Whaling* confirms what has been described as 'the protectionist mindset of a court that wants to restrict the dispute to an exclusive question of law'.[43]

The various cases that forced the Court to consider its standard of review have not resulted in a clear position on the intensity of its review. The absence of a substantive discourse on deference suggests that the Court favours *de novo* review of the legality of State conduct under

[39] Gros, 'The ICJ's Handling of Science' (n 28) 590. But see for an analysis linking the *Whaling* case to earlier ICJ jurisprudence, Asier Garrido-Muñoz, 'Managing Uncertainty: The International Court of Justice, "Objective Reasonableness" and the Judicial Function' (2017) 30 Leiden J of Int'l L 457.

[40] See section 1.5.2.

[41] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgment of 13 July 2008, para 101.

[42] *Whaling* (n 28) para 88. cf Malintoppi, 'Fact Finding' (n 24) 443: the Court 'showed itself to be highly engaged with the evidence, carefully questioning counsel and the experts at the oral hearing, and facilitating vigorous cross-examination of the experts'.

[43] Jean d'Aspremont and Makane Mbengue, 'Strategies of Engagement with Scientific Fact-finding in International Adjudication' (2014) J of Int'l Dispute Settlement 240, 254. A less critical account is provided by James Devaney, who describes the Court's approach to fact-finding as 'reactive'. James Devaney, *Fact-finding before the International Court of Justice* (CUP 2016) 30.

international law, while it tries to condense the disputes before it into purely legal questions. Even though the Court rarely explicitly rejects demands for deference, such as in *Oil Platforms*, it appears that the ICJ favours rigorous review, based on the conviction that its task as an international court is to provide 'objective' review.

2.3 The European Court of Human Rights

Through its development of the notion of the 'margin of appreciation', the ECtHR has come to play a central role in discussions about deference in international adjudication.[44] Other international courts and tribunals have often developed their own approaches to deference in response to parties' references to the ECtHR, and some of them have explicitly imported the margin of appreciation.[45] Given the multi-faceted and intricate character of the Court's use of the margin, this section will be divided in various subsections, discussing first the historical development of the margin before proceeding with a more conceptual analysis of the doctrine and its justifications.[46] The section will conclude with a discussion of the so-called 'fourth instance' doctrine, which refers to another expression of deference by the ECtHR in a narrower category of cases.

[44] The margin of appreciation has been studied extensively. See Howard Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Nijhoff 1996); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002); Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012); Josephine Asche, *Die Margin of Appreciation. Entwurf einer Dogmatik monokausaler richterlicher Zurückhaltung für den europäischen Menschenrechtsschutz* (Springer 2018). See for a longer list of contributions, Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 14 Cambridge Ybk of European Legal Studies 2011-2012 381, 384-385.

[45] eg *Continental Casualty v Argentina* (n 3) fn 270; *Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v Uruguay*, ICSID ARB/10/7, Award of 8 July 2016, para 399; José Alvarez, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris 2017).

[46] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe 2000) 32: 'it is questionable if it is really a "doctrine" at all since it could be said to lack the minimum theoretical specificity and coherence which a viable legal doctrine requires'. But see *A and Others v United Kingdom*, ECtHR (GC) 3455/05, Judgment of 19 February 2009, para 184, speaking about 'the doctrine of the margin of appreciation'.

2.3.1 Development of the Margin of Appreciation

The concept of the 'margin of appreciation' was used for the first time in the Strasbourg jurisprudence by the European Commission on Human Rights in the context of Article 15 of the Convention, which allows derogation in times of emergency.[47] In *Greece v United Kingdom*, the Commission ruled on the question of whether an emergency existed in Cyprus:

> The Commission of Human Rights is authorised by the Convention to express a critical opinion on derogations under Article 15, but the Government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation. In the present case the Government of Cyprus has not gone beyond these limits of appreciation.[48]

Along these lines, in *Lawless v Ireland*, the Commission reasoned:

> While the concept of a "public emergency threatening the life of the nation" is sufficiently clear, it is by no means an easy task to determine whether the facts and conditions of any particular situation fall within that concept. This being so, and having regard to the high responsibility which a Government has to the life of the nation, it is evident that a certain discretion - a certain margin of appreciation - must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.[49]

---

[47] The roots of the margin of appreciation have traditionally been related to domestic administrative law. See eg Meinhard Hilf and Tim Salomon, 'Margin of Appreciation Revisited: The Balancing Pole of Multilevel Governance' in Marise Cremona *et al* (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Brill 2013). Pierre Lambert, 'Marge nationale d'appréciation et contrôle de proportionnalité' in Frédéric Sudre (ed), *L'interprétation de la Convention européenne des droits de l'homme* (Bruylant 1998) 63, emphasizes the 'inspiration britannique'. See, however, for an argument emphasising the international roots of the concept, Eirik Bjorge, 'Been There, Done That: The Margin of Appreciation and International Law' (2015) 4 Cambridge J of Int'l and Comparative L 181.

[48] *Greece v United Kingdom*, ECHR 176/56, Report of August-September 1958, para 136. See for the early use of the margin, Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 Current L Problems 49, 50-52.

[49] *Lawless v Ireland*, ECHR, Report of 19 December 1959, *Series B 1960-1961*, para 90. The subsequent Court judgment was the first judgment of the ECtHR. See for a comment P O'Higgins, 'The Lawless Case' (1962) 20 Cambridge L J 234.

In subsequent cases, the appropriate intensity of review became a contested issue before the Strasbourg institutions. In *Belgian Linguistics*, the respondent argued that when distinguishing between discrimination and legitimate differentiation under Article 14 of the Convention, the Court should presume the legitimacy of domestic measures: '[t]he European jurisdictions would be acting outside the limits of their attributed powers if they were to review the legitimacy, the equity and the desirability of the actions of States'.[50] Such review would lead the Strasbourg institutions to engage in 'political tutelage' of democratic parliaments.[51] In response, the Commission considered that the substantive provisions of the Convention 'do not precisely define' the protected rights, but 'leave States a certain margin of appreciation with regard to the fulfilment of their obligation'. 'Up to a point', they 'leave it to the States to choose the appropriate means to guarantee a right'.[52] The Court, on its turn, concluded that:

> [I]t cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.[53]

The debate on the scope and intensity of the Court's review continued in *Handyside v United Kingdom*, a case concerning criminal proceedings against the publisher of a children's book considered obscene by the authorities. Within the Strasbourg institutions, there was disagreement on the appropriate standard of review, as well as on whether the review should focus on the original contested measure or only on the domestic court judgments reviewing that measure. According to the Government and the majority of the Commission, the Strasbourg institutions should only ensure that the English courts had 'acted reasonably, in good faith and within the limits of the margin of appreciation left to the Contracting States by Article 10 para. 2'.[54] The minority of the Commission, on the other hand, considered that its task was 'not to review the [domestic] judgment

[50] *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium*, ECtHR (Plenary) 1474/62, Judgment of 23 July 1968, Law I A para 4.

[51] ibid.

[52] ibid.

[53] ibid, Law I B para 10.

[54] *Handyside v United Kingdom*, ECtHR (Plenary) 5493/72, Judgment of 7 December 1976, para 47.

but to examine the Schoolbook directly in the light of the Convention and of nothing but the Convention'.[55] The Court replied in various steps. First, it repeated that 'the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights'.[56] Second, it noted that it was not possible 'to find in the domestic law of the various Contracting States a uniform European conception of morals'.[57] Third, the Court considered that '[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of morals] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them'.[58] It concluded:

> 'Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (…). Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements, is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. (…) It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 (art. 10) the decisions they delivered in the exercise of their power of appreciation. However, the Court's supervision would generally prove illusory if it did no more than examine these decisions in isolation; it must view them in the light of the case as a whole, including the publication in question and the arguments and evidence adduced by the applicant in the domestic legal system and then at the international level. The Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of "interference" they take are relevant and sufficient under Article 10 para. 2'.[59]

[55] ibid.

[56] ibid, para 48.

[57] ibid.

[58] ibid.

[59] ibid, paras 48-50.

The debate was revisited in *Sunday Times v United Kingdom*, a case concerning an injunction restraining publication of a newspaper article. Repeating the principles established in *Handyside*, the Court held:

> 'This does not mean that the Court's supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention. The Court still does not subscribe to the contrary view which, in essence, was advanced by the Government and the majority of the Commission in the *Handyside* case'.[60]

The Court then considered that 'the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10 (2)'.[61] While *Handyside* concerned 'the protection of morals', *Sunday Times* concerned the 'far more objective notion' of 'the authority and impartiality of the judiciary'.[62] In this context, the Court observed much less divergence among the member States: '[t]he domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. (…) Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation'.[63]

The Court's considerations in *Sunday Times* marked the beginning of an extensive discourse on the 'scope', 'width' or 'breadth' of the margin of appreciation.[64] In *Ireland v United Kingdom*, the Court had held that the context of public emergencies leaves domestic authorities 'a wide margin of appreciation'.[65] In *Sporrong and Lönnroth v Sweden*, it considered that 'in an area as complex and difficult as that of the development of large cities, the Contracting States should enjoy a wide margin of appreciation in order to implement their town-planning policy'.[66] In *Dudgeon v United Kingdom*, the Court held that 'not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation',

[60] *Sunday Times v United Kingdom*, ECtHR (Plenary) 6538/74, Judgment of 26 April 1979, para 59.

[61] ibid.

[62] ibid.

[63] ibid.

[64] See for a discussion of the various factors determining this width, Paul Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 Human Rights L J 1, 5-6.

[65] *Ireland v United Kingdom*, ECtHR (Plenary), 5310/71, Judgment of 18 January 1978, para 207.

[66] *Sporrong and Lönnroth v Sweden*, ECtHR (Plenary) 7151/75, Judgment of 23 September 1982, para 69.

determining that interferences with a 'most intimate aspect of private life' require a narrow margin.[67] In *Rasmussen v Denmark*, the Court summarised: '[t]he scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States'.[68] The last factor, often labelled the 'European consensus', became capable of both widening and narrowing the scope of the margin of appreciation.[69] Whereas in *Handyside* the absence of a consensus compelled the Court to grant a margin of appreciation, in later cases the existence of a European consensus could lead to a narrowing of the margin.[70]

An extensive summary of the factors determining the scope of the margin can be found in *S and Marper v United Kingdom*:

> A margin of appreciation must be left to the competent national authorities. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the Member States of the Council of Europe,

[67] *Dudgeon v United Kingdom*, ECtHR (Plenary) 7525/76, Judgment of 22 October 1981, para 52. cf *Hatton and Others v United Kingdom*, ECtHR (GC) 36022/97, Judgment of 8 July 2003, para 123; *Parrillo v Italy*, ECtHR (GC) 46470/11, Judgment of 27 August 2015, para 174-175.

[68] *Rasmussen v Denmark*, ECtHR 8777/79, Judgment of 28 November 1984, para 40.

[69] Kanstantsin Dzehtsiarou describes the ECtHR's concept of consensus as 'a presumption that favours the solution to a human rights issue which is adopted by the majority of the Contracting Parties' and which can be rebutted 'if the Contracting Party in question offers a compelling justification'. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 9, 12. Dean Spielmann, 'Consensus et marge d'appréciation nationale' (2012) 131 Journal des tribunaux 592.

[70] The Court's use of the consensus as a factor relevant to the scope of the margin implies that this scope can change over time, if the European consensus changes. See eg *Goodwin v United Kingdom*, ECtHR (GC) 28957/95, Judgment of 11 July 2002, paras 92-93. See further Shai Dothan, 'Three Interpretative Constraints on the European Court of Human Rights' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels. Contestations and Deference* (Hart 2016); Shai Dothan, 'Judicial Deference Allows European Consensus to Emerge' (2018) 18 Chicago J of Int'l L 393.

> either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider.[71]

The Court applies the margin of appreciation to a variety of assessments that need to be made when it reviews compliance with the Convention.[72] Its most common application is in the context of the limitation clauses of Articles 8 to 11, where the Court reviews whether a certain interference with Convention rights is 'necessary' in a democratic society,[73] and in the context of Article 14, the Convention's provision on non-discrimination.[74] By contrast, the margin has been less visible in the non-derogable rights of the Convention, such as the prohibition of torture codified in Article 3.[75] In *Chahal v United Kingdom*, it was held that 'the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3'.[76]

[71] *S and Marper v United Kingdom*, ECtHR (GC) 30562/04, Judgment of 4 December 2008, para 102.

[72] Yutaka Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in Andreas Føllesdal *et al* (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 69-78.

[73] Spielmann, 'Allowing the Right Margin' (n 44) 387-390.

[74] *Stec and Others v United Kingdom*, ECtHR (GC) 65731/01, Judgment of 12 April 2006, para 51. Janneke Gerards argues that the margin is used differently in the context of Article 14. Janneke Gerards, 'The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination' in Marco Balboni (ed), *The Principle of Discrimination and the European Convention of Human Rights* (Editoriale Scientifica 2017).

[75] Johan Callewaert, 'Is There a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?' (1998) 19 Human Rights L J 6; Françoise Tulkens and Luc Donnay, 'L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?' (2006) 1 Revue de science criminelle et de droit pénal comparé 3, 11-14. Greer, 'The Margin of Appreciation' (n 46) 6. Samantha Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?' (2016) 61 American J of Jurisprudence 69, 82: 'there are some rights in relation to which the margin of appreciation has been excluded by the ECtHR. This is the case with violations of absolute ECHR rights (e.g., art. 3 ECHR)'. Spielmann, 'Allowing the Right Margin' (n 44) 395: 'the margin is virtually inexistent when it comes to the non-derogable rights'. Spielman points, however, to *Finogenov and Others v Russia*, ECtHR 18299/03, Judgment of 20 December 2011, para 213, where the Court mentions the margin in the context of Article 2. See also *Lambert and Others v France*, ECtHR (GC) 46043/14, Judgment of 5 June 2015, para 144-148; *Meier v Switzerland*, ECtHR, 10109/14, Judgment of 9 February 2016, para 77.

[76] *Chahal v United Kingdom*, ECtHR (GC) 22414/93, Judgment of 15 November 1996, para 96.

2.3.2 Conceptual Analysis of the Margin of Appreciation

The ECtHR developed its discourse on the margin of appreciation incrementally, and it is widely acknowledged that the Court uses the term in various different and sometimes inconsistent ways.[77] One way to understand the margin is to perceive it as a 'zone of legality', which covers State conduct that does not clearly violate the Convention.[78] An example of this use of the margin appears in *Lautsi v Italy*, a case concerning the presence of crucifixes in state schools. The Grand Chamber found that:

> [T]he Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. (…) The Court therefore has a duty in principle to respect the Contracting States' decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination. The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State.[79]

When used this way, the margin seems to cover issues on which the Court leaves the final say to the member States. The crucial question before the Court is whether a certain contested measure actually falls within this margin. In *Lautsi*, the Court held that policies concerning public education and the convictions of parents would be left to the appreciation of the Member States, as long as they did not involve indoctrination. This constituted the relevant limit to the margin of

[77] eg Jonas Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Nijhoff 2009) 236.

[78] Shany, 'Towards a General Margin of Appreciation Doctrine' (n 16) 912.

[79] *Lautsi and Others v Italy*, ECtHR (GC) 30814/06, Judgment of 18 March 2011, paras 69-70. The Grand Chamber overturned the decision of the Chamber, which had evoked widespread controversy. See Giulio Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The *Lautsi* Case' (2013) 13 Human Rights L Rev 287, 289.

appreciation.[80] In general, however, the Court does not often specify the outer limit of the margin, even if its breadth can be 'crucial' to the final outcome of a case.[81]

Various commentators have criticised the use of the margin of appreciation as a zone of legality, because it only rephrases the Court's final conclusion as to whether the Convention has been breached.[82] If the Court concludes that the respondent State has not 'overstepped its margin of appreciation',[83] it is difficult to see how this reference to the margin adds anything to the conclusion that the Convention has not been violated.[84] At most, the conclusion that the State has not overstepped its margin of appreciation could imply that the Court, even if it does not find a

[80] *Lautsi* (n 79) para 70: 'the Court's task in the present case being to determine whether the limit mentioned in paragraph 69 above has been exceeded'. cf *Hirst v United Kingdom (No 2)*, ECtHR (GC) 74025/01, Judgment of 6 October 2005, para 82: '[s]uch a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be'.

[81] *A, B and C v Ireland*, ECtHR (GC) 25579/05, Judgment of 16 December 2012, para 231.

[82] eg Rabinder Singh, 'Is there a Role for the "Margin of Appreciation" in National Law after the Human Rights Act?' (1999) 1 Eur Human Rights L Rev 15; George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford J of Legal Studies 705, 711: '[w]hether the complained acts fall within or outside the margin of appreciation, whether that is, the interference with the freedom is permissible all things considered, is what the Court in each case is asking. It cannot answer this question on the basis that the complained acts fall within the state's margin of appreciation. This would beg the question'. See also Itzcovich, 'One, None and One Hundred Thousand' (n 79) 306-307.

[83] eg *Janowski v Poland*, ECtHR (GC) 25716/94, Judgment of 21 January 1999, para 35; *Odièvre v France* (n 2) para 49; *Khoroshenko v Russia*, ECtHR (GC) 41418/04, Judgment of 30 June 2015, para 148.

[84] Letsas, 'Two Concepts' (n 82) 711. cf *Z v Finland*, ECtHR 22009/93, Judgment of 25 February 1997, Partly Dissenting Opinion of Judge De Meyer: '[t]he empty phrases concerning the State's margin of appreciation - repeated in the Court's judgments for too long already - are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights. Such terminology, as wrong in principle as it is pointless in practice, should be abandoned without delay.' Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 Netherlands Q of Human Rights 324, 342; Catherine van de Heyning, 'No Place Like Home. Discretionary Space for the Domestic Protection of Fundamental Rights' in Patricia Popelier *et al* (eds), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Intersentia 2011) 86-89. See also Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 Human Rights L Rev 349, 353: '[b]ecause an in-depth examination of the human rights conformity of certain measures cannot be meaningfully performed in the abstract, it must be undertaken in the concrete context, by the national authorities. … Yet the public and political perception of such an ECtHR judgment in practice is that of a Court clearance of a restrictive practice as such. In many cases, national courts and legislators interpret the international "no violation" judgment as a license to proceed with a restrictive measure without having to perform their own in-depth evaluation'.

breach, has some concerns about the contested measure.[85] It could mean that the measure under review is not categorically in accordance with or in violation of the Convention, unlike other measures that clearly do or do not constitute a breach.[86] Understood this way, the margin of appreciation coincides with a certain grey zone, comprising State conduct which is suspicious but not or not yet in breach of the Convention.[87] Alternatively, the applicability of the margin could mean that while a certain measure is permissible in the particular circumstances of one Member State, it might constitute a violation in another.[88] In each of these interpretations, however, it is difficult to see how the Court's discourse on the 'width' of the margin fits in. As long as the margin coincides with the absence of a violation, one would expect the Court to say where the boundary between the margin and a violation lies, as an absolute minimum standard, rather than suggesting

[85] See eg *Goodwin* (n 70) para 92-93. See also Lawrence Helfer and Annemarie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale L J 273, 317: 'the ECHR is able to identify potentially problematic practices for the contracting states before they actually become violations, thereby permitting the states to anticipate that their laws may one day be called into question'.

