Intensity of review in international courts and tribunals

A comparative analysis of deference

Fahner, J.H.

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3. A Comparative Analysis of Deference in International Practice

3.1 Introduction

While the previous chapter has established the general approach of the different institutions towards their intensity of review, this chapter will analyse the findings in a comparative manner, investigating in more detail when and how international courts and tribunals defer to domestic decision-makers. Often, adjudicators hint at a need for deference but do not specify how such deference will be applied in the case at hand. For example, in *Handyside*, the ECtHR considered, after having elaborated on the margin of appreciation, 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 the decisions they delivered in the exercise of their power of appreciation'.[1] This phrasing alludes to the need for deference to domestic courts, but then concludes by stating the obvious, namely that the Court is only tasked to review compliance with the Convention.[2] The crucial question, however, is how the the Court defers to national authorities *while* making that assessment.

A similar example is provided by the AB Report in *US – Reformulated Gasoline*. By way of postscript, the Appellate Body explained that its report did 'not mean, or imply, that the ability of any WTO Member to take measures … to protect the environment, is at issue'.[3] Indeed, according to the AB, 'WTO Members have a large measure of autonomy to determine their own policies on the environment'.[4] It then concluded: 'that autonomy is circumscribed only by the need need to respect the requirements of the *General Agreement* and the other covered agreements'.[5] Yet the extent to which the WTO agreements circumscribe the Members' autonomy in this context

[1] *Handyside v United Kingdom*, ECtHR (Plenary) 5493/72, Judgment of 7 December 1976, para 50.

[2] cf *Fretté v France*, ECtHR 36515/97, Judgment of 26 February 2002, para 41: '[t]his margin of appreciation should not, however, be interpreted as granting the State arbitrary power, and the authorities' decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention'.

[3] *United States - Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WTO DS2, AB Report of 29 April 1996, 30.

[4] ibid.

[5] ibid.

was exactly the question that needed to be answered. The AB's pronouncement that WTO Members are free to protect the environment as long as they comply with WTO obligations does not tell anything about how the AB recognises that freedom when interpreting these obligations.[6]

A final example is found in the *Whaling* case, in which the ICJ considered, after having elaborated on its standard of review, that:

> The Court … 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.[7]

Here again, the adjudicators refer to a potential rationale for deference, namely the observation that whaling policies are the subject of disagreement among States. Yet the Court only confirms that its task is to review treaty compliance, which is uncontested, and which does not add anything to the discussion on the appropriate intensity of review.

These examples show that considerations of deference in international decisions require a careful reading. Sometimes, they serve a rhetorical purpose, when they allude to the State's concern for intrusive review, but then only confirm that the adjudicator's task is restricted to reviewing treaty compliance.[8] The intensity of review concerns the deference granted in the

[6] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WTO DS58, AB Report of 12 October 1998, para 185-186.

[7] *Whaling in the Antarctic (Australia v Japan)*, ICJ, Judgment of 31 March 2014, para 69.

[8] Eduardo Jordão, 'La dynamique de la déférence: création et évolution des modèles auto-restrictives de contrôle juridictionnel dans le droit comparé' (2015) 2 Revista de Investigações Constitucionais 111. Jordão observes, however, that judicial deference may not only serve to express respect, but can also be used as a mitigating factor when judges expand the scope of their review. A similar argument is advanced by Elias Kastenas with regard to the ECtHR's margin of appreciation and its 'fonction compensatrice'. 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) 242.

context of precisely that assessment of compliance with international law.[9] The confirmation that the adjudicators 'only' review treaty compliance, does not explain when and how the adjudicator defers to the respondent or its domestic authorities.

The current chapter of this thesis attempt to clarify these matters. It will discuss, first of all, several specific contexts in which adjudicators express deference. Whereas some notions of deference, such as the 'objective assessment' of Article 11 DSU or the margin of appreciation of the ECtHR suggest the use of a general standard of review for a wide variety of different assessments, a more detailed analysis of the jurisprudence shows that the intensity of review differs depending on the type of assessment under review, the type of domestic decision-maker that receives deference, and the type of treaty provision that is being applied.[10] This chapter will discuss discuss to what extent different adjudicators adopt similar solutions in these regards. Next, the chapter discusses different ways in which deference operates, focusing on different methods and standards of review. Notions like reasonableness and good faith review appear in different fields of international adjudication, and the comparative inquiry seeks to establish whether they mean the same thing across different regimes.

3.2 The Scope of Deference

The considerations of deference studied in the previous chapter have different levels of generality. They range from considerations that apply to any assessment made under international law to those that apply only in the context of a specific legal provision or assessment. An example of a very general consideration of deference is the suggestion that international adjudicators should always be deferential to States on grounds of their sovereignty or their right to conduct domestic affairs as they see fit. For instance, the *TECO* tribunal held that it was 'mindful of the deference that international tribunals should pay to a sovereign State's regulatory powers'.[11] Such phrases

[9] Becroft is therefore wrong to suggest that '[t]he notion of a standard of review is not going to be important where the arbitral body is merely deciding on whether an international obligation has been observed'. Ross Becroft, *The Standard of Review in WTO Dispute Settlement. Critique and Development* (Elgar 2012) 24.

[10] Stephan Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2012) 3 J of Int'l Dispute Settlement 577, 595, noting the relevance of 'the text of investment treaties, the subject-matter of the host state's conduct at stake, the procedural posture of a case, the applicable law, and the structure of the state's obligation at stake'.

[11] *TECO Guatemala Holdings LLC v Guatemala*, ICSID ARB/10/17, Award of 19 December 2013, para 490.

propose that any international adjudicator should always grant a certain amount of deference to the respondent State.[12] They suggest a generic approach to deference, operating within the regime or international law as a whole.[13]

A comprehensive standard of review appears to be present in the WTO dispute settlement system. The AB has identified the 'objective assessment' contained in Article 11 DSU as covering any assessment made by panels. Yet in practice, the panels and the AB have applied different standards of review under this catch-all standard.[14] Consequently, one may wonder whether the pronouncement of a comprehensive standard of review such as the 'objective assessment' has much conceptual value.[15]

Another concept which might appear as a comprehensive standard of review is the margin of appreciation of the ECtHR. The margin features in a wide range of cases, especially when the intensity of the Court's review is controversial. Yet the previous chapter has demonstrated that the 'width' of the margin, commonly understood as corresponding to the intensity of the Court's review, varies in accordance with a wide range of factors. It is therefore perhaps misleading to speak about 'the margin of appreciation' instead of a variety of 'margins of appreciation'.[16] At

[12] The *TECO* tribunal specified its standard of review in para 492-493.

[13] Ilona Cheyne, 'Deference and the Use of the Public Policy Exception in International Courts and Tribunals' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation* (OUP 2014) 40. See for a theoretical discussion (and rejection) of a general doctrine of deference in the domestic United Kingdom context, Trevor Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) L Q Rev 96, 97: '[m]y objection was to the notion of a special *doctrine* of deference, which could occupy a distinctive place in our theory and practice of judicial review - independent of the various standards of review or of the principles defining the content of specific constitutional rights'.

[14] Andrew Guzman, 'Determining the Appropriate Standard of Review in WTO Disputes' (2009) 42 Cornell Int'l L J 45, 51: '[e]xisting WTO jurisprudence has implicitly acknowledged that the standard of review must vary depending on the agreement at issue and the matter being decided'.

[15] cf Julian Arato, 'The Margin of Appreciation in International Investment Law' (2014) 54 Virginia J of Int'l L 545, 553: 'I suggest that the broader problem of legal certainty arising out of fragmented approaches to the standard of review in international investment arbitration will not likely be resolved by appeal to a unified *a priori* standard of review, as a one-size-fits-all solution'. But see Becroft, *The Standard of Review* (n 9) 100, proposing a new 'general standard that may be applied in relation to all WTO Agreements', although, 'the general standard does not prescribe any particular degree of deference', 102.

[16] Giulio Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The *Lautsi* Case' (2013) 13 Human Rights L Rev 287, 308. Arato, 'The Margin of Appreciation' (n 15) 54 Virginia J of Int'l L 545, 568: 'the margin represents something of a moving target: unlike typical standards of review, within the ECHR the margin affords national authorities a *variable* level of deference'.

most, the 'doctrine' of the margin in a general sense could refer to the series of factors that determine the Court's intensity of review. Yet the practice of the Court has expanded this list to such an extent that the distinction between the determination of the margin's scope on the one hand and the assessment of Convention compliance on the other has become blurred.[17] Consequently, the concept of the 'margin of appreciation' exemplifies the two extremes of the spectrum of generality with which considerations of deference can be expressed. On the one hand, the margin can be seen as a general standard of review, but this obscures the Court's further calibration of the standard of review in different cases according to a variety of factors. On the other hand, one can envisage a wide variety of 'margins of appreciation' applicable in different contexts, but this might lead to such detailed refinement that the identification of the applicable standard of review comes to coincide with the assessment of the merits.

In spite of the use of generic concepts of deference in some fields of international law, in practice most considerations of deference appear in the context of a specific assessment, with regard to a specified domestic decision-maker, or under a particular treaty standard.[18] An example which is restricted in each of these three ways would be the argument that an investment arbitration tribunal reviewing compliance with the fair and equitable treatment standard should defer to domestic courts as far as the correct application of domestic law is concerned. In this case, deference is granted to a specific domestic actor concerning a specific assessment under a particular treaty standard. Such restrictions on the scope of deference allow for focused discussions of its appropriateness. At the same time, similar arguments can play a role in considerations with different levels of generality. For example, arguments concerning institutional capacity and legitimacy can inform general standards of review as well as tailored standards which only apply in a specific context.

[17] See fn 143 and accompanying text.

[18] Cheyne, 'Deference and the Use of the Public Policy Exception' (n 13) 40: this approach 'makes deference and intensity of review contingent on the circumstances of each case'.

3.2.1 Deference in the Context of Specific Assessments

3.2.1.1 Assessments of Facts

The establishment of facts by international adjudicators often takes place without explicit consideration of the standard of review.[19] For instance, in the context of investment arbitration, it has been noted that typical arbitrators have 'the willingness and ability … to probe the record and pursue the facts'.[20] This corresponds with approaches common in commercial arbitration, which 'favor active involvement by fact-finders in exploring the facts'.[21] At the same time, the previous chapter has shown that considerations of deference are not unusual in the context of fact-finding. It is commonly noted that 'international tribunals inherently are poorly equipped for the fact-finding task by comparison with municipal tribunals, and that at the same time the task of finding facts inevitably is more difficult for international tribunals than for their municipal counterparts'.[22] counterparts'.[22] Along these lines, the WTO AB has held that panels are generally 'poorly suited'

[19] Jean d'Aspremont and Makane Mbengue, 'Strategies of Engagement with Scientific Fact-finding in International Adjudication' (2014) 5 J of Int'l Dispute Settlement 240, 245: 'methods of establishment of facts and standards of proofs generally fluctuate in the life of all courts, especially international courts and tribunals'. For a general introduction, see Anna Riddell, 'Evidence, Fact-Finding, and Experts' in Cesare Romano *et al* (eds), *The Oxford Handbook of International Adjudication* (OUP 2013). The classic international law approach to fact-finding is characterised by its independence from domestic rules on evidence as well as its recognition of the discretionary powers of the adjudicator. See Gérard Niyungeko, *La preuve devant les juridictions internationales* (Bruylant 2005) 446-448.

[20] John Crook, 'Fact-Finding in the Fog: Determining the Facts of Wars and Upheavals' in Catherine Rogers and Roger Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 318. cf *Chemtura v Canada*, UNCITRAL, Award of 2 August 2010, para 123: 'the Tribunal is of the opinion that the assessment of the facts is an integral part of its review'. Yuka Fukunaga, 'Standard of Review and "Scientific Truths" in the WTO Dispute Settlement System and Investment Arbitration' (2012) 3 J of Int'l Dispute Settlement 559, 560: 'tribunals in investment arbitration tend to review the facts extensively based on the first-hand evidence produced by the parties, or, to some extent, collected by the tribunals themselves'; Lucy Reed, 'Confronting Complexities in Fact-Finding and the Nature of Investor-State Arbitration' (2012) 106 ASIL Proceedings 233: '[t]he often unruly state of fact-finding in investor-state arbitration awards is not necessary'.

[21] Crook, 'Fact-Finding' (n 20) 318-319.

[22] Charles Brower, 'The Anatomy of Fact-Finding before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence' in Richard Lillich (ed), *Fact-Finding Before International Tribunals. Eleventh Sokol Colloquium* (Transnational 1992) 147.

to engage in *de novo* review of facts.[23] Similarly, the regional human rights courts routinely confirm that it is not their role to assess themselves the facts considered by domestic courts.[24] The ICJ, however, commonly holds that it 'will make its own determination of the facts'.[25]

When analysing the standard of review applied by international courts and tribunals in the context of fact-finding, it is useful to distinguish between different tasks undertaken by the adjudicators. In some cases, they establish the facts material to the case at hand, but in others they review whether domestic authorities have properly gathered and assessed facts in the light of an international legal standard that poses certain requirements in that regard. Examples of such standards can be found in the WTO Agreements, where domestic authorities are obliged to make specific determinations before imposing certain measures such as trade remedies.[26] Other examples are Article 6 of the ECHR as well as the procedural limbs of other Articles of the Convention.[27] Such review of domestic fact-finding provides a common context for discussions about deference. In this context, the human rights courts developed the 'fourth instance' formula, expressing their reluctance to reconsider fact-finding by domestic courts in great detail. Likewise, the AB held that when making assessments of whether domestic authorities properly investigated the situation at stake, a panel should 'bear in mind its role as *reviewer* of agency action, rather than

[23] *European Communities - Measures Concerning Meat and Meat Products (EC – Hormones)*, WTO DS26, AB Report of 16 January 1998, para 117. Nonetheless, in para 132, discussing the scope of its own appellate review, the AB referred to the panel as 'the trier of facts'.

[24] *Kemmache v France (No 3)*, ECtHR 17621/91, Judgment of 24 November 1994, para 44. In *Hatton*, the Court refrained from making certain factual assessments. *Hatton and Others v United Kingdom*, ECtHR (GC) 36022/97, Judgment of 8 July 2003, para 124. *Isiaga v Tanzania*, ACtHPR, 032/2015, Judgment of 21 March 2018, para 65.

[25] *Armed Activities on the Territory of the Congo (Congo v Uganda)*, ICJ, Judgment of 19 December 2005, para 57; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ, Judgment of 20 April 2010, para 168. See James Devaney, *Fact-finding before the International Court of Justice* (CUP 2016) 9-10. See for the suggestion of using special masters as practised by the United States Supreme Court, Cymie Payne, 'Mastering the Evidence: Improving Fact Finding by International Courts' (2011) 41 Environmental L J 1191.

[26] Michelle Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (OUP 2009) 231-232. Reto Malacrida and Gabrielle Marceau, 'The WTO Adjudicating Bodies' in in Rob Howse *et al* (eds), *The Legitimacy of International Trade Courts and Tribunals* (CUP 2018) 39-41.

[27] Eva Brems, 'Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights* (CUP 2013).

as *initial trier of fact*'.[28] In sum, expressions of deference in the context of fact-finding appear when adjudicators are reviewing the quality of domestic fact-finding. Discussions related to the intensity of review are rare in cases where the international adjudicator is directly involved in fact-finding, even if this happens on the basis of records produced by domestic authorities.[29]

3.2.1.2 Technical Assessments

Difficulties related to the assessment of facts often overlap with difficulties related to technical assessments.[30] In various different fields of international law, the review of such assessments has prompted adjudicators to express considerations of deference. The ECtHR has granted a wide margin of appreciation 'in an area as complex and difficult as that of the development of large cities' and 'in an area as complex and fluctuating as that of unfair competition'.[31] The WTO AB has held in the context of risk assessments under the SPS Agreement that panels should not substitute their 'own scientific judgment for that of the risk assessor'.[32] According to the AB, the

[28] *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. cf *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US – Cotton Yarn)*, WTO DS192, AB Report of 8 October 2001, para 74.

[29] See for a distinction between situations where panels need to review agency determinations and situations where they have to conduct their own review *Australia - Measures Affecting the Importation of Apples from New Zealand (Australia – Apples)*, WTO DS367, AB Report of 29 November 2010, para 356: '[c]aution not to conduct a *de novo* review is appropriate where a panel reviews a risk assessment conducted by the importing Member's authorities in the context of Article 5.1. However, the situation is different in the context of an Article 5.6 claim.'

[30] See special section 20 Finnish Ybk of Int'l L 2009 (2011), introduced by Jan Klabbers, 'Changing Futures? Science and International Law', 211; special issue 3 J of Int'l Dispute Settlement 3 (2012), introduced by Laurence Boisson de Chazournes, 'Introduction: Courts and Tribunals and the Treatment of Scientific Issues' (2012) 3 J of Int'l Dispute Settlement 479; Tania Voon, 'Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law' (2015) 18 JIEL 795.

[31] *Sporrong and Lönnroth v Sweden*, ECtHR (Plenary) 7151/75, Judgment of 23 September 1982, para 69; *Markt Intern Verlag GmbH and Klaus Beermann v Germany*, ECtHR (Plenary) 10572/83, Judgment of 20 November 1989, para 33.

[32] *Canada – Continued Suspension of Obligations in the EC-Hormones Dispute (Canada – Continued Suspension)*, WTO DS321, AB Report of 16 October 2008, para 590.

question for the panel should not be whether the Member's risk assessment was 'correct' but only whether it was 'objectively justifiable'.[33] In the *Whaling* case, the ICJ adopted a standard of reasonableness after earlier approaches emphasizing the Court's independent review had been heavily criticized by some of the judges.[34] In the field of investment arbitration, the problems related to the review of technical assessments have also led to discussions about deference.[35]

Since deference in the context of technical assessments is justified by the expertise and capacities of domestic institutions, in certain contexts it might not be the respondent State who possesses superior expertise concerning certain technical assessments. Indeed, in various investment arbitration cases, tribunals have deferred to the expertise of investors, a practice known as the 'business judgment rule'.[36] Moreover, instead of deferring to the institutions of the

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[33] ibid. Members are not obliged to follow majority opinions in science: *EC – Hormones* (n 23) para 194; *European Communities - Measures Affecting Asbestos and Products Containing Asbestos (EC – Asbestos)*, WTO DS135, AB Report of 12 March 2001, para 178.

[34] *Whaling in the Antarctic (Australia v Japan)*, ICJ, Judgment of 31 March 2014, para 67.

