Intensity of review in international courts and tribunals

A comparative analysis of deference

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4. A Normative Assessment of Deference in International Adjudication

4.1 Introduction

The previous chapters of this study have demonstrated that the main arguments in favour of deference in international adjudication concern the allegedly superior expertise and legitimacy of domestic decision-makers. In order to provide a normative answer to the question of whether deference is legitimate in international adjudication, I propose to make a corresponding distinction between epistemic deference, based on the expertise of domestic institutions, and constitutional deference, based on the accountability of domestic decision-makers.[1] The distinction follows from the observation that these two forms of deference have largely different justifications, which require separate treatment.

[1] The distinction party overlaps with distinctions made by others. Robert Alexy, writing in the context of constitutional rights, distinguishes between 'structural discretion', which is the policy space left free by the constitution, and 'epistemic discretion', which is constituted 'by the limits of our capacity to know what the limits of the constitution are'. Epistemic discretion depends on 'the limits of both empirical and normative knowledge'. Empirical epistemic discretion, in turn, follows from uncertainty about relevant facts and empirical assumptions, while normative epistemic discretion results from normative uncertainty, which, according to Alexy, exists primarily in the context of balancing. Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010) 393, 414-415, 420-421. Caroline Henckels follows Alexy's distinctions, focusing on 'empirical deference' and 'normative deference'. Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (CUP 2015) 35-37. Paul Daly, writing in the context of administrative law, distinguishes between 'epistemic deference', which involves 'the paying of respect to the decisions of others', and 'doctrinal deference', which concerns the allocating of 'authority to another to make binding decisions'. Daly proposes the use of the term 'curial deference', which 'denotes the paying of respect on the basis of another's competence', encompassing both epistemic and doctrinal deference. Paul Daly, *A Theory of Deference in Administrative Law. Basis, Application and Scope* (CUP 2012) 7-10. Mark Elliott distinguishes between 'expertise-based deference' and 'legitimacy-based deference', which closely resembles the distinction proposed here. Mark Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' in Christopher Forsyth *et al* (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010) 272-277. I propose nonetheless the distinction between epistemic and constitutional deference, because it emphasises the precise reasons underlying these forms of deference, namely differences in knowledge (epistemic deference) and the distribution of authority (constitutional deference).

Epistemic deference depends on expertise in matters that are not of a primarily legal character. The assumption is that international judges lack the knowledge and skills that domestic institutions have in such matters. Out of the different assessments discussed in the previous chapter, epistemic deference would apply to factual and technical assessments as well as interpretations and applications of domestic law. Constitutional deference, on the other hand, relies on considerations of legitimacy, inquiring whether international judges should be empowered to have a final say on issues of domestic policy-making. The justifications for constitutional deference partly overlap with concerns common in political theory related to domestic judicial review, combined with considerations of State sovereignty unique to international law. A crucial difference between the two forms of deference is that epistemic deference is based on the assumption that the question at issue has a right answer as a matter of empirical truth, but that an international court or tribunal is not well qualified to find that answer; constitutional deference, however, is based on the conviction that the question at issue does not have a single right answer, or at least allows for legitimate disagreement, and that an international tribunal should not impose its own preference.[2]

In this chapter, I will first undertake a normative assessment of epistemic deference. I will submit that a legitimate execution of the judicial task justifies deference to domestic decision-makers on grounds of their expertise with regard to assessments that require such expertise. At the same time, the different skills of adjudicators and domestic authorities do not call for a structural

[2] The question of whether any legal question has a single right answer has stirred controversy in legal theory. See for an affirmative account, Ronald Dworkin, 'No Right Answer?' (1978) 53 NYU L Rev 1. See for further discussion eg Brian Bix, *Law, Language, and Legal Determinacy* (OUP 2003) 77-132; Timothy Endicott, 'Vagueness and Legal Theory' (1997) 3 Legal Theory 37. Trevor Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) 127 L Q Rev 96, 101: '[i]f there are no uniquely correct answers to the legal issues arising, but only the conflicting answers of different institutions, it makes sense to suppose that courts should sometimes defer to other bodies *against their own best judgment of a party's legal rights*'. Yet Allan rejects this assumption, 102: '[i]f there are no right answers, … then there is no genuine difference between legal analysis and political choice. Law is merely politics by another means. … A coherent theory of rights, capable of consistent judicial enforcement, assumes that there is always a right answer to the question of whether or not a particular action or decision lay within the jurisdiction of the responsible public authority'. At the same time, Allan advocates judicial 'sensitivity to the sphere of reasonable disagreement about a subject matter that may be inherently speculative or prone to rapid and unpredictable change', 104. A parallel to the domestic debate about the single right answer thesis is the debate about the completeness of international law. Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with a New Epilogue* (CUP 2006) 52-58; Gleider Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 241-244.