[86] Mireille Delmas-Marty and Marie-Laure Izorche, 'Marge nationale d'appréciation et internationalisation du droit: réflexions sur la validité formelle d'un droit commun pluraliste' (2001) 46 McGill L J 923, 934: 'la marge implique un changement de logique juridique, de la logique binaire classique à une logique de gradation évoquant les sous-ensembles flous'. An example of a 'clear' breach can be found in *Buscarini and Others v San Marino*, ECtHR (GC) 24645/94, Judgment of 18 February 1999, para 38. It has been argued that the Convention standards have an absolute core to which the margin is not applicable. See eg Eva Brems, *Human Rights: Universality and Diversity* (Nijhoff 2001) 407-11. See also Michael Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 ICLQ 638, 645, discussing a model containing 'a central norm, surrounded by an area (the margin) where the State's interpretation, even if deviating somewhat from the central norm, will be accepted as being within the margin of appreciation'.

[87] The term 'grey zone' is used by Jeroen Schokkenbroek, 'Judicial Review by the European Court of Human Rights: Constitutionalism at European Level' in Rob Bakker *et al* (eds), *Judicial Control. Comparative Essays on Judicial Review* (MAKLU 1995) 163. See also Rahim Moloo and Justin Jacinto, 'Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law' in Karl Sauvant (ed), *Yearbook on International Investment Law and Policy 2011-2012* (OUP 2013) 551.

[88] This seems a logical inference from the observation made in *Handyside* that 'the view taken by [the Member States'] respective laws of the requirements of morals varies from time to time and from place to place'. The extent to which local 'morals' can justify an interference with a Convention right depends on the actual content of such morals. See also *Paksas v Lithuania*, ECtHR (GC) 34932/04, Judgment of 6 January 2011, para 96; *A, B and C* (n 81) para 235-236, 239, 241. See also James Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 ICLQ 459.

that the margin has an ever changing width depending on many different aspects of the concrete case under review.[89]

Instead of understanding the margin of appreciation as a qualified finding of compliance, it has become common to describe it as a reduction of the intensity of the Court's review.[90] The assumption is that even if the Court grants a margin of appreciation, this does not exempt the contested measure from the Court's review, but only limits the intensity of its scrutiny. This approach suggests a two-step analysis: first, the Court determines, in relative terms, the width of the margin on the basis of the different relevant factors; next, it proceeds to evaluate the merits of the case in the light of the applicable margin.[91]

An example of this use of the margin can be found in *Mouvement Raëlien Suisse v Switzerland*, a case concerning the authorities' refusal to authorise a poster campaign. The Court found that '[t]he examination by the local authorities of the question whether a poster satisfies certain statutory requirements (…) falls within the margin of appreciation afforded to States, as

[89] Hutchinson (n 86) 643: 'if the Court were genuinely imposing a universal minimum standard, it could be clear about what exactly it was. While it is often the case that the acceptable limits on a Convention right cannot be defined in the abstract, it would nonetheless be quite possible, and very desirable from the perspective of improving the coherence and predictability of judgments, if the Court were to indicate clearly where the floor was, even if this was restricted to the instant case. … In fact, the variable width of the margin which is such a feature of the jurisprudence rules out this idea of an absolute minimum. It is clear from the jurisprudence that the width of the margin is perceived as capable of determining whether a State's actions fall inside the margin, which can only mean that the floor is mobile, that is, it is not an absolute minimum at all. There would be little point in the Court affording a particularly wide margin in some particular case, if the actual borderline between breach and compliance was fixed.' For an understanding of the Convention as a minimum standard, see eg Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 Eur Const L Rev 173, 177. cf *Apotex Holdings Inc and Apotex Inc v United States*, ICSID ARB(AF)/12/1, Award of 25 August 2014, para 9.37.

[90] Gerards, 'Pluralism' (n 2) 105: 'a margin of appreciation doctrine is a useful and flexible tool to determine the intensity of review of interferences with fundamental rights'; Pieter van Dijk and Godefridus van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer 1998) 92: 'the margin of appreciation emerges as a review doctrine, used by the Court for determining and justifying the intensity of its supervision which is considered appropriate in concrete cases'.

[91] William Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: the Standards of Review in Investor-State Arbitrations' (2010) 35 Yale J of Int'l L 283, 342-343: '[t]he margin of appreciation analysis starts with a determination of the appropriate width of the margin or "breadth of deference" in the particular case. … The margin of appreciation analysis then proceeds to a second step, a residual proportionality test … the residual proportionality test in margin analysis should be informed by the prior determination of the width of the margin of appreciation afforded in the particular case'.

the authorities have a certain discretion in granting authorisation in this area'.[92] For that reason, the Court found that 'only serious reasons could lead it to substitute its own assessment for that of the national authorities'.[93] Here, the Court confirms the idea that the margin of appreciation does not exempt the contested measure from its review, but increases the likelihood that it will accept the decision of the national authorities.[94] The Court's discourse on the scope of the margin confirms a connection between the margin and the intensity of the Court's review: a wide margin results in lenient scrutiny, whereas a narrow margin increases the intensity of the Court's review.[95] It follows that the margin expresses a relative degree of deference, and that the actual amount of deference granted in a specific case depends on the 'factors' determining the scope of the margin.[96]

In some cases, the Court has referred to specific standards of review expressing a certain degree of deference under the margin of appreciation. In *Handyside*, it focused on whether 'the reasons given by the national authorities' to justify the contested measure were 'relevant and sufficient',[97] a criterion that would be repeated in many other judgments.[98] In *James and Others v United Kingdom*, the Court applied a wide margin of appreciation in the context of social and economic policies, considering that it would 'respect the legislature's judgment' on the public interest 'unless that judgment be manifestly without reasonable foundation'.[99] In *Markt Intern v Germany*, the Court ruled that in matters 'as complex and fluctuating as that of unfair competition', it 'must confine its review to the question whether the measures taken on the national level are

[92] *Mouvement Raëlien Suisse v Switzerland*, ECtHR (GC) 16354/06, Judgment of 13 July 2012, para 65.

[93] ibid para 66. cf *Evans v United Kingdom*, ECtHR (GC) 6339/05, Judgment of 7 March 2006, para 68: 'the central question in terms of Article 8 of the Convention is not whether a different solution might have been found by the legislature which would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it'.

[94] cf *Lautsi* (n 79) Dissenting Opinion of Judge Malinverni Joined by Judge Kalaydjieva, para 1: '[w]here the Court decrees that the margin of appreciation is a narrow one, it will generally find a violation of the Convention; where it considers that the margin of appreciation is wide, the respondent State will usually be "acquitted".'

[95] An example of the latter situation is found in *Obukhova v Russia*, ECtHR 34736/03, Judgment of 8 January 2009, para 22, where the Court links 'a limited margin of appreciation' to 'the most careful scrutiny'.

[96] Under the first understanding of the margin, the Court's discourse on the 'width' of the margin appears pointless. In that understanding, the only relevant inquiry concerns the absolute, outer limit of the margin. On the other hand, it is surprising that there are only few examples of cases in which the Court explicitly links the width of the margin to the intensity of its review.

[97] *Handyside* (n 54) para 50.

[98] Arai-Takahashi, *The Margin of Appreciation* (n 44) 87.

[99] *James and Others v United Kingdom*, ECtHR (Plenary) 8793/79, Judgment of 21 February 1986, para 46.

justifiable in principle and proportionate'.[100] These statements could be understood as references to explicit standards of review.[101] Yet in *Sunday Times*, the Court had refused to accept the respondent's suggestion that its task was limited 'to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith'.[102] Indeed, it seems that notwithstanding incidental references to particular standards, the Court does not apply them in a consistent, structural manner. Instead, it identifies relative degrees of deference, expressed by a wider or narrower margin of appreciation.[103]

2.3.3 Justifications for the Margin of Appreciation

Throughout its jurisprudence, the Court has referred to a wide variety of interrelated reasons that justify the margin of appreciation.[104] A first reason relates to the open-ended nature of Convention provisions, which leave States discretion in the fulfilment of their obligations.[105] This discretion respects the diversity of cultural and legal practices among the Member States: it does not require 'absolute uniformity'.[106] Indeed, the Court has often acknowledged that many issues that are

[100] *Markt Intern Verlag GmbH and Klaus Beermann v Germany*, ECtHR (Plenary) 10572/83, Judgment of 20 November 1989, para 33.

[101] See for an attempt to distil a systemic framework of standards of review, Nicholas Lavender, 'The Problem of the Margin of Appreciation' (1997) 4 Eur Human Rights L Rev 380.

[102] *Sunday Times* (n 60) para 59.

[103] cf Julian Arato, 'The Margin of Appreciation in International Investment Law' (2014) 54 Virginia J of Int'l L 545, 558: '[t]he deeper problem with the margin is that it entails no particular standard of review. As regards the scope and degree of deference due to national decision-makers, the margin of appreciation is essentially *contentless*. … the margin of appreciation does not entail any concrete linguistic standard or specific test'.

[104] Greer, 'The Margin of Appreciation' (n 46) 32: the margin is 'misleading in so far as its use suggests that the various kinds of state discretion identifiable under the Convention have a common identity and rationale'.

[105] Christoffersen, *Fair Balance* (n 77) 236: 'the Contracting Parties enjoy a measure of discretion, which is independent of the subsidiarity of the Court's review and purely a consequence of the norms of the ECHR'.

[106] *Sunday Times* (n 60) para 63. In the context of electoral systems, the Court has held that 'there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision'. *Animal Defenders Int v United Kingdom*, ECtHR (GC) 48876/08, Judgment of 22 April 2013, para 111.

brought before it concern matters 'on which opinions within a democratic society may reasonably differ widely'.[107]

A related principle underpinning the margin is that of subsidiarity.[108] In *Belgian Linguistics*, the Court noted the 'subsidiary nature of the international machinery of collective enforcement established by the Convention'.[109] It explained further in *Handyside* that:

> The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted.[110]

Whereas the Court explicitly referred to the anteriority of domestic review necessitated by the requirement to exhaust local remedies, it also gives a normative priority to domestic assessments.[111] This is confirmed by the Court's often repeated statement that national authorities are 'better placed than the international judge' to make certain assessments.[112] National authorities are better placed because they have a 'direct knowledge of their society and its needs' and are 'closer to the realities of their country'.[113] They have a 'direct and continuous contact with the vital forces of their countries' and 'direct democratic legitimation'.[114] All these aspects encourage

---

[107] *James and Others* (n 99) para 46; *Lithgow and Others v United Kingdom*, ECtHR (Plenary) 9006/80, Judgment of 8 July 1986, para 122.

[108] Elias Kastanas, *Unité et Diversité: notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme* (Bruylant 1996) 184: 'la source de la doctrine de la marge d'appréciation réside dans la subsidiarité du système … instauré par la Convention'.

[109] *Belgian Linguistics* (n 50) Law I B para 10.

[110] *Handyside* (n 54) para 48.

[111] Kastanas calls these two aspects the 'subsidiarité formelle et matérielle'. Kastanas, *Unité et Diversité* (n 108) 184. cf Besson, 'Subsidiarity' (n 75) 78-83, distinguishing between procedural, substantive, and remedial subsidiarity.

[112] *Gillow v United Kingdom*, ECtHR 9063/80, Judgment of 24 November 1986, para 56; *Hatton* (n 67) para 97. See also *A and Others* (n 46) para 184: 'the doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court'. Asche (n 44) 154-179, noting that the 'better placed' argument covers a variety of different aspects.

[113] *James and Others* (n 99) para 46; *Mouvement Raëlien* (n 92) para 64.

[114] *Handyside* (n 54) para 48; *Hatton* (n 67) para 97. See also *Animal Defenders* (n 106) para 108, 111. For a critical discussion of the role the democratic argument plays in the Court's reasoning, see Peggy Ducoulombier, '*Animal Defenders International c. Royaume-Uni*: victoire du dialogue institutionnel ou déférence injustifiée à l'égard des principes du droit brittanique?' [2014] J eur des droits de l'homme 3.

the Court to defer to national authorities, especially when confronted with matters of technical complexity,[115] questions of general public policy,[116] issues of moral sensitivity,[117] or the balancing of competing individual rights.[118]

The two elements of discretion and subsidiarity can be distinguished on a conceptual level: discretion concerns the normative flexibility of the Convention whereas subsidiarity concerns the institutional differences between the Court on the one hand and national authorities on the other.[119] Nonetheless, the Court fuses considerations of both discretion and subsidiarity in its use of the margin of appreciation.[120] As noted by Oddný Arnardóttir, the margin has a 'dual function': 'the systemic distribution of competences between decision making bodies and the normative function of allowing pluralism and flexibility in the interpretation and application of rights'.[121] Consequently, the Court's use of the margin incorporates substantive reasons related to the application of the Convention in a concrete situation as well as non-merits reasons related to the institutional capacity and legitimacy of domestic decision-makers.[122] The margin of appreciation acknowledges the empirically and normatively better position of the national authority to deal with

[115] eg *Markt Intern* (n 100) para 33.

[116] *Hatton* (n 67) para 97.

[117] eg *A, B and C* (n 81) para 233.

[118] *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v United Kingdom*, ECtHR (GC) 44302/02, Judgment of 30 August 2007, para 71; *SH and Others v Austria*, ECtHR (GC) 57813/00, Judgment of 3 November 2011, para 106. cf *Hannover v Germany (No 2)*, ECtHR (GC) 40660/08, Judgment of 7 February 2012, para 107. It is often noted, however, that the ECtHR does not address the horizontal application of rights explicitly. See Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter 2014) 1-2.

[119] Stephan Schill and Robyn Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) 13 Max Planck UNYB 61, 74-75, relating 'discretion' to a State's entitlement to a certain freedom of choice, determined by the contracting parties, while 'deference' is a form of self-restraint adopted by the dispute settlement body itself. Besson, 'Subsidiarity' (n 75) 84: 'human rights subsidiarity, especially in its substantive dimension, requires deference to the review of domestic authorities. It should not be confused with the protection of the discretion of States in specifying and implementing human rights duties in their local circumstances in the first place'.

[120] cf Shany, 'Towards a General Margin of Appreciation Doctrine' (n 16) 909-10, distinguishing between 'judicial deference' and 'normative flexibility'; Letsas, 'Two Concepts' (n 82) 706, distinguishing between the 'substantive' and the 'structural' concept of the margin of appreciation. The two aspects could well be covered by the multiple meanings of the word 'margin', which could be understood as both 'latitude' and 'measure'. Delmas-Marty and Izorche, 'Marge nationale d'appréciation' (n 86) 925.

[121] Oddný Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 Eur Const L Rev 27, 42.

[122] ibid 44-45.

the normative flexibility of the Convention and to endow it with the specificity that the national context demands.[123]

2.3.4 Deference to Domestic Courts beyond the Margin of Appreciation

The margin of appreciation applies to assessments made by a variety of domestic institutions, including courts.[124] Yet also in cases where the margin is not applied, has the Court developed a practice of expressing deference towards the findings of domestic courts.[125] In *Kemmache v France*, the Court held that:

> In principle, and without prejudice to its power to examine the compatibility of national decisions with the Convention, it is not the Court's role to assess itself the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action.[126]

Pursuant to this formula, which has become known as the 'fourth instance doctrine',[127] the ECtHR applies a limited intensity of review in regard to two different assessments: the application of

[123] Christoffersen, *Fair Balance* (n 77) 237: 'there is a close interaction in borderline cases between the discretion of the Contracting Parties and the subsidiarity of the Court's review'.

[124] *Handyside* (n 54) para 48. See Dean Spielmann's discussion of a 'reverse' or 'second-degree' margin of appreciation, 'whereby discretionary powers can be distributed between executive and judicial authorities at the domestic level'. Spielmann, 'Allowing the Right Margin' (n 44) 412-415.

[125] Dean Spielmann, 'Le fait, le juge et la connaissance: aux confins de la compétence interprétative de la Cour européenne des droits de l'homme' in Pierre d'Argent *et al* (eds), *Les limites du droit international. Essais en l'honneur de Joe Verhoeven* (Bruylant 2015).

[126] *Kemmache v France (No 3),* ECtHR 17621/91, Judgment of 24 November 1994, para 44. Note that 'in the vast majority of Strasbourg cases the significant facts are no longer in dispute'. Philip Leach *et al*, 'Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads' (2010) 28 Netherlands Q of Human Rights 41. See for a critical review of the Court's approach to facts, Katayoun Sadeghi, 'The European Court of Human Rights: The Problematic Nature of the Court's Reliance on Secondary Sources for Fact-Finding' (2009) 25 Connecticut J of Int'l L 127.

[127] Maija Dahlberg, '"It is Not Its Task to Act as a Court of Fourth Instance": the Case of the ECtHR' (2014) 7 Eur J of L Studies 84. The fourth instance doctrine appears to have been developed in parallel to the margin of appreciation,

domestic law and the evaluation of evidence.[128] The premise is that national courts are 'particularly qualified to settle' issues of domestic law and 'better placed to assess the evidence adduced before them'.[129] The fourth instance formula is most commonly associated with the Court's review under Article 6, but similar considerations have been expressed in the context of other Convention articles as well.[130]

The deference granted by the Court to domestic courts is not unlimited.[131] The Court held in *Khamidov v Russia*:

> [I]t is not its task to take the place of the domestic courts, which are in the best position to assess the evidence before them, establish facts and interpret domestic law. The Court will not, in principle, intervene, unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair as required by Article 6 § 1.[132]

The formulation used in *Khamidov* suggests that the Court reviews domestic judgments exclusively under the standards of arbitrariness and manifest unreasonableness, at least in the context of Article 6. Yet in reality, the Court's practice seems more flexible and casuistic, and

---

although they have been conflated. *Koval v Ukraine*, ECtHR 65550/01, Judgment of 19 October 2006, para 117: 'the Court cannot conclude that the adversarial nature of the proceedings was not respected or that the national courts exceeded the margin of appreciation they have in the admission and assessment of evidence'. Christoffersen, *Fair Balance* (n 77) 292: 'there is no conceptual difference between the fourth instance principle, the margin of appreciation, and the principle of subsidiarity in the context of the rule of law, but the Court does not normally use the term margin of appreciation in this field.'

[128] Dean Spielmann notes that 'pour la Cour, le droit national est une question de fait'. Dean Spielmann, 'La Cour européenne des droits de l'homme et l'erreur de fait' in Isabelle Riassetto *et al* (eds), *Liber Amicorum Rusen Ergeç* (Pasicrisie 2017) 292. With regard to the application of domestic law specifically, the Court routinely holds that 'it is primarily for the national authorities, notably the courts, to interpret and apply domestic law', eg *Rotaru v Romania*, ECtHR (GC) 28341/95, Judgment of 4 May 2000, para 53.