[35] *Glamis Gold Ltd v United States*, UNCITRAL, Award of 8 June 2009, para 779; *Chemtura v Canada*, UNCITRAL, Award of 2 August 2010, para 123. In *Methanex*, the tribunal evaluated a report of the University of California. *Methanex Corp v United States*, UNCITRAL, Final Award of 3 August 2005, Part III, Ch A, para 101: '[w]hilst it is possible for other scientists and researchers to disagree in good faith with certain of its methodologies, analyses and conclusions, the fact of such disagreement, even if correct, does not warrant this Tribunal in treating the UC Report as part of a political sham by California'. The tribunal was 'not persuaded that the UC Report was scientifically incorrect'. Céline Lévesque, 'Science in the Hands of International Investment Tribunals: A Case for "Scientific Due Process"' (2011) 20 Finnish Ybk of Int'l L 2009 259; Fukunaga, 'Standard of Review' (n 20) 572; Lukasz Gruszczynski and Valentina Vadi, 'Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration. Converging Parallels?' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 13).

[36] Thomas Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Christina Binder *et al* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 734-735. eg *Micula* et al *v Romania*, ICSID ARB/05/20, Award of 11 December 2013, para 1138: 'giving due deference to the business judgment of the owners and managers of the business'. In *Hrvatska Elektroprivreda dd v Slovenia*, ICSID ARB/05/24, Award of 17 December 2015, para 386, the tribunal reviewed certain decisions by the investor in the context of the calculation of loss. The tribunal held: '[w]hile deference should be given to the judgment of the HEP dispatchers who made decisions in real time, the Tribunal does require that those judgments were reasonable. … The fact that someone else would have acted differently is not enough to discredit HEP's course of conduct unless it was unreasonable or irrational. In summary, this approach does not give an operator *carte blanche* to make any decision at will, but the Tribunal will not second guess an operator's decision unless there is evidence that the decision was unreasonable.' See also *Eiser Infrastructure Ltd and Energia Sola Luxembourg SarL v Spain*, ICSID ARB/13/36,

respondent State, some adjudicators refer to experts instead.[37] This is the approach advocated by Judges Al-Khasawneh and Simma in *Pulp Mills*:

> The adjudication of disputes in which the assessment of scientific questions by experts is indispensable, as is the case here, requires an interweaving of legal process with knowledge and expertise that can only be drawn from experts properly trained to evaluate the increasingly complex nature of the facts put before the Court.[38]

Consequently, according to the dissenting Judges, reliance on experts is the right response to cases involving complex scientific and technological assessments.[39] In the *Whaling* case, the Court took account of the assessments made by the experts appointed by the parties, especially when they

Award of 4 May 2017, para 364, noting, in its assessment of legitimate expectations, that 'Claimants are experienced and sophisticated investors'.

[37] See the special issue 9 J of Int'l Dispute Settlement 3 (2018), introduced by Laurence Boisson de Chazournes *et al*, 'The Expert in the International Adjudicative Process: Introduction to the Special Issue'. See, in that issue, for a broad empirical study Laurence Boisson de Chazournes *et al*, 'One Size does not Fit All – Uses of Experts before International Courts and Tribunals: An Insight into the Practice' (2018) 9 J of Int'l Dispute Settlement 477.

[38] *Pulp Mills* (n 25) Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, para 3. In para 4, the Judges give a vivid description of the issue: 'The Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties. To refer to only a few instances pertinent for our case, a court of justice cannot assess, without the assistance of experts, claims as to whether two or three-dimensional modelling is the best or even appropriate practice in evaluating the hydrodynamics of a river, or what role an Acoustic Doppler Current Profiler can play in such an evaluation. Nor is the Court, indeed any court save a specialized one, well-placed, without expert assistance, to consider the effects of the breakdown of nonylphenolethoxylates, the binding of sediments to phosphorus, the possible chain of causation which can lead to an algal bloom, or the implications of various substances for the health of various organisms which exist in the River Uruguay.'

[39] ibid para 11. See for a similar argument Juan Sandoval Coustasse and Emily Sweeney-Samuelson, 'Adjudicating Conflicts over Resources: The ICJ's Treatment of Technical Evidence in the Pulp Mills Case' (2011) 3 Goettingen J of Int'l L 447. For an analysis of prodecural options, see Caroline Foster, 'New Clothes for the Emperor? Consultation of Experts by the International Court of Justice' (2013) 5 J of Int'l Dispute Settlement 139.

agreed among each other.[40] It seems that reliance on experts has become more and more common in a variety of international courts and tribunals.[41]

Irrespective of whether technical assessments are left to the respondent State or referred to experts, a thorny question is how to draw the line between technical and legal assessments. In some cases, the boundary between the task of experts and that of adjudicators has led to controversy. The *Enron* Annulment Committee criticized the tribunal for relying too heavily on an expert opinion in the context of assessing whether Argentina could invoke a necessity defence. The committee noted: 'Professor Edwards is an economist and not a lawyer, and his report does not purport to address the principle of necessity under customary international law or the interpretation of Article 25 of the ILC'.[42] Instead of applying that Article itself, the tribunal had 'applied an expert opinion on an economic issue', which constituted a ground for annulment.[43] Consequently, adjudicators should avoid deferences to experts where they need to make legal assessments under international law.[44]

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[40] *Whaling* (n 34) para 188, 225. See Lucas Carlos Lima, 'The Evidential Weight of Experts before the ICJ: Reflections on the *Whaling in the Antarctic* Case' (2015) 6 J of Int'l Dispute Settlement 621. See further for the role of experts in the *Whaling* case, Shotaro Hamamoto, 'Paradoxical Role of Experts in the *Whaling in the Antarctic* Case' (2016) 59 Japanese Ybk of Int'l L 345, noting that independent experts can have views not necessarily beneficial to the party that appoints them.

[41] Joost Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2002) 51 ICLQ 325. Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality* (CUP 2011) 341. Foster notes 'a greater reliance on expert evidence'. Tullio Treves, 'Law and Science in the Interpretation of the Law of the Sea Convention: Article 76 Between the Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf' (2012) 3 J of Int'l Dispute Settlement 483, 486: '[t]he practice of ITLOS and of Annex VII arbitral tribunals shows moderate resort to scientific experts'.
In *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (Argentina - Textiles and Apparel)*, WTO DS56, AB Report of 27 March 1998, para 86, the AB considered that 'it might perhaps have been useful for the Panel to have consulted with the IMF', but that the panel 'did not abuse it discretion' by not doing so. Gabrielle Marceau and Jennifer Hawkins, 'Experts in WTO Dispute Settlement' (2012) 3 J of Int'l Dispute Settlement 493.

[42] *Enron Creditors Recovery Corp v Argentina*, ICSID Case No ARB/01/3, Decision on the Application for Annulment of 30 July 2010, para 374.

[43] ibid, para 377.

[44] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentina*, ICSID ARB/03/19, Decision on Annulment of 5 May 2017, para 306. Concerns related to the impartiality of experts can also cause trouble, see *Canada – Continued Suspension* (n 32) para 436: '[s]cientific experts and the manner in which their opinions are solicited and evaluated can have a significant bearing on a panel's consideration of the evidence and its review of a

3.2.1.3 Interpretation and Application of Domestic Law

A third type of assessment that commonly evokes discussions about deference in different international courts and tribunals concerns the interpretation and application of domestic law. Even if questions of domestic law have traditionally been understood, from an international point of view, as question of fact,[45] international adjudicators have often realised that their review of domestic law may necessitate legal assessments.[46] For instance, the IACtHR considered that in its its review of State compliance with the Convention, 'there is an intrinsic interrelationship between the analysis of international law and domestic law'.[47]

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domestic measure, especially in cases like this one involving highly complex scientific issues. Fairness and impartiality in the decision-making process are fundamental guarantees of due process. Those guarantees would not be respected where the decision-makers appoint and consult experts who are not independent or impartial. Such appointments and consultations compromise a panel's ability to act as an independent adjudicator'.

[45] *Monte Confurco (Seychelles v France)*, ITLOS No 6, Judgment of 18 December 2000, para 72. Giorgio Gaja, 'Dualism – A Review' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP 2007) 58-59; Peter Tomka *et al*, 'International and Municipal Law Before the World Court: One or Two Legal Orders?' (2015) 35 Polish Ybk of Int'l L 11, 20-26; 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. *United States - Sections 301-310 of the Trade Act of 1974 (US – Section 301 Trade Act)*, WTO DS152, Panel Report of 22 December 1999, para 7.18.

[46] Sharif Bhuiyan, *National Law in WTO Law. Effectiveness and Good Governance in the World Trading System* (CUP 2007) 42: 'sometimes it is suggested that because national laws are merely facts, an international tribunal does not interpret such laws. This proposition, however, is difficult to substantiate. It is problematic in that it fails to take into account that rules of national law do not lose their normative quality in relation to the rights, obligations and transactions that they seek to regulate, simply because their content or meaning is determined as a factual matter and on the basis of evidence. And the normative import of a rule of law can hardly be ascertained without a certain amount of interpretation.' See also Guillermo Aguilar Alvarez and Santiago Montt, 'Investments, Fair and Equitable Treatment, and the Principle of "Respect for the Integrity of the Law of the Host State": Toward a Jurisprudence of "Modesty" in Investment Treaty Arbitration' in Mahnoush Arsanjani *et al* (eds), *Looking to the Future. Essays on International Law in Honor of W Michael Reisman* (Brill 2010) 602. The legal relevance of domestic law is especially evident in investment disputes where domestic law is (part of) the applicable law; Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 104-108. James Flett, 'When is an Expert not an Expert?' (2018) 9 J of Int'l Dispute Settlement 352, arguing that an assessment of the meaning of municipal law is not a question of pure fact. *Alghanim and Sons Co for General Trading and Contracting WLL and Fouad Mohammed Thunyan Alghanim v Jordan*, ICSID ARB/13/38, Award of 14 December 2017, para 355.

[47] *Cabrera García and Montiel Flores v Mexico*, IACtHR, Judgment of 26 November 2010, para 16.

Consequently, issues of domestic law in cases before international courts and tribunals have evoked questions concerning the proper relationship between domestic authorities and international adjudicators. Most international courts and tribunals express deference in this context. In the *Diallo* case, the ICJ held:

> The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts. Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.[48]

According to the ECtHR, '[i]t is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law', because they are 'particularly qualified to settle the issues arising in this connection'.[49] The ACtHPR considered that the Supreme Court of Appeal of Malawi, 'being the final court, has the last word on what the correct national law is'.[50] In the context of investment law, it was held in *Pac Rim Cayman v El Salvador* that '[a]s a general approach, deference should be given by an international tribunal to the unanimous interpretation of its own laws given in good faith by the responsible authorities of a State at a time before the emergence of the parties' dispute'.[51] At the same time, according to the tribunal, 'such deference does not preclude or exhaust the jurisdiction of an international tribunal' but 'operates only as a rebuttable presumption'.[52]

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[48] *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*, ICJ, Judgment of 30 November 2010, para 70, referring to case law of the PCIJ.

[49] *Winterwerp v Netherlands*, ECtHR 6301/73, Judgment of 24 October 1979, para 46.

[50] *Mkandawire v Malawi*, ACtHPR, 003/2011, Judgment of 21 June 2013, para 39.3.

[51] *Pac Rim Cayman LLC v El Salvador*, ICSID ARB/09/12, Award of 14 October 2016, para 8.31. Apparently, such deference would not necessarily apply to interpretations advanced in the context of the dispute. The tribunal further distinguishes between interpretations by 'the responsible bodies entrusted with governmental powers' and 'non-authoritative' interpretations, for example by 'academic lawyers'.

[52] ibid. See, generally, Hepburn, *Domestic Law in International Investment Arbitration* (n 46) 108-138. See also *Soufraki v United Arab Emirates*, ICSID ARB/02/7, Annulment Decision of 5 June 2007, para 96-97; *AES Corp and Tau Power BV v Kazakhstan*, ICSID ARB/10/16, Award of 1 November 2013, para 306-307; *Emmis Int Holding BV,*

In the context of trade law, the question of the interpretation of domestic law has also led to discussions of deference.[53] In *US – Section 301 Trade Act*, the Panel concluded that it was 'not bound to accept the interpretation' of domestic law presented by the respondent.[54] At the same time, it held that 'any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law'.[55] In *China – Intellectual Property Rights*, the Panel held that 'objectively, a Member is normally well-placed to explain the meaning of its own law', but that 'in the context of a dispute, to the extent that either party advances a particular interpretation of a provision of the measure at issue, it bears the burden of proof that its interpretation is correct'.[56] Consequently, WTO adjudicators defer to the respondent Member as far as the interpretation of domestic law is concerned, unless that interpretation is contested by the other party, in which case the panel will 'objectively examine the question at issue' based on the legal text and other evidence.[57]

Emmis Radio Operating BV, MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v Hungary, ICSID ARB/12/2, Award of 16 April 2014, para 176: 'determinations of municipal courts as to the content of the municipal laws that they are mandated to apply are likely to be of great help to an international tribunal'. See also Andrzej Olas, 'May International Arbitral Tribunals Declare Laws Unconstitutional? An International and a Polish Perspective on the Issue of Dealing with Unlawful Laws' (2017) 34 J of Int'l Arbitration 169.

[53] *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (India – Patents (US))*, WTO DS50, AB Report of 19 December 1997, para 64-66. India complained before the AB that the panel should have 'sought guidance from India on matters relating to the interpretation of Indian law'. According to the AB, 'the Panel was simply performing its task' in determining whether India complied with its treaty obligations: '[t]here was simply no way for the Panel to make this determination without engaging in an examination of Indian law'. Yet, according to the AB, the Panel was not interpreting Indian law 'as such'; instead, it 'was examining Indian law solely for the purpose of determining whether India had met its obligations'. The AB referred to *Certain German Interests in Polish Upper Silesia*, PCIJ, Judgment of 25 May 1925, para 52: '[t]he Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations'.

[54] *US – Section 301 Trade Act* (n 45) para 7.19.

[55] ibid.

[56] *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights)*, WTO DS362, Panel Report of 26 January 2009, para 7.28. Confirmed by the AB in *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines (Thailand – Cigarettes (Philippines))*, WTO DS371, AB Report of 17 June 2011, fn 253.

[57] *Thailand – Cigarettes (Philippines)* (n 56) Panel Report of 15 November 2010, para 7.684; AB Report of 17 June 2011, fn 253. cf *United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (US – Carbon Steel)*, WTO DS213, AB Report of 28 November 2002, para 157.

It appears that in different international contexts, adjudicators grant a certain degree of deference to respondent States as far as the interpretation of domestic law is concerned. At the same time, some adjudicators demonstrate less deference when the respondent State's interpretation is contested by the other party to the dispute, or when such an interpretation has only surfaced after the dispute arose. Adjudicators who defer to the State's interpretation justify such deference on grounds similar to those advanced in the context of factual assessments: national authorities are presumably more familiar with domestic law than an international tribunal. Nonetheless, not only institutional capacity but also institutional legitimacy seems to play a role here. As noted by Sharif Bhuiyan in the context of trade law: an 'invocation of even minimalist powers to interpret national law would generate a huge outcry by the Members of the WTO'.[58]

3.2.1.4 Public Policy Choices

The context in which questions of deference are most controversial is probably the review of public policy choices made by domestic authorities. Such choices are often at stake in controversial cases before the human rights courts, but investment arbitration and WTO cases also regularly concern issues of public policy.[59]

The ECtHR respects 'the exercise of discretionary judgment in the implementation of policies adopted in the interest of the community'.[60] In *Hatton and Others*, the Court considered that:

> The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a

[58] Bhuiyan, *National Law in WTO Law* (n 46) 217.

[59] Gus van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP 2013) 10-14; Emily Lydgate, 'Is it Rational and Consistent? The WTO's Surprising Role in Shaping Domestic Public Policy' (2017) 20 JIEL 561.

[60] *Buckley v United Kingdom*, ECtHR 20348/92, Judgment of 25 September 1996, para 75, with further references.

> democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.[61]

The Court has identified specific areas where it grants substantial deference. In *James and Others*, it held that 'the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one'.[62] A broad margin is also required in regard to sensitive 'moral and ethical issues'.[63]

The investment tribunal in *Philip Morris v Uruguay* considered that a similar approach should be adopted in investment arbitration, at least in the context of public health.[64] In that same context, the tribunal in *Achmea v Slovakia* held that it was 'not empowered to intervene in the democratic process of a sovereign State'.[65] The claimant had requested the tribunal to order Slovakia to refrain from expropriating its investment in the context of a proposed health care sector reform, which the tribunal refused.

> The design and implementation of its public healthcare policy is for the State alone to assess and the State must balance the different and sometimes competing interests, such as its duty to ensure appropriate healthcare to its population and its duty to honor its international investment protection commitments.[66]

[61] *Hatton v United Kingdom* (n 24) para 97.

[62] *James and Others v United Kingdom*, ECtHR (Plenary) Judgment of 21 February 1986, para 46. More specific contexts concern eg policies concerning elections (*Mathieu-Mohin and Clerfayt v Belgium*, ECtHR (Plenary) 9267/81, Judgment of 2 March 1987, para 52) and education (*Lautsi and Others v Italy*, ECtHR (GC) 30814/06, Judgment of 18 March 2011, para 69). See also the areas identified by Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012) 153-167.

[63] *Evans v United Kingdom*, ECtHR (GC) 6339/05, Judgment of 10 April 2007, para 81; *A, B and C v Ireland*, ECtHR (GC) 25579/05, Judgment of 16 December 2012, para 233.

[64] *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. See also para 418.

[65] *Achmea BV v* Slovakia, PCA 2013-12, Award on Jurisdiction and Admissibility of 20 May 2014, para 251.

[66] ibid.

Also beyond the context of public health, several investment arbitration tribunals have expressed deference in the context of the review of public policies.[67] For instance, the *Paushok* tribunal held that:

> The definition of public interest is one that varies considerably from one State to another and it is a subject of significant public debate within each State, [e]specially when controversial legislation or regulation is proposed. This is more a subject for political debate than arbitral decisions.[68]

The considerations expressed by the ECtHR and various investment tribunals in the context of their review of public policies are reminiscent of arguments commonly raised in the context of domestic judicial review. As in the domestic context, international adjudicators allude to the boundaries between political and legal tasks, and to the democratic legitimacy of other decision-makers. At the same time, not all institutions studied in the previous chapter have developed a discourse of deference. The practice of the IACtHR, which reviews cases similar to those before the ECtHR, is fragmented, while one of its previous Presidents has denied the pertinence of deference in the Inter-American context. Moreover, several investment tribunals have rejected demands for deference, not because they 'might be wishing to substitute for the functions of the sovereign State', but because they could not 'fail to give effect to legal commitments that are binding on the parties and interpret the rules accordingly'.[69] The WTO AB recognises that Members have a right to determine their own level of protection of non-trade interests, but apart from that pronouncement, the AB has not elaborated on the suitability of judicial deference in the context of its review of public policies.