doctrine of deference. Rather, epistemic deference is a limited and context-dependent form of deference, applicable only to non-legal assessments. Since it is justified by expertise, epistemic deference does not necessarily benefit the respondent State: it can also be accorded to the other party to the dispute or to an independent expert.

Second, I will provide a normative assessment of the more controversial issue of constitutional deference. After outlining some of the arguments raised for and against this form of deference, I will focus on the principle of the separation of powers as the decisive rationale justifying judicial deference. In contrast to common arguments based on the separation of powers, I submit that its application on the international level produces an argument against rather than in favour of deference, because of the limited impact that decisions of international courts and tribunals have on the domestic legal order. Most international adjudicators can order only limited forms of remedies, and States possess a variety of means to mediate the effects of international decisions. These restrictions on the powers of international courts and tribunals correspond to their purpose, which is narrower than that of domestic courts. With the exception of the human rights courts, international courts do not form part of a constitutional framework securing the legitimate exercise of public power. Instead, they serve more instrumental aims, such as solving interstate disputes and facilitating economic exchange. Accordingly, States have granted international adjudicators only limited powers to interfere with domestic decision-making. As a consequence, the balance of power between domestic institutions on the one hand and international courts on the other heavily favours the former, even if international courts and tribunals review domestic policies against international legal standards. In light of this situation, there is no real need for a doctrine of constitutional deference in international adjudication. The regional human rights courts form an exception, since they do have a constitutional purpose of securing the legitimate exercise of public power. In those regimes, constitutional deference is mandated, not only by concerns for judicial overreach that justify judicial deference in the domestic context, but also by the concurrent principle of subsidiarity.

4.2 Epistemic Deference

It is a common observation, both in domestic and in international adjudication, that judges are not trained to answer all sorts of technical questions. Like domestic judges, international courts and tribunals cannot be expected to provide final answers on non-legal questions, because of ‘the

limited epistemic competence of such bodies to assess the correctness of scientific evidence, which in turn considerably increases the risk of rendering wrong decisions'.[3] Specialised agencies have an advantage in terms of time, resources and capacities to deal with technical questions.[4] Consequently, judicial deference on this ground is relatively uncontroversial.[5]

A defining characteristic of epistemic deference is that it is limited to questions that require non-legal expertise. As a consequence, the scope of epistemic deference never covers the entire question to be decided by the court or tribunal, which is normally a legal question with possibly certain non-legal elements.[6] In practice, however, it can be difficult to draw the boundary between legal and non-legal assessments.[7] For instance, the review of risk assessments such as those required under the SPS Agreement includes both scientific and non-scientific components.[8] This makes it difficult for a WTO panel to determine where the scientific assessment, and therefore its

[3] Lukasz Gruszczynski and Valentina Vadi, 'Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration. Converging Parallels?' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation* (OUP 2014) 165.

[4] 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 3) 102.

[5] Elliott, 'Proportionality and Deference' (n 1) 272: '[s]uch deference on the grounds of the executive's superior expertise in relation to certain matters is broadly, but not universally, recognised as legitimate'; Gruszczynski and Vadi, 'Standard of Review and Scientific Evidence' (n 3) 165: 'multiple reasons speak in favour of the deferential approach ... of WTO panels, and more generally of any international court or tribunal, with respect to evaluation of scientific facts'.

[6] Elliott, 'Proportionality and Deference' (n 1) 272: 'deference on expertise grounds is appropriate only where *the matter in question engages issues that call for expertise*'.