[129] resp *Winterwerp v Netherlands*, ECtHR 6301/73, Judgment of 24 October 1979, para 46; *Murray v United Kingdom*, ECtHR (GC) 14310/88, Judgment of 28 October 1994, para 66.

[130] eg *Klaas v Germany*, ECtHR 15473/89, Judgment of 22 September 1993, para 29 (Article 3); *Kemmache v France* (n 126) para 44 (Article 5); *McShane v United Kingdom*, ECtHR 43290/98, Judgment of 28 May 2002, para 103 (Article 2).

[131] eg *Benham v United Kingdom*, ECtHR (GC) 19380/92, Judgment of 10 June 1996, para 41.

[132] *Khamidov v Russia*, ECtHR 72118/01, Judgment of 15 November 2007, para 170.

other standards have also been applied.[133] In regard to fact-finding, the Court commonly requires 'cogent elements' justifying a departure from the findings of domestic courts.[134]

In certain categories of cases, the Court applies a more stringent scrutiny of domestic judgments. In particular in the contexts of Articles 2 and 3, concerning the right to life and the prohibition of ill-treatment, the Court 'is prepared to conduct a thorough examination of the findings of the national courts', in light of the absolute character of these rights.[135] In *Kononov v Latvia*, it was held that also Article 7, which prohibits punishment without the law, requires stringent review. The Court acknowledged that such review could lead to 'differences between the legal approach and reasoning of this Court and the relevant domestic decisions', but it concluded that less stringent review 'would render Article 7 devoid of purpose'.[136]

2.3.5 Conclusions on the European Court of Human Rights

The ECtHR has developed an intricate jurisprudence on the intensity of its review, mainly but not exclusively through the concept of the margin of appreciation.[137] The Court's deference to domestic authorities results from a wide variety of reasons: the flexibility of Convention standards, the subsidiary character of its international supervision, and the superior legitimacy, proximity and

[133] See eg *Dulaurans v France*, ECtHR 34553/97, Judgment of 21 March 2000, para 38, where the Court found 'une erreur manifeste d'appréciation'. Spielmann, 'La Cour européenne' (n 128) 295.

[134] *Klaas v Germany* (n 130) para 30; *Matko v Slovenia*, ECtHR 43393/98, Judgment of 2 November 2006, para 100; *Austin and Others v United Kingdom*, ECtHR (GC) 39692/09, Judgment of 15 March 2012, para 61.

[135] *Bouyid v Belgium*, ECtHR 23380/09, Judgment of 28 September 2015, para 85. cf *Matko* (n 134) para 100. But see n 130.

[136] *Kononov v Latvia*, ECtHR 36376/04, Judgment of 17 May 2010, para 198. The reasoning seems a bit different from the one applied in *Winterwerp* (n 129) para 46, where the Court held, in the context of Article 5, that '[i]t is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection'.

[137] As mentioned in section 2.1, this does not necessarily mean that the Court's jurisprudence in terms of actual outcomes is deferential. See eg Boudouhi, 'A Comparative Approach' (n 2) 17: the margin of appreciation 'is the counterpart to the judicial activism which is so characteristic of the ECtHR, not only through the proportionality analysis but also through other judicial techniques such as the evolutive interpretation and the principle of effectiveness'.

capacity of domestic decision-making.[138] The discourse on the scope of the margin of appreciation suggests that it does not entail complete deference; rather, references to its fluctuating 'width' or 'scope' suggest that the margin decreases the intensity of the Court's review.[139]

Over time, the margin of appreciation has developed from a mere expression of an unspecified degree of deference to an elaborate framework listing a variety of factors that determine the intensity of the Court's review. Yet for several reasons, this development has obscured rather than clarified the Court's intensity of review. First, it suggests that the margin can be used as a calculator for determining the intensity of its review as if deference is an exact value that can be quantified.[140] It seems doubtful, however, that the intensity of review can be specified beyond some broad, relative terms indicating strict or lenient scrutiny.[141] Second, it is questionable if and how the factors that the Court uses to determine the width of the margin are commensurable. The case-law on the margin does not provide a method for balancing factors that are so different in nature and which can pull in different directions.[142] When the Court makes its final calculation on the width of the margin, it is unclear how it balances these different factors. This relates to a

[138] Academic interpretations that reduce the concept of the margin of appreciation to only one of these aspects do not provide a full understanding of the Court's reasoning. This is the criticism voiced by Oddný Arnardóttir against the analysis provided by Andrew Legg. Arnardóttir, 'Rethinking the Two Margins of Appreciation' (n 121) 44. In Arnardóttir's view, Legg reduces the margin to three types of non-merits reasons for deference (democracy, European consensus, and expertise), whereas the Court uses the concept of the margin in more diverse ways.

[139] This is also confirmed by the Court's common expression that the margin 'goes hand in hand' with European supervision. Oddný Arnardóttir suggests that in certain cases the Court grants 'complete deference' once it is satisfied that domestic assessments were procedurally diligent. Oddný Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 Int'l J of Const L 9. Yet this form of deference is still dependent upon a certain degree of review, if only procedural.

[140] Jan Kratochvíl uses the metaphor of a high jump competition: '[t]he margin works here like a bar in a high jump competition. The Court sets the bar at a certain height over which the State must jump in order to escape a violation. A narrow margin means that the bar is relatively high; a wide margin means an easy jump'. Kratochvíl, 'The Inflation of the Margin of Appreciation' (n 84) 330.

[141] cf *TV Vest AS and Rogaland Pensjonistparti v Norway*, ECtHR 21132/05, Judgment of 11 December 2008, para 67, where the Court allows 'a somewhat wider margin of appreciation' than in other categories of cases.

[142] eg *Hatton* (n 67) para 103 (wide margin in general policy matters; limited margin because of intimate right); *Stoll v Switzerland*, ECtHR (GC) 69698/01, Judgment of 10 December 2007, para 105 (limited margin in the context of press freedom), para 107 (absence of consensus); *A, B and C* (n 81) para 233 (wide margin regarding sensitive moral and ethical issues), para 235 (existence of consensus, which would normally narrow the margin); *Animal Defenders* (n 106) para 102-104 (narrow margin in the context of press freedom), para 123 (lack of European consensus broadens margin). Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2005) 11 Columbia J of Eur L 113, 129.

third issue: the Court's expansion of factors that determine the width of the margin blurs the distinction between the determination of the width of the margin on the one hand and the final assessment of the merits of the case on the other hand.[143] It could be argued that this distinction is an academic construction that is not necessarily adhered to by the Court.[144] Yet in that case, the added value of the margin of appreciation becomes doubtful, because the determination of the width of the margin would then coincide with the assessment of whether the Convention has been breached or not.[145]

2.4 The Inter-American Court of Human Rights

According to its preamble, the American Convention on Human Rights provides 'international protection … reinforcing or complementing the protection provided by the domestic law of the American states'. The Inter-American Commission has inferred from this notion of 'complementarity' that 'the international protection provided by the supervisory bodies of the

[143] See *Hatton* (n 67) para 122; *Hirst* (n 80) para 78-84; *A, B and C (n 81)* paras 231-41. See also Legg, *The Margin of Appreciation* (n 44) 196-197. For this reason Michael Hutchinson suggests that '[t]he factors currently used by the Court in determining the width of the margin, … can all quite properly be used as part of the Court's assessment of what is actually necessary in a democratic society'. Hutchinson (n 86) 648.

[144] cf Spielmann, 'Whither the Margin of Appreciation?' (n 48) 56: 'the margin of appreciation is sensitive to the legal and factual context of each case. Determining its span is not a prelude to the exercise of judgment in a case, but intrinsic to it'. Tulkens and Donnay, 'L'usage de la marge d'appréciation' (n 75): 'on peut donc, théoriquement, distinguer l'intensité du contrôle (marge d'appréciation) de l'objet de celui-ci (la proportionnalité), il faut reconnaître qu'en pratique, dans la mesure où plusieurs facteurs leur sont communs, la distinction n'est pas toujours évidente'.

[145] cf fn 82 and 96. The problem is apparent in the analysis of Andrew Legg, who comments in the following way on the factor concerning the 'nature of the right', which has explicitly been identified by the Court as a factor determining the width of the margin: '[w]hen, therefore, lawyers, judges, or commentators refer to the nature of the right as a factor *affecting* the margin of appreciation, what they mean is that the nature of the right affects the strength or importance of the first-order reasons that must be overcome by the three factors for a margin of appreciation'. According to Legg, the 'nature of the right' is not an 'institutional' factor or a second-order reason, and therefore not a determinant of the width of the margin, but only a consideration within the final proportionality assessment. Legg, *The Margin of Appreciation* (n 44) 200. However, Legg can be criticized for insisting on his own framework in disregard of actual pronouncements by the Court.

Convention is of a subsidiary nature'.[146] In *Zambrano Vélez* et al *v Ecuador*, the Court held in the context of an emergency defence that 'States do not enjoy an unlimited discretion', and that they are subjected to the control of the Inter-American institutions exercised 'in a subsidiary and complementary manner'.[147] In *Cabrera García and Montel Flores v Mexico*, it was considered:

> This Court has established that the international jurisdiction is of a subsidiary, reinforcing and complementary nature, and therefore it does not perform the role of a court of "fourth instance." This means that the Court cannot act as a higher court or as an appeal court in settling disputes between parties, on some aspects of the assessment of evidence, or of the application of the domestic law to certain matters not directly related to compliance with international human rights obligations.[148]

The 'fourth instance' doctrine has become a regular feature of the IACtHR's jurisprudence.[149] In *Mémoli v Argentina*, the Court reviewed the criminal conviction of two journalists for defamation, which raised issues concerning the balance to be struck between the applicants' right to freedom of expression and the right to honour and reputation of others. The Court considered that:

---

[146] *Santiago Marzioni v Argentina*, IACHR, Report No 39/96, 15 October 1996, para 48. See Luis López Guerra, 'Two Dimensions of Subsidiarity' in Wydawnictwo Sejmowe (ed), *Human Rights in Contemporary World. Essays in Honour of Professor Leszek Garlicki* (Kancelaria Sejmu 2017).

[147] *Zambrano Vélez* et al *v Ecuador*, IACtHR, Judgment of 4 July 2007, para 47.

[148] *Cabrera García and Montiel Flores v Mexico*, IACtHR, Judgment of 26 November 2010, para 16. cf *Masacre de Santo Domingo v Colombia*, IACtHR, Judgment of 30 November 2012, para 142; *Gelman v Uruguay*, IACtHR, Order of 20 March 2013, para 70-2.

[149] Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn CUP 2013) 125-128. Víctor Abramovich, 'Autonomy and Subsidiarity: the Inter-American System of Human Rights vs. National Justice Systems' in César Rodríguez-Garavito (ed), *Law and Society in Latin America: A New Map* (Routledge 2015) 188: the fourth instance rule 'functions as a form of deference to national judicial systems'. Abramovich argues that a better definition would 'contribute decisively to the possibility of resolving the tension between autonomy and international protection'.
See on the Court's fact-finding, Thomas Buergenthal, 'Judicial Fact-Finding: Inter-American Human Rights Court' in Richard Lillich (ed), *Fact-Finding Before International Tribunals. Eleventh Sokol Colloquium* (Transnational 1992); Alberto Bovino, 'Evidential Issues before the Inter-American Court of Human Rights' (2005) 2 Sur – Int'l J of Human Rights 57.

> [T]he international jurisdiction is of a contributing and complementary nature and, thus, the Court does not fulfil the functions of a court of "fourth instance." … in strict observance of its subsidiary competence, the Court considers that, in a case such as this one, it must verify whether the State authorities made a reasonable and sufficient weighing up between the two rights in conflict, without necessarily making an autonomous and independent weighing, unless the specific circumstances of the case require this.[150]

The Court concluded that the balancing undertaken by the Argentine courts 'constituted a reasonable and sufficient weighing up of the two rights in conflicts', which justified the convictions.[151]

Not only the fourth instance doctrine, but also the margin of appreciation has appeared in the jurisprudence of the IACtHR,[152] albeit less frequently.[153] In one of its earliest advisory opinions, the Court reviewed certain proposed amendments to Costa Rica's rules on naturalisation. It considered that 'it is within the sovereign power of Costa Rica to decide what standards should determine the granting or denial of nationality to aliens who seek it, and to establish certain reasonable differentiations'.[154] With regard to the concrete differentiations proposed by the amendments, the Court considered that some of them were 'debatable on various grounds', but that this would not suffice to find a violation of the Convention. In reaching this conclusion, the Court was 'fully mindful of the margin of appreciation which is reserved to states when it comes

[150] *Mémoli v Argentina*, IACtHR, Judgment of 22 August 2013, para 140.

[151] ibid para 143. See also *Cepeda Vargas v Colombia*, IACtHR, Judgment of 26 May 2010, para 246, where the Court considered that it reviews national mechanisms of reparation under the criteria of 'objectivity, reasonableness and effectiveness'.

[152] Pablo Contreras, 'National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights' (2012) 11 Northwestern J of Int'l Human Rights 28, 59. Belen Giupponi, 'Assessing the Evolution of the Inter-American Court of Human Rights in the Protection of Migrants' Rights: Past, Present and Future' (2017) 21 Int'l J of Human Rights 1477, 1484. The Commission has also occasionally referred to the margin of appreciation. See eg *Montt v Guatemala*, IACHR, Report No 30/93, 12 October 1993, para 24, 31; *Walter Humberto Vasquez Vejarano v Peru*, IACHR, Report No 48/00, 13 April 2000, para 52, 55.

[153] Manuel Góngora Mera, *Inter-American Judicial Constitutionalism. On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (IIDH 2011) 213: 'in general terms, the Inter-American Court and Commission have not embraced the margin of appreciation doctrine'.

[154] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IACtHR, Advisory Opinion OC-4/84 of 19 January 1984, para 59.

to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with'.[155] The margin of appreciation also appeared in a number of cases concerning the right to freedom of expression in a political context. In *Ivcher-Bronstein v Peru*, the Court noted that according to the ECtHR, the freedom of expression 'leaves a very reduced margin to any restriction of political discussion or discussion of matters of public interest'.[156] This reference to a 'reduced margin' was repeated in several other cases.[157]

The Inter-American institutions have recognised, in the context of political rights, that the Convention does not impose uniform standards on member States with diverse political, social and cultural backgrounds.[158] The Court considered in *Gutman v Mexico* that:

> The inter-American system … does not impose a specific electoral system or a specific means of exercising the rights to vote and to be elected. The American Convention establishes general guidelines that determine a minimum content of political rights and allows the States to regulate those rights, within the parameters established in the Convention, according to their historical, political, social and cultural needs, which may vary from one country to another and even within one country, at different historical moments.[159]

Yet in other contexts, the Court has attached less weight to the absence of consensus within the region. In *Atala Riffo and Daughters v Chile*, the Court rejected the argument that the lack of consensus on the rights of same-sex couples should lead it to defer to national authorities:

> The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the

[155] ibid para 62.

[156] *Ivcher-Bronstein v Peru*, IACtHR, Judgment of 6 February 2001, para 155.

[157] *Herrera-Ulloa v Costa Rica*, IACtHR, Judgment of 2 July 2004, para 127. See also para 161, dealing with the right to a fair trial, where the Court held that '[w]hile States have a margin of discretion in regulating the exercise of [appeals], they may not establish restrictions or requirements inimical to the very essence of the right to appeal a judgment'. *Canese v Paraguay*, IACtHR, Judgment of 31 August 2004, para 97.

[158] *Aylwin Azócar et al v Chile*, IACHR, Report 137/99, 27 December 1999, para 76, 99; *Statehood Solidarity Committee v United States*, IACHR, Report 98/03, 29 December 2003, para 88.

[159] *Gutman v Mexico*, IACtHR, Judgment of 6 August 2008, para 166.

> international obligations arising from a sovereign decision by the States to adhere to the American Convention.[160]

In *Murillo* et al *v Costa Rica*, the Court reviewed a judgment of the Constitutional Chamber of the Costa Rican Supreme Court, which had determined that in vitro fertilisation (IVF) was unconstitutional because of the risks it posed to prenatal life. The IACtHR found that the domestic court had failed to take competing rights into account, concluding that the judgment under review constituted 'an arbitrary and excessive interference in private and family life'.[161] In the light of its findings on the start of the right to life under the Convention, the Court did not 'consider it pertinent to rule on the State's argument that it has a margin of appreciation to establish prohibitions such as the one established by the Constitutional Chamber'.[162]

Notwithstanding occasional references to subsidiarity, the fourth instance doctrine, and the margin of appreciation,[163] the Court has repeatedly confirmed that it is 'the ultimate interpreter of the American Convention'. [164] This phrasing emerged in the context of the so-called 'conventionality control' doctrine, according to which domestic authorities are obliged to review

[160] *Atala Riffo and Daughters v Chile*, IACtHR, Judgment of 24 February 2012, para 92. At the same time, the Court referred to 'social, cultural, and institutional changes' justifying its ruling, para 120.

[161] *Murillo* et al *v Costa Rica*, IACtHR, Judgment of 28 November 2012, para 316. The Court noted that Costa Rica was the only country in the region prohibiting IVF, para 254.

[162] ibid. Jorge Contesse discusses both cases as examples of transnational dialogue because of their references to the domestic law and practice of other States within the region. Jorge Contesse, 'The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights' (2017) 15 Int'l J of Const L 414.

[163] Nino Tsereteli argues that this use of the margin of appreciation by the IACtHR only relates to an 'acknowledgment of a flexibility of norms', and that the Court 'did not intend to give up its status of an ultimate interpreter of the Convention'. Nino Tsereteli, 'Emerging Doctrine of Deference of the Inter-American Court of Human Rights' (2016) 20 Int'l J Human Rights 1097, 1098.

[164] *Almonacid-Arellano v Chile*, IACtHR, Judgment of 26 September 2006, para 124; *Article 55 of the American Convention on Human Rights*, IACtHR, Advisory Opinion OC-20/09 of 29 September 2009, para 18; *Cantú* et al *v Mexico*, IACtHR, Judgment of 31 August 2010, para 219; *Lund* et al *v Brazil*, IACtHR, Judgment of 24 November 2010, para 176 ('the final interpreter of the American Convention'); *Cardenas and Pena v Boliva*, IACtHR, Judment of 1 September 2010, para 202 ('the final arbiter of the American Convention'); *García and Flores v Mexico* (n 148) para 225; *Atala Riffo v Chile* (n 160) para 282 ('the final authority on the interpretation of the American Convention'); *Furlan and Family v Argentina*, IACtHR, Judgment of 31 August 2012, para 303 ('the final interpreter of the American Convention'); *Gelman v Uruguay* (n 148) para 66 ('the final arbiter of the American Convention').

the compatibility between domestic law and the Convention, taking into account its interpretation by the Court.[165]

> The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[166]

In later cases, the Court added that domestic courts should exercise their conventionality control *ex officio*, but within 'the context of their respective spheres of competence and the corresponding procedural regulations',[167] possibly to account for the diversity of domestic systems of judicial review.[168] Later on, the Court clarified that the obligation to exercise conventionality control was binding not only on courts, but on 'all state authorities'.[169] At the same time, the Court noted that 'the binding effect of the provision of the Convention that is interpreted and applied differs depending on whether or not the State was a material party to the international proceedings' before it.[170] For authorities of a State that was found in breach of the Convention, the obligation of

---

[165] Conventionality control entails regard to both judgments and advisory opinions of the Court. *Gender identity, and equality and non-discrimination with regard to same-sex couples*, IACtHR, Advisory Opinion OC-24/17 of 24 November 2017, para 26.