[67] *SD Myers Inc v Canada,* UNCITRAL, Partial Award of 13 November 2000, para 261. *Glamis Gold v United States* (n 35) para 804: 'governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless'.

[68] *Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Mongolia,* UNICTRAL, Award on Jurisdiction and Liability of 28 April 2011, para 328.

[69] *Enron Corp and Ponderosa Assets, LP v Argentina,* ICSID ARB/01/3, Award of 22 May 2007, para 340.

3.2.1.5 Treaty Interpretation

A final assessment which has occasionally evoked discussions about deference concerns treaty interpretation. Some adjudicators have considered that a respondent State is entitled to deference in its capacity of treaty drafter.[70] In *Pope and Talbot v Canada*, the tribunal rejected a particular interpretation of Article 1105 NAFTA advocated by the United States for lack of evidence, concluding that 'the suggestions of the United States on this matter do not enjoy the kind of deference that might otherwise be accorded to representations by parties to an international agreement as to the intentions of the drafters with respect to particular provisions in that agreement'.[71] The passage suggests that in other circumstances, a respondent State would be accorded deference on this ground.[72]

The issue became highly contested when the three NAFTA member States issued a joint declaration on Article 1105. Under Article 1132(2) NAFTA, the Free Trade Commission (FTC), which consists of representatives of the States party, can issue binding interpretations of the

[70] See for a defense of this position Margie-Lys Jaime, 'Relying Upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements' (2014) Georgetown J of Int'l L 261. A specific question of treaty interpretation where deference could be invoked concerns the interpretation of jurisdictional clauses. See Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 440 ff. Yet deference in this context would conflict with the principle of *compétence de la compétence*. See eg *Fisheries Jurisdiction Case (Spain v Canada)*, ICJ, Judgment of 4 December 1998, para 37: '[t]he Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself'. Ibrahim Shihata, *The Power of the International Court to Determine its Own Jurisdiction. Compétence de la compétence* (Springer 1965); Laurence Boisson de Chazournes, 'The Principle of Compétence de la Compétence in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals' in Mahnoush Arsanjani *et al* (eds), *Looking to the Future. Essays on International Law in Honor of W Michael Reisman* (Brill 2010). For the interpretation of unilateral declarations, see Orakhelashvili, *The Interpretation of Acts and Rules* (n 70) 465; *Nuclear Tests Case (Australia v France)*, ICJ, Judgment of 20 December 1974, para 44.

[71] *Pope and Talbot Inc v Canada*, UNCITRAL, Award on the Merits of Phase 2 of 10 April 2001, para 114.

[72] cf Art 31(3) VCLT, which provides that '[t]here shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'. See Kendra Magraw, 'Investor-State Disputes and the Rise of Recourse to State Party Pleadings as Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties' (2015) 30 ICSID Rev 142. See, generally, Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013). See for the influence of the non-disputing State party to a bilateral treaty, Andrés Sureda, *Investment Treaty Arbitration. Judging under Uncertainty* (CUP 2012) 36-40.

Agreement. In July 2001, the FTC issued several 'Notes of Interpretation of Certain Chapter 11 Provisions', including a statement on the interpretation of the minimum standard as codified in Article 1105.[73] The Notes were issued shortly after the *Pope and Talbott* tribunal had issued its award on the merits, in which it had found a breach of Article 1105,[74] and sent by Canada to the tribunal. In its damages award, the tribunal wondered if Canada intended the Notes to apply retroactively to the tribunal's own interpretations of Article 1105. It considered 'as a rule of international law that no-one shall be judge in his own cause, and that the purpose of this arbitral mechanism is … to assure due process before an impartial tribunal'.[75] In the end, the tribunal saw no contradiction between its own interpretation and the Notes,[76] but the award suggests that if this would have been otherwise, the tribunal would have retained its own interpretation.[77]

In another case that was pending when the FTC issued its Notes, *ADF v United States*, the tribunal was not reluctant to defer to the FTC's interpretation of Article 1105, because it saw 'the Parties themselves – all the Parties – speaking to the Tribunal'.[78] The arbitrators could not conceive conceive of a 'more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA'.[79] The *Methanex* tribunal invoked an analogy with domestic legal systems:

> If a legislature, having enacted a statute, feels that the courts implementing it have misconstrued the legislature's intention, it is perfectly proper for the legislature to clarify its intention. In a democratic and representative system in which legislation

[73] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions', 31 July 2001. The most contentions statements stipulated that '[t]he concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens' and that '[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)'. See Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 180-181; Michael Reisman, 'Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law' (2015) 30 ICSID Rev 616, 624-633.

[74] *Pope and Talbot v Canada* (n 71).

[75] *Pope and Talbot* (n 71) Award in Respect of Damages of 31 May 2002, para 13.

[76] ibid para 69.

[77] ibid para 47.

[78] *ADF Group Inc v United States*, ICSID ARB(AF)/00/1, Award of 9 January 2003, para 177.

[79] ibid.

> expresses the will of the people, legislative clarification in this sort of case would appear to be obligatory. The Tribunal sees no reason why the same analysis should not apply to international law.[80]

The discussions in the context of the FTC Notes demonstrate the potential tensions between the role of a State as treaty drafter and interpreter on the one hand, and as disputing party on the other. Yet the issue may be typical for investment arbitration, where only one of the disputing parties is a State party to the treaty, and where agreement among all signatories is relatively more likely because investment treaties are commonly concluded between two or a small number of States.[81] The issue is less likely to arise in the context of interstate disputes, where both disputing parties can assert insider's knowledge of the treaty parties' intentions, and in the context of multilateral treaties with a large number of signatories, where subsequent agreement on the interpretation of the treaty is less probable.[82]

Beyond the scope of NAFTA, some international adjudicators have considered that treaties should be interpreted 'in deference to the sovereignty of states'.[83] This so-called principle of 'restrictive interpretation' stipulates that treaty obligations should be interpreted restrictively on

[80] *Methanex v United States* (n 35) Part IV C para 22. cf *ADF v United States* (n 78) para 177, mentioning the need 'for a mechanism for correcting what the Parties themselves become convinced are interpretative errors'.

[81] Explicit clauses providing for binding joint interpretation by States parties are rare even in investment law. Eleni Methymaki and Antonios Tzanakopoulos, 'Masters or Puppets? Reassertion of Control through Joint Investment Treaty Interpretation' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2017) 168.

[82] Sean Murphy, 'The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 92-93: 'it seems plausible that a bilateral treaty is more susceptible to use of subsequent agreement for interpretation (or even modification), which might easily be done through a simple exchange of diplomatic notes or standing consultative commission. … [I]t would seem comparatively more difficult to develop through subsequent conduct an interpretation (let alone a modification) of an existing multilateral treaty given the need to assess the practice of numerous states and to decide how to view any inconsistencies in that practice, how to construe silence or inaction, and how to determine which types of practice are relevant'.

[83] *Loewen Group Inc and Raymond Loewen v United States*, ICSID ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction of 5 January 2001, para 51. The *Loewen* tribunal rejected the principle: '[w]hatever the status of this suggested principle may have been in earlier times, the Vienna Convention on the Law of Treaties is the primary guide to the interpretation of the provisions of NAFTA'.

account of State sovereignty.[84] In *Navigational Rights*, the ICJ was 'not convinced by Nicaragua's argument that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua'.[85] The Court considered that:

> While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, *i.e.* in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.[86]

In *Navigational Rights*, the Court rejected the idea that a treaty provision limiting sovereignty should be interpreted *a priori* in a restrictive way.[87] Yet at the same time, the Court's phrasing suggests that in cases where the customary rules of treaty interpretation do not result in a conclusive outcome, restrictive interpretation may be called for.[88] This narrower approach is known under a Latin maxim, *in dubio mitius*, which holds that if a treaty provision is ambiguous, 'the meaning is to be preferred which is less onerous for the obliged party, or which interferes less

[84] Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Ybk Int'l L 48, 58. Lauterpacht denounced the principle. See also Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 EJIL 681.

[85] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgment of 13 July 2009, para 48.

[86] ibid.

[87] See also *Methanex v US* (n 35) Partial Award of 7 August 2002, para 105: '[w]e accept that the NAFTA Parties intended that the provisions of Chapter 11, … should be interpreted in good faith in accordance with their ordinary meaning (in accordance with Article 31(1) of the Vienna Convention), without any one-sided doctrinal advantage built in to their text to disadvantage procedurally an investor seeking arbitral relief'. *Mondev Int Ltd v United States*, ICSID ARB(AF)/99/2, Award of 11 October 2002, para 43: '[i]n the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties'.

[88] Richard Gardiner, *Treaty Interpretation* (2nd edn OUP 2015) 407. cf *Whaling* (n 34) para 58.

with the parties' territorial and personal supremacy, or which contains less general restrictions upon the parties'.[89]

The principle of *in dubio mitius* has been applied by the AB of the WTO in *EC – Hormones*, in the context of Article 3.1 of the SPS Agreement, which obliges Members to 'base' their SPS measures on international standards, guidelines or recommendations. According to the Panel, this article required that such measures 'conform to' international standards, providing the same level of protection. The AB rejected this interpretation. Amongst other things, it noted that:

> The Panel's interpretation of Article 3.1 would … transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the *SPS Agreement* would be necessary.[90]

In a footnote, the AB referred to '[t]he interpretative principle of *in dubio mitius*, widely recognized in international law as a "supplementary means of interpretation"'.[91] The AB listed a number of academic sources and four judicial and arbitral decisions allegedly applying *in dubio mitius*, including the ICJ's *Nuclear Test Case*.[92] The claim that *in dubio mitius* is 'widely

[89] Lassa Oppenheim, *International Law. A Treatise. Vol I Peace* (London 1905) 561. James Cameron and Kevin Gray, 'Principles of International Law in the WTO Dispute Settlement Body' (2001) 50 ICLQ 248, 258-259.

[90] *EC – Hormones* (n 23) para 165.

[91] ibid fn 154.

[92] *Nuclear Tests Case* (n 70) para 44, where the Court held in the context of unilateral acts: '[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for'. The AB further referred to the judgment in *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, PCIJ, Advisory Opinion of 11 December 1931, para 45; a decision of the Italian-US Conciliation Commission of 1961; and an interstate arbitral award of 1963.

recognized' has been contested by academics,[93] and the principle has not been applied by the AB on other occasions.[94]

In the field of investment law, the pertinence of *in dubio mitius* has been assessed differently by several tribunals ruling on their jurisdiction. In *Ethyl Corp v Canada*, the tribunal held that the notion 'has long since been displaced by Articles 31 and 32 of the Vienna Convention'.[95] By contrast, the *SGS v Pakistan* tribunal explicitly applied *in dubio mitius*. In that case, the tribunal rejected the investor's claim that a so-called umbrella clause could give the tribunal jurisdiction over claims arising out of a contract between the investor and the host State government:

> Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant. The appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*.[96]

On a similar issue, the tribunal in *Eureko v Poland* reached a different conclusion. It considered that:

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[93] According to Christophe Larouer, 'In the Name of Sovereignty? The Battle over In Dubio Mitius Inside and Outside the Courts' (2009) Cornell Law School Inter-University Graduate Student Conference Papers No 22, 29-31, the references used by the AB are not only insufficient but also misleading. See also Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 63. Van Damme notes that the AB's statement was not 'entirely' correct. Eric de Brabandere and Isabelle van Damme, 'Good Faith in Treaty Interpretation' in Andrew Mitchell *et al* (eds), *Good Faith and International Economic Law* (2015) 45-48.

[94] Van Damme, *Treaty Interpretation* (n 93) 64. In *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 411, the AB held that 'even if the principle of *in dubio mitius* were relevant in WTO dispute settlement, there is no scope for its application in this dispute', because the application of Article 31 [VCLT] yielded a conclusion on the proper interpretation of the relevant provision. Malacrida and Marceau, 'The WTO Adjudicating Bodies' (n 26) 47-48.

[95] *Ethyl Corp v Canada*, UNCITRAL, Award on Jurisdiction of 24 June 1998, para 55.

[96] *SGS Société Générale de Surveillance SA v Pakistan*, ICSID ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003, para 171. See Jude Antony, 'Umbrella Clauses Since *SGS v. Pakistan* and *SGS v. Philippines* – A Developing Consensus' (2013) 29 Arbitration Int'l 607.

> [R]eliance by the Tribunal in *SGS v. Pakistan* on the maxim *in dubio mitius* so as effectively to presume that sovereign rights override the rights of a foreign investor could be seen as a reversion to a doctrine that has been displaced by contemporary customary international law, particularly as that law has been reshaped by the conclusion of more than 2000 essentially concordant bilateral investment treaties.[97]

In this paragraph, the tribunal seems to conflate the question of the interpretation of an umbrella clause and the potential relevance of *in dubio mitius* therein with the observation that thousands of BITs contain such a clause or, alternatively, an investment arbitration clause. While the precise reasoning of the tribunal is not entirely clear, it is difficult to see how the conclusion of thousands of BITs, even if this would have an impact on customarily international law,[98] would change the status of *in dubio mitius*. Indeed, even though controversial,[99] the principle of *in dubio mitius* keeps keeps surfacing in international adjudication.[100] It provides a potential justification for deference in the context of treaty interpretation on grounds of State sovereignty.

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[97] *Eureko BV v Poland*, UNCITRAL, Award of 19 August 2005, para 258.

[98] José Alvarez, 'A BIT on Custom' (2009) 42 NYU J of Int'l L and Policy 17; Patrick Dumberry, 'Are BITs Representing the "New" Customary International Law in International Investment Law?' (2010) 28 Penn State Int'l L Rev 675.

[99] *Arbitration regarding the Iron Rhine ("IJzeren Rijn") Railway (Belgium v Netherlands)*, PCA 2003-02, Award of 24 May 2005, para 50: 'some authors note that the principle has not been relied upon in any recent jurisprudence of international courts and tribunals and that its contemporary relevance is to be doubted'. Rudolf Bernhardt, 'Evolutive Interpretation, Especially of the European Convention on Human Rights' (1999) 42 German Ybk of Int'l L 11, 14: '[t]his principle is no longer relevant, it is neither mentioned in the Vienna Convention nor has it ever been invoked in the recent jurisprudence of international courts and tribunals'; Stephan Schill, *The Multilateralization of International Investment Law* (CUP 2009) 316-317: 'the majority of international courts and tribunals openly reject the *in dubio mitius* approach as a valid interpretative method'. Catherine Brölmann notes that the application of *in dubio mitius* is more common in so-called 'contractual treaties'. Catherine Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 513; Eirik Bjorge, 'The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Methods of Interpretation?' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation. Reassertion and Convergence in International Law* (CUP 2015) 520-525.

[100] eg *Teinver SA, Transportes de Cecanías SA and Autobuses Urbanos des Sur SA v Argentina*, ICSID ARB/09/01, Award of 21 July 2017, Separate Opinion of Dr Kamal Hossain, para 25.

3.2.2 Deference towards Specific Domestic Actors

Considerations of deference can be restricted not only in terms of the relevant assessment, but also in regard to the actor to which the adjudicators defer. The most general form of deference in this sense is deference to the respondent State as a whole. The *TECO* tribunal, for instance, was mindful of 'the deference that international tribunals should pay to a sovereign State's regulatory powers'.[101] Similarly, the *Electrabel* tribunal considered that its task was not 'to sit retrospectively in judgment upon Hungary's discretionary exercise of a sovereign power'.[102]

The focus on the State as the recipient of deference corresponds to the fact that international courts adjudicate the responsibility of States. The Articles on State Responsibility provide that 'the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions'.[103] The Commentary to the Article adds that 'the principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility'.[104] Consequently, an international court or tribunal formally reviews the acts of the respondent State. Yet in practice, adjudicators realise that they may actually be reviewing the acts of specific domestic actors, and different considerations of deference may ensue.

The ECtHR commonly refers to the margin of appreciation of the 'Contracting States', but it has specified that 'this margin is given both to the domestic legislator … and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force'.[105] Several investment tribunals have been explicit in assigning their deference to specific actors, for example to the respondent State's government,[106] its parliament and government,[107] its regulators,[108] or its

[101] *TECO v Guatemala* (n 11) para 490.

[102] *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.'

[103] Articles on State Responsibility, Article 4 para 1.

[104] Commentary on Article 4 of the Articles on State Responsibility, para 5. See Eric Posner, 'International Law and the Disaggregated State' (2005) 32 Florida State University L Rev 797, 799.

[105] *Handyside v United Kingdom* (n 1) para 48.

[106] *Goetz et consorts c Burundi*, ICSID ARB/95/3, Sentence du 10 février 1999, para 126.

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

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

courts.[109] Some adjudicators have even distinguished between different levels of deference to be accorded to different domestic institutions. For example, in *Mondev v United States*, the tribunal considered that '[i]t is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State'.[110] The *RosInvestCo* tribunal noted that the applicable BIT did not distinguish between 'different organs of the state and particularly between acts of courts and acts of other State entities'.[111] Still, the tribunal considered that 'one will have to take into account the different functions held by administrative organs and judicial organs of a state and the resulting differences in their discretion when applying the law and in the appeal available against their decisions'.[112] The following section discusses the practice of according deference to specific actors, in particular domestic parliaments, administrative agencies, and courts.

3.2.2.1 Domestic Parliaments

Some international adjudicators have held that the decisions of representative institutions are entitled to deference. In *EC – Hormones*, the WTO AB suggested a degree of deference for 'responsible, representative governments'.[113] In investment law, the *Paushok* tribunal considered that '[a]ctions by legislative assemblies are not beyond the reach of bilateral investment treaties. A State is not immune from claims by foreign investors in connection with legislation passed by its legislative body'.[114] At the same time, the tribunal held that '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

[109] *Eli Lilly and Company v Canada*, ICSID UNCT/14/2, Final Award of 16 March 2017, para 224.

[110] *Mondev v US* (n 87) para 126.

[111] *RosInvestCo UK Ltd v Russia*, SCC V (079/2005), Final Award of 12 September 2010, para 274.

[112] ibid. cf *Int Thunderbird Gaming Corp v Mexico*, UNCITRAL, Arbitral Award of 26 January 2006, para 200: '[t]he administrative due process requirement is lower than that of a judicial process'.

[113] *EC – Hormones* (n 23) para 124. In discussing the precautionairy principle, the AB held: 'a panel charged with determining … whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution'. Robert Howse, 'Moving the WTO Forward – One Case at a Time' (2009) 42 Cornell Int'l L J 223, 229.