[7] James Flett describes how the task of experts can be very close to the adjudicator's task. James Flett, 'When is an Expert not an Expert?' (2018) 9 J of Int'l Dispute Settlement 352. Attempts have been made to distinguish between the tasks of an expert and of an adjudicator, but it seems difficult to provide abstract criteria in this regard. See eg, in the WTO context, CA Thomas, 'Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement' (2011) 14 JIEL 295, 325-326: '[i]t is for experts to provide and elucidate an economic reading of the facts; it is for panelists to make an objective assessment of the facts so presented in line with the requirements of the covered agreements, a hermeneutic function'. David Coady *et al*, 'Scientific Whaling and How Philosophy of Science Can Help Break the International Deadlock' (2018) 72 Australian J of Int'l Affairs 49.

[8] Gruszczynski and Vadi, 'Standard of Review and Scientific Evidence' (n 3) 166. See also Oren Perez and Reut Snir, 'Global Environmental Risk Governance under Conditions of Scientific Uncertainty: Legal, Political and Social Transformations' (2013) 2 Transnat'l Environmental L 7, 8: 'regulatory science not only stretches the epistemic limits of science in the manufacturing of facts, it also requires science and policy-makers to exercise considerable subjective judgment (which is not purely scientific) in interpreting and extrapolating specific research results to policy issues'.

epistemic deference, ends. Instead, it may be more helpful to think of a spectrum ranging from purely legal assessments to assessments that are largely non-legal. Epistemic deference would increase accordingly.[9]

A second defining characteristic of epistemic deference is that it depends on expertise, and therefore can be accorded to any expert, not necessarily the respondent State or its agencies.[10] As pointed out in the domestic context, 'public authority defendants cannot legitimately occupy a uniquely privileged position' for the purposes of epistemic deference.[11] Indeed, '[i]f another party to the proceedings has great expertise, … it is surely incumbent upon the court to ascribe weight to that view just as it would ascribe weight to the view of an expert public authority defendant'.[12] The previous chapter of this study has given examples of instances where an investment tribunal deferred to the investor, and most adjudicators defer sometimes to experts. The recipient of epistemic deference is the person or institution with the greatest relative expertise.

In certain circumstances, there is an argument in favour of deference to domestic authorities rather than experts, notably in situations of scientific uncertainty that evokes

[9] Jean d'Aspremont and Makane Mbengue describe epistemic deference as 'outsourcing', as distinguished from 'protectionist' approaches, which seek to substitute legal reasoning for scientific fact-finding, and from 'adversarial' approaches, which leave it to the parties to produce and assess scientific evidence. 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, 262. D'Aspremont and Mbengue conclude that 'the determination of engagement with scientific fact-finding and the weighing thereof are all contingent upon various parameters, including the functions and types of adjudication, the powers of the adjudicative body and the circumstances and facts of the case. There is thus no hierarchy of reasoning processes *in abstracto*. It is all a choice that must be made *in concreto* on a case-by-case basis'. cf Stephan Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2012) 3 J of Int'l Dispute Settlement 577, 601: 'the interplay of different areas of expertise of primary decision-makers and adjudicators should lead to a balanced outcome that mitigates between different degrees of deference depending on the circumstances at play in an individual case'.

[10] In some cases, adjudicators have noted the benefit of hindsight, which provided them with more knowledge than the original decision-maker. Interestingly, some adjudicators considered this a reason for deference. See *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US – Cotton Yarn)*, WTO DS192, AB Report of 8 October 2001, para 74; *Continental Casualty Co v Argentina*, ICSID ARB/03/9, Award of 5 September 2008, para 181; *Enron Creditors Recovery Corp v Argentina*, ICSID ARB/01/3, Decision on the Application for Annulment of 30 July 2010, para 372; *Electrabel v Hungary*, ICSID ARB/07/19, Award of 25 November 2015, para 8.35.

[11] Elliott, 'Proportionality and Deference' (n 1) 274.