[166] *Almonacid-Arellano* (n 164) para 124.

[167] *Dismissed Congressional Employees v Peru*, IACtHR, Judgment of 24 November 2006, para 128.

[168] Contesse, 'The Final Word?' (n 162) 419-421. cf *Alibux v Surinam*, IACtHR, Judgment of 30 January 2014, para 124: 'the American Convention does not impose a specific model for the regulation of issues of constitutionality and control for conformity with the Convention. In this sense, the Court recalls that the obligation to monitor the compliance between domestic legislation and the American Convention is delegated to all bodies of the State, including its judges and other mechanisms related to the administration of justice at all levels'.

[169] *Gelman v Uruguay* (n 148) para 65.

[170] ibid para 67.

conventionality control simply meant that domestic authorities should consider the Court's judgment as 'res judicata', and apply it 'to comply fully and in good faith'.[171] In regard to States who had not been a party to the relevant proceedings, the Court held that:

> [T]the mere fact of being a Party to the American Convention means that all public authorities and all the organs of State, including the democratic bodies, judges and other organs involved in the administration of justice at all levels, are bound by the treaty. This obliges them to exercise control of conformity with the Convention *ex officio*, taking into account the treaty itself and its interpretation by the Inter-American Court, within the framework of their respective spheres of competence and of the corresponding procedural rules, either by the enactment and enforcement of laws, as regards their validity and compatibility with the Convention, or through the identification, prosecution and deciding of particular situations and specific cases, bearing in mind the treaty and, as appropriate, the jurisprudential precedents and guidelines of the Inter-American Court.[172]

The Court sees the doctrine of 'conventionality control' as closely related to the principle of complementarity: the result is that 'a dynamic and complementary control of the States' treaty-based obligations … has been established between the domestic authorities (who have the primary obligation) and the international instance (complementarily), so that their decision criteria can be established and harmonized'.[173]

The conventionality control doctrine has been received both with enthusiasm, for its contribution to the entrenchment of human rights protection, and criticism, for its interference with domestic decision-making powers.[174] Along the latter line, the doctrine has been described as 'the obverse of the margin of appreciation', 'an extraordinary and unprecedented degree of intrusion into domestic legal systems'.[175] It has been noted that conventionality control 'does not act in a

[171] ibid para 68.

[172] ibid para 69.

[173] *Masacre de Santo Domingo* (n 148) para 143; *Gelman v Uruguay* (n 148) para 70-71.

[174] Contesse, 'The Final Word?' (n 162) 419. See the symposium in 109 AJIL Unbound (2015), introduced by Alexandra Huneeus, 'Introduction to Symposium on the Constitutionalization of International Law in Latin America', 89. See for some varied reactions by domestic courts, Pasqualucci, *The Practice and Procedure* (n 149) 301-303. *García and Flores v Mexico* (n 148) para 226-232; *Furlan v Argentina,* (n 164) para 304.

[175] Paolo Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions' (2016) 61 American J of Jurisprudence 51, 65.

complementary or subsidiary manner, but places the American Convention and its inter-American judicial interpreter, the Court, at the top of the legal order'.[176] The most controversial aspect is probably not the obligation of conventionality control in itself, which concerns the direct effect of international law in the domestic legal order, but the role that the Court assigns to itself in this context. Common expressions of the doctrine do not only oblige domestic authorities to apply the Convention, but to follow the Court's jurisprudence. At the same time, a close reading of the more recent case-law suggests that the Court has somewhat diluted its earliest expressions of the doctrine. Whereas initially it confirmed itself as the 'ultimate interpreter' of the Convention, more recently it considered that domestic authorities should bear in mind 'the treaty and, as appropriate, the jurisprudential precedents and guidelines of the Inter-American Court'.[177]

Nonetheless, the doctrine of conventionality control remains a judicial creation through which the Court imposes on all domestic authorities the explicit obligation to consider its case-law in all their decisions. Moreover, it is difficult to understand how conventionality control interacts with the principle of complementarity.[178] It obliges domestic authorities to pass judgment on conventionality before the Court does so.[179] The Court has not clarified, however, whether this anterior role of domestic decision-makers affects its own review. In *Cabrera García and Montiel Flores v Mexico*, the respondent argued that the exercise of conventionality control by its domestic courts, in light of the fourth instance doctrine, barred the jurisdiction of the IACtHR. The Court did not accept this objection: 'the merits stage shall determine whether the presumed conventionality control allegedly exercised by the State involved observance of the State's international obligations in accordance with this Court's case law and with the applicable international law'.[180] It would have been interesting to see how the Court would have responded

[176] Ariel Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) 50 Texas Int'l L J 45, 47.

[177] *Gelman v Uruguay* (n 148) para 69. Moreover, in some recent restatements of the conventionality control doctrine, the reference to the Court being the ultimate interpreter of the Convention have disappeared. eg *Fontevecchia and D'Amico v Agentina*, IACtHR, Judgment of 29 November 2011, para 93; *Mendoza* et al *v Argentina*, IACtHR, Judgment of 14 May 2013, para 221; *Gender identity* (n 165), para 26. See also para 193: '[t]hose who drafted and adopted the American Convention did not presume to know the absolute scope of the fundamental rights and freedoms recognized therein. Accordingly, the Convention confers on the States and the Court the task of identifying and protecting the scope in accordance with the passage of time.'

[178] The Court noted that it 'refers to domestic case law in order to found and conceptualize the violation of the American Convention in a specific case'. *Gelman v Uruguay* (n 148) para 71.

[179] ibid para 69.

[180] *García and Flores v Mexico* (n 148) para 13, 21.

to an argument that domestic conventionality control does not bar the jurisdiction of the Court, but obliges it to limit the intensity of review. In the current situation, there is no reason to assume that the Court applies a deferential standard of review when it repeats an assessment of conventionality control made at the domestic level.

The IACtHR's creation of the conventionality control doctrine in the absence of a structural counterbalancing mechanism like the margin of appreciation justifies the conclusion that the Court favours a rigorous standard of review. Bernard Duhaime finds that 'the Inter-American institutions have been very hesitant to defer to domestic legislative, administrative and judicial institutions'.[181] Jorge Contesse, similarly, concludes that 'the Inter-American Court embraces a maximalist model of adjudication – one that leaves very little, if any, room for states to reach their own decisions'.[182] Even if the Court has, in a few cases, referred to a margin of appreciation, several of these references seem to justify rigorous rather than restrained review, as the emphasis is on the restricted character of such margin.[183]

The reluctance of the Inter-American institutions to grant deference to respondent States is commonly explained by reference to the character of most of the claims traditionally brought before it, namely claims concerning gross human rights violations.[184] Andrew Legg notes that, because of this, there are 'far fewer examples of cases employing concepts of deference' in the

[181] Bernard Duhaime, 'Subsidiarity in the Americas. What Room is There for Deference in the Inter-American System?' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 10) 314.

[182] Jorge Contesse, 'Contestation and Deference in the Inter-American Human Rights System' (2016) 79 L and Contemporary Problems 2, 124.

[183] cf Boudouhi, 'A Comparative Approach' (n 2) 21: 'it is doubtful that the Court really uses the doctrine, even though its terminology may evoke in certain cases the *concept* of margin of appreciation'. Carozza, 'The Problematic Applicability of Subsidiarity' (n 175) 64: in the Inter-American human rights jurisprudence, 'there is no doctrine of a margin of appreciation'. Carozza is wrong, however, to suggest that the Inter-American institutions never use the term 'margin of appreciation'.

[184] Contreras, 'National Discretion and International Deference' (n 152) 28-29. James Cavallaro and Stephanie Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: the Case of the Inter-American Court' (2008) 102 AJIL 768, 774: 'the Court continues to adjudicate cases of severe, endemic violations such as paramilitary violence, summary executions, use of torture by police, and brutal violence against detained individuals'. Cavallaro and Brewer note that with the enlargement of the Council of Europe in the 1990s, such cases have become more common before the ECtHR as well. Gerald Neuman notes that the IACtHR does not rely on a regional consensus, like the ECtHR often does. Gerald Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 EJIL 101. See further Víctor Abramovich, 'From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System' (2009) 11 Sur – Int'l J on Human Rights 7.

practice of the IACtHR than in that of the ECtHR.[185] At the same time, he argues that deference has 'as much relevance in the context of the Inter-American system of human rights protection as anywhere else'.[186] He points out that since the Court is now dealing more often with cases concerning cultural differences and a dynamic interpretation of the Convention, there is an increasing role for the margin of appreciation in the Inter-American system.[187] Yet this claim is hardly substantiated by Legg's limited sample of cases in which this alleged deferential approach is demonstrated.[188] Indeed, Jorge Contesse argues that even if the Court now addresses a wider range of human rights issues, it still does so 'without granting deference to domestic states'.[189]

Former President of the Court Antônio Cançado Trindade has identified differences between the European and the American domestic contexts in order to explain why the margin of appreciation does not apply within the Inter-American system.[190] He has pointed out that the margin of appreciation is premised on 'the existence of truly democratic States, with autonomous judicial powers'.[191] In many of the member States of the American Convention, by contrast, judges are subject to intimidation and pressure, while there is no distinction between military and civil jurisdictions. In those circumstances, he argues, 'we have no alternative but to strengthen the international mechanisms for protection'.[192]

Some scholars have sought other explanations for the strict scrutiny of the IACtHR, beyond the quality of the domestic rule of law in American States. According to Dinah Shelton, 'the basic texts of the Inter-American system are more ambitious than those of the European system,

---

[185] Legg, *The Margin of Appreciation* (n 44) 4.

[186] ibid 31.

[187] ibid 4-5. Nino Tsereteli argues that 'instances of deference will become more frequent', now that the capacity of national authorities is improving. Tsereteli, 'Emerging Doctrine' (n 163) 1104.

[188] In section 2.5.b. of his book, where Legg summarizes the approach of the IACtHR, he mentions only a handful of cases, the 'clearest resort to second-order reasoning' being the 1984 *Naturalization* Advisory Opinion. Legg, *The Margin of Appreciation* (n 44) 32.

[189] Contesse, 'Contestation and Deference' (n 182) 128.

[190] cf James Cavallaro and Stephanie Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 AJIL 768, 774.

[191] Quoted in López Guerra, 'Two Dimensions of Subsidiarity' (n 146) 91.

[192] Quoted in Contesse, 'Contestation and Deference' (n 182) 134. For other examples of criticism of the margin of appreciation by Cançado Trindade, see Contreras, 'National Discretion and International Deference' (n 152) 61-63. See also the experience Paolo Carozza, former member of the Commission: 'I can estimate that at least three quarters of the contentious cases that came to us involved serious failures by judicial bodies to uphold basic requirements of justice and due process that ought to be routine in any moderately healthy system of law'. Carozza, 'The Problematic Applicability of Subsidiarity' (n 175) fn 41.

containing longer and more detailed listings of human rights'.[193] In addition, she argues that the IACtHR may feel emboldened by experience of the ECtHR: the IACtHR 'is not as cautious and hesitant in its review as the first court seemingly felt it had to be'.[194] Laurence Burgorgue-Larsen argues that '[d]epuis ses débuts, [la Cour] a toujours privilégié la finalité *pro homine* de la Convention' and expressed a 'préférence pour une protection maximale des droits'.[195] She explains this approach by reference to the Convention's rules on interpretation and its openness to other sources of international human rights law, expressed in Article 29, and the natural law philosophy underlying the Convention. Combined with the political and sociological context of the Court, this means that 'tous les ingrédients sont réunis pour que la Cour interaméricaine des droits de l'homme privilégie une approche interprétative téléologique et évolutive'.[196]

For current purposes, the most relevant question is how the Court itself justifies its standard of review. It does hardly do so, however, beyond the observation that the States party to the Convention assumed international obligations when acceding to the treaty and that the Court was instituted to provide final interpretations of these obligations. This suggests that the Court does not see a need to justify its standard of review. Indeed, it seems to depart from the observation that when exercising its review, it is only fulfilling the mandate given to it by the States party to the Convention. From this point of view, it is deference, not rigorous review, which would be in need of justification.

2.5 The African Court on Human and Peoples' Rights

Before the ACtHPR issued its first judgment in 2009, the African Commission had already recognised the relevance of both the principle of subsidiarity and the margin of appreciation for the African Charter:

> The principle of subsidiarity indeed informs the African Charter, like any other international and/or regional human rights instrument does to its respective supervisory body established under it, in that the African Commission could not substitute itself for

[193] Dinah Shelton, 'Judicial Review of State Action by International Courts' (1988) 12 Fordham J of Int'l L 361, 379.
[194] ibid.
[195] Laurence Burgorgue-Larsen, 'Les methods d'interprétation de la Cour interaméricaine des droits de l'homme. *Justice in Context* (2014) 97 Revue trimestrielle des droits de l'homme 31, 33, 35.
[196] ibid 36.

> internal/domestic procedures found in the respondent state that strive to give effect to the promotion and protection of human and peoples' rights enshrined under the African Charter. Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape its society. … The African Commission is aware of the fact that it is a regional body and cannot, in all fairness, claim to be better situated than local courts in advancing human and peoples' rights in member states.[197]

A similar doctrine of subsidiarity has not been expressed in the still limited jurisprudence of the Court. The most common references to deference in the case-law of the ACtHPR concern the review of domestic criminal proceedings. In *Mtingwi v Malawi*, the Court considered 'that it does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and/or regional and similar Courts'.[198] The 'primacy' of the domestic system for the protection of human rights implies that 'the Court does not have a first instance jurisdiction over a matter which was not raised at the domestic level'.[199] Nonetheless, in *Thomas v Tanzania*, the Court added that this would not 'preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards' found in human rights law.[200] Moreover, in *Abubakari v Tanzania*, it considered that 'this Court

[197] *Prince v South Africa*, ACHPR, 255/2002, Communication of December 2004, para 50-52. It has been noted, though, that in practice '[t]he African Commission has in effect taken any margin of appreciation away from states, even on issues of custom'. Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (Hart 2000) 45. See also Rachel Murray, 'Borrowing International Human Rights Law. Some Examples from the Doctrine of the Margin of Appreciation in the African Charter on Human and Peoples' Rights' in Charles Chernor Jalloh and Alhagi Marong (eds), *Promoting Accountability under International Law for Gross Human Rights Violations in Africa. Essays in Honour of Prosecutor Hassan Bubacar Jallow* (Brill 2015).

[198] *Mtingwi v Malawi*, ACtHPR, 001/2013, Decision of 15 March 2013, para 14.

[199] *Isiaga v Tanzania*, ACtHPR, 032/2015, Judgment of 21 March 2018, para 34.

[200] *Thomas v Tanzania*, ACtHPR, 005/2013, Judgment of 20 November 2015, para 130. *Jonas v Tanzania*, ACtHPR, 011/2015, Judgment of 28 September 2017, para 28; *Umuhoza v Rwanda*, ACtHPR, 003/2014, Judgment of 24 November 2017, para 54; *Viking and Nguza v Tanzania*, ACtHPR, 006/2015, Judgment of 23 March 2018, para 35; *Isiaga v Tanzania* (n 199) para 34; *Mango and Mango v Tanzania*, ACtHPR, 005/2015, Judgment of 11 May 2018, para 116.

would be acting as an appellate jurisdiction only if, *inter alia*, it were to apply to the case the same law as the Tanzanian national courts, that is, Tanzanian law'.[201] In regard to factual assessments, the Court considered in *Isiaga v Tanzania* that:

> The Court underscores that domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[202]

Except in cases where a 'manifest error' or a 'miscarriage of justice' was demonstrated, the Court indicated that it would defer to the domestic courts.[203]

Beyond the review of domestic criminal proceedings, the Court has referred to the margin of appreciation in *Umuhoza v Rwanda*. In that case the Court reviewed the criminalisation of genocide revisionism and noted 'the margin of appreciation that the Respondent State enjoys in defining and prohibiting some criminal acts in its domestic legislation'.[204] In two other cases, the respondent State invoked special local circumstances to justify impugned policies. In *Tanganyika Law Society* et al *v Tanzania*, the applicants complained of a constitutional ban on independent, unaffiliated candidates for political elections. The respondent argued that the ban was 'dependent on the social needs of the country, based on its historical reality' and that it was a 'political and not legal' issue.[205] The Court assessed whether the difference in treatment enshrined in the ban were 'pertinent, in other words reasonable, and legitimate', and found that this was not the case.[206] In *APDF and IHRDA v Mali*, the respondent invoked 'social, cultural and religious realities' to justify a legal minimum age of marriage of 15 years.[207] The Court did not address this argument

[201] *Abubakari v Tanzania*, ACtHPR, 007/2013, Judgment of 3 June 2016, para 28. See also *Onyachi v Tanzania*, ACtHPR, 003/2015, Judgment of 28 September 2017, para 39, where the Court observed 'that it does not have jurisdiction to examine the constitutionality of domestic legislation', but that it can review legislation in the light of international human rights law.

[202] *Isiaga v Tanzania* (n 199) para 65.

[203] ibid para 73. *Viking and Nguza v Tanzania* (n 200) para 89.

[204] *Umuhoza v Rwanda* (n 200) para 138.

[205] *Tanganyika Law Society* et al *v Tanzania*, ACtHPR, 009/2011, 011/2011, Judgment of 14 June 2013, para 94.

[206] ibid para 119.

[207] *APDF and IHRDA v Mali*, ACtHPR, 046/2016, Judgment of 11 May 2018, para 66. The respondent also argued that a planned amendment of the relevant legislation could not be promulgated due to 'force majeure' in the form of

in its judgment. Indeed, for now it seems the Court has not developed a structural approach on the distribution of authority between itself and domestic decision-makers, even if the Commission has expressed such a position.

2.6 The World Trade Organization

Throughout the history of the General Agreement on Tariffs and Trade (GATT) and the WTO, the intensity of review, in trade law commonly discussed as 'standard of review', has been a recurrent topic of debate.[208] During the Uruguay Round, some negotiators pressed for a deferential standard of review whereas others objected to such an approach, afraid to hamper the effectiveness and consistency of international trade dispute settlement.[209] In the end, a specific standard of review was adopted only in the context of anti-dumping, in the form of Article 17.6 of the Antidumping

'a mass protest movement', 'a huge threat of social disruption, disintegration of the nation and upsurge of violence', para 63-64.