[114] *Paushok v Mongolia* (n 68) para 298.

an investment treaty has occurred'.[115] In response to the investor's claim that the legislative process had not been transparent, the tribunal considered that:

> Legislative assemblies in all countries regularly adopt legislation within a very short time and, sometimes, without debates, especially if there is urgency and there is unanimity of views among parliamentarians. The recent worldwide economic crisis has led to such steps adopted by legislative assemblies in all kinds of democratic countries.[116]

The tribunal's remarks suggest that it approached parliamentary decisions with particular deference.[117]

In the field of European human rights law, it has been noted that the Court has recently started to grant more deference to domestic parliaments if it is convinced that the latter have demonstrated a sufficiently thorough deliberation about the issue at stake, and, conversely, to increase the rigour of its review when no such deliberation has taken place.[118] In *Hirst v United Kingdom*, the Court noted that 'there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote'.[119] Conversely, in *Evans v United Kingdom*, the Court noted that the impugned legislation on IVF treatment was 'the culmination of an exceptionally detailed examination of the

[115] ibid para 299. cf *Electrabel v Hungary* (n 102) para 8.23.

[116] *Paushok v Mongolia* (n 68) para 304.

[117] Jonathan Bonnitcha, *Substantive Protection under Investment Treaties. A Legal and Economic Analysis* (CUP 2014) 213–214. Gus van Harten, however, concludes that such deference is rare in investment arbitration. On the basis of an analysis of 'about 60 cases in which legislative measure were reviewed', he notes that '[o]verall, the arbitrators evidently did not signal respect for legislatures'. Van Harten, *Sovereign Choices* (n 59) 78.

[118] Robert Spano speaks about a 'qualitative, democracy-enhancing approach'. Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights L R 487, 499. Matthew Saul suggests that the Court is 'more cautious in engaging with the nature of parliamentary process than the process of the other national authorities'. Matthew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 Human Rights L Rev 745, 748. Saul also notes, however, that 'the Court has hardly been specific on the criteria that it employs for assessing the quality of parliamentary process'. See also Matthew Saul, 'Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights' (2016) 20 Int'l J of Human Rights 1077.

[119] *Hirst v United Kingdom (No 2)*, ECtHR (GC) 74025/01, Judgment of 6 October 2005, para 79.

social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate'.[120] The Court concluded that:

> [I]t would have been possible for Parliament to regulate the situation differently. However, as the Chamber observed, the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article.[121]

It appears that the Court is inclined to defer to domestic parliaments if it is convinced of the quality of the parliamentary debate on the issue under review.[122]

At the same time, the ECtHR as well as the IACtHR and the ACtHPR have demonstrated that their mandate may require them to provide a counterweight to decisions of majoritarian institutions. In *Tyrer v United Kingdom*, the ECtHR overruled a local law that had been approved by a local parliament not long before. The Court justified its decision by interpreting the Convention as a 'living instrument', in the light of a European consensus.[123] In *Gelman v Uruguay*, the IACtHR reviewed an amnesty law that had been twice endorsed by popular referendums. According to the Court, the fact that the law had been 'approved in a democratic regime' and supported by the public would not 'automatically or by itself grant legitimacy under International Law'.[124]

> The bare existence of a democratic regime does not guarantee, per se, the permanent respect of International Law, including International Law of Human Rights. … The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention,

[120] *Evans v UK* (n 63) para 86, 91.

[121] ibid para 91.

[122] In the series of cases concerning prisoner voting rights in the United Kingdom, the Court showed that its patience towards parliamentary processes is not unlimited. *Greens and MT v United Kingdom*, ECtHR 60041/08, Judgment of 23 November 2010, para 115.

[123] *Tyrer v United Kingdom*, ECtHR, 5856/72, Judgment of 25 April 1978, para 15, 31.

[124] *Gelman v Uruguay*, IACtHR, Judgment of 24 February 2011, para 238.

> in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a[n] impassable limit to the rule of the majority'.[125]

In *Tanganyika Law Society* et al *v Tanzania*, the applicants complained before the ACtHPR of a constitutional ban on independent candidates for political elections. The domestic Court of Appeal had ruled that the matter was a political one and should be resolved by parliament. In response, a legislative process had been initiated. Before the ACtHPR, the respondent argued that this process formed part of the local remedies that the applicants needed to exhaust. The Court rejected this argument:

> The parliamentary process … is a political process and is not an available, effective and sufficient remedy because it is not freely accessible to each and every individual; it is discretionary and may be abandoned anytime; moreover, the outcome thereof depends on the will of the majority. No matter how democratic the parliamentary process will be, it cannot be equated to an independent judicial process for the vindication of the rights under the Charter.[126]

The Court's reasoning, even if made in the context of the requirement to exhaust local remedies, suggests that it is not inclined to defer to parliamentary decision-making when individual rights risk being disregarded. The position taken by the human rights court demonstrates the intricate tensions between majority rule and human rights review, which is also at the core of debates on judicial deference in the domestic sphere.

Deference to majoritarian institutions raises further problems when the relevant international rules protect rights or interests of non-nationals in particular. In *James and Others*, the ECtHR considered in the context of compensation for expropriation that 'non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part

[125] ibid para 239. Robert Gargarella, 'Democracy and Rights in *Gelman v Uruguay*' (2015) 109 AJIL Unbound 115.

[126] *Tanganyika Law Society* et al *v Tanzania*, ACtHPR, 009/2011, 011/2011, Judgment of 14 June 2013, para 82.3.

in the election or designation of its authors nor have been consulted on its adoption'.[127] The *Tecmed* tribunal repeated this consideration when defining its standard of review under the expropriation standard:

> [I]t should be … considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitle[d] to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors.[128]

In a similar vein, the *Renta4* tribunal discussed to what extent a foreign investor should contribute 'to the accomplishment of regulatory objectives for the benefit of a national community of which the investor is not a member'.[129] These remarks suggest that deference to domestic policy-makers depends on whether the disputing parties form part of the relevant democratic constituency and have a say in domestic decision-making procedures.

3.2.2.2 Domestic Administrative Agencies

A second category of domestic actors that is regularly singled out in the context of deference concerns administrative agencies, especially in the context of fact-finding and technical decision-making. Adjudicators commonly defer to agencies, not only when agency decisions as such are under review against international legal norms, but also when they verify whether agencies have complied with international norms obliging them to make certain assessments, such as those found in various WTO disciplines. The AB has held in this context that a balance needs to be struck. On the one hand, 'panels are not entitled to conduct a *de novo* review of the evidence, nor to

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[127] *James and Others v UK* (n 62) para 63. Hélène Ruiz Fabri, 'The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriations" of the Property of Foreign Investors' (2002) 11 NYU Environmental L J 148, 171-173.

[128] *Técnicas Medioambientales Tecmed SA v Mexico*, ICSID ARB(AF)/00/2, Award of 29 May 2003, para 122. See also *Lemire v Ukraine* (n 107) Award of 28 March 2011, para 57: '[f]oreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State and may thus, as a matter of legitimate policy, be granted a wider scope of protection.'

[129] *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 23.

substitute their own conclusions for those of the competent authorities'. Yet on the other hand, 'this does *not* mean that panels must simply *accept* the conclusions of the competent authorities'.[130]

The *Glamis Gold* tribunal considered in the context of Article 1105 NAFTA that:

> It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency's review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of the customary international law standard embedded in Article 1105.[131]

In other words, 'a tribunal's determination that an agency acted in [a] way with which the tribunal disagrees' is not enough for a breach of Article 1105.[132]

A more ambiguous position was adopted in *Chemtura v Canada*. In this case, the parties disagreed on whether a tribunal applying Article 1105 NAFTA should acknowledge 'a margin of appreciation granted to domestic regulatory agencies'.[133] The tribunal replied that it would 'take into account all the circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and public policy determination'.[134] At the same time, the tribunal reasoned that '[t]his is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be conducted *in concreto*'.[135]

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[130] *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 106.

[131] *Glamis Gold v United States* (n 35) para 779.

[132] ibid para 803. cf *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings From Brazil (EC – Tube or Pipe Fittings)*, WTO DS219, Panel Report of 7 March 2003, para 7.296: 'a reasonable and objective authority could have reached this determination on the basis of the record of this investigation. It is not our task to substitute our judgement for that of the investigating authority'.

[133] *Chemtura v Canada* (n 35) para 123.

[134] ibid.

[135] ibid. See also para 134-135.

The *Chemtura* award was criticised by the tribunal ruling on *Apotex v United States*: 'the *Chemtura* tribunal did not posit a standard for assessing claims of deprivation of due process' in the context of Article 1105.[136] The *Apotex* tribunal itself did not provide such a standard either, but it required a 'high threshold of severity and gravity' for a breach of Article 1105.[137] Moreover, it recalled 'the decisions by NAFTA and other international tribunals emphasising the need for international tribunals to recognise the special roles and responsibilities of regulatory bodies charged with protecting public health and other important public interests'.[138] These decisions indicated 'the need for international tribunals to exercise caution in cases involving a state regulator's exercise of discretion, particularly in sensitive areas involving protection of public health and the well-being of patients'.[139] The tribunal concluded that 'by inclination, qualification and training', it could not 'possibly act as a drug regulator'.[140]

3.2.2.3 Domestic Courts

It is a common observation of international courts and tribunals that they are not meant to act as courts of appeal vis-à-vis the decisions of domestic courts. The ICJ has held that it is not 'a court of appeal of national criminal proceedings'[141] and the ITLOS has ruled that it is not 'an appellate forum against a decision of a national court'.[142] Likewise, all three regional human rights courts

[136] *Apotex Holdings Inc and Apotex Inc v USA*, ICSID ARB(AF)/12/1, Award of 25 August 2014, para 9.46.

[137] ibid para 9.47, 9.49.

[138] ibid para 9.37.

[139] ibid.

[140] ibid para 9.39.

[141] *LaGrand (Germany v United States)*, ICJ, Judgment of 27 June 2001, para 52. For the Court's general attitude to domestic decisions, see André Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice' (2006) 5 Chinese J of Int'l L 301, noting that the Court generally adopts a traditional approach considering domestic decisions as fact, but that some signs of a more complementary relationship have appeared.

[142] *Monte Confurco* (n 45) para 72.

have confirmed that they are not 'courts of fourth instance'[143] with 'appellate jurisdiction'.[144] Investment tribunals also commonly state that they are not courts of appeal.[145] Yet in practice international courts and tribunals commonly review decisions taken by domestic courts in several different ways.[146] First, measures that are contested before an international jurisdiction have often been reviewed by a domestic court at an earlier stage, under domestic law which may have a substantive overlap with international law[147] or even directly under international law. Second, the procedural antecedents or substantive contents of a domestic decision can on their own give rise

[143] eg *Schatschaschwili v Germany*, ECtHR (GC) 9154/10, Judgment of 15 December 2015, para 124; *Mémoli v Argentina*, IACtHR, Judgment of 22 August 2013, para 140. See for a discussion of the relevance of domestic courts serving the applicant's cause, Chris Hilson, 'The Margin of Appreciation, Domestic Irregularity and Domestic Court Rulings in the ECHR Environmental Jurisprudence: Global Legal Pluralism in Action' (2013) 2 Global Constitutionalism 277. *Las Palmeras v Colombia*, IACtHR, Judgment of 6 December 2001, para 33: 'when a question has been definitively settled under domestic law - to use the language of the Convention - the matter need not be brought to this Court for "approval" or "confirmation."'

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

[145] eg *Loewen v US* (n 83) Award of 26 June 2003, para 51: '[t]he Tribunal cannot under the guise of a NAFTA claim entertain what is in substance an appeal from a domestic judgment'; and para 242: '[t]oo great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself'; *Thunderbird v Mexico* (n 112) para 125: '[i]t is not the Tribunal's function to act as a court of appeal or review in relation to the Mexican judicial system'; *RosInvestCo v Russia* (n 111) para 275; *OAO Tatneft v Ukraine*, UNICTRAL, PCA, Award on the Merits of 29 July 2014, para 474; *Arif v Moldova*, ICSID ARB/11/23, Award of 8 April 2013, para 416, 441; *ECE Projektmanagement v Czech Republic*, UNCITRAL, Award of 19 December 2013, para 4.764. See generally Hege Kjos, 'Domestic Courts under Scrutiny: The Rule of Law as a Standard (of Deference) in Investor-State Arbitration' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels. Contestations and Deference* (Hart 2016); Berk Demirkol, *Judicial Acts and Investment Arbitration* (CUP 2018).

[146] *Von Hannover v Germany (No 2)*, ECtHR (GC) 40660/08, Judgment of 7 February 2012, para 105, noting that the Court's supervision concerns 'both the legislation and the decisions applying it, even those delivered by an independent court'.

[147] Kjos, 'Domestic Courts under Scrutiny' (n 145) 375. Such overlap does not always exist, of course. See eg *TECO v Guatemala* (n 11) para 483: 'the disputes resolved by the Guatemalan judiciary are not the same as the one which this Arbitral Tribunal now has to decide. The Arbitral Tribunal may of course give deference to what was decided as a matter of Guatemalan law by the Guatemalan Constitutional Court. However, such decisions made under Guatemalan law can not be determinative of this Arbitral Tribunal's assessment of the application of international law to the facts of the case'.

to claims under international law, for example under the human right to a fair trial or as a denial of justice.[148]

In the first context, domestic courts normally benefit from the deference granted to the respondent State in general.[149] In *Handyside*, the ECtHR considered that the margin of appreciation 'is given both to the domestic legislator … and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force'.[150] As a consequence, the Court's review does not concern the domestic judicial decisions as such: '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'.[151]

In *A and Others v United Kingdom*, the United Kingdom government argued that the House of Lords had 'erred in affording the State too narrow a margin of appreciation' in its review of counterterrorism measures. The Court sided with the House of Lords on the merits and rejected the Government's argument related to the margin of appreciation:

> The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level. As the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time.[152]

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[148] See for a distinction between the two contexts, *Mondev v US* (n 87) para 97; *RosInvestCo v Russia* (n 111) para 274, 280. Another context where investment arbitration tribunals review domestic decisions is the review of the refusal of a domestic court to enforce an award. See eg *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award of 12 November 2010, para 527.

[149] See also Başak Çalı, 'From Flexible to Variable Standards of Judicial Review: the Responsible Domestic Courts Doctrine at the European Court of Human Rights' in Oddný Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge 2016), who argues that the ECtHR has developed a 'responsible courts doctrine' in order to defer to domestic courts.

[150] *Handyside v United Kingdom* (n 1) para 47.

[151] ibid para 50.

[152] *A and Others v United Kingdom*, ECtHR (GC), Appl no 3455/05, Judgment of 19 February 2009, para 150, 184. See also Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015) 200-201. In *Animal Defenders*, the applicants complained of 'the broad margin accorded by the domestic courts to the legislature'.

In other words, the Court's margin of appreciation follows from the subsidiarity of its review. Within the domestic framework, the rationale for deferential review is not necessarily the same.[153] On the contrary, the Court suggests that domestic judicial review of human rights issues should be rigorous; only its own review is attenuated by the margin of appreciation.

While the review of the regional human rights courts is necessarily preceded by domestic judicial review, this is not necessarily the case in other fields of international law. Consequently, an important question is whether international adjudicators adapt their intensity of review depending on whether domestic judicial review has taken place. Practice shows that this happens in two different ways. On the one hand, it has been considered that international adjudicators should be more deferential if the original impugned decision has been upheld by domestic courts.[154] Several investment arbitration tribunals have expressed this view, at least as far as the application of domestic law is concerned. As noted by the *Azinian v Mexico* tribunal, '[a] governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level*'.[155] Yet on the other hand, it could be argued that a tribunal should be more deferential when no domestic judicial review has taken place, because in that case the State has not had the opportunity to correct mistakes through internal means. The tribunal in *Generation Ukraine* applied this logic when it rejected a claim for indirect expropriation.

Animal Defenders Int v United Kingdom, ECtHR (GC) 48876/08, Judgment of 22 April 2013, para 79. The Court rejected this view in para 115.

[153] Geir Ulfstein, 'The European Court of Human Rights and National Courts: a Constitutional Relationship?' in Arnardóttir and Buyse, *Shifting Centres* (n 149) 50.

[154] Schill, 'Deference in Investment Treaty Arbitration' (n 10) 597: '[a]rguably, when the exhaustion of local remedies is needed, and provided these remedies are brought in impartial, independent, and neutral domestic courts that observe due process of law and strike a reasonable balance between competing rights and interests, an international court or tribunal can apply a more deferential standard when reviewing host state conduct, because the conduct under review has already been reviewed by another independent instance. When no prior exhaustion of local remedies takes place, in contrast, it is difficult to justify an equally deferential standard because the international court or tribunal in question essentially serves as a first instance court that does not need to exercise restraint as its domestic brethrens have not reviewed the conduct in question.'

[155] *Azinian, Davitian and Baca v Mexico*, ICSID ARB(AF)/97/2, Award of 1 November 1999, para 97. See also *Arif v Moldova* (n 145) para 416. An apparently different line of reasoning is followed in *Mondev v US* (n 87) para 96: '[t]he standard laid down in Article 1105(1) has to be applied in both situations, i.e., whether or not local remedies have been invoked.'

> This Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. That function is within the proper domain of domestic courts and tribunals that are cognisant of the minutiae of the applicable regulatory regime. In the circumstances of this case, the conduct cited by the Claimant was never challenged before the domestic courts of Ukraine. … There is, of course, no formal obligation upon the Claimant to exhaust local remedies before resorting to ICSID arbitration pursuant to the BIT. Nevertheless, in the absence of any *per se* violation of the BIT discernible from the relevant conduct of the Kyiv City State Administration, the only possibility in this case for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation would have been for the Claimant to be denied justice before the Ukrainian courts in a *bona fide* attempt to resolve these technical matters.[156]

The awards in the cases of *Azinian* and *Generation Ukraine* show that both the prior involvement of domestic courts and the absence of such involvement can provide reasons for deference. According to *Azinian*, the fact that domestic courts have validated a measure provides a reason to limit the investment tribunal's intensity of review, whereas according to *Generation Ukraine*, the fact that no domestic judicial review has taken place is a reason for deference. The second position is the more controversial, since it seems to criticise the investor for failing to exhaust local remedies, even if the contracting States themselves decided to remove or relax that condition.[157]

Domestic court decisions are not only relevant in relation to decisions adopted by other domestic actors; they can also breach international law in their own right, for example through a

[156] *Generation Ukraine Inc v Ukraine*, ICSID ARB/00/9, Award of 16 September 2003, para 20.33. cf *Waste Management Inc v Mexico (II)*, ICSID ARB(AF)/00/3, Award of 30 April 2004, para 98.