[12] ibid.

disagreement among experts.[13] As noted by Jean d'Aspremont and Makane Mbengue, in such circumstances the 'outsourcing' of scientific assessments to experts only postpones the responsibilities of the court or tribunal: the adjudicators will be the recipients of indeterminate or contradictory findings, which forces them to exercise judgment over the 'revamped question that the experts have returned'.[14] Indeed, 'when competing scientific experts are, for all the nonexpert knows, fairly evenly matched in credentials, reputation, and demeanor, and when no generally accessible rational criteria (such as self-contradiction by an expert witness) break the "tie" …, then a nonexpert is not capable of choosing among the competing experts in an epistemically nonarbitrary way'.[15] It has been argued in the domestic context that the only viable solution is that 'one and the *same* legal decisionmaker wear two hats', namely those of legal and epistemic competence, which could be achieved through a systematic and routinely training of judges in scientific theory and method.[16] This solution appears logical but may be too ambitious and difficult to realise in practice.[17] Moreover, in cases of scientific uncertainty, the assessment made by a knowledgeable judge would have the same epistemic authority as the potentially conflicting conclusions of other experts. Therefore, if the adjudicator would impose his or her own assessment in spite of the controversy, this would still produce an epistemically arbitrary result. In such circumstances, epistemic deference to the respondent State and its specialised institutions seems a better option. Specialised agencies are specifically charged with the task of determining policy on

[13] James Flett denounces 'battles of experts', where experts have become advocates, with teleological expert reports. Flett, 'When is an Expert not an Expert?' (n 7). Yet leaving aside experts with 'insidious intent', experts may genuinely disagree on many matters, regardless of the merits of the dispute.

[14] D'Aspremont and Mbengue, 'Strategies of Engagement' (n 9) 262, 265. See also 264: '[t]he epistemic deference that led the arbitrator to outsource scientific fact-finding only provides a lull in the thought-making process of the commissioning adjudicative body, which cannot escape its adjudicative responsibilities'. D'Aspremont and Mbengue suggest that this uncertainty applies to any question of scientific knowledge: '[i]n the context of a highly unstable and indeterminate scientific truth, it is not difficult to see how scientific controversy is the reflection of argumentative struggle for persuasiveness and authority as much as legal controversies. There is not one scientific truth but only one position that needs to gain the upper hand in the struggle for persuasiveness and authority among scientists.' For the purposes of international adjudication, this position seems unnecessarily sceptical to me: different scientific questions evoke different degrees of disagreement and uncertainty.

[15] Scott Brewer, 'Scientific Expert Testimony and Intellectual Due Process' (1998) 107 Yale L J 1535, 1680.

[16] Ibid 1681.

[17] D'Aspremont and Mbengue, 'Strategies of Engagement' (n 9) 268: 'such epistemological competence cannot be expected from judges and arbitrators at the international level, simply because they are trained for, selected and recruited on the basis of other skills'.

the basis of technical assessments, even in situations of scientific uncertainty.[18] Consequently, deference to such agencies may still produce an epistemically arbitrary result,[19] but it is not for that same reason also unjustified from a legal point of view.[20] Rather, the special mandate of agencies within the institutional structure of a State provides a convincing reason for granting them epistemic deference in situations of scientific uncertainty.[21]

4.3 Constitutional Deference

4.3.1 Introduction

Unlike epistemic deference, which responds to a lack of expertise on the side of adjudicators, constitutional deference responds to the belief that judges lack the mandate to have a final say on question of public policy. To some extent, this concern overlaps with objections to strict judicial review in domestic courts. In that context, domestic judges commonly consider that it is inappropriate for them to make certain decisions without deference to other, notably representative, institutions. Additionally, for international adjudicators the issue of constitutional deference has a specific international dimension as well. As pointed out by the WTO AB in *Hormones*, '[t]he standard of review … must reflect the balance established … between the

[18] Moreover, agencies integrate the scientific and political aspects of a certain assessment. They adapt assessments of scientific uncertainties to the specific socio-cultural conditions of the State concerned, including local attitudes towards particular risks and the required level of protection. Gruszczynski and Vadi, 'Standard of Review and Scientific Evidence' (n 3) 166; Andrew Guzman, 'Determining the Appropriate Standard of Review in WTO Disputes' (2009) 42 Cornell Int'l L J 45, 71.