[208] eg, Andrew Stuart, '"I Tell Ya I Don't Get No Respect!": The Policies Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals' (1992) 23 L and Policy in Int'l Business 749; Steven Croley and John Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 AJIL 193; Stefan Zleptnig, 'The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority' (2002) 13 Eur Business L Rev 427; Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (OUP 2003); Claus-Dieter Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law' (2004) 7 JIEL (2004) 491; Elisabeth Trujillo, 'Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures and the WTO' (2007) 40 Cornell Int'l L J 201; Jan Bohanes and Nicolas Lockhart, 'Standard of Review in WTO Law' in Daniel Bethlehem *et al* (eds), *The Oxford Handbook of International Trade Law* (OUP 2009); Andrew Guzman, 'Determining the Appropriate Standard of Review in WTO Disputes' (2009) 42 Cornell Int'l L J 45; Muhammed Korotana, 'The Standard of Review in WTO Law' (2009) 15 Int'l Trade L and Regulation 72; Daniel Lovric, *Deference to the Legislature in WTO Challenges to Legislation* (Kluwer 2010); Becroft, *The Standard of Review* (n 9).

[209] John Jackson, 'The Great 1994 Sovereignty Debate: United State Acceptance and Implementation of the Uruguay Round Results' (1997) 36 Columbia J of Transnat'l L 157, 182; Steven Croley and John Jackson, 'WTO Dispute Panel Deference to National Government Decisions. The Misplaced Analogy to the US Chevron Standard-of-Review Doctrine' in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer 1999) 189; Michael Ioannidis, 'Beyond the Standard of Review. Deference Criteria in WTO Law and the Case for a Procedural Approach', in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 10) 91.

Agreement (ADA). The more general standard of review was provided, according to the Appellate Body, in Article 11 of the Dispute Settlement Understanding (DSU).

2.6.1 Article 11 of the Dispute Settlement Understanding

In the case of *EC – Hormones*, the European Communities argued that the standard provided in Article 17.6 ADA should apply also in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[210] The Appellate Body (AB) rejected that proposal.

> The standard of review appropriately applicable in proceedings under the *SPS Agreement*, of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that. We do not mean however, to suggest that there is at present no standard of review applicable to the determination and assessment of the facts in proceedings under the *SPS Agreement* or under other covered agreements. In our view, Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.[211]

[210] More precisely, the EC advocated the application of Art 17.6(i), described as a 'deferential "reasonableness" standard', and argued that it should be applied 'in all highly complex factual situations'. *European Communities - Measures Concerning Meat and Meat Products (EC – Hormones)*, WTO DS26, AB Report of 16 January 1998, para 113.

[211] ibid para 115-116. The AB's reference to 'sufficient clarity' has often been mocked. eg Sharif Bhuiyan, *National Law in WTO Law. Effectiveness and Good Governance in the World Trading System* (CUP 2007) 161: '[q]uite contrarily, this provision says almost nothing about standard of review'.

In *EC – Hormones*, the AB identified Article 11 of the Dispute Settlement Understanding (DSU) as the general standard of review for WTO dispute settlement panels.[212] This article stipulates, in its relevant parts:

> (…) a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements (…).[213]

In *EC – Hormones*, the AB further interpreted this provision, distinguishing between questions of fact and questions of law.[214] The AB specified that an 'objective assessment of the facts' does not imply *de novo* review, because panels are 'poorly suited to engage in such a review', nor total deference.

> So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts". Many panels have in the past refused to undertake *de novo* review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, "total deference to the findings of the national authorities", it has been

[212] See further G Axel Desmedt, 'Hormones: "Objective Assessment" and (or as) Standard of Review' (1998) 1 JIEL 695. For the standard of review under the SPS Agreement specifically, see Michael Du, 'Standard of Review under the SPS Agreement after *EC – Hormones II*' (2010) 59 ICLQ 441; Jacqueline Peel, 'Of Apples and Oranges (and Hormones in Beef): Science and the Standard of Review in WTO Disputes under the SPS Agreement' (2012) 61 ICLQ (2012) 427; Tracey Epps, 'Recent Developments in WTO Jurisprudence: Has the Appellate Body Resolved the Issue of an Appropriate Standard of Review in SPS Cases?' (2012) 62 University of Toronto L J 201.

[213] See Yang Guohua *et al* (eds), *WTO Dispute Settlement Understanding. A Detailed Interpretation* (Kluwer 2005) 110-119, 124-128.

[214] This distinction is common in the WTO legal framework. cf Art 17.6 ADA and Art 17.6 DSU. Oesch, *Standards of Review* (n 208) 16-19. In practice, the distinction is not unproblematic. See for a discussion in the context of the restrictive scope of AB review, Pieter Jan Kuijper, 'The Appellate Body and the Facts' in Marco Bronckers (ed), *New Directions in International Economic Law. Essays in Honour of John H Jackson* (Kluwer 2000). See also Richard Bilder, 'The Fact/Law Distinction in International Adjudication' in Lillich, *Fact-Finding* (n 149), questioning whether the distinction applies differently in the international than in the domestic context.

> well said, "could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU".[215]

As far as legal questions were concerned, the AB held that panels should apply 'the customary rules of interpretation of public international law'.[216]

Although the AB identified the 'objective assessment' of Article 11 DSU as a general standard of review for any question of fact or law, panels and the AB have carved out more specific standards in concrete disputes and under specific treaty standards.[217] Two different contexts, in particular, raise thorny questions regarding the rigour with which panels should exercise their scrutiny.[218] The first context is the review of domestic assessments which under WTO law are required before a Member can resort to a trade-restrictive measure.[219] If the propriety of such investigations is challenged before the WTO, the panels need to exercise a form of scrutiny which

---

[215] *EC – Hormones* (n 210) para 117 (references omitted). Matthias Oesch notes that the AB excluded *de novo* review only 'on *practical* grounds': [i]t did not mention, let alone elaborate on, other rationales which arguably are equally relevant for a somehow limited panel review of factual records'. Oesch, *Standards of Review* (n 208) 106.

[216] *EC – Hormones* (n 210) para 118. The AB based itself on Art 3.2 of the DSU, which stipulates that the dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. The reference to 'customary rules of interpretation of public international law' is commonly understood as a reference to Articles 31 and 32 of the Vienna Convention on the Law of Treaties. *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, WTO DS8, AB Report of 4 October 1996, under D.

[217] cf *US – Lamb* (n 1) para 105.

[218] cf James Cameron and Stephen Orava, 'GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures. Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000) 236-242, discussing 'deference in reviewing the decisions of domestic investigating authorities' and 'deference under the Article XX exceptions'.

[219] Michelle Grando distinguishes this situation, where the panel acts as a 'reviewer', from other contexts, where the panel acts as an 'original-trier-of-facts'. In the latter category, in which he includes determinations under the SPS and TBT Agreements, 'references to the standard of review in its narrow meaning – ie whether panels should grant low/high/total deference to a domestic authority's evaluation of the evidence – make no sense'. Michelle Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (OUP 2009) 231-245. cf Oesch, *Standards of Review* (n 208) 116, distinguishing between the review of 'raw evidence' and 'factual conclusions'. cf *United States – Subsidies on Upland Cotton (US – Upland Cotton)*, WTO DS267, AB Report of 3 March 2005, para 458, distinguishing between the task of the panel as 'the first trier of facts' and 'reviewer of factual determinations made by a domestic investigating authority'. Reto Malacrida and Gabrielle Marceau, 'The WTO Adjudicating Bodies' in Rob Howse *et al* (eds), *The Legitimacy of International Trade Courts and Tribunals* (CUP 2018) 39-41.

determines whether the domestic assessment satisfies the requirements of WTO law without repeating the actual investigation undertaken.[220] The second context is the determination of whether certain public interest policies are justified under exception clauses such as Article XX GATT and Article XIV of the General Agreement on Trade in Services (GATS).[221]

An example of the first context is provided by Article 4 of the Safeguards Agreement, which obliges Members who intend to apply a safeguard measure to 'evaluate all relevant factors of an objective and quantifiable nature'. Only when 'objective evidence' demonstrates a causal link between increased imports and domestic injury, can Members proceed with the imposition of safeguard measures. In concrete disputes, panels have had to evaluate whether Members complied with this requirement. In *Argentina – Footwear*, Argentina complained that the Panel had engaged in *de facto de novo* review of the findings and conclusions of the Argentine authorities. The Appellate Body replied:

> [W]e do not believe that the Panel conducted a *de novo* review of the evidence, or that it substituted its analysis and judgement for that of the Argentine authorities. Rather, the Panel examined whether, as required by Article 4 of the *Agreement on Safeguards*, the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view, the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. … [T]he Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.[222]

In *US - Lamb*, the AB read into this interpretation a formal and a substantive aspect, the formal one being whether the domestic authorities evaluated 'all relevant factors' and the substantive one

---

[220] cf *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea (US — Countervailing Duty Investigation on DRAMs)*, WTO DS296, AB Report of 27 June 2005, para 188: 'a panel examining a subsidy determination should bear in mind its role as *reviewer* of agency action, rather than as *initial trier of fact'*.

[221] Emily Lydgate, 'Is it Rational and Consistent? The WTO's Surprising Role in Shaping Domestic Public Policy' (2017) 20 JIEL 561, 581: '[t]he standard of review applied to domestic regulation is crucial to defining the balance of power between an international court and the domestic government'.

[222] *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear)*, WTO DS121, AB Report of 14 December 1999, para 121.

being whether the national determination was supported by a 'reasoned and adequate explanation'.[223] The AB added that:

> We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel.[224]

In *US – Cotton Yarn*, the AB summarised its case-law on the standard of review under the Safeguards Agreement and concluded that it spells out 'key elements of a panel's standard of review under Article 11 of the DSU'.[225] Consequently, these elements were also found to be relevant under other agreements.[226]

---

[223] *US – Lamb* (n 1) para 103.

[224] ibid para 106. The AB considered that an explanation would not be reasoned or adequate 'if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation'.

[225] *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US – Cotton Yarn)*, WTO DS192, AB Report of 8 October 2001, para 74. cf *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada (US – Softwood Lumber VI)*, WTO DS277, Art 21.5 AB Report of 13 April 2006, para 93.

[226] ibid para 76 (ATC); *United States – Definitive Safeguard Measures on Imports of Certain Steel Products (US – Steel Safeguards)*, WTO DS248, AB Report of 10 November 2003, para 276 (GATT); *US — Countervailing Duty Investigation on DRAMs)* (n 220) para 184 (SCM Agreement). Oesch, *Standards of Review* (n 208) 108: 'the analysis of the case law will indicate that, overall, panels and the Appellate Body have applied these key elements similarly throughout all agreements'.

For the SPS Agreement, cf *Japan - Measures Affecting the Importation of Apples (Japan – Apples)*, WTO DS245, AB Report of 26 November 2003, para 165-166, rejecting the view that the panel should 'favour' or 'give precedence to' the importing Member's evaluation of evidence and risk. *Canada – Continued Suspension of Obligations in the EC-Hormones Dispute (Canada – Continued Suspension)*, WTO DS321, AB Report of 16 October 2008, para 590: '[t]he panel's task is to review that risk assessment. Where a panel goes beyond this limited mandate and acts as a risk assessor, it would be substituting its own scientific judgement for that of the risk assessor and making a *de novo* review and, consequently, would exceed its functions under Article 11 of the DSU. Therefore, the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense,

In *US – Cotton Yarn*, the AB also established that the panel's assessment should not consider evidence which did not exist when the contested domestic decision was taken. Noting the 'urgent' nature of safeguard investigations, the AB held that:

> A Member cannot, of course, be faulted for not having taken into account what it could not have known when making its determination. If a panel were to examine such evidence, the panel would, in effect, be conducting a *de novo* review … . The panel would be assessing the due diligence of a Member in reaching its conclusions and making its projections with the benefit of hindsight and would, in effect, be reinvestigating the market situation and substituting its own judgement for that of the Member. In our view, this would be inconsistent with the standard of a panel's review under Article 11 of the DSU.[227]

The second context in which the quest for a proper standard of review has proven controversial concerns the necessity of trade-restrictive measures allegedly adopted in the public interest.[228] In *US – Gasoline*, the AB considered that:

> WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.[229]

---

objectively justifiable.' See for a further qualification *Australia - Measures Affecting the Importation of Apples from New Zealand (Australia – Apples)*, WTO DS367, AB Report of 29 November 2010, para 225. Lukasz Gruszczynski, *Regulating Health and Environmental Risks under WTO Law* (OUP 2010) 50-52.

[227] *US – Cotton Yarn* (n 225) para 77-78. The situation seems different when panels are required not to review domestic investigations, but to conduct their own review. *Australia – Apples* (n 226) para 356; *Korea - Import Bans, and Testing and Certification Requirements for Radionuclides (Korea – Radionuclides (Japan))*, WTO DS495, Panel Report of 22 February 2018, para 7.6.

[228] Hélène Ruiz Fabri, 'La nécessité devant le juge de l'OMC', in Société francaise pour le droit international, *La nécessité en droit international. Colloque de Grenoble* (Pedone 2007) 204.

[229] *United States - Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WTO DS2, AB Report of 29 April 1996, 30. cf *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications)*, WTO DS363, AB Report of 21 December 2009, para 222, referring to the 'right to regulate' mentioned in China's Protocol of Accession: 'we see the "right to

These requirements may include that a certain policy allegedly adopted to further a legitimate interest is indeed 'necessary' and not a disguised form of protectionism. Since the AB's report in *Korea – Beef*, the necessity test has been applied in the form of a balancing exercise. In that report, the AB evaluated a measure in the light of Article XX(d) GATT, which justifies measures 'necessary to secure compliance with laws or regulations'. According to the AB, the necessity analysis involves:

> a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[230]

The balancing assessment should respect the Member's chosen level of protection of non-trade interests: '[i]t is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations'.[231] This right also applies to other general exceptions. In *EC – Asbestos*, the AB considered that 'it is undisputed that WTO Members have the right to determine the level of protection of health that they consider

---

regulate", in the abstract, as an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the *WTO Agreement*.'

[230] *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea – Beef)*, WTO DS161, AB Report of 11 December 2000, para 164. cf *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WTO DS400, AB Report of 22 May 2014, para 5.169, where the AB suggests a general 'necessity' test for the different subparagraphs of Article XX GATT.

[231] *Korea – Beef* (n 230) para 176. This language 'migrated' from the text of the SPS Agreement to Article XX GATT. *Australia – Measures Affecting Importation of Salmon (Australia – Salmon)*, WTO DS18, AB Report of 20 October 1998, para 199: '[t]he determination of the appropriate level of protection … is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body'. See Michael Du, 'Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?' (2010) 13 JIEL 1077, 1079.

appropriate in a given situation'.[232] Consequently, WTO adjudicators respect the Member's chosen level of protection as the departure point of the necessity assessment.[233]

Yet in other ways, the AB has rejected deferential approaches. In *US – Gambling*, it held in the context of Article XIV GATS that:

> [T]he standard of "necessity" provided for in the general exceptions provision is an *objective* standard. To be sure, a Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach (…) will be relevant in determining whether the measure is, objectively, "necessary". A panel is not bound by these characterizations, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the "necessity" of the measure before it.[234]

The language used in *US – Gambling* suggests that the AB prescribes a *de novo* review under the necessity requirement. Matthias Oesch notes that there seems to exist a presumption of 'full *de novo* review towards WTO law': '[n]o defendant has ever tried to justify a disputed policy measure on the basis of its own interpretation of WTO law to which judicial restraint should be applied'.[235] At the same time, the existing case law has been interpreted in divergent ways by academic observers, differing in their assessment as to whether the standard applied is actually deferential or intrusive. Oesch notes that:

---

[232] *European Communities - Measures Affecting Asbestos and Products Containing Asbestos (EC – Asbestos)*, WTO DS135, AB Report of 12 March 2001, para 168. In practice the freedom to choose a certain level of protection may apply mostly to health concerns. M Bloche, 'WTO Deference to National Health Policy: Toward an Interpretive Principle' (2002) JIEL 825, 848: 'the WTO's tacit endorsement of protection for health as an interpretive principle, effected through heightened deference to national health policies'. Petros Mavroidis, 'The Gang That Couldn't Shoot Straight: the Not So Magnificent Seven of the WTO Appellate Body' (2017) 27 EJIL 1107, 1112: '[d]eference was effectively limited to cases where human health is at stake (…) and not when other societal preferences are advanced'. Isabelle van Damme, 'Procedural Review in WTO Law' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (CUP 2017) 233: '[t]he degree of deference … appears to differ depending on the sub-paragraph which is invoked'.

[233] There is an analytical tension, however, between the AB's respect for the chosen level of protection and a proportionality assessment *stricto sensu*. See Ruiz Fabri, 'La nécessité' (n 228) 213-214.

[234] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WTO DS285, AB Report of 7 April 2005, para 304. Cf the Panel Report of 10 November 2004, para 6.461.

[235] Oesch, *Standards of Review* (n 208) 174-175. Guzman, 'Determining the Appropriate Standard' (n 208) 59.

> Despite the strict policy of *de novo* review, panels and the Appellate Body have not assumed for themselves a too active role … Rather than through a deferential standard of review, in a technical sense, they have taken national sensitivities and political preferences in sensitive subject-matters into adequate account through deferential means of interpretation.[236]

Likewise, Rob Howse has interpreted the AB's application of the necessity test as 'a rather deferential standard of review to determine whether, given the impact on trade, the defending Member has acted reasonably in the choice of policy instrument for its chosen objective'.[237] According to Howse, the necessity test 'largely boils down to assessing the overall reasonableness of the Member choosing the measure that it uses to achieve its objective, given the trade restrictiveness of that measure'.[238] The interpretation given by Oesch and Howse is not universally shared.[239] Gisele Kapterian condemns the balancing test enunciated in *Korea-Beef* and its subsequent application for 'expanding the adjudicating bodies' jurisdiction and discretion', constituting 'an unwarranted intrusion into Members' autonomy'.[240]

> [T]he balancing test expands the jurisdiction of the adjudicating bodies, demonstrating a disconcerting dependence on their discretion for the survival of domestic regulatory choices. The jurisprudence reveals a strong tendency to judge the value of the policy goal using the adjudicating bodies' own value system and opaque reasoning on how the

[236] Oesch, *Standards of Review* (n 208) 182. Oesch speaks about 'a *state sovereignty conscious* method of interpretation'. He quotes Cameron and Orava, 'GATT/WTO Panels Between Recording and Finding Facts (n 218) 241: 'the Appellate Body has begun to articulate a constitutional doctrine of deference'.