[157] See for criticism of the latter argument, Ursula Kriebaum, 'Local Remedies and the Standards for the Protection of Foreign Investment' in Christina Binder *et al* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009); Christoph Schreuer, 'Interaction of International Tribunals and Domestic Courts in Investment Law' in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010* (Brill 2011) 75-76; George Foster, 'Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' (2011) 49 Columbia J of Transnat'l L 201; Demirkol, *Judicial Acts* (n 145) 109-147.

denial of justice or a breach of fair trial rights.[158] In this context, international adjudicators commonly apply deferential standards of review, asserting that only decisions that are seriously wrong can give rise to a violation of international law. The ECtHR developed its fourth instance doctrine in this context.[159] In investment law, the tribunal in *Mondev v United States* concluded in the context of the fair and equitable treatment standard:

> In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.[160]

Similarly, the tribunal in *Liman Caspian Oil BV and NCL Dutch Investment BV v Kazakhstan* stressed that 'the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law'.[161] According to the tribunal, one would need proof that 'the court system fundamentally failed'.[162] In these cases, discussions about deference are intertwined with considerations concerning the content of the applicable legal standard. Nonetheless, regardless of the applicable standard, a high degree of deference seems common when a tribunal reviews whether court decisions as such are in breach of international law.[163]

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[158] Denial of justice is the most well-known breach of international law by a domestic court. It is not the only possibility, however. Demirkol, *Judicial Acts* (n 145) 24.

[159] See *Mustafa Tunç and Fecire Tunç v Turkey*, ECtHR (GC) 24014/05, Judgment of 14 April 2015, para 220-222 for a distinction between the assessments under Articles 2 and 6 of the Convention.

[160] *Mondev v US* (n 87) para 127. Later on, the tribunal evaluated a concrete domestic decision, asserting that it found nothing to 'shock or surprise even a delicate judicial sensibility', para 133. cf *Arif v Moldova* (n 145) para 445: 'the State can be held responsible for an unfair and inequitable treatment of a foreign indirect investor if and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions'.

[161] *Liman Caspian Oil BV and NCL Dutch Investment BV v Kazakhstan*, ICSID ARB/07/14, Award of 22 June 2010, para 274.

[162] ibid para 279. Identical language is found in *RosInvestCo v Russia* (n 111) para 275, 279.

[163] Although it is suggested in *Tatneft v Ukraine* (n 145) para 475 that a review under fair and equitable treatment will be less deferential than a review for a denial of justice. See also para 481. See also *Chevron Corp and Texaco Petroleum Corp v Ecuador*, PCA 34877, Partial Award on the Merits of 30 March 2010, para 244. See for the

In determining whether domestic courts are entitled to more deference than other branches of government, international adjudicators vacillate between two different considerations.[164] On the one hand, they acknowledge that courts have a special position within the domestic legal framework, ideally providing for independent and impartial judicial review. On the other hand, international adjudicators are aware that courts are capable of violating international obligations just like any other domestic actor. The *Arif* tribunal held that:

> International law has evolved in recent decades and the previous conviction … that acts of the judiciary had to be judged with more 'delicacy' and circumscription than acts committed by the other branches of government, is obsolete. The Tribunal shares the modern opinion according to which the State has to be seen as a unity and the acts of any of its organs, including the judiciary, may violate international law.[165]

The *Tatneft* tribunal considered that:

> [D]eference on the part of international tribunals requires the clear perception that domestic courts are independent, competent and above all clear of suspicion of corruption. While this perception will be many times well supported by the facts and the reputation of the court system, it has also known exceptions.[166]

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distinction between a denial of justice and other forms of review of domestic decisions Mavluda Sattorova, 'Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct' (2012) 61 ICLQ 223.

[164] Similar considerations may play a role when domestic courts review domestic courts in another State. See Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard Int'l L J 191, 210-213.

[165] *Arif v Moldova* (n 145) para 439. Nonetheless, the tribunal introduced a deferential standard of review in para 442. See for a comment on the case Martins Paparinskis, 'Franck Charles Arif v Moldova: Courts Behaving Nicely and What to Do About It' (2016) 31 ICSID Rev 122.

[166] *Tatneft v Ukraine* (n 145) para 476. See for the review of a decision made by a domestic prosecutor, *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID ARB/03/25, Annulment Decision of 23 December 2010, para 242: 'the decisions of municipal authorities seized of cases against an alien which arise directly out of the same set of facts may need to be scrutinised very carefully by an international tribunal. The tribunal would need to satisfy itself, *inter alia*, as to the impartiality of the relevant decision-maker, in view of the pendency of proceedings against the state of which that decision-maker is an organ. The tribunal retains the ultimate power to judge the probative value of evidence placed before it.'

Two different inquiries could be employed to verify whether a presumption of deference toward domestic courts should be upheld. First, an adjudicator could analyse, in the abstract, whether the domestic legal system provides credible, impartial judicial review, and if so, proceed to an analysis of the impugned decisions under a deferential standard of review.[167] Yet in practice, such an analysis might be difficult to undertake, and, moreover, overstep the boundaries of the adjudicator's mandate. Second, the adjudicator could directly review the impugned court decisions and decide whether or not it defers to the domestic courts. This seems to be the approach taken in *Tatneft*: '[t]his Tribunal, having examined the various court decisions complained of and the arguments on which they are based, is not at ease with an unrestricted application of the standard of deference'.[168] The problem with this approach is that it applies deference not as a method of review, but rather as the outcome of the assessment. The tribunal decides whether or not to defer, *after* having reviewed the impugned decisions. Yet if used this way, deference does not play a role *during* the assessment, which seems to reduce its usefulness. Deference is then merely used to rephrase the adjudicator's conclusion that no breach of international law was committed.

3.2.3 Deference in the Context of Specific International Legal Norms

Earlier sections of this study have demonstrated that discussions about deference are often intertwined with considerations concerning the content of the applicable legal standard. The current section investigates to what extent certain features of applicable legal standards evoke deferential approaches in different fields of international law. Two categories of standards will be discussed, namely indeterminate standards and self-judging clauses. The interpretation and application of provisions falling in either of these categories often leads adjudicators to defer.

[167] The tribunal in *Alghanim v Jordan* (n 46) para 282, notes as 'two potentially disputed issues of international law: (i) Whether it is necessary to show some larger systemic failure in the judicial system of the state; or (ii) Whether a denial of justice may be found on the ground of the substantive content of the decision.'

[168] *Tatneft v Ukraine* (n 145) para 479.

3.2.3.1 Indeterminate Standards

International adjudicators commonly adopt deferential approaches when reviewing compliance with international norms that exhibit a certain flexibility. For instance, in *Handyside*, the ECtHR's pronouncements on the margin of appreciation were preceded by an analysis of the text of Article 10(2).[169] The Court noted that the term 'necessary' in this provision was different from the terms 'indispensable', 'absolutely necessary', and 'strictly necessary' found in other provisions, whereas it did not have the 'flexibility' of expressions like 'admissible', 'useful', or 'reasonable' either.[170] This textual context led the Court to its development of the margin of appreciation.[171] In the case of *Mathieu-Mohin and Clerfayt v Belgium*, the Court noted that electoral rights 'are not absolute': '[s]ince Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations', which in turn provided States with 'a wide margin of appreciation'.[172] The *Continental Casualty v Argentina* tribunal considered that deference is due 'when the application of general standards in a specific factual situation is at issue, such as reasonable, necessary, fair and equitable'.[173]

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[169] Björnstjern Baade, 'The ECtHR's Role as a Guardian of Discourse: Safeguarding a Decision-Making Process Based on Well-Established Standards, Practical Rationality, and Facts' (2018) 31 Leiden J of Int'l L 335, 338, identifies different standards of review in the ECtHR's jurisprudence, distinguishing between 'sufficiently concrete' and 'broad, abstract and relative Convention rights'.

[170] *Handyside v United Kingdom* (n 1) para 48.

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

[172] *Mathieu-Mohin v Belgium* (n 62) para 52.

[173] *Continental Casualty Co v Argentina*, ICSID ARB/03/9, Award of 5 September 2008, fn 270. cf 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) 541. Joshua Paine, 'Standard of Review (Investment Arbitration)' (2018) MPILux Research Paper Series 1, para 21: '[t]he idea that host states may enjoy a "margin for error" in making certain regulatory determinations is consistent both with the content of investment treaty disciplines – which typically do not require such determinations to be correct or ideal from a public policy perspective – and with the comparatively greater institutional competence of host state governments in making such determinations'. See on the vagueness of investment law standards, Jan Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions' (2015) 78 Modern L Rev 793, 793-794. See for an explanation of the preeminent role of open-ended standards in international investment law, Anne van Aken, 'International Investment Law Between Commitment and Flexibility:

If the indeterminacy of certain international legal norms is commonly considered as a reason for deference, this raises the question of how to identify such indeterminacy. Yuval Shany has classified three categories of international legal norms that exhibit an 'inherent uncertainty'. The first category comprises 'standard-type' norms, the second category 'discretionary norms', and the third category 'result-oriented norms'. The common denominator of these three categories is that the application of these norms is 'either inevitably circumstance-dependent or purposefully non-uniform'.[174]

Shany acknowledges that 'there are various gradations of ambiguity within these groups of norms – i.e., some uncertain norms are more uncertain than others'.[175] However, even beyond the three categories identified by Shany, it could be argued that the application of almost any international legal norm involves some degree of uncertainty.[176] Jean-Pierre Cot has noted that 'some of the most imperative norms are also among the most uncertain'.[177] Scholars have provided various reasons for the abundance of indeterminate rules in international law.[178] Contracting States may have been unable to reach consensus about more determinate language, or deliberately chose to leave certain issues undecided. Because treaties are negotiated compromises, they 'abound with

A Contract Theory Analysis' (2009) 12 JIEL 507, 528; Federico Ortino, 'Refining the Content and Role of Investment "Rules" and "Standards": A New Approach to International Investment Treaty Making' (2013) 28 ICSID Rev 152.

[174] Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 EJIL 907, 913-917.

[175] ibid 914.

[176] cf Itzcovich, 'One, None and One Hundred Thousand Margins' (n 16) 300, arguing that 'almost every case decided by the [ECtHR] is a hard one'.

[177] 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) 392. cf Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 EJIL 7, 13-15, suggesting that international adjudication is not merely a technical exercise 'according to which the right interpretation may be derived from the pertinent provisions', but involves creative elements of law making.

[178] Sureda, *Investment Treaty Arbitration* (n 72) 9: 'States may not have been able to agree on the definition of a term, they may have opted to provide for standards of conduct rather than clear-cut rules, they may have intentionally left a certain provision open for future development, or else the field in question may not be sufficiently developed in general'. See also N Jansen Calamita, 'The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties' in Andrea Bjorklund (ed), *Yearbook of International Investment Law and Policy 2013-2014* (OUP 2015) 161.

ambiguities'.[179] The resulting uncertainty does not necessarily mean that the drafters expected adjudicators to defer to respondent States when applying the negotiated rules.[180]

Indeed, arguments have been made that indeterminate treaty language is no conclusive reason for deference. Elias Kastanas, writing in the context of the ECtHR, argues that the Court's deference cannot fully be justified by 'le caractère vague et indéterminé' of the provisions of the Convention: '[j]ustification plausible et valable, mais insuffisante, car elle n'explique pas pour quelle raison la Cour s'abstient d'apporter à ces notions la densité normative qui leur manque, de leur reconnaître un caractère autonome et délègue cette tâche aux Etats'.[181] According to this view, indeterminacy does not necessarily require deference, because adjudicators can also choose to provide their own interpretation of an indeterminate legal norm. Andreas Kulick has described the opportunities created by 'vagueness and ambiguity' in international law: they 'enable a court or tribunal to engage in judicial law- or policy-making'.[182] Indeterminacy allows them to take on 'further-reaching functions such as the promotion of the international rule of law, the constitutionalization of international law, the furtherance of democracy on the domestic and international level, or merely the politics of its own role within a treaty regime or the international

[179] Wälde, 'Interpreting Investment Treaties' (n 36) 735: '[t]reaties, as with all negotiated legal instruments, abound with ambiguities; ambiguity is necessary to find a ground for consensus. It is also a function of the lack of omniscience on the part of treaty drafters (as legislators). … Parties delegate the identification of the true meaning to the process of interpretation and cover their political back and flanks by often intentional, although sometimes accidental, ambiguity in the precise definition of the contours of obligations assumed'. See 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) 448, describing the 'paradox of interpretation': the ambiguity of treaties, combined with the difficulty of changing them, creates a high demand for treaty interpretation, yet at the same time such interpretation is sensitive when it concerns highly contested limitations on State sovereignty.

[180] 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 13) 101: 'the fact that an international provision is drafted broadly enough to trigger a discussion over the proper standard of review does not necessarily mean that the contracting parties intended to exclude the relevant domestic decisions from international scrutiny. On many occasions, issues are left open in international negotiations because States are unwilling or unable to reach agreement, preferring to defer their solution to a later time and/or a third party'.

[181] Kastanas, *Unité et Diversité* (n 8) 238.

[182] Andreas Kulick, 'From Problem to Opportunity? An Analytical Framework for Vagueness and Ambiguity in International Law' (2016) 59 German Ybk of Int'l L 257.

community at large'.[183] The point for now is not to pass judgment on such roles, which leads back to the question of whether international courts should exercise activism or restraint, but only to emphasize that deference is no necessary corollary of indeterminate language.

3.2.3.2 Self-judging Clauses

Whereas a concern for intrusive review does not necessarily explain indeterminate treaty language, such a concern is clearly demonstrated by so-called self-judging clauses: provisions in which a certain determination is explicitly reserved to the State.[184] An example is Article XXI of the GATT, which provides that nothing in the GATT 'shall be construed' … 'to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests', in three different contexts, including those of 'war or other emergency in international relations'. Since this clause justifies measures which the State 'considers necessary', it is undisputed that a high measure of deference should be granted if an adjudicator were to review its application. Indeed, the extent to which a State's application of a self-judging clause can be reviewed at all is controversial.[185]

In *Nicaragua*, the ICJ interpreted the security exception found in the FCN treaty between Nicaragua and the United States, which is not phrased as a self-judging clause, but which, according to the United States, fell outside the jurisdiction of the Court. The ICJ rejected this

[183] ibid. cf Robert Hudec, 'Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization' (2002) 1 World Trade Rev 211, 215: '[c]ourts in every judicial system are sometimes able to use their powers of analysis to fill in gaps in legislation on the basis of what seems to be the slimmest of legal evidence. If done skillfully, this kind of judicial creativity can succeed in capturing intentions that were implicit, and helps the parties to realize the goals that they did in fact agree to pursue.'

[184] The term 'self-judging' can be used to describe both the textual phrasing of a provision and the resulting prohibition of (any) review. In this study, the first meaning is used, which implies that the question of whether the application of a self-judging clause can to some extent be reviewed is not yet answered by the observation that it is self-judging.

[185] Stephan Schill and Robyn Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) 13 Max Planck UNYB 61. See also Dominik Eisenhut, 'Sovereignty, Nationals Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with regard to "Security Exceptions"' (2010) 48 Archiv des Völkerrechts 431; Michael Nolan and Frédéric Sourgens, 'The Limits of Discretion? Self-judging Emergency Clauses in International Investment Agreements' in Karl Sauvant (ed), *Ybk on International Investment Law and Policy 2010-2011* (OUP 2012).

argument, contrasting Article XXI of the FCN treaty with Article XXI GATT: '[t]hat the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade'.[186] In *Djibouti v France*, however, the Court did not accept the inverse proposition according to which a self-judging clause would be outside the scope of its review. Instead, the Court held that France's application of the clause was subject to the obligation of good faith and as such reviewable by the Court: 'while it is correct, as France claims, that the terms of Article 2 provide a State … with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties'.[187]

The pertinence of a good faith standard of review is confirmed by some of the tribunals reviewing the Argentine economic recovery measures adopted in the early 2000s. While they unanimously rejected Argentina's argument that the relevant security exception was self-judging, because there was no textual proof for this,[188] some tribunals commented on what their standard of review would have been if the clause had been self-judging. The *LG&E* tribunal considered that '[w]ere the Tribunal to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith review anyway, which does not significantly differ from the substantive analysis presented here'.[189] According to the *Continental Casualty* tribunal:

> If Art. XI granted unfettered discretion to a party to invoke it, in good faith, in order to exempt a particular measure which the investor claims has breached its treaty rights from any scrutiny by a tribunal, then that tribunal would be prevented from entering

[186] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ, Judgment of 27 June 1986, para 222.

[187] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, ICJ, Judgment of 4 June 2008, para 145. Robyn Briese and Stephan Schill, 'Djibouti v France. Self-Judging Clauses before the International Court of Justice' (2009) 10 Melbourne J of Int'l L 308.

[188] *CMS Gas Transmission Company v Argentina*, ICSID ARB/01/8, Award of 12 May 2005, para 370; *LG&E Energy Corp v Argentina*, ICSID ARB/02/1, Decision on Liability of 3 October 2006, para 212; *Enron v Argentina* (n 69) para 332, 335; *Sempra Energy International v Argentina*, ICSID ARB/02/16, Award of 28 September 2007, para 374, 379; *Continental Casualty v Argentina* (n 173) para 187-188.

[189] *LG&E v Argentina* (n 188) para 214.

> further into the merits, after having recognized that an economic crisis such as the one experienced by Argentina in 2001-2002 qualified under Art. XI.[190]

Apparently, according to the *Continental Casualty* tribunal, a self-judging clause provides a State with 'unfettered discretion', restricted only by a good faith obligation. A tribunal's review would be limited to determining whether the circumstances justified the invocation of the self-judging clause.

As regards Article XXI GATT, practice has not yet provided a conclusive answer as to whether or not its invocation can be reviewed.[191] In 1982, the GATT Council adopted a Decision on Article XXI which stipulated that the other contracting parties 'should be informed to the fullest extent possible' of Article XXI measures, while they would 'retain their full rights under the General Agreement'.[192] The latter remark suggests that dispute settlement rights as such are not affected by the invocation of Article XXI.[193] In 1985, Nicaragua requested the establishment of a GATT panel to review the legality of the trade embargo imposed by the United States. The latter did not object to the establishment of a panel, on the condition that it would not examine 'the validity of or motivation for' of its invocation of Article XXI.[194] In its report, which remained unadopted, the panel expressed the dilemma posed by self-judging clauses: '[i]f it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it,

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[190] *Continental Casualty v Argentina* (n 173) para 182.