[237] Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 EJIL 9, 46. See also Ming Du, 'The Necessity Test in World Trade Law: What Now?' (2016) 12 Chinese J of Int'l L 817, 836: 'the weighing and balancing test, after the AB's constant refinement, tends to give more respect to WTO Members' domestic regulatory autonomy than the GATT/WTO panels did in the earlier years'.

[238] Howse, 'The World Trade Organization 20 Years On' (n 237) 49, 50. cf Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (OUP 2009) 284: 'a margin of appreciation has been given to WTO Members also for adopting a "precautionary approach" to environmental and health protection under the GATT'.

[239] Sarah Joseph, *Blame it on the WTO. A Human Rights Critique* (OUP 2011) 117: 'the Appellate Body and the Panels engage in a high level of scrutiny in examining a State's impugned measures under WTO law. There is little sign of a margin of discretion being accorded to States'; Mavroidis, 'The Gang That Couldn't Shoot Straight' (n 232) 1112.

[240] Gisele Kapterian, 'A Critique of the WTO Jurisprudence on "Necessity"' (2010) 59 ICLQ 89, 127.

> elements of the balancing test interact when applied to the particular circumstances of the case.[241]

An assessment of whether or not the standards enunciated by the AB are deferential is difficult to determine without reference to the actual outcome reached in concrete cases.[242] However, for the purposes of this study, the most relevant element of the WTO case law on necessity is the absence of explicitly deferential language. Even if the approach of the AB may be considered lenient in practice, it has not adopted a discourse of judicial deference.[243]

2.6.2 Article 17.6 of the Antidumping Agreement

The compromise that was negotiated during the final days of the Uruguay Round entailed that no general standard of deferential review would be specified for the WTO dispute settlement system as a whole. At the same time, at the behest of the US, a specific standard of review was introduced in Article 17.6 of the ADA, which governs a particularly contentious branch of trade law.[244] It was

---

[241] ibid 91.

[242] Desmedt, 'Hormones' (n 212) 1 JIEL 695, 698: '[p]erhaps more telling than a general pronouncement on the standard of review, are the actual findings of the Appellate Body in the *Hormones* case. There, the Appellate Body appeared to show more deference to the EC authorities' measures than the Panel did. In this sense, an argument can be made that the Appellate Body favoured a deferential approach'.

[243] A curious exception is the reference to *in dubio mitius* in *EC – Hormones* (n 210) fn 165. See further below, section 3.2.1.5. Moreover, in its *US – COOL* Article 25.1 Report, the AB considered in the context of Article 2.2 of the TBT Agreement that 'there is a margin of appreciation in the assessment of whether a proposed alternative measure achieves an equivalent degree of contribution'. *United States - Certain Country of Origin Labelling (COOL) Requirements (US - COOL)*, WTO DS384, AB Article 21.5 Report of 18 May 2015, para 5.215. See Anna Aseeva, 'The Right of States to Regulate in Risk-Averse Areas and the ECtHR Concept of Margin of Appreciation in the WTO *US – COOL Article 2.5* Decision' (2015) 11 Croation Ybk of Eur L and Policy 161. James Flett, 'The Client's Perspective' in Marion Jansen *et al* (eds), *The Use of Economics in International Trade and Investment Disputes* (CUP 2017) 96. However, this 'margin of appreciation' seems to relate to the Panel's rather than the Member's assessment. Para 5.269 confirms that understanding. See also *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Australia – Plain Packaging (Honduras))*, WTO DS435, Panel Report of 28 June 2018, para 7.1371, 7.1463, 7.1722.

[244] Croley and Jackson, 'WTO Dispute Panel Deference' (n 209) 194-195; Gary Horlick and Peggy Clarke, 'Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO' in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer 1999); Andrew Stoler, 'The WTO

also decided that the standard of review of Article 17.6 would be 'reviewed after a period of three years with a view to considering the question of whether it is capable of general application'.[245] In reality, this assessment did not take place, and the AB has rejected the application of Article 17.6 outside the scope of the ADA.[246] The relevance of Article 17.6 thus remains limited to antidumping cases.[247]

The first paragraph of Article 17.6 reads:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

From this standard follows that as far as factual assessments are concerned, panels have to restrict their review to verifying whether the domestic assessment was 'proper' and 'unbiased and objective'. Panels are explicitly warned not to substitute their own assessment for that of domestic authorities, as long as the latter complied with the requirements mentioned.[248]

As to questions of law, Article 17.6 holds:

> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible

---

Dispute Settlement Process: Did the Negotiators Get What They Wanted?' (2004) 3 World Trade Rev 99, 109-112; Becroft, *The Standard of Review* (n 9) 44-46.

[245] Ministerial Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Moreover, another Ministerial Declaration recognised 'the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures'.

[246] *EC – Hormones* (n 210) para 114; *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US – Lead and Bismuth II)*, WTO DS138, AB Report of 10 May 2000, para 50.

[247] See for a detailed analysis, Edwin Vermulst, *The WTO Anti-Dumping Agreement. A Commentary* (OUP 2005) 224-232.

[248] Pieter Jan Kuijper, 'From the Board: The US Attack on the WTO Appellate Body' (2018) 45 Legal Issues of Economic Integration 1, 5: '[w]hat is now Article 17(6)(i) ADA was relatively uncontroversial, as it represented the "non-de-novo-review" rule, also known as "broad margin of appreciation" in European administrative law systems, although written in a typical US legislative style'.

> interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[249]

In *Guatemala – Cement*, the AB established that Article 17 ADA does not replace the stipulations of the DSU. Such an interpretation would 'deny the integrated nature of the WTO dispute settlement system'.[250] A special provision like Article 17 would only prevail over the DSU in case of an inconsistency between the two.[251] In *US – Hot-Rolled Steel*, the AB did not find such an inconsistency between Article 17.6 ADA and the DSU. It held with regard to Article 17.6(i):

> [T]he text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the Anti-Dumping Agreement does not expressly state that panels are obliged to make an assessment of the facts which is "objective". However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an objective "assessment of the facts of the matter".[252]

With regard to Article 17.6(ii), the AB ruled that a plurality of 'permissible interpretations' could only be identified *after* application of the pertinent customary rules of treaty interpretation. The AB then concluded:

> Nothing in Article 17.6(ii) of the Anti-Dumping Agreement suggests that panels examining claims under that Agreement should not conduct an "objective assessment" of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. Article 17.6(ii) simply adds

---

[249] It is commonly held that the Article 17.6(ii) was modelled after the *Chevron* deference known in US administrative law. Becroft, *The Standard of Review* (n 9) 63; Kuijper, 'The US Attack on the WTO Appellate Body' (n 248) 5-6. See for a critical comparison, Croley and Jackson, 'WTO Dispute Panel Deference' (n 209); Carlos Vázquez, 'Judicial Review in the United States and in the WTO: Some Similarities and Differences' (2004) 36 George Washington Int'l L R 587, 602-605.

[250] *Guatemala – Anti-Dumping Investigation regarding Portland Cement from Mexico (Guatemala – Cement I)*, WTO DS60, AB Report of 2 November 1998, para 67. See *US – Softwood Lumber VI* (n 225) Panel Report of 22 March 2004, para 7.14-7.22.

[251] *Guatemala – Cement I* (n 250) para 66.

[252] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US – Hot-Rolled Steel)*, WTO DS184, AB Report of 24 July 2001, para 55. See also *US – Softwood Lumber VI* (n 225) para 92.

> that a panel shall find that a measure is in conformity with the Anti-Dumping Agreement if it rests upon one permissible interpretation of that Agreement.[253]

In *US – Continued Zeroing*, the AB further explained that Article 17.6(ii) 'allows for the possibility that the application of the rules of the Vienna Convention may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible'.[254] According to the AB, '[t]he function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail'.[255] However, the AB also noted that treaty interpretation according to the Vienna Convention could never produce 'mutually contradictory results'.[256] Instead, all permissible interpretations should fit 'harmoniously with the terms, context, and object and purpose of the treaty'.[257]

In practice, the AB has refused to recognise a plurality of permissible interpretations, even if panels have done so.[258] Some academic observers have frequently criticised the case law on anti-dumping for failing to give effect to the deferential standard of review embodied in Article 17.6.[259]

---

[253] *US – Hot-Rolled Steel* (n 252) para 62. Mavroidis, 'The Gang That Couldn't Shoot Straight' (n 232) 1109: 'this meant the end of deference in anti-dumping disputes'.

[254] *United States – Continued Existence and Application of Zeroing Methodology (US – Continued Zeroing)*, WTO DS350, AB Report of 4 February 2009, para 272.

[255] ibid.

[256] ibid para 273.

[257] ibid.

[258] *United States - Final Anti-dumping Measures on Stainless Steel from Mexico (US – Stainless Steel (Mexico))*, WTO DS344, Panel Report of 20 December 2007, para 7.143; AB Report of 30 April 2008, para 134, 136. *US – Continued Zeroing* (n 254) Panel Report of 1 October 2008, para 7.162-7.163; AB Report of 4 February 2009, para 317. See also Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 68-71; Becroft, *The Standard of Review* (n 9) 63-64.

[259] Richard Cunningham and Troy Cribb, 'Dispute Settlement through the Lens of "Free Flow of Trade". A Review of WTO Dispute Settlement of US Anti-Dumping and Countervailing Duty Measures' (2003) 6 JIEL 155, 161-162: '[t]he WTO Panels and the Appellate Body, however, have demonstrated a remarkable proclivity to find ways to substitute their own judgments for those of domestic authorities despite the Article 17 requirement'; Lee Hamilton, 'US Antidumping Decisions and the WTO Standard of Review: Deference or Disregard?' (2003) 4 Chicago J of Int'l L 265; Roger Alford, 'Reflections on *US-Zeroing*: A Study in Judicial Overreaching by the WTO Appellate Body' (2006) 45 Columbia J of Transnat'l L 196.

Others, however, have defended the AB's approach.[260] With regard to paragraph 2 of Article 17.6, it has been questioned whether the customary rules of interpretation ever allow for more than one permissible interpretation of a treaty provision.[261] In other words, the fact that the AB has never applied the second sentence is a logical consequence of the 'uneasy embrace' between the two sentences of paragraph 2.[262]

2.6.3 Conclusions on the WTO

The dispute settlement system of the WTO regularly reviews the propriety of domestic decision-making procedures and the legality of public policies. The appropriate standard of review is a controversial matter in such disputes. The AB has specified that Article 11 DSU provides the overall standard of review, obliging panels to make an 'objective assessment' of the matter. Even if the

[260] James Durling, 'Deference, but Only When Due: WTO Review of Anti-Dumping Measures' (2003) 6 JIEL 125; Kuijper, 'The US Attack on the WTO Appellate Body' (n 248) 6.

[261] Donald McRae, 'Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 178: 'application of the Vienna rules produces a result—an interpretation—and so after the application of the first sentence to the provision in question there is no room for the second sentence to have any effect'; Andreas von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standard of Review' (2012) 10 I-CON 1023, 1043-1044: '[t]he rules of treaty interpretation … precisely aim to eliminate any ambiguity with respect to a given norm and speak of the identification of a norm's meaning in the singular as the objective of treaty interpretation. … for article 17.6(ii) ADA to become relevant at all, the interpretive process would have to be incapable of reducing an existing set of diverging meanings to a single one, a highly unlikely outcome'; Pieter-Jan Kuijper, 'John Jackson and the Standard of Review' (2016) 15 World Trade Rev 398, 399: '[a]ny serious (international) lawyer applying [Articles 31 and 32 of the Vienna Convention] would normally end up with one interpretation, not with two permissible ones'.

[262] Kuijper, 'The US Attack on the WTO Appellate Body' (n 248) 6. Kuijper suggests, on the basis of personal recollections, that paragraph 2 was the result of a 'negotiation error' of the US: '[t]he US certainly believed that it had won something and has been very frustrated for a long time that the AB has never found reason to apply the second sentence, which embodies the US *Chevron* principle. The others, however, had hoped precisely for this result, and some even expected it. … Given their disgruntlement at these late stage negotiations, they did not want to make the US any the wiser about their reasons for accepting the compromise. The US simply made a bad judgment during this hurried negotiation, probably for want of understanding of interpretation in international law in the new negotiating team sent from Congress.'

AB held that this standard provides for 'sufficient clarity', scholars have often complained that it does not tell much about the appropriate intensity of review.[263] It could be argued that Article 11 'does not openly promote judicial restraint',[264] while the adoption of a deferential standard of review in the ADA might suggest that a less deferential standard of review was envisaged for other agreements. Neither of these points, however, have been explicitly adopted by the AB. On the contrary, with regard to the latter point, the AB has held that also under Article 17.6 ADA an 'objective assessment' is required, which precludes an interpretation of Article 11 DSU based on the differences between the two provisions.

In its interpretations of Article 11, the AB has distinguished between issues of fact and issues of law. As far as the review of facts is concerned, this entails, according to the AB, a standard of review falling somewhere between *de novo* review and total deference. The AB has recognised several rationales for deference in this context. On the one hand, it has pointed out that panels are 'poorly suited' to substitute their analysis for that of domestic institutions, whereas, on the other, it has acknowledged that panels may possess a benefit of hindsight, which cannot be held against domestic authorities. Even if these two rationales are logically contradictory, both instruct panels to limit the intensity of their review. At the same time, the AB has repeatedly held that panels are not 'bound by' or obliged to 'accept' domestic determinations.

In terms of legal assessments, the AB has not engaged in much discussion of the appropriate intensity of review. One common phrase that could be read as an expression of deference is the pronouncement that Members have the right to choose the 'level of protection' of non-trade interests, but once this level is determined, the WTO adjudicators do not explicitly defer in their assessment of whether a contested measure is necessary to realise this level of protection. Consequently, commentators disagree over the extent to which the AB defers to Members, a discussion that inevitably turns on the actual outcomes reached in concrete cases.

The absence of a discourse on the appropriate intensity of review for legal assessments suggests that the AB is reluctant to tie its hands by subscribing explicitly to a doctrine of judicial deference or, alternatively, to a general standard of *de novo* review.[265] Instead, it appears to vary

[263] Ioannidis, 'Beyond the Standard of Review' (n 209) 97-99.

[264] Oesch, *Standards of Review* (n 208) 242.

[265] ibid 241: 'deliberations in panel and Appellate Body proceedings on the proper balance of powers among the various actors are not overtly present in relation to *standards of review*'. Oesch notes the 'contractual and intergovernmental' nature of the WTO dispute settlement system.

the intensity of review dependent on the concrete circumstances of a dispute, without providing general indicators of how it determines this intensity.[266] The AB's reluctance to define general principles governing the intensity of review is further demonstrated by its application of Article 17.6 ADA. Even if this Article imposes deferential standards of review for issues of both fact and law, the AB has trivialised the differences between Article 17.6 and the objective assessment of Article 11 DSU.

2.7 Investor-State Arbitration Tribunals

International investment law is probably the field where the appropriate intensity of international review is currently the most controversial.[267] The appropriate intensity of review is widely debated among scholars, whereas tribunals have expressed divergent opinions on the matter, ranging from

[266] Tomer Broude, 'Selective Subsidiarity and Dialectic Deference in the World Trade Organization' (2016) 79 L and Contemporary Problems 53, 70.

[267] eg Burke-White and Von Staden, 'Private Litigation in a Public Law Sphere' (n 91); Julian Mortenson, 'The Meaning of "Investment": ICSID *Travaux* and the Domain of International Investment Law' (2010) 51 Harvard Int'l L J 257, discussing deference in the context of the investment definition; Anna Katselas, 'Do Investment Treaties Prescribe a Deferential Standard of Review? A Comparative Analysis of the U.S. Administrative Procedure Act's Arbitrary and Capricious Standard of Review and the Fair and Equitable Treatment and Arbitrary or Discriminatory Measures Treaty Standards' (2012) 34 Michigan J of Int'l L 87; Anthea Roberts, 'The Next Battleground: Standards of Review in Investment Treaty Arbitration' (2011) Int'l Council for Commercial Arbitration Congress Series No 16; Stephan Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review', (2012) 3 J of Int'l Dispute Settlement 577; Van Harten, *Sovereign Choices* (n 5); Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 J of Int'l Dispute Settlement 197; Moloo Jacinto, 'Standards of Review' (n 87); Valentina Vadi and Lukasz Gruszczynski, 'Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal' (2013) 16 J of Int'l Economic L 613; Caroline Henckels, 'The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 10); Erlend Leonhardsen, 'Treaty Change, Arbitral Practice and the Search for a Balance: Standards of Review and the Margin of Appreciation in International Investment Law' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 10); Arato, 'The Margin of Appreciation' (n 103); Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (CUP 2015); Paul Barker, 'Investor-State Arbitration as International Public Law: Deference, Proportionality and the Standard of Review' in Ian Laird *et al* (eds), *Investment Treaty Arbitration and International Law. Vol 8* (Juris 2015); Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Arbitration* (Elgar 2018).

categorical rejections of the concept of deference to its explicit adoption. This section will provide an overview of the different approaches taken, identifying various lines of reasoning applied by tribunals when deciding on their intensity of review.

2.7.1 Approaches in Favour of (Some) Deference

A significant number of investment arbitration tribunal have adopted deferential approaches, notably when reviewing policy choices made by host States. They have repeatedly ruled that States are entitled to deference in this context, and that arbitrators are not empowered to second-guess domestic decisions.[268] In the words of the *Invesmart v Czech Republic* tribunal:

> Numerous tribunals have held that when testing regulatory decisions against international law standards, the regulators' right and duty to regulate must not be subjected to undue second-guessing by international tribunals. Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions.[269]

In cases where the impugned measures have been reviewed by domestic courts, tribunals commonly hold that they are not meant to act as courts of appeal.[270] The *Mondev* tribunal suggested that the occurrence of domestic judicial review increased the need for deference: '[i]t is one thing to deal with unremedied acts of the local constabulary and another to second-guess the

[268] eg *Renée Rose Levy de Levi v Peru*, ICSID ARB/10/17, Award of 26 February 2014, para 161: '[t]he Tribunal fully agrees with Peru that it is unacceptable for an Arbitral Tribunal to "step into the shoes" of any organ and to "second-guess" its actions. In other words, an Arbitral Tribunal cannot substitute itself for a State organ or convert itself into an appeals body to examine acts or decisions of the relevant authorities'.

[269] *Invesmart v Czech Republic*, UNCITRAL, Award of 26 June 2009, para 501.

[270] eg *Azinian, Davitian and Baca v Mexico*, ICSID ARB(AF)/97/2, Award of 1 November 1999, para 99; *Chevron Corp and Texaco Petroleum Corp v Ecuador*, PCA 34877, Partial Award on the Merits of 30 March 2010, para 247: 'the Tribunal is not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*', but see also para 377, 379; *Philip Morris v Uruguay* (n 45) para 418; *Eli Lilly and Company v Canada*, ICSID UNCT/14/2, Final Award of 16 March 2017, para 224: 'the Tribunal emphasizes that a NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts'.

reasoned decisions of the highest courts of a State'.[271] According to the *Tatneft* tribunal, there is a 'generally accepted proposition' that 'international tribunals ought to be deferential to domestic courts'.[272]

In many cases, deference is seen as the corollary of the discretion left to States under the applicable treaty norm. An example of a treaty norm which has repeatedly led to affirmations of deference is Article 1105 NAFTA, the so-called 'minimum standard of treatment', which requires host States to provide 'treatment in accordance with international law, including fair and equitable treatment and full protection and security'.[273] The *S.D. Myers v Canada* tribunal held in this context that:

> When interpreting and applying the 'minimum standard', a Chapter 11 tribunal does 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 ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[274]

Noting that Article 1105 referred to 'treatment in accordance with international law', the tribunal held:

> The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that

[271] *Mondev Int Ltd v United States*, ICSID ARB(AF)/99/2, Award of 11 October 2002, para 126.

[272] *OAO Tatneft v Ukraine*, UNICTRAL, PCA, Award on the Merits of 29 July 2014, para 475. Nonetheless, the tribunal mentioned various limits to its deference. In the context of the fair and equitable treatment standard it held that deference is 'not automatic and certainly does not require that extreme forms of misconduct, such as egregiousness, be found to establish that breaches have occurred as a consequence of those decisions', para 480.

[273] See generally Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013).

[274] *SD Myers Inc v Canada*, UNCITRAL, Partial Award of 13 November 2000, para 261.

> international law generally extends to the right of domestic authorities to regulate matters within their own borders.[275]

The *S.D. Myers* tribunal understood Article 1105 in such a way that only exceptional circumstances would produce a violation, which, in other words, left a wide policy space to the respondent State. This understanding was underpinned by the tribunal's consideration that international law generally extends 'a high measure of deference … to the right of domestic authorities to regulate matters within their own borders'.[276] The approach of the *S.D. Myers* tribunal has been endorsed by numerous other NAFTA tribunals.[277] Also outside the scope of NAFTA, the 'high measure of deference' introduced by the *S.D. Myers* tribunal has been applied, as a general point of departure[278] or in the context of the customary law minimum standard,[279] the fair and equitable treatment standard,[280] the expropriation standard,[281] and the prohibition of performance requirements.[282]

---

[275] ibid para 263.

[276] ibid.

[277] eg *GAMI Investments Inc v Mexico*, UNCITRAL, Final Award of 15 November 2004, para 93; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Canada*, UNCITRAL, PCA Case No 2009-04, Award on Jurisdiction and Liability of 17 March 2015, para 440-441; *Mesa Power Group LLC v Canada*, PCA Case No 2012-17, Award of 24 March 2016, para 553. See also para 505: 'when defining the content of Article 1105 one should further take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs'. Tribunals have often defined the minimum standard in such a way as to protect only against actions that meet a certain threshold of seriousness. For a summary and synthesis of some early case law, see *Waste Management Inc v Mexico (II)*, ICSID ARB(AF)/00/3, Award of 30 April 2004, para 98. For a different reading, see *Apotex Holdings Inc and Apotex Inc v United States*, ICSID ARB(AF)/12/1, Award of 25 August 2014, para 9.37: 'the Tribunal here addresses under NAFTA Article 1105(1) a "minimum" standard of treatment, with no permissible margin of appreciation below such minimum'. In para 9.49, the tribunal nonetheless applied a 'high threshold of severity and gravity' required for breaches of Article 1105.

[278] *Gemplus v Mexico* (n 5) para 6.26.

[279] *Adel A Hamadi Al Tamimi v Oman*, ICSID ARB/11/33, Award of 3 November 2015, para 382.

[280] *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para 305; *Total SA v Argentina*, ICSID ARB/04/01, Decision on Liability of 27 December 2010, para 115; *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID ARB/08/1 and ARB/09/20, Award of 16 May 2012, para 258.

[281] *Invesmart v Czech Republic* (n 269) para 501.

[282] *Lemire v Ukraine*, ICSID ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010, para 505.

Indeed, investment tribunals have repeatedly held that common BIT standards leave States discretion in their regulation of domestic affairs.[283] These interpretations are corroborated by the understanding that international law in general respects the regulatory powers of States.[284] The *Continental Casualty* tribunal, referring to the case law of the ECtHR, concluded that 'a certain

[283] In the context of the expropriation standard, deference is commonly expressed under the 'public purpose' requirement. eg *Goetz et consorts c Burundi*, ICSID ARB/95/3, Sentence du 10 février 1999, para 126: '[e]n l'absence d'erreur de droit ou de fait, d'erreur manifeste d'appréciation ou de détournement de pouvoir, il n'appartient pas au Tribunal de substituer son propre jugement à l'appréciation faite discrétionnairement par le Gouvernement du Burundi des "impératifs d'utilité publique... ou d'intérêt national"'; *Siemens AG v Argentina*, ICSID Case No ARB/02/8, Award of 17 January 2007, para 273: 'the Tribunal defers to Argentina in the determination of its public interest'; *Kardassopoulos and Fuchs v Georgia*, ICSID ARB/05/18, Award of 3 March 2010, para 391: 'on all the evidence, it is arguable that the expropriation of Mr. Kardassopoulos' rights was in the Georgian public interest. As the Claimants acknowledge, the Respondent is entitled to a measure of deference in this regard'; *Copper Mesa Mining Corporation v Ecuador*, PCA Case No 2012-2, Award of 15 March 2016, para 6.64: '[i]t is no part of this Tribunal's function under the Treaty to decide for itself what was or was not in the national interests of the Respondent, its citizens or the local population. It is not a regulator. The Tribunal therefore defers to the Respondent's sovereign right, as regulator, to determine what lies within its national interest'; *Crystallex Int Corp v Venezuela*, ICSID ARB(AF)/11/2, Award of 4 April 2016, para 712: 'States are afforded a wide margin of appreciation in determining whether an expropriation serves a public purpose'; *Vestey Group Ltd v Venezuela*, ICSID ARB/10/23, Award of 15 April 2016, para 294; '[i]nternational tribunals should thus accept the policies determined by the state for the common good, except in situations of blatant misuse of the power to set public policies'; *Rusoro Mining Ltd v Venezuela*, ICSID ARB(AF)/12/5, Award of 22 August 2016, para 385: 'States enjoy extensive discretion in establishing their public policy. It is not the role of investment tribunals to second-guess the appropriateness of the political or economic model adopted by the legitimate organs of a sovereign State'; *Teinver SA, Transportes de Cecanías SA and Autobuses Urbanos des Sur SA v Argentina*, ICSID ARB/09/01, Award of 21 July 2017, para 985: '[t]he Tribunal agrees that a State must be accorded a certain amount of deference in determining how to best advance its public interest once a public interest has been demonstrated as the reason for which an expropriation occurred'. See also *Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Mongolia*, UNICTRAL, Award on Jurisdiction and Liability of 28 April 2011, para 328. On the fair and equitable treatment standard, see *Philip Morris v Uruguay* (n 45) para 418: '[t]he fair and equitable treatment standard is not a justiciable standard of good government'.

[284] cf *Lemire v Ukraine* (n 282) para 505: '[a]s a sovereign State, Ukraine has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by its Parliament and Government'; *Tza Yap Shum v Peru*, ICSID ARB/07/6, Award of 7 July 2011, para 180: 'la potestad regulatoria del Estado merece un trato deferente'; *Unglaube v Costa Rica* (n 280) para 246: 'such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters with[in] their borders'; *TECO Guatemala Holdings LLC v Guatemala*, ICSID ARB/10/17, Award of 19 December 2013, para 490: '[t]he Arbitral Tribunal, in deciding this dispute, is mindful of the deference that international tribunals should pay to a sovereign State's regulatory powers'; *Apotex v US* (n 277) para 9.37: 'the need for international tribunals to exercise caution in cases involving a state regulator's exercise of discretion'.

deference to such a discretion when the application of general standards in a specific factual situation is at issue, such as reasonable, necessary, fair and equitable, may well be by now a general feature of international law also in respect of the protection of foreign investors under BITs'.[285] The tribunal in *Total v Argentina* added that BITs do not limit the right of States to address the needs and requests of their people: '[s]uch limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed'.[286]

Apart from the discretion left to national authorities under common BIT standards or under general international law, tribunals have occasionally pointed to other reasons for deference, such as the expertise of domestic institutions. In *Laboratoires Servier* et al *v Poland*, the tribunal held that it 'must accord due deference to the decisions of specialized Polish administrators interpreting and applying laws and regulations governing their area of competence'.[287] The *Bilcon* tribunal considered in the context of Article 1105 NAFTA, that 'third-party adjudicators must, in applying the international minimum standard, take into account that domestic authorities may have more familiarity with the factual and domestic legal complexities of a situation'.[288] In the words of the tribunal in *Crystallex v Venezuela*:

> The Tribunal believes that in matters where a government regulator and/or administration is called to make decisions of a technical nature, those government authorities are the primary decision-makers called to examine the reports presented by the applying investor and the available scientific data. As such, those governmental authorities should enjoy a high level of deference for reasons of their expertise and competence (which is assumed to be present in those institutions called to make the relevant decisions) and proximity with the situation under examination.[289]

[285] *Continental Casualty v Argentina* (n 3) fn 270. See also fn 351.

[286] *Total v Argentina* (n 280) para 115.

[287] *Laboratoires Servier SAS, Biofarma SAS and Arts et Techniques du Progres SAS v Poland*, UNCITRAL, Award of 14 February 2012, para 568.

[288] *Bilcon v Canada* (n 277) para 439. Nonetheless, the tribunal also considered that '[t]hird-party adjudicators may have their own advantages including independence and detachment from domestic pressures'.

[289] *Crystallex v Venezuela* (n 283) para 583.

Tribunals have regularly recognised the specific expertise of domestic institutions, and of courts in particular, concerning the interpretation and application of domestic law.[290]

Another justification for deference advanced by several tribunals concerns the political or democratic legitimacy of domestic decision-makers. The tribunal in *Paushok v Mongolia*, reviewing a windfall profit tax, held: 'the fact that a democratically elected legislature has passed legislation that may be considered as ill-conceived, counter-productive and excessively burdensome does not automatically allow to conclude that a breach of an investment treaty has occurred'.[291] The *Bilcon* tribunal considered that, compared to international adjudicators, domestic authorities may 'enjoy distinctive kinds of legitimacy, such as being elected or accountable to elected authorities'.[292]

Finally, various tribunals have acknowledged that domestic institutions sometimes need to make complex decisions in a short time, whereas arbitrators can review those decisions calmly and with the benefit of hindsight. Some adjudicators dealing with the Argentine economic crisis have adopted a deferential approach for this reason.[293] The *LG&E* tribunal held that the assessment of a state of necessity is, in principle, 'left to the State's subjective appreciation'.[294] The *Continental Casualty* tribunal held that its 'objective assessment' under the necessity clause of the BIT should 'contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the

[290] *Helnan Int Hotels v Egypt*, ICSID ARB/05/19, Award of 3 July 2008, para 106; *Arif v Moldova*, ICSID ARB/11/23, Award of 8 April 2013, para 416; *Luigiterzo Bosca v Lithuania*, PCA 2011/04, Award of 19 February 2016, para 198; *Pac Rim Cayman LLC v El Salvador*, ICSID ARB/09/12, Award of 14 October 2016, para 8.31.

[291] *Paushok v Mongolia* (283) para 299. See also para 304. cf *Eastern Sugar BV v Czech Republic*, SCC 088/2004, Partial Award of 27 March 2007, para 272: '[a] violation of a BIT does not only occur through blatant and outrageous interference. However, a BIT may also not be invoked each time the law is flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT. Otherwise, every aspect of any legislation of host state or its implementation could be brought before an international arbitral tribunal under the guise of a violation of the BIT. This is obviously not what BITs are for.'

[292] *Bilcon v Canada* (n 277) para 439.

[293] William Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia J of Int'l L 307; Antoine Martin, 'Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law' (2012) 29 J of Int'l Arbitration 49.

[294] *LG&E Energy Corp v Argentina*, ICSID ARB/02/1, Decision on Liability of 3 October 2006, para 248.

disadvantage of hindsight'.[295] The annulment committee which annulled the award rendered in *Enron v Argentina* discussed the way in which the tribunal had reviewed whether the Argentine policies were the only means available to address the crisis, and wondered:

> Does the tribunal determine this at the date of its award, when the tribunal may have the benefit of knowledge and hindsight that was not available to the State at the time that it adopted the measure in question? Or does the Tribunal determine whether, on the basis of information reasonably available at the time that the measure was adopted, a reasonable and appropriately qualified decision maker would have concluded that there was a relevant alternative open to the State? Or does customary international law recognise that reasonable minds might differ in relation to such a question, and give a 'margin of appreciation' to the State in question? In that event, the relevant question for the Tribunal might be whether it was reasonably open to the State, in the circumstances as they pertained at the relevant time, to form the opinion that no relevant alternative was open.[296]

Also outside the scope of economic crises, tribunals have acknowledged the complex and urgent character that domestic decision-making can have. In *Invesmart v Czech Republic*, the tribunal considered that '[m]inisters must make often difficult, multi-variable decisions that do not necessarily admit of clear right or wrong answers'.[297] The tribunal in *Gemplus v Mexico* granted the respondent 'a generous measure of appreciation, applied without the benefit of hindsight'.[298] The *Electrabel* tribunal considered that its task was not 'to sit retrospectively in judgment upon Hungary's discretionary exercise of a sovereign power', which concerned 'a difficult discretionary exercise involving many complex factors'.[299] According to the *Bilcon* tribunal:

> [I]nternational responsibility and dispute resolution, in the investor context, is not supposed to be the continuation of domestic politics and litigation by other means.

[295] *Continental Casualty v Argentina* (n 3) para 181.

[296] *Enron Creditors Recovery Corp v Argentina*, ICSID ARB/01/3, Decision on the Application for Annulment of 30 July 2010, para 372.

[297] *Invesmart v Czech Republic* (n 269) para 484.

[298] *Gemplus v Mexico* (n 5) para 6.26.

[299] *Electrabel v Hungary*, ICSID ARB/07/19, Award of 25 November 2015, para 8.35. 'Hungary would enjoy a reasonable margin of appreciation in taking such measures before being held to account under the ECT's standards of protection.'

> Modern regulatory and social welfare states tackle complex problems. Not all situations can be addressed in advance by the laws that are enacted. Room must be left for judgment to be used to interpret legal standards and apply them to the facts. Even when state officials are acting in good faith there will sometimes be not only controversial judgments, but clear-cut mistakes in following procedures, gathering and stating facts and identifying the applicable substantive rules. State authorities are faced with competing demands on their administrative resources and there can be delays or limited time, attention and expertise brought to bear in dealing with issues.[300]

In *Teinver v Argentina*, the claimants, stakeholders in two airline companies, complained of Argentina's alleged failure to increase regulated airfares as well as the ultimate nationalisation of the airlines. The tribunal held:

> [T]he Tribunal accepts that the issues involved were complex and that Respondent had other concerns to address, including the maintenance of service to various parts of the country and prices to users. In this regard, the Tribunal accepts that some deference or leeway should be granted to Respondent in balancing these interests.[301]

Many of the tribunals which adopted a deferential approach cautioned that they would not grant complete deference: 'deference to the primary decision-makers cannot be unlimited, as otherwise a host state would be entirely shielded from state responsibility and the standards of protection contained in BITs would be rendered nugatory'.[302]

In order to clarify the intensity of their review in more detail, some tribunals have provided an explicit standard of review. The *Tecmed v Mexico* tribunal proposed a review of reasonableness and proportionality.

> Although 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 the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic

[300] *Bilcon v Canada* (n 277) para 437.

[301] *Teinver v Argentina* (n 283) para 688.

[302] *Crystallex v Venezuela* (n 283) para 584.

> rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.[303]

Other tribunals have defined their standard of review in different ways. The *Lemire* tribunal reviewed whether the domestic authorities acted in an 'arbitrary or capricious' way,[304] whereas the *Unglaube* tribunal applied a standard of 'due diligence', reviewing whether the conduct of the domestic authorities had been 'arbitrary or discriminatory'.[305] A multifaceted standard was applied by the *TECO* tribunal:

> The Arbitral Tribunal, in deciding this dispute, is mindful of the deference that international tribunals should pay to a sovereign State's regulatory powers. … However, the deference to the State's regulatory powers cannot amount to condoning behaviors that are manifestly arbitrary, idiosyncratic, or that show a complete lack of candor in the conduction of the regulatory process. As a consequence, although the role of an international tribunal is not to second-guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers, it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters.[306]

The *Crystallex* tribunal adopted a procedural approach. It refused to decide whether the reasons given by the Venezuelan authorities for refusing a gold mining permit were 'substantially valid'.[307] Instead, it assessed 'whether there have been serious procedural flaws which have resulted in the Permit being arbitrarily denied, or in the investor being treated non-transparently or inconsistently throughout the process and thereafter'.[308]

---

[303] *Técnicas Medioambientales Tecmed SA v Mexico*, ICSID ARB (AF)/00/2, Award of 29 May 2003, para 122. cf *Saluka v Czech Republic* (280) para 272.

[304] ibid para 283.

[305] *Unglaube v Costa Rica* (n 280) para 247.

[306] *TECO v Guatemala* (n 284) para 490-493.

[307] *Crystallex v Venezuela* (n 283) para 585.

[308] ibid.

Finally, some tribunals have imported the margin of appreciation with reference to the ECtHR.[309] In *Philip Morris v Uruguay*, the majority in the tribunal held, quoting the Respondent:

> The Tribunal agrees with the Respondent that the "margin of appreciation" is not limited to the context of the ECHR but "applies equally to claims arising under BITs," at least in contexts such as public health. The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health.[310]

The references made by different tribunals to the margin of appreciation and standards such as reasonableness and arbitrariness demonstrate attempts to define an appropriate standard of review when *de novo* review is considered inappropriate because of the superior capacities and legitimacy of domestic decision-makers.

2.7.2 Approaches Critical of Deference

In contrast to the deferential approaches described above, other tribunals have expressed criticism of deference in the context of investment arbitration. Two tribunals ruling on the Argentine crisis emphasized that review by an international investment tribunal needs to be strict. In response to Argentina's argument that the emergency carve-out of the applicable BIT was self-judging, the *CMS* tribunal ruled that:

> [I]n the context of what a State believes to be an emergency, it will most certainly adopt the measures it considers appropriate without requesting the views of any court. However, if the legitimacy of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness.[311]

---

[309] *Continental Casualty v Argentina* (n 3) fn 270.

[310] *Philip Morris v Uruguay* (n 45) para 399. See for an opposing argument the Concurring and Dissenting Opinion of Gary Born, para 87.