[191] Michael Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1991) 12 Michigan J of Int'l L 558; Wesley Cann, 'Creating Standards of Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism' (2001) 26 Yale J of Int'l L 413; Peter Lindsay, 'The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?' (2003) 52 Duke L J 1277; Dapo Akande and Sope Williams, 'International Adjudication on National Security Issues: What Role for the WTO?' (2003) 43 Virginia J of Int'l L 365; Roger Alford, 'The Self-Judging WTO Security Exception' (2011) 3 Utah L Rev 697; Rostam Neuwirth and Alexandr Svetlicinii, 'The Economic Sanctions over the Ukraine Conflict and the WTO: "Catch-XXI" and the Revival of the Debate on Security Exceptions' (2015) 49 J of World Trade 891; Ji Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?' (2016) 19 JIEL 417; Tsai-fang Chen, 'To Judge the "Self-Judging" Security Exception Under the GATT 1994 – A Systematic Approach' (2017) 12 Asian J of WTO and Int'l Health L and Policy 311.

[192] 'Decision Concerning Article XXI of the General Agreement', 2 December 1982, L/5426, para 1-2.

[193] Schill and Briese, '"If the State Considers"' (n 185) 101.

[194] *United States – Trade Measures Affecting Nicaragua*, GATT, Panel report of 13 October 1986, L/6053, para 1.3-1.4.

how could the contracting parties ensure that this general exception … is not invoked excessively or for purposes other than those set out in this provision?'.[195] Currently, the reviewability of Article XXI GATT is on the table again in disputes concerning the sanctions adopted by and against Russia in the context of the Ukraine conflict, and the embargo imposed on Qatar by the United Arab Emirates and others.[196] In the former context, the EU and the US have provided opposing third party submissions on Article XXI. According to the EU, the security exception is justiciable under a good faith standard of review, whereas the US consider that an invocation of Article XXI is not subject to review.[197]

Besides Article XXI GATT and comparable security exceptions in other WTO Agreements, self-judging language provisions can also be found in the DSU. In the context of retaliation, Article 22(3)(b) and (c) provide that if the retaliating party 'considers that it is not practicable or effective' to suspend obligations with regard to the same sector or under the same agreement as the original complaint, it may retaliate in other sectors or under other agreements. In the *EC – Bananas* dispute, it was argued by Ecuador that the wording of Article 22(3) suggests 'that it is essentially the prerogative of the Member' to determine whether paragraphs (b) and (c) should be applied and that arbitrators could only review whether the procedural requirements of the Article had been followed.[198] The arbitrators disagreed:

> It follows from the choice of the words "if that party *considers*" in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party concerned … . However, it equally follows from the choice of the words "in considering what concessions or other obligations to suspend, the complaining party *shall* apply the following principles and procedures" in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators. In our view, the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has

[195] ibid para 5.17.

[196] *Russia – Measures concerning Traffic in Transit*, WTO DS512; *United Arab Emirates - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO DS526.

[197] *Russia – Measures concerning Traffic in Transit*, WTO DS512, European Union Third Party Written Submission of 8 November 2017, para 36. *Russia – Measures concerning Traffic in Transit*, WTO DS512, Third Party Executive Summary of the United States of America, para 8.

[198] *European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, WTO DS27, Art 22.6 Arbitration Report of 24 March 2000, para 47.

> considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough.[199]

The arbitrators accorded Ecuador a 'certain margin of appreciation', but nonetheless considered that they should 'broadly judge' whether the necessary facts had been considered 'objectively' and whether the conclusions derived from them were 'plausible'. The reasoning suggests that if a self-judging clause contains substantive criteria, their fulfilment can be subjected to a lenient form of review.[200] Such an understanding corresponds to the approach of the ICJ and several investment arbitration tribunals with regard to the review of self-judging clauses.

3.3 Expressions of Deference

Whenever adjudicators declare a willingness to defer to the respondent State or to domestic decision-makers, they usually immediately add that their deference will not be unlimited. This raises questions concerning the standard of review, and adjudicators have applied different methods to respond. In *Lemire v Ukraine*, the tribunal adopted a standard known from United States administrative law, even if it did not explicitly refer to that background:

> The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal's sole duty is to consider whether there has been a treaty violation. A claim that a regulatory decision is

[199] ibid para 52. The reasoning is also applied in *United States – Tax Treatment for "Foreign Sales Corporations" (US – FSC)*, DS108, Art 22.6 Arbitration Report of 30 August 2002, para 5.62; *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WTO DS285, Art 22.6 Arbitration Report of 21 December 2007, para 4.18.

[200] Alexander Orakhelashvili infers from the duty to inform other States party that normally accompanies self-judging emergency clauses, that 'there is a limit separating what can validly be claimed under emergency clauses from what cannot' and that '[t]he judgment on this is not the exclusive property of the State that invokes the emergency'. Orakhelashvili, *The Interpretation of Acts and Rules* (n 70) 555-556.

> materially wrong will not suffice. It must be proven that the State organ acted in an arbitrary or capricious way.[201]

In other decisions, it is not always possible to distinguish between the adjudicator's formulation of a standard of review on the one hand and the interpretation of the applicable legal rule on the other.[202] For instance, in the WTO case law on trade remedies, the AB has spelled out certain elements that panels should review to verify whether national authorities were compliant with the relevant treaty norms. In *Argentina – Footwear Safeguard*, the AB held that:

> To determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the *Agreement on Safeguards*, the 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.[203]

This approach mentions certain tests that the WTO reviewer will apply to the national decision-making process. These tests can be understood as an interpretation of the treaty standard, defining the obligations incumbent on domestic decision-makers, or as standards of review, defining the elements that the panels will assess in their evaluation.

A conflation of norm interpretation on the one hand and the definition of standards of review on the other can also be found in several investment arbitration awards that spell out the

[201] *Lemire v Ukraine* (n 107) para 283. cf *TECO v Guatemala* (n 11) para 490-493. The United States Administrative Procedure Act (APA) provides in section 706 that '[t]he reviewing court shall … (2) hold unlawful and set aside agency action, findings and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'.

[202] Esmé Shirlow, 'Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Frameworks for Future Analysis' (2014) 29 ICSID Rev 595, 598.

[203] *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear)*, WTO DS121, AB Report of 14 December 1999, para 121. The AB later understood these considerations as 'certain indications as to the *application* of the standard of review in Article 11 of the DSU in disputes where claims are made under Article 4 of the *Agreement on Safeguards*'. *US – Lamb* (n 130) para 102.

content of the international minimum standard of treatment, codified in Article 1105 NAFTA.[204] An example is the *Glamis Gold* award in which the tribunal considered that:

> [T]o violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking - a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons - so as to fall below accepted international standards and constitute a breach of Article 1105(1).[205]

In this case, the tribunal provides negative tests to be applied to the conduct of domestic authorities. Again, these tests can be understood either as an interpretation of the treaty norm or as a standard of review.[206] This raises the question of whether it makes sense to discuss the formulation of standards of review as a conceptual issue separate from the interpretation of a legal norm.[207]

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[204] The often-cited 'high measure of deference' in the *SD Myers* award seems primarily related to the substantive content of Article 1105 NAFTA, rather than to the distribution of interpretative powers between the tribunal and the State. *SD Myers v Canada* (n 67) para 263.

[205] *Glamis Gold v United States* (n 35) para 616. See for an overview of different interpretations *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 427-445. Another example which falls between interpretation and the determination of standards of review is the discussion about whether the alleged necessity of the Argentine economic recovery measures required that there were 'no other means available'. See 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, 299. The discussions about 'necessity' in the WTO context can also be understood from this perspective.

[206] 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, 214: the tribunal conflated 'the normative content of fair and equitable treatment with the concept of deference based on external factors'.

[207] Holger Spamann wonders whether the concept of the standard of review is a matter of substance (which corresponds with norm interpretation) or procedure (which corresponds with the intensity of review). Spamann concludes that the standard of review is 'the description of the interplay of substantive and procedural rules which, together, specify the role of Panels when reviewing national authorities' determinations, and thus define the structural relationship between Members and Panels (and, by the same token, the scope of the obligations binding Members *vis-a-vis* each other under the WTO agreements)'. Holger Spamann, 'Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis' (2004) 38 J of World Trade 509, 514. See also at 530: 'The AB seems to have a perfectly clear vision of this interplay and routinely cites the substantive rules of the relevant WTO agreements in developing the standard of review.'

Conceptually, the standard of review refers to the scope of the review exercised by the adjudicator, whereas norm interpretation concerns the actual meaning of the provision.[208] Consequently, adjudicators can provide a certain interpretation of the obligation incumbent upon the State, but apply a more lenient standard of review. The distinction played an interesting role in the *Glamis Gold* award where the tribunal rejected the respondent's request for deference as found in domestic courts in the following way: 'the Tribunal finds the standard of deference to already be present in the standard as stated, rather than being additive to that standard'.[209] In other words, the tribunal considered that its interpretation of Article 1105 NAFTA was already narrow, which removed the need for ('additive') deference in the form of a deferential standard of review.

From a practical point of view, it may seem that there is no real difference between the formulation of standards of review on the one hand and the interpretation of a treaty provision on the other. A standard of review can be read as a minimalist interpretation of the applicable rule. Nonetheless, the concept of deference requires differentiation between a treaty interpretation and a standard of review. The interpretation of a treaty rule defines the substantive obligations incumbent on the State and its domestic institutions. A standard of review, by contrast, only limits the scope or intensity of the adjudicator's review, because of the different capacities and responsibilities of domestic authorities on the one hand and international courts and tribunals on the other.[210] Consequently, the adoption of a narrow standard of review does not necessarily impact upon the substantive content of the treaty obligation, which is left to the appreciation of domestic authorities.[211]

In light of the conceptual difference between treaty interpretation and the definition of standards of review it is unsurprising that international adjudicators have attempted to define standards of review that exist independently of the substantive content of the obligation. Some of these standards of review are even used in different fields of international law, such as the standards of reasonableness and good faith. The current section analyses some of these standards,

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[208] cf Tom Hickman, *Public Law after the Human Rights Act* (Hart 2010) 99-101, distinguishing between 'standards of review' and 'standards of legality'.

[209] *Glamis Gold v United States* (n 35) para 617.

[210] cf Christoffersen, *Fair Balance* (n 171) 274: '[t]he effect of the convergence of the standards [of review and of protection] is that the impact of the subsidiarity principle becomes impossible to identify'.

[211] Samantha Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?' (2016) 61 American J of Jurisprudence 69, 84: '[s]ubstantive subsidiarity, and especially the margin of appreciation, implies adapting the degree of stringency of the ECtHR's scrutiny, but not of the duties arising from human rights themselves'.

in order to determine whether they have a common meaning across the boundaries of different fields of international law.

3.3.1 The Margin of Appreciation

Previous parts of this study have described the margin of appreciation as the ECtHR's main expression of deference. Yet outside the scope of European human rights law, the notion has also gained some traction.[212] The term has been used by the IACtHR,[213] the ACtHPR,[214] investment arbitration tribunals,[215] WTO arbitrators,[216] and ITLOS judges.[217] The wide distribution of the margin of appreciation persuaded Yuval Shany to use it as the central term describing the deference accorded by international adjudicators to States.[218] His conclusions are disputed by Eirik Bjorge, who argues that 'in the recent past, international courts and tribunals have resisted the doctrine'.[219] He points at the Nuremberg Tribunal, which held that the question of whether Germany's invasion

[212] Petra Butler, 'Margin of Appreciation – A Note towards a Solution for the Pacific' (2009) 39 Victoria University of Wellington L Rev 687, arguing that a future Pacific human rights instrument should include the margin of appreciation. Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Hart 2013) 289-291; Johannes Hendrik Fahner, 'The Margin of Appreciation in Investor-State Arbitration: The Prevalence and Desirability of Discretion and Deference' (2014) 26 Hague Ybk of Int'l L 2013 422. See also the special issue 20 Int'l J of Human Rights 8 (2016), introduced by Andreas Føllesdal and Nino Tsereteli, 'The Margin of Appreciation in Europe and Beyond'. For the use of the margin of appreciation by the CJEU, see Pär Hallström, 'Balance or Clash of Legal Orders – Some Notes on Margin of Appreciation' in Joakim Nergelius and Eleonor Kristoffersson (eds), *Human Rights in Contemporary European Law. Swedish Studies in European Law. Volume 6* (Hart 2015).

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

[214] *Umuhoza v Rwanda*, ACtHPR, 003/2014, Judgment of 24 November 2017, para 138.

[215] eg *Continental Casualty v Argentina* (n 173) para 181; *Frontier Petroleum v Czech Republic* (n 148) para 527; *Electrabel v Hungary* (n 102) para 8.35; *Philip Morris v Uruguay* (n 64) para 399; *Crystallex International Corp v Venezuela*, ICSID ARB(AF)/11/2, Award of 4 April 2016, para 712.

[216] *EC – Bananas III* (n 198) para 52; *US – FSC* (n 199), para 5.62; *US – Gambling* (n 199) para 4.18.

[217] *Camouco (Panama v France)*, ITLOS No 5, Judgment of 7 February 2000, Dissenting Opinion of Judge Anderson; *Volga (Russia v Australia)*, ITLOS No 11, Judgment of 23 December 2002, Separate Opinion of Judge Cot, para 18.

[218] Shany, 'Toward a General Margin of Appreciation' (n 174) 939.

[219] Eirik Bjorge, 'Been There, Done That: The Margin of Appreciation and International Law' (2015) 4 Cambridge J of Int'l and Comparative L 181, 182. cf Orakhelashvili, *The Interpretation of Acts and Rules* (n 70) 197: 'international law contains no general principle on the margin of appreciation …, although there are doctrinal calls to the contrary'.

of Norway was necessary could not be decided by Germany alone, but 'must ultimately be subject to investigation and adjudication if International Law is ever to be enforced'.[220] In addition, Bjorge refers to the ICJ's judgments in *Oil Platforms* and *Whaling in the Antarctic*, in which 'the Court moved to disavow its deferential approach from earlier decades'.[221] According to Bjorge, the doctrine has 'been reduced to vanishing point' in the second half of the twentieth century.[222]

Bjorge's analysis could be improved by referring to several explicit rejections of the margin of appreciation in some investment arbitration awards.[223] Yet his final conclusion that the margin has disappeared from international practice is wrong, as previous parts of this study have demonstrated.[224] The explicit term 'margin of appreciation' remains common in different fields of international law. Even if it may be difficult to prove 'a growing acceptance on the part of many international courts and tribunals of the margin of appreciation doctrine', as proposed by Shany,[225] Bjorge's contrary claim that the margin has disappeared is contradicted by a variety of decisions.

A different question concerns the actual meaning of the term 'margin of appreciation' as used by different courts and tribunals. It seems that, like the ECtHR, adjudicators use the term to describe a certain discretion, a degree of deference, or both.[226] At the same time, none of the other international courts and tribunals has followed the ECtHR's intricate framework of factors

[220] International Military Tribunal (Nuremberg), Judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, 436.

[221] Bjorge, 'Been There, Done That' (n 219) 188.

[222] ibid, 190. 'Those who think they have something to teach international law by arguing that it adopt the by now fairly hackneyed doctrine of the margin of appreciation are late by approximately 60 years'. See also Bjorge, *Domestic Application* (n 152) 198: 'the doctrine, …, has been reduced in general international law to vanishing point, with the International Court of Justice stating with clarity in its *Oil Platforms* judgment that it simply does not exist.'

[223] *Siemens AG v Argentina*, ICSID ARB/02/8, Award of 17 January 2007, para 354; *Renta 4 v Russia* (n 129) para 22; *Bernhard von Pezold and Others v Zimbabwe*, ICSID ARB/10/15, Award of 28 July 2015, para 465-466.

[224] Bjorge's reading of *Oil Platforms* and *Whaling in the Antarctic* can also be contested. In *Oil Platforms*, the Court rejected the US' call for a measure of discretion in the context of determining the necessity of self-defence, but did not comment on the appropriateness of a margin of appreciation in different or wider contexts. Moreover, in *Whaling in the Antarctic*, the Court indeed applied an 'objective' standard of reasonableness, which appears to be relatively intrusive. At the same time, the judgment does not contain an explicit rejection of the margin of appreciation.

[225] Shany, 'Toward a General Margin of Appreciation' (n 174) 939.

[226] Orakhelashvili, *The Interpretation of Acts and Rules* (n 70) 198: the margin of appreciation is 'a complex and multi-level arrangement which includes initial determination by the State that may well include an element of discretion, and the consequent third-party review of this determination'.

determining the width of the margin of appreciation.[227] Consequently, references to the 'margin of appreciation' outside the scope of European human rights law refer only to a certain undetermined degree of discretion or deference.[228] Indeed, it has been rightly suggested that in the case of *Philip Morris v Uruguay*, the majority of the tribunal 'did not intend to import the ECtHR's "margin of appreciation" doctrine wholesale, but the wider idea of some degree of adjudicatory respect for complex policy determinations'.[229]

3.3.2 Reasonableness

The concept of reasonableness is well-known as a standard of review for the judicial review of the exercise of administrative discretion in certain domestic legal systems.[230] The term also appears regularly in international legal practice.[231] In *Sunday Times*, the ECtHR rejected the idea that its review was limited to ascertaining whether a member State had 'exercised its discretion reasonably, carefully and in good faith'.[232] Yet in *James and Others*, it was held: '[t]he Court,

[227] Although the IACtHR has followed the ECtHR's position that in the field of political speech, the margin is 'very reduced'. *Ivcher-Bronstein v Peru*, IACtHR, Judgment of 6 February 2001, para 155.

[228] This is the primary reason why Julian Arato objects to the importation of the margin in international investment arbitration: '[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*'. Julian Arato, 'The Margin of Appreciation in International Investment Law' (2014) 54 Virginia J of Int'l L 545, 558.

[229] Paine, 'Standard of Review' (n 173) para 22. See also Giovanni Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of *Philip Morris v Uruguay*' (2017) 14 Brazilian J of Int'l L 95, 113-114.

[230] *Associated Provincial Picture Houses v Wednesbury Corporation*, Court of Appeal of England and Wales, Judgment of 10 November 1947. *Dunsmuir v New Brunswick*, Supreme Court of Canada, Case No 31459, Judgment of 7 March 2008, para 47. See Michal Bobek, 'Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence' in Giorgio Bongiovanni *et al* (eds), *Reasonableness and Law* (Springer 2009).