[311] *CMS Gas Transmission Company v Argentina,* ICSID ARB/01/8, Award of 12 May 2005, para 373. cf para 159: '[t]he Tribunal has noted above that it is not its task to pass judgment on the economic policies adopted by Argentina

In a similar vein, and in response to the same argument raised by Argentina, the *Enron* tribunal held that:

> Judicial determination of the compliance with the requirements of international law in this matter should not be understood as if arbitral tribunals might be wishing to substitute for the functions of the sovereign State, but simply responds to the duty that in applying international law they cannot fail to give effect to legal commitments that are binding on the parties and interpret the rules accordingly.[312]

Some tribunals have rejected the argument made by respondent States that deferential standards of review applicable in domestic courts should be applied by the tribunal as well. In *Glamis Gold*, the United States referred in the context of Article 1105 NAFTA to the deference accorded by US and Canadian courts to administrative decision-making.[313]

> Respondent argues below that, in reviewing State agency or departmental decisions and actions, international tribunals as well as domestic judiciaries favor deference to the agency so as not to second guess the primary decision-makers or become "science courts." The Tribunal disagrees that domestic deference in national court systems is necessarily applicable to international tribunals. In the present case, the Tribunal finds the standard of deference to already be present in the standard as stated, rather than being additive to that standard.[314]

---

and hence it is not for it to determine whether the devaluation was the right or the wrong measure to take in the circumstances. However, it is its duty to establish whether such measure had specific adverse consequences for the Claimant in light of the legal commitments made by Argentina both under the applicable domestic and international legal framework'. See for a different assessment *LG&E v Argentina* (n 294) para 212-214. See also para 248.

[312] *Enron Corp and Ponderosa Assets LP v Argentina*, ICSID ARB/01/3, Award of 22 May 2007, para 340. The reasoning is copied in *Sempra Energy International v Argentina*, ICSID ARB/02/16, Award of 28 September 2007, para 389. The *Enron* tribunal's rejection of Argentina's necessity defense was annulled by *Enron Creditors v Argentina* (n 296). The *Sempra* award was annulled by *Sempra Energy International v Argentina*, ICSID ARB/02/16, Annulment Decision of 29 June 2010.

[313] *Glamis Gold Ltd v United States*, UNCITRAL, Award of 8 June 2009, para 595.

[314] ibid para 617.

The *Glamis Gold* tribunal questioned whether domestic standards of deference should be applicable in investment arbitration too, whereas, at the same time, it considered that Article 1105 was already a deferential standard in its own right.[315]

In another NAFTA case, *Apotex v United States*, the Canadian claimants objected to the seat of arbitration being in the US. They argued that this would create an 'uneven playing field for post-award proceedings', since US courts tend to defer to the views of the US government on the interpretation of treaties.[316] The tribunal rejected this argument:

> As a tribunal created by international law under NAFTA's Chapter Eleven, this Tribunal owes no special deference to the views of the Respondent as a NAFTA Party. This Tribunal's task is to interpret NAFTA in accordance with the international law rules governing treaty interpretation, as provided by NAFTA Article 1131(1). Canons of interpretation operating only in US domestic law are not relevant to this Tribunal. The Tribunal considers that its mandate under NAFTA Article 1131(1) is absolute: it would be a violation of that mandate for this Tribunal to interpret and apply NAFTA's Chapter Eleven taking into account any canon of construction under US law unduly favourable to the Respondent and unfavourable to the Claimants.[317]

For these reasons, post-award review proceedings could not apply domestic doctrines of deference, according to the tribunal.

> The Tribunal would regard the invocation of any deference argument by the Respondent in any future litigation between the Parties over an award by this Tribunal as being wholly inconsistent with the Respondent's commitment to international arbitration under NAFTA Articles 1116 and 1117. In the Tribunal's view, consent by the Respondent to a process of international arbitration under a treaty, such as NAFTA's

[315] According to the tribunal, Article 1105 would be violated only by measures 'sufficiently egregious and shocking', such as 'a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons', para 616. Van Harten, *Sovereign Choices* (n 5) 65: 'the tribunal took a strong position of deference in its interpretation of one applicable treaty standard, the minimum standard of treatment, which the tribunal characterized as exhaustive of any considerations of deference in the case; in doing so, the tribunal took a position of in-built restraint while rejecting a position of general deference to legislatures'. According to Henckels, the tribunal conflated 'the normative content of fair and equitable treatment with the concept of deference based on external factors'. Caroline Henckels, 'Balancing Investment Protection' (n 267) 214.

[316] *Apotex v US* (n 277) Appendix A para A.27.

[317] ibid para. A.44.

> Chapter Eleven, carries with it an obligation in good faith not to seek an escape from an adverse award by invoking a US domestic law doctrine that is not recognised in, and has no authority, in international law, particularly by virtue of NAFTA Article 1131(1).[318]

Doubts about deference have been raised also outside the scope of NAFTA. The *Renta 4* tribunal reviewed facts that had earlier been ruled upon by both another investment tribunal and the European Court of Human Rights, which had reached different conclusions on whether the tax measures applied by the Russian authorities to the oil company Yukos were adopted in good faith. Siding with the *RosInvest* tribunal, the *Renta 4* tribunal distinguished arbitral review in investment arbitration from the review exercised by the ECtHR:

> [H]uman rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of "margins of appreciation" that apply to the former.[319]

Later on, the tribunal considered:

> The notion that states have a considerable margin of discretion in enacting and enforcing tax laws should not lead to any confused idea that they have a discretion as to whether or not to comply with an international treaty. … When agreeing to the jurisdiction of international tribunals, states perforce accept that those jurisdictions will exercise their judgment ... .[320]

The margin of appreciation as developed by the ECtHR was also rejected in *Bernhard von Pezold and Others v. Zimbabwe*:

---

[318] ibid para A.47.

[319] *Quasar de Valores SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA, ALOS 34 SL (Renta 4) v Russia,* SCC V (024/2007), Award of 20 July 2012, para 22.

[320] ibid para 179.

> [D]ue caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law. The Respondent has only referred the Tribunal to European human rights cases in its arguments. This is a very different situation from that in which margin of appreciation is usually used. Here, the Government has agreed to specific international obligations and there is no "margin of appreciation" qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore the Tribunal declines to apply this doctrine.[321]

2.7.3 Conclusions on investment arbitration

Investment arbitration tribunals apply a variety of treaty and customary law standards to many different factual situations. Yet in spite of this diversity, the issue of deference has produced comparable arguments in different cases. A large number of tribunals have concluded that host States are entitled to deference under common BIT standards that could affect the regulatory powers of domestic authorities. Tribunals justify this deference by reference to the phrasing of such standards, which pose obligations in open-ended terms such as 'reasonable' and 'fair and equitable', and to international law's general respect for the right of States to conduct their domestic affairs. Some tribunals have also pointed to the special expertise of domestic institutions and the political legitimacy of their decision-making. Others have added that arbitral review should acknowledge the complexity of the many regulatory issues and the limited time-span in which domestic authorities may have to act. If tribunals defer to domestic decision-makers, they do

[321] *Bernhard von Pezold and Others v Zimbabwe*, ICSID ARB/10/15, Award of 28 July 2015, paras 465-466. The tribunal appears to believe that even if the margin were applied, this would not acquit the respondent: '[t]he Claimants have noted that neither the "margin of appreciation" nor the proportionality doctrine can be used to justify illegal conduct, such as a breach of an obligation *erga omnes*, by engaging in racial discrimination. As discussed below, there is ample evidence that the Claimants were targeted in the present case on the basis of skin colour'. See for another rejection of the margin of appreciation, *Siemens v Argentina* (n 283) para 354: 'a margin of appreciation not found in customary international law or the Treaty'. See for an intermediate approach *Chemtura v Canada*, UNCITRAL, Award of 2 August 2010, para 123.

normally not subscribe to complete deference, but only to a limited degree of deference. In order to further clarify the intensity of their scrutiny, some tribunals have adopted a specific standard of review, which is often informed by the treaty standard of protection or derived from traditional domestic standards of review such as reasonableness and arbitrariness.

The appropriateness of deference in investment arbitration is not universally accepted. Some tribunals have emphasized that they are required to provide neutral review, whereas deference would favour the cause of the respondent. They have pointed out that States party to international investment treaties voluntarily accepted to be subject to such review and that investors rely on these commitments when making their investments. Moreover, when respondent States invoked domestic doctrines of deference, some tribunals have questioned why such doctrines would apply in the international context. Likewise, some have rejected the approach of the ECtHR, emphasizing the differences between human rights law and investment law.

Compared with the high number of awards containing arguments for at least some form of deference, the number of awards explicitly rejecting deference is relatively low. Of course, this does not necessarily mean that investment arbitration tribunals tend to adopt lenient standards of review. In his 2013 empirical study of deference in investment arbitration, Gus van Harten concluded on the basis of 243 awards that the tribunals 'assumed far-reaching authority to oversee states intensively in relation to legislative and executive decision-making and in spite of the overlapping role of other adjudicators'.[322] According to Van Harten, the arbitrators demonstrated an 'evident proclivity to expand their role in myriad ways beyond what courts have done in domestic and international judicial review'.[323] Their tendency was 'to assert explicitly or implicitly an expansive role for themselves to decide whether the choices and conduct of another decision-maker were correct'.[324] Such claims, however, are difficult to substantiate in the absence of explicit positions adopted by tribunals with regard to their standard of review, and even if such positions have been expressed, there may be inconsistencies between the standard formally adopted and the actual intensity of review. In this study, the focus is on explicit statements. They suggest that a large number of tribunals have seen reason to accord some degree of deference to domestic decision-makers.

[322] Van Harten, *Sovereign Choices* (n 5) 17.

[323] ibid 18.

[324] ibid 162.

2.8 The International Tribunal for the Law of the Sea

In the context of the ITLOS, the notion of judicial deference has not received wide attention, as this tribunal does not commonly rule on cases involving 'the exercise of regulatory or judicial discretion' by States.[325] Nonetheless, various references to 'reasonableness' in the United Nations Convention on the Law of the Sea (UNCLOS) have invited judges to expand on the tribunal's intensity of review, notably in the context of prompt release cases.[326] In these cases, a crucial question is whether a bond set by a member State having arrested a vessel is 'reasonable' as required by Article 73 UNCLOS.

In various individual opinions, ITLOS judges have called for judicial deference in the review of a bond's reasonableness. In the *Camouco* case, Judge Anderson held that:

> It should be recognised that the local courts are best placed to appreciate all the relevant considerations of fact and law in the State concerned. In a matter such as this, concerning as it does procedure in a current criminal case, the local court should be accorded a wide discretion in fixing the amount of the security for release pending trial. In other words, national courts should be accorded a broad "margin of appreciation", a concept applied by the European Court of Human Rights, e.g. in the Handyside Case.[327]

In the same case, Judge Wolfrum noted that the 'discretionary powers or margin of appreciation on the side of the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not'.[328] According to Judge Wolfrum, this discretion applied to both the establishment of a vessel release system as a general matter and its implementation in a concrete case. As to the first level, 'it was not for the Tribunal to substitute its own decision for

[325] Rosemary Rayfuse, 'Standard of Review in the International Tribunal for the Law of the Sea' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation* (OUP 2014) 337.

[326] Seline Trevisanut, 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends' (2017) 48 Ocean Development and Int'l L 300, 303-304. Jean-Pierre Cot, 'The Law of the Sea and the Margin of Appreciation' in Tafsir Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Nijhoff 2007) 389-403.

[327] *Camouco (Panama v France)*, ITLOS No 5, Judgment of 7 February 2000, Dissenting Opinion of Judge Anderson.

[328] ibid Dissenting Opinion of Judge Wolfrum, para 11.

the discretionary power of the coastal States in that respect'.[329] On the second level as well, 'the French authorities had a considerable margin of appreciation'.[330] Judge Wolfrum further held that:

> The Tribunal is in a situation which is not dissimilar to that faced by international human rights courts which, in general, have to verify whether national decisions or measures are in conformity with an international human rights agreement. They restrict themselves, generally speaking, to ascertaining whether such a decision or measure was unlawful under international law, or was arbitrary, or constituted an abuse of authority, or was made in bad faith, or was disproportionate. The Tribunal should have allowed itself to be inspired by this jurisprudence (…).[331]

Less deferential approaches were taken by other Judges. According to Judge Treves, 'the notion of "reasonable bond" to be determined by the Tribunal must be an international notion, based on the Convention. It does not necessarily have to coincide with what can be considered as reasonable from a domestic point of view'.[332] Judge Laing held that 'the Tribunal should not be unduly concerned with a detaining State's categorization of its actions under its law'.[333] He further noted that 'every day judicial bodies everywhere must objectively and impartially determine whether or not actions are reasonable, which is a neutral and unpejorative expression (…). In the case of prompt release proceedings, the appropriate perspective is that of an international standard determined to be proper by the Tribunal'.[334] It should be kept in mind, according to Judge Laing, that prompt release proceedings do not concern substantive questions of domestic or international law: 'prompt release proceedings are in no way akin to situations in which the international minimum standard is applied in substantive proceedings involving assertions of State delictual responsibility'.[335]

In the *Volga* case, Judge Cot noted that 'international courts constantly use the concept of margin of appreciation, often implicitly or unwittingly'.[336] He considered the standard of

[329] ibid para 13.

[330] ibid para 14.

[331] ibid.

[332] ibid Dissenting Opinion of Judge Treves, para 4.

[333] ibid Declaration of Judge Laing.

[334] ibid.

[335] ibid.

[336] *Volga (Russia v Australia)*, ITLOS No 11, Judgment of 23 December 2002, Separate Opinion of Judge Cot, para 16.

'reasonableness' to be 'both an instrument for preserving the margin of appreciation of States and an instrument for courts to control the exercising of the discretionary power of the State'.[337] Judge Cot further held:

> Provided that the bond is not "unreasonable", the Tribunal does not have to substitute its discretion for that of the coastal State. It has no intention of being an appellate forum against a decision of a national court (…); nor is it the hierarchical superior of an administrative or government authority.[338]

Consequently, the tribunal should limit itself to a form of 'minimum control'.[339]

In spite of the insistence of various individual Judges on a deferential approach, it seems that the Tribunal applies its own independent standard of reasonableness. In the *Monte Confurco* case, the Tribunal considered that 'its determination must be based on the Convention and other rules of international law not incompatible with the Convention'.[340] In *Juno Trader*, the Tribunal ruled that '[t]he assessment of the relevant factors must be an objective one, taking into account all information provided to the Tribunal by the parties'.[341] Indeed, 'the notion of an international standard of reasonableness of bond appears to be that which has won favour in the Tribunal'.[342] In spite of the common association between the notion of reasonableness and deference, the Tribunal had developed a practice of evaluating the reasonableness of bonds independently and according to its own criteria.

---

[337] ibid para 18.

[338] ibid para 22.

[339] ibid para 24.

[340] *Monte Confurco (Seychelles v France)*, ITLOS No 6, Judgment of 18 December 2000, para 75. The Tribunal noted the factors relevant to an assessment of the reasonableness of a bond, as listed in *Camouco*, but added: '[t]his is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them', para 76.

[341] *Juno Trader (Saint Vincent and the Grenadines v Guinea-Bissau)*, ITLOS No 13, Judgment of 18 December 2004, para 85.

[342] Rayfuse, 'Standard of Review' (n 325) 344.

2.9 Conclusions

The variety of international courts and tribunals studied in this chapter has demonstrated a patchwork of different approaches concerning the intensity of review. First of all, considerations of deference in international decisions display a great variety in terms of sophistication. Some adjudicators have developed advanced frameworks for determining the intensity of their review, while others deal with the issue in short, sometimes sweeping statements. This diversity relates in part to the institutional characteristics of the different adjudicators: a standing court has more opportunities and incentives to develop a doctrinal approach than an *ad hoc* tribunal. Moreover, the development of notions of deference probably depends on the arguments of parties in individual cases, while some adjudicators may also feel their task is limited to solving a concrete dispute, rather than developing a theory of judicial deference.

More importantly, considerations related to deference in international adjudication differ not only in form, but also in content. Some adjudicators explicitly defer to respondent States, expressing their deference in different forms and different contexts. The ECtHR has identified a complex list of factors that limit the intensity of the review it will exercise in a concrete case. It acknowledges the existence of legitimate disagreement over the implementation of the discretionary standards of the Convention, as well as the democratic legitimacy of domestic decision-makers and their proximity to local circumstances. The African Commission has adopted a similar position, emphasising the subsidiarity that underpins international human rights law, but it is not yet clear whether the African Court will follow suit. It may instead choose the approach of the IACtHR, which in spite of occasional references to the margin of appreciation and subsidiarity insists on its mandate to provide final interpretations of the Convention.

In investment law, a large number of investment arbitration tribunals have ruled that a certain degree of deference is due to domestic decision-makers, especially when applying open-ended treaty standards to regulatory policies of the host State. Some have suggested that judicial deference is a logical corollary of the general reluctance of international law to interfere with the domestic affairs of States. Other investment tribunals, however, have rejected demands for deference, emphasising their duty to provide effective supervision of the implementation of international rules, as well as the need to protect the interests of investors. The Appellate Body of the WTO has warned panels not to exercise *de novo* review with regard to factual assessments, but it rarely explicitly addresses the intensity of review with regard to legal assessments. Likewise, the ICJ has not developed a structural approach to its standard of review, although occasional remarks

suggest that the Court favours strict scrutiny. The ITLOS also appears to subscribe to *de novo* review, even if several of its judges have repeatedly advocated a deferential approach.

The variety of approaches taken by different international courts and tribunals refute academic observations suggesting that a convergent approach to deference in international adjudication is emerging. Scholars have argued so in two ways, concluding either that international adjudicators generally defer to domestic decision-makers,[343] or, to the contrary, that they generally reject deference.[344] In reality, the issue of judicial deference is genuinely contested, dividing international court and tribunals as well as individual adjudicators within the same institution. To some extent, the diversity of approaches to the intensity of review may be explained by the broader differences between the various institutions in terms of procedure, substantive law, and institutional configuration. For instance, a dispute between a private party and a State concerning a purely domestic regulatory measure is more likely to raise questions of deference than a dispute between two States concerning a transboundary issue. Moreover, the judgments of a permanent court might have a wider impact beyond an individual case than an arbitral award, and therefore evoke stronger concerns over judicial overreach.

Nonetheless, structural differences between the various institutions cannot explain the divergence between the ECtHR and the IACtHR, between different investment arbitration tribunals, and between individual ITLOS judges. Instead, it appears that when some adjudicators are persuaded to defer by certain factors, such as the indeterminacy of treaty language or the democratic legitimacy of the decision under review, other reviewers nonetheless exercise strict scrutiny in similar circumstances. Their overriding concern is to provide independent review of compliance with an international obligation voluntarily assumed by the respondent State. Indeed, the adoption or rejection of deference ultimately depends on normative preferences concerning the appropriate balance between international supervision on the one hand and the prerogatives of domestic institutions on the other.

[343] Shany, 'Towards a General Margin of Appreciation Doctrine' (n 16) 939.

[344] Bjorge, 'Been There, Done That' (n 47) 183, 190.