[231] See generally Jean Salmon, 'Le concept de raisonnable en droit international public' in *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Pedone 1981); Olivier Corten, *L'utilisation du "raisonnable" par le juge international. Discours juridique, raison et contradictions* (Bruylant 1997). In *Barcelona Traction*, the ICJ held that 'in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably'. *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)*, ICJ, Judgment of 5 February 1979, para 93. cf *Rights of Nationals of the United States of America in Morocco (France v United States)*, ICJ, Judgment of 27 August 1952, 212. See also Vienna Convention on the Law of Treaties, Article 32(b).

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

finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation'.[233] Moreover, in *Khamidov*, the Court stipulated that it would not overrule domestic courts, unless their decisions appeared to be 'arbitrary or manifestly unreasonable'.[234] The IACtHR has also employed the term 'reasonable' to describe its standard of review. In *Mémoli v Argentina*, it held that: 'in strict observance of its subsidiary competence, the Court considers that … 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'.[235]

The term 'reasonable' plays a central role in the ICJ's *Whaling* judgment. In response to Japan's demands for deference, the Court ruled that it would consider whether the 'design and implementation' of Japan's scientific programme were 'reasonable in relation to achieving its stated objectives'.[236] The standard of reasonableness also features in various investment arbitration awards,[237] such as *Tecmed v Mexico*, where the tribunal, 'mindful of the deference that international tribunals should pay to a sovereign State's regulatory powers', inquired whether allegedly expropriatory measures were 'reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation'.[238]

Like in domestic practice, reasonableness is used by international courts and tribunals as a standard of review embodying a limited intensity of review. In the *Navigational Rights* case, the ICJ considered that:

> [A] court examining the reasonableness of a regulation must recognize that the regulator, in this case the State with sovereignty over the river, has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its

[233] *James and Others v UK* (n 62) para 46.

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

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

[236] *Whaling* (n 34) para 97.

[237] Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (CUP 2015) 117-120.

[238] *Tecmed v Mexico* (n 128) para 122. See also *Enron v Argentina* (n 42) para 372.

> knowledge of the situation, the measure that it deems most appropriate to meet that need.[239]

Likewise, Judge Cot of the ITLOS considered that reasonableness 'appears 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'.[240]

The use of 'reasonableness' as a standard of review raises questions concerning the definition of this standard. The challenge of defining 'reasonableness' is shared by adjudicators who apply treaty provisions that contain references to 'reasonableness', which are widespread, for example referring to 'reasonable' periods of time or 'reasonable' expectations.[241] Indeed, it is widely acknowledged that 'reasonableness' is difficult to define.[242] In the context of Article X:3(a) GATT, a WTO panel considered that 'the ordinary meaning of the word "reasonable", refers to notions such as "in accordance with reason", "not irrational or absurd", "proportionate", "having sound judgement", "sensible", "not asking for too much", "within the limits of reason, not greatly less or more than might be thought likely or appropriate", "articulate"'.[243]

In light of the difficulty of defining reasonableness, several adjudicators have emphasised that an assessment of whether a certain decision is 'reasonable' is dependent on concrete circumstances. In *Continental Shelf (Tunisia v Libya)*, the ICJ considered that 'what is reasonable

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[239] *Navigational Rights* (n 85) para 101.

[240] *Volga* (n 217) Separate Opinion of Judge Cot, para 18. cf *United States – Restrictions on Imports of Tuna (US – Tuna)*, WTO DS29, Panel Report of 16 June 1994, para 3.73, where the European Communities and the Netherlands argued: '[t]he reasonableness inherent in the interpretation of "necessary" was not a test of what was reasonable for a government to do, but of what a *reasonable government* would or could do. In this way, the panel did not substitute its judgement for that of the government. … It was a standard of review of government actions which did not lead to a wholesale second-guessing of such actions'.

[241] Cot, 'The Law of the Sea and the Margin' (n 177) 397-398.

[242] Henckels, *Proportionality and Deference* (n 237) 119; Valentina Vadi, 'Proportionality, Reasonableness, and Standards of Review in Investment Treaty Arbitration' in Andrea Bjorklund (ed), *Yearbook on International Investment Law & Policy 2013-2014* (OUP 2015) 214.

[243] *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes (Dominican Republic – Import and Sale of Cigarettes)*, WTO DS302, Panel Report of 26 November 2004, para 7.385. In *Parkerings-Compagniet v Lithuania*, ICSID ARB/05/8, Award of 11 September 2007, para 278, the tribunal equated 'equitable and reasonable' to 'fair and equitable'.

and equitable in any given case must depend on its particular circumstances'.[244] In *Navigational Rights*, the Court held: '[i]t will not be enough in a challenge to a regulation simply to assert in a general way that it is unreasonable. Concrete and specific facts will be required to persuade a court to come to that conclusion'.[245] Along the same lines, a WTO panel considered that:

> The word "reasonable" implies a degree of flexibility that involves consideration of the circumstances of a particular case. What is "reasonable" in one set of circumstances may prove to be less than "reasonable" in different circumstances. The elements of "balance" and "flexibility", as well as the need for a "case-by-case analysis", are inherent in the notion of "reasonable".[246]

Nonetheless, commentators have sought to identify different relevant elements of the concept of reasonableness.[247] Olivier Corten distinguishes between formal interpretations on the one hand and substantive interpretations on the other.[248] The first approach 'deals with the manner in which a judge or a State will justify an interpretation, independently from the actual content'.[249] This concerns the question of whether the State provides an explanation for the contested measure, in the form of a reasoning which is capable of intersubjective understanding, exempt from contradictions, and supported by relevant legal authorities.[250] Substantive interpretations integrate 'content into the justificatory discourse', by focusing on whether there is 'a sufficient causal link

[244] *Continental Shelf (Tunisia v Libya)*, ICJ, Judgment of 24 February 1982, para 72. cf *Wemhoff v Germany*, ECtHR 2122/64, Judgment of 27 June 1968, Law para 10.

[245] *Navigational Rights* (n 85) para 101.

[246] *Mexico - Measures Affecting Telecommunications Services*, WTO DS204, Panel Report of 2 April 2004, para. 7.328. The panel referred to considerations expressed by the AB in the context of a 'reasonable' period of time. The panel considered that 'the same basic elements of the word "reasonable"' also applied beyond that context.

[247] Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Arbitration* (Elgar 2018).

[248] Olivier Corten, 'The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions' (1999) 48 ICLQ 613, 620. cf the distinction between 'procedural' and 'substantive' approaches, eg Richard Happ, 'Dispute Settlement under the Energy Charter Treaty' (2002) 45 German Ybk of Intl L 331, 352.

[249] Corten, 'The Notion of "Reasonable"' (n 248) 620.

[250] ibid 621-622. See also Graham Cook, 'Reasonableness in WTO Law' (2013) 1 Latin American J of Int'l Trade 713. Cook categories three examples of unreasonableness with examples from WTO practice: irrational distinctions, inverted outcomes, and contradictions.

between the legitimate objective sought and the behaviour that one seeks to establish as reasonable'.[251]

Corten's distinctions seems to correspond with an interpretation provided by the tribunal in *AES v Hungary*, in its interpretation of Article 10(1) of the Energy Charter Treaty, which refers to 'unreasonable' measures:

> There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.[252]

The purpose of the concept of reasonableness, in Corten's view, is to provide a form of review that avoids reliance on subjective morality or equity:

> Judges will avoid condemning a State on the basis of moral, ethical or political arguments which have not first been formalised and translated into legal arguments. Rather, they will develop a discourse framed in syllogistic terms, invoking elements which appeal to reason.[253]

[251] Corten, 'The Notion of "Reasonable"' (n 248) 623.

[252] *AES Summit Generation Ltd and AES-Tisza Erömü Kft v Hungary*, ICSID ARB/07/22, Award of 23 September 2010, para 10.3.7-9. See also *Micula v Romania* (n 36) para 525.

[253] Corten, 'The Notion of "Reasonable"' (n 248) 624. cf *Camouco* (n 217) Declaration of Judge Laing: 'every day judicial bodies everywhere must objectively and impartially determine whether or not actions are reasonable, which is a neutral and unpejorative expression'. But see Happ, 'Dispute Settlement under the Energy Charter Treaty' (n 248) 352: 'since it is always in the eye of the beholder whether a measure is substantially reasonable or not, the substantive concept approach must be rejected'.

The appeal of reasonableness as a standard of review lies in that it suggests an objective, neutral assessment, rather than a subjective one influenced by the personal preferences of the adjudicator. Moreover, reasonableness is commonly understood to express a degree of deference, because it does not require the measure under review to be correct or optimal, but only rationally defensible.[254] Yet once one starts to inquire into the specific requirements embodied in a standard of reasonableness, it proves difficult to define their content in a way that explains how the standard combines meaningful review with deference. Assessments of whether a respondent State advances 'rational' justifications for a contested measure and whether there is a 'reasonable' connection between the measure and its aim can be undertaken with different degrees of exigency.[255] Consequently, the standard of reasonableness has limited analytical value, beyond its expression of the adjudicator's willingness to exercise deferential review.

3.3.3 Good Faith

The principle of good faith appears in various international legal contexts.[256] According to Article 26 of the Vienna Convention on the Law of Treaties, treaties must be performed 'in good faith'.[257] Moreover, according to Article 31 of the same Convention, '[a] treaty shall be interpreted in good faith'.[258] In practice, various international courts and tribunals have applied good faith as a standard of review when evaluating compliance with other norms of international law. Most prominently in the context of self-judging clauses, adjudicators have adopted an approach based

[254] Giovanni Sartor speaks about a 'sufficientist' understanding of reasonableness: 'in order for reasonableness to be achieved, a sufficient level of rationality and morality is required, and this is a lower level than that of cognitive and moral optimality'. Giovanni Sartor, 'A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review' in Giorgio Bongiovanni *et al* (eds), *Reasonableness and Law* (Springer 2009) 67.

[255] Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 Leiden J of Int'l L 71, 72-73.

[256] See generally Robert Kolb, *La bonne foi en droit international public* (Graduate Institute 2000). The principle is considered both a general principle of law and a principle of customary international law. Andrew Mitchell, 'Good Faith in WTO Dispute Settlement' (2006) 7 Melbourne J Int'l L 339, 341-244.

[257] cf Article 2(2) United Nations Charter. According to the WTO AB, good faith is 'at once a general principle of law and a general principle of international law'. *US – Shrimp* (n 6) para 158.

[258] Because of Article 31(1) Vienna Convention on the Law of Treaties, the notion of good faith plays a central role in treaty interpretation, both as 'an interpretative aid and as a mechanism of accountability of the treaty interpreter'. De Brabandere and Van Damme, 'Good Faith in Treaty Interpretation' (n 93) 38.

on the principle of good faith. In *Djibouti v France*, the ICJ held with regard to a self-judging clause: 'while it is correct, as France claims, that the terms of Article 2 provide a State … with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith'.[259] The *LG&E* tribunal suggested that its review of Argentina's invocation of a security exception would be conducted as a good faith review, even if the applicable treaty provision was not self-judging.[260]

Like the principle of reasonableness, the principle of good faith is difficult to define.[261] In *Gabčíkovo-Nagymaros*, the ICJ considered that '[t]he principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized'.[262] Yet this definition does not provide much clarity, beyond a reference to the equally indeterminate notion of reasonableness. William Burke-White and Andreas von Staden consider that 'as a standard of review, good faith has two basic elements: first, whether the state has engaged in honest and fair dealing and, second, whether there is a rational basis for the action taken by the government'.[263] Andrei Mamolea distinguishes three different elements that would demonstrate bad faith in State conduct: discrimination; the absence of a designated legitimate aim; and unreasonableness or arbitrariness.[264]

Traditionally, States are considered to benefit from a presumption against bad faith.[265] A finding of bad faith would be a controversial pronouncement, probably even more so than the finding of an ordinary breach.[266] Consequently, the good faith principle is often considered to

[259] *Mutual Assistance in Criminal Matters* (n 187) para 145.

[260] *LG&E v Argentina* (n 188) para 214.

[261] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953) 105.

[262] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ, Judgment of 25 September 1997, para 142.

[263] Burke-White and Von Staden, 'Private Litigation in a Public Law Sphere' (n 205) 312.

[264] Andrei Mamolea, 'Good Faith Review' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 13) 78-84.

[265] ibid 75. *European Communities - Trade Description of Sardines (EC - Sardines)*, WTO DS231, AB report of 26 September 2002, para 278: '[w]e must assume that Members of the WTO will abide by their treaty obligations in good faith'.

[266] cf *US – Section 301 Trade Act* (n 45) para 7.64: '[i]t is notoriously difficult, or at least delicate, to construe the requirement of the Vienna Convention that a treaty shall be interpreted in good faith in third party dispute resolution, not least because of the possible imputation of bad faith to one of the parties'. This does not mean that findings suggesting bad faith do not exist. See eg *SD Myers v Canada* (n 67) para 162.

provide a lenient standard of review.[267] In the *Whaling* case, Australia objected against the application of a good faith standard for this reason: 'the Court's power of review should not be limited to scrutiny for good faith, with a strong presumption in favour of the authorizing State, as this would render the multilateral regime for the collective management of a common resource … ineffective'.[268] Instead, Australia argued for a review of 'objective elements', an approach that the Court apparently followed.[269]

Even if the good faith standard is often considered as a lenient standard of review, certain aspects of the concept seem actually geared toward strict scrutiny.[270] The standard suggests an evaluation not only of factual elements but also of a State's subjective intent, which raises difficult questions in practice.[271] Moreover, the scope of the standard is obscured by controversy about whether the principle of good faith adds to existing obligations. The ICJ has repeatedly rejected this idea. For instance, in *Border and Transborder Armed Activities (Nicaragua v Honduras)*, the Court considered that good faith 'is not in itself a source of obligation where none would otherwise exist'.[272] Yet the WTO AB created doubts about this issue in its report in *US – Offset Act (Byrd Amendment)*. In that case, the panel had found breaches of Article 5.4 ADA and Article 11.4 SCM

[267] Burke-White and Von Staden, 'Private Litigation in a Public Law Sphere' (n 205) 312: 'good faith is an extremely lenient standard'; 333: 'the good faith standard provides the broadest deference': 'such drastic judicial self-restraint allocates only a residual supervisory role to courts and tribunals'.

[268] *Whaling* (n 34) para 63.

[269] ibid.

[270] See the concerns voiced by Helge Zeitler, '"Good Faith" in the WTO Jurisprudence - Necessary Balancing Element or an Open Door to Judicial Activism' (2005) 8 JIEL 721, 753: 'it is evident that another risk of judicial activism may come with the use of broad general concepts such as good faith'; 756: '[a] vague concept, such as good faith, inevitably contains the risk of overbroad use by judges'. cf Mamolea, 'Good Faith Review' (n 264) 88: '[o]pen-textured standards permit the consideration of a State's improper intent as an aggravating factor'.

[271] ibid 74. *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, WTO DS8, AB Report of 4 October 1996, 27-28; *SD Myers v Canada* (n 67) para 161: '[t]he intent of government is a complex and multifaceted matter. Government decisions are shaped by different politicians and officials with differing philosophies and perspectives'; *Methanex v US* (n 87) para 158: '[w]here a single governmental actor is motivated by an improper purpose, it does not necessarily follow that the motive can be attributed to the entire government'; *Whaling* (n 34) para 97.

[272] *Border and Transborder Armed Activities (Nicaragua v Honduras)*, ICJ, Judgment of 20 December 1988, para 94. The Court confirmed this statement in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, ICJ, Judgment of 11 June 1998, para 39, 59.

Agreement, concluding that the United States had not acted in good faith.[273] In response to the United States' complaint that panels were not empowered to adopt such a conclusion, the AB affirmed the 'relevance of the principle of good faith' and ruled that:

> Clearly … there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith. Nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion.[274]

The passage has created confusion and can be interpreted in different ways.[275] The AB seems to consider that a violation of a substantive treaty provision is 'a necessary but not sufficient condition' for finding a violation of good faith.[276] This approach is incompatible with the use of good faith as a standard of review for evaluating compliance with a substantive obligation, where an absence of good faith would be the crucial, or only, reason for finding a violation of that obligation. Consequently, there is great uncertainty about the differences, if any, between the concept of good faith as a standard of review on the one hand, and as an accessory obligation[277] of international law on the other.[278]

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[273] *United States - Continued Dumping and Subsidy Offset Act of 2000 (US — Offset Act (Byrd Amendment))*, WTO DS217, Panel Report of 16 September 2002, para 7.63.

[274] ibid, AB Report of 16 January 2003, para 297-298.

[275] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO. The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Hart 2006) 63-67.

[276] Mitchell, 'Good Faith in WTO Dispute Settlement' (n 256) 365.

[277] Marion Panizzon, 'Fairness, Promptness and Effectiveness: How the Openness of Good Faith Limits the Flexibility of the DSU' (2008) 77 Nordic J of Int'l L 275, 276: '[w]hile some argue for a self-standing value, others, including the WTO Appellate Body, find good faith to have an accessory standing in the sense that good faith only becomes enforceable when it attaches (accessorily) to a specific legal obligation, which it may then complement or intensify.'

[278] Burke-White and Von Staden, 'Private Litigation in a Public Law Sphere' (n 205) 312: '[u]nfortunately, the paucity of jurisprudence on the principle of good faith means that the practical standards for undertaking a good faith review are underdeveloped and arbitrators may find the standard lacking specificity. The "good faith" standard in treaty performance is, however, well established and offers a useful starting point for the development of good faith as a standard of review'.

3.3.4 Proportionality

The concept of proportionality and its use as a standard of review in international adjudication has received wide attention.[279] Proportionality analysis is commonly described as an assessment consisting of three consecutive steps, evaluating, first, whether the measure under review is suitable to achieve a legitimate aim (suitability); second, whether there are no less restrictive alternatives that can serve the aim equally effectively (necessity); and third, whether the measure under review does not impose a disproportionate burden on certain right-holders (proportionality *stricto sensu*).[280] Some of the institutions studied in this study have applied it in the context of allegedly deferential review. In the case of *Markt Intern*, the ECtHR ruled that:

> The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to a European supervision as regards both the legislation and the decisions applying it, even those given by an independent court (...). The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate.[281]

[279] See eg Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999); Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law in Comparative Perspective' (2007) 42 Texas Int'l L J 370, reprinted as Mads Andenas and Stefan Zleptnig, 'Proportionality and Balancing in WTO Law: A Comparative Perspective' in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services* (Nijhoff 2008); Benedict Kingsbury and Stephan Schill, 'Public Law Concepts to Balance Investor's Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010); Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review. A Theoretical and Comparative Study* (Europa Law 2013); Yutaka Arai-Takahashi, 'Proportionality' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013); Alexia Herwig and Asja Serdarevic, 'Standard of Review for Necessity and Proportionality Analysis in EU and WTO Law' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 13); Anne Peters, 'Proportionality as a Global Constitutional Principle' in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Elgar 2017); Thomas Cottier *et al*, 'The Principle of Proportionality in International Law: Foundations and Variations' (2017) 18 J of World Investment and Trade 628; Vadi, *Proportionality, Reasonableness and Standards of Review* (n 247).

[280] Kingsbury and Schill, 'Public Law Concepts' (n 279) 86-88. Kai Möller splits the first step in two, describing four different stages. Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 181.

[281] *Markt Intern v Germany* (n 31) para 33.

By stating that it would 'confine' its review to proportionality analysis, the Court apparently applied proportionality as a non-intrusive standard of review. In the words of Judge Wolfrum of the ITLOS:

> [I]nternational human rights courts … 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 (…).[282]

Yet in reality, it seems that the concept of proportionality does not necessarily function as a deferential standard of review, but rather as a test that can be applied with different degrees of intensity.[283] In other words, the proportionality test is an assessment of which the rigour depends on the applicable standard of review, or, in the case of the ECtHR, on the width of the margin of appreciation.[284] Previous sections of this study have noted that the standards of reasonableness and good faith can also be applied in an intrusive manner. Yet these two concepts have traditionally been associated with the limits of judicial review, whereas proportionality analysis has been credited with an expansion of judicial powers.[285] Indeed, without a deferential standard of review

[282] ibid.

[283] Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge L J 174. Jansen Calamita, 'The Principle of Proportionality' (n 178) 176-177; Besson, 'Subsidiarity' (n 211) 85.

[284] See eg *S and Marper v United Kingdom*, ECtHR (GC) 30562/04, Judgment of 4 December 2008, para 101-102; *Ndidi v United Kingdom*, ECtHR 41215/14, Judgment of 14 September 2017, para 76. cf Burke-White and Von Staden, 'Private Litigation in a Public Law Sphere' (n 205) 308: '[i]n practice, the Court uses the margin of appreciation to inform its proportionality analysis. In other words, when the Court grants a wide margin of appreciation to states in a given issue area, it then transforms that wide margin into a greater degree of deference to the national government in the proportionality balancing process which follows. A wide margin results in a less stringent proportionality test. A narrow margin leads to stricter review in the proportionality test.' Some authors describe an inverse relationship, describing the effect that proportionality analysis has on the margin of appreciation. This, however, seems only convincing if the margin is understood as coinciding with a zone of compliance. See on this section 2.2.2.

[285] This latter argument is made by Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 Columbia J of Transnat'l L 72.

limiting the rigour of the assessment, proportionality analysis is likely to induce intrusive review.[286]

3.3.5 Procedural Review

Instead of formulating a specific standard of review in the form of a narrow substantive test that domestic measures need to pass, some international adjudicators have adopted procedural tests in order to exercise deferential review. The underlying idea is that the adjudicator refrains from engaging with the merits if the original decision-maker has followed a fair decision-making procedure. In *Crystallex v Venezuela*, the tribunal reviewed the respondent's refusal to grant a mining permit to the claimant in the light of the fair and equitable treatment standard in the following way:

> [W]hile the Tribunal will refrain from making findings as to whether … the reasons put forward by the Respondent in denying the Permit were substantively valid, the Tribunal will, in its review of the government conduct, assess whether there have been serious procedural flaws which have resulted in the Permit being arbitrarily denied, or in the

[286] Andenas and Zleptnig, 'Proportionality' (n 279) 384: '[t]he proportionality test is usually associated with a full review on the merits, going beyond the more traditional and narrower concept of a reasonableness review of the initial decision'; Kingsbury and Schill, 'Public Law Concepts' (n 279) 103: 'proportionality analysis can be criticized as legitimating judicial lawmaking and as generating a *gouvernement des juges*'. See also Stone Sweet and Mathews, 'Proportionality' (n 285) 78-79, describing proportionality analysis as 'strict scrutiny, positioning courts to exercise dominance over both policy and constitutional development' and as 'the most intrusive form of review'. Henckels, *Proportionality and Deference* (n 237) 28-29: '[p]roportionality analysis can be a very far-reaching method of review in terms of its intrusiveness into governmental policy-making. … Arguably, adopting an appropriately deferential approach to proportionality analysis can resolve – or at least attenuate – these concerns'. Rivers, 'Proportionality and Discretion' (n 283). Thomas Kleinlein, 'Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law' (2011) 12 German L J 1141, advocating the adoption of the margin of appreciation in the context of proportionality analysis.

Debates about the appropriateness of proportionality analysis provide an illustration of broader debates about the intensity of judicial review. For an overview of such debates see eg Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 75-84; Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (OUP 2015) 63-64.

> investor being treated non-transparently or inconsistently throughout the process and thereafter.[287]

In the context of the ECtHR, scholars have noted that procedural review has recently become more visible in the Court's jurisprudence.[288] In *Shtukaturov v Russia*, the Court considered that '[t]he extent of the State's margin of appreciation … depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism'.[289] The inverse could be true as well, meaning that the margin of appreciation would be broader if the domestic decision-making procedures were proper.[290] In *Animal Defenders*, the Court held that:

> [I]n order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation.[291]

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[287] *Crystallex v Venezuela* (n 215) para 585.

[288] See eg Spano, 'Universality or Diversity' (n 118); Saul, 'The European Court of Human Rights' Margin of Appreciation' (n 118). Yet Oddný Arnardóttir concludes that '[t]he contours of this development are … still quite unclear'. 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, 13. See generally Patricia Popelier, 'The Courts as Regulatory Watchdog. The Procedural Approach in the Case Law of the European Court of Human Rights' in Patricia Popelier *et al* (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013); Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (CUP 2017); Robert Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law (2018) 18 Human Rights L Rev 473.

[289] *Shtukaturov v Russia*, ECtHR 44009/05, Judgment of 27 March 2008, para 89.

[290] This would suggest that the quality of the domestic procedure would belong among the factors that determine the width of the margin. Angelika Nussberger notes that 'there is a direct link between the degree of proceduralisation of the Court's review and the margin of appreciation'. Angelika Nussberger, 'Procedural Review by the ECHR: View from the Court' in Gerards and Brems, *Procedural Review* (n 288) 174. Nussberger, however, describes an inverse effect, noting that in cases where the Court grants a wide margin of appreciation, it will focus on procedural review. In that case, procedural review would be the Court's implementation of a (wide) margin of appreciation. Janneke Gerards notes that the implications of positive and negative outcomes of procedural review are not similar. Janneke Gerards, 'Procedural Review by the ECtHR: A Typology' in Gerards and Brems, *Procedural Review* (n 288) 141.

[291] *Animal Defenders v UK* (n 152) para 108.

After describing the 'exceptional examination by parliamentary bodies' and 'the extensive pre-legislative consultation on the Convention compatibility' of the prohibition under review, the Court concluded that it attached 'considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies'.[292]

Whereas procedural review can be understood as deferential in the sense that it may limit the intensity of the adjudicator's review of the substantive content of an impugned measure,[293] the method does not escape certain difficulties that trouble other standards of review as well. First, it is debatable if and how procedural review can take place without a consideration of the merits of the decision under review.[294] It seems that an assessment of compliance with procedural requirements needs to evaluate also the final outcome of the decision-making process. For instance, a review of whether all relevant interests have been taken into account by the decision-maker seems to require some evaluation of the final decision, rather than only a purely procedural check to see whether all stakeholders have been invited to share their views.[295] Procedural review is unlikely to result in a truly distinct assessment, but instead reframes the substantive assessment by using procedural language.

Second, many substantive rules of international law are considered to have a procedural element.[296] For instance, the ITLOS has considered that:

> The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or

[292] ibid para 114-116. For more examples, see Gerards, 'Procedural Review' (n 290) 141-142.

[293] Janneke Gerards, 'The Prism of Fundamental Rights' (2017) 8 Eur Const L Rev 173, 197-198.

[294] cf Eva Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in Gerards and Brems, *Procedural Review* (n 288) 35, arguing for 'substance-flavoured' procedural review, 'a "mixed" type of review that is procedural and substantive at the same time'.

[295] This is confirmed by the case-law of the ECtHR. Gerards, 'Procedural Review' (n 290) 159: 'in hardly any of these cases are the arguments from procedure decisive. Mostly they are only supportive'.

[296] For the ECHR, see Gerards, 'Procedural Review' (n 290) 130-140. For the WTO, see Isabelle van Damme, 'Procedural Review in WTO Law' in Gerards and Brems, *Procedural Review* (n 288) 217-232.

> other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision.[297]

In such circumstances, procedural review is not an expression of deference, but rather the exercise of normal review of compliance with the procedural elements of a certain obligation.[298] Adjudicators may also add procedural elements to substantive obligations on their own initiative. For instance, the ECtHR considered that:

> [W]hilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The Court must therefore determine whether, having regard to the circumstances of the case and notably the importance of the decisions to be taken, the applicant has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests.[299]

In this way, the Court adds a procedural layer to a substantive obligation. The *US – Shrimp* decision of the WTO AB can be understood in a similar way. In that case, the AB reviewed whether a US import ban could be justified under Article XX(g) GATT. The AB ultimately decided that the ban was not justified, because of procedural shortcomings in the way the ban was adopted and implemented. The AB noted 'the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations'.[300] Moreover, the certification process established by the ban failed to comply with 'minimum standards for transparency and procedural fairness' as codified in Article X GATT.[301] According

[297] *Juno Trader (Saint Vincent and the Grenadines v Guinea-Bissau)*, ITLOS No 13, Judgment of 18 December 2004, para 77.

[298] cf eg *Hatton v United Kingdom* (n 24) para 104.

[299] *Görgülü v Germany*, ECtHR 44009/05, Judgment of 27 March 2008, para 89.

[300] *US – Shrimp* (n 6) para 166.

[301] ibid para 183.

to the AB, if such minimum standards applied to trade measures generally, 'rigorous compliance' was required for measures that purported to be justified under Article XX.[302]

The *US – Shrimp* decision has been praised for its refusal to engage in a substantive evaluation of the import ban.[303] Yet it is debatable whether the procedural review exercised by the AB expressed deference. Rather, substantive review was replaced by or expanded with review for compliance with procedural requirements found elsewhere in the GATT.[304] To the extent that procedural review entails an assessment distinct from the substantive evaluation of compliance with a legal rule, it is doubtful whether such a procedural inquiry is actually legitimate. Instead of decreasing the intensity of the adjudicator's review, procedural review replaces the original assessment of treaty compliance by a different assessment, namely of compliance with democratic norms and due process rules.[305] Such an inquiry may be more controversial than review for compliance with substantive rules. Indeed, a finding of procedural impropriety, like a finding of bad faith, could be more offensive to a respondent State than the finding of a substantive violation.[306]

[302] ibid para 182.

[303] Ioannidis, 'Beyond the Standard of Review' (n 180) 108. For a more critical analysis, see Maureen Irish, 'Global Public Policy and the World Trade Organization after *Shrimp/Turtle* and *Asbestos*' (2004) 42 Canadian Ybk of Int'l L 253, 350: '[a]s more disputes come forward concerning the Article XX exemptions, interpretation of the introductory clause of the article should become more substantive'. See also Gregory Shaffer, 'The Democratic Legitimacy of Extraterritorial U.S. Trade Sanctions on Environmental Grounds: The WTO Shrimp-Turtle Case' (2000) 94 ASIL Proceedings 84.

[304] Van Damme, 'Procedural Review' (n 296) 238.

[305] Aruna Sathanapally, 'The Modest Promise of "Procedural Review" in Fundamental Rights Cases' in Gerards and Brems, *Procedural Review* (n 288) 55: '[w]hether procedural review is an exercise in judicial restraint on institutional grounds, or instead a more expansive supervision by courts over other institutions of government, depends on how a court engages in the evaluation of process'. cf Janneke Gerards and Eva Brems, 'Procedural Review in European Fundamental Rights Cases: Introduction' in Gerards and Brems, *Procedural Review* (n 288) 12: 'there is no sufficient basis for the [ECtHR and CJEU] to engage in full procedural review, which means that a court would not at all look into the substance of a measure or decision infringing a fundamental right, but only at the quality of the decision-making procedure'.

[306] See for some examples in the ECtHR context, Nussberger, 'Procedural Review' (n 290) 162-163.

3.3.6 Overlapping Standards of Review

The margin of appreciation, reasonableness, good faith, proportionality, and procedural review are often used alongside each other or conflated. For instance, adjudicators commonly include the standard of reasonableness when they provide a definition of good faith.[307] Reasonableness, in turn, has been interpreted as including requirements of proportionality[308] and fairness.[309] The margin of appreciation has been associated with reasonableness[310] as well as proportionality.[311] In other words, attempts to define standards of review often boil down to a replacement of one indeterminate concept by another.[312] Indeed, 'there are limits to the degree of precision which is either appropriate or possible when formulating' standards of review.[313] Beyond relative terms

[307] *US – Shrimp* (n 6) para 158; *US – Gambling* (n 199) Panel Report of 10 November 2004, para 6.49. cf *Aerial Incident of 27 July 1955 (Israel v Bulgaria)*, ICJ, Judgment of 26 May 1959, Joint Dissenting Opinion of Judges Lauterpacht, Koo and Spender, 189: '[i]t is consistent with enlightened practice and principle to apply the test of reasonableness to the interpretation of international instruments - a test which follows from the ever present duty of States to act in good faith'.

[308] *Filleting within the Gulf of St. Lawrence between Canada and France (Canada v France)*, Arbitral Award of 17 July 1986, para 54. See also *Volga* (n 217) Separate Opinion of Judge Cot, para 21. In *Total v Argentina* (n 280) para 309(h), the tribunal mentions a 'standard of reasonableness and proportionality'.

[309] *Juno Trader* (297) para 77.

[310] *James and Others v UK* (n 62) para 46; *Volga* (n 217) Separate Opinion of Judge Cot, para 18.

[311] *Markt Intern v Germany* (n 31) para 33.

[312] Mitchell, 'Good Faith in WTO Dispute Settlement' (n 256). Alexander Orakhelashvili, 'Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter' (2016) 31 ICSID Rev 344, 364: '[t]he use of indeterminate and open-ended notions in treaties leads to judicial and doctrinal efforts to use more indeterminate notions, so "reasonableness" is used to ascertain what is meant by "fair and equitable", and "diligence" is used to ascertain by what is meant by "full protection". The acute need of Occam's razor in this area is obvious'. Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 109: '[t]o go down the road of classification can lead only to metaphysical problems of distinguishing different forms of irrationality which would truly be worthy of mediaeval schoolmen'.

[313] Nicholas Lavender, 'The Problem of the Margin of Appreciation' (1997) 4 Eur Human Rights L Rev 380, 390. Ioannidis, 'Beyond the Standard of Review' (n 180) 95: '[a]nother risk when studying the standard of review is to overcharge the analytical capacity of concepts as broad and vague as "reasonableness" or "objectiveness". Courts often use such concepts to describe the standard of review they apply, and so do many authors. However, we can seldom discern a court's attitude towards other instances of authority simply by saying that it engages in "*de novo*" or "reasonableness" review'.

describing stricter or more lenient scrutiny, it is difficult to specify forms of deference in more detail.[314]

Numerous adjudicators have acknowledged that it is difficult to provide precise definitions of standards of review, and that one should focus on the factual circumstances of the case instead. In *Mondev v United States*, the tribunal determined that its analysis of a denial of justice claim would focus on whether the impugned decision was 'clearly improper and discreditable'.[315] It then concluded: '[t]his is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities'.[316] This observation of the *Mondev* tribunal puts a pragmatic end to debates about the definition of standards of review. Whereas the concept of deference can validly express a certain willingness to accept the determinations made by domestic authorities, attempts to quantify or qualify deference in more precise terms fail to produce satisfactory results.[317]

3.4 Conclusions

When international courts and tribunals defer to respondent States, they do so in different ways. Adjudicators often grant deference in specific contexts, such as the establishment of facts, the evaluation of technical issues, and the interpretation and application of domestic law, whereas deference in the context of public policy review and treaty interpretation is more controversial. Alternatively, some adjudicators link their deference not primarily to a specific assessment, but to a specific domestic actor. Parliaments, administrative agencies, and courts appear to be the most frequent recipients of deference by international courts and tribunals.

Limitations on the scope of deference demonstrate that general, structural doctrines of deference are not very useful in international adjudication. Instead, adjudicators realise that the appropriate intensity of review differs depending on the actual type of assessment that is challenged before an international court or tribunal. An inevitable consequence of refining

[314] Shirlow, 'Deference and Indirect Expropriation Analysis' (n 202) 601, describes such relative terms as 'quantum markers'.

[315] *Mondev v US* (n 87) para 127.

[316] ibid.

[317] cf Richard Posner, *How Judges Think* (Harvard 2008) 114, writing in the context of domestic standards of appellate review: 'the gradations of deference that these distinctions mark are finer than judges want, can discern, or need. The only distinction the judicial intellect actually makes is between deferential and nondeferential review'.

doctrines of deference is that they become more closely intertwined with discussions about the scope and content of the applicable legal provision. The connection is most obvious in the context of self-judging clauses, which are widely considered to allow only for a very limited form of review. Adjudicators also often limit the intensity of review on grounds of the alleged indeterminacy of an applicable norm, understood as leaving a certain freedom of decision-making to the State.

It is nonetheless important to distinguish between the interpretation of the norm and the adoption of a deferential standard of review. Interpretation concerns the substantive content of the legal obligation, whereas the standard of review concerns the distribution of interpretative powers between international and domestic actors. The adoption of a deferential standard of review defines the limits of international supervision, leaving the implementation of the international obligation beyond those limits to domestic authorities. This is precisely the purpose of deference, namely to respect the interpretation and application of an international obligation as undertaken by domestic decision-makers.

At the same time, this chapter has demonstrated that the definition of specific standards of review, independent of the applicable legal norm, does not result in a better understanding of the adjudicator's intensity of review. Several general notions, such as the margin of appreciation, good faith, and reasonableness, have been used as deferential standards of review under different substantive standards, but their conceptual value seems limited to expressing some degree of deference, rather than providing a clear analytical framework of analysis. Attempts to spell out the precise contents of these standards often result in cross-referencing and conceptual confusion. Moreover, whereas some standards have been introduced as expressions of deferential review, their application easily evolves into intrusive review. The standard of good faith, for instance, has traditionally been understood as a deferential standard of review, but its apparent inclusion of intentional elements may actually increase the scrutiny of the adjudicator. The limited analytical value of specific standards of review makes it difficult to provide a precise description of the impact of deference on judicial reasoning, beyond its expression of a certain willingness of the adjudicator to accept the assessments made by domestic authorities.