[19] See for a less sceptical view Gustavo Ribeiro, 'No Need to Toss a Coin: Conflicting Scientific Expert Testimonies and Intellectual Due Process' (2013) 12 Law, Probability and Risk 229, who argues that a variety of criteria, such as non-contradiction and credentials, can enable the adjudicator to 'make legitimate epistemically justified decisions', without any criteria being determinative or even useful in all cases.

[20] As suggested by Scott Brewer, 'Scientific Expert Testimony and Intellectual Due Process' (1998) 107 Yale L J 1535, 1539.

[21] Andrew Guzman adds that if deference serves the regulatory sovereignty of States while strict scrutiny serves the fight against protectionism, 'it is best to err on the side of deference to member states'. Guzman, 'Determining the Appropriate Standard of Review' (n 18) 69.

jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves'.[22]

More so than epistemic deference, the issue of constitutional deference has provoked extensive debate in the context of actual disputes as well as in scholarly literature, involving both pragmatic and normative reasons. A pragmatic argument in favour of deference is that it will enhance the prospect of compliance by States.[23] It has been noted that deference is 'a rational response to the problem of institutional weakness that characterises international courts and tribunals in times when … States and those who influence States voice strong criticism'.[24] Indeed,

[22] *European Communities - Measures Concerning Meat and Meat Products (EC – Hormones)*, WTO DS26, AB Report of 16 January 1998, para 115.

[23] 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) 329: the margin of appreciation 'has the advantage of facilitating norm-internalisation by domestic actors and, ultimately, compliance'. cf Giulio Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The *Lautsi* Case' (2013) 13 Human Rights L Rev 287, 244: 'the doctrine of the margin of appreciation can be justified on a principled basis (subsidiarity and democracy) but also on instrumentalist arguments and pragmatic considerations'. Itzcovich notes, however, that such pragmatic considerations 'differ sharply from the kind of principled argumentation upon which the constitutional courts are usually expected to rely', 298. Moreover, it is difficult to assess to what extent State approval or criticism depends on the intensity of review applied by international adjudicators or rather on the outcome of individual cases. In the latter case, the pragmatic argument would boil down to an argument in favour of judicial restraint more generally, rather than judicial deference specifically.

[24] Erlend Leonhardsen, 'Treaty Change, Arbitral Practice and the Search for a Balance: Standards of Review and the Margin of Appreciation in International Investment Law' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 3) 139. According to Mikael Madsen, the practice of the ECtHR shows that the Court has come to refer more often to the margin of appreciation since the Interlaken Declaration. Mikael Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 J of Int'l Dispute Settlement 199. See for an argument on the ECtHR's tactics, distinguishing between its dealings with high-reputation and low-reputation States, Shai Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 12 Chicago J of Int'l L 115; Simon Paul, 'Governing from the Margins: The European Court of Human Rights' Margin of Appreciation Doctrine as a Tool of Global Governance' (2016) 12 Croatian Ybk of Eur L and Policy 81. William Burke-White and Andreas von Staden have related the decision or threat of several States to withdraw from the ICSID Convention to the 'strict standards of review employed by many arbitral tribunals', and, consequently, advocated the use of the margin of appreciation in investor-State disputes with a public law subject matter. 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, 285.

judicial deference is a means to avoid clashes with States over controversial issues.[25] Yet even when leaving aside the question of whether international adjudicators should allow themselves to be influenced by such arguments,[26] it is difficult to see how pragmatic concerns can justify a structural approach of deference. An emphasis on State approval could persuade adjudicators to adopt such a lenient approach that their review would become irrelevant.[27] Instead, a certain degree of conflict between international adjudicators and respondent States seems a logical consequence of the latter's task to supervise States.[28] Moreover, even if a respondent State might be pleased with deferential review, this does not necessarily also apply to the other party in an inter-State case dispute or to other States party to the underlying treaty.[29]

On the normative level, a great variety of arguments has been raised, sometimes in isolation, emphasising different but ultimately interrelated aspects of the issues involved. The current section of this study provides an evaluative overview of the different normative reasons for and against constitutional deference. After that, I present a final balancing of the various arguments, focusing on the principle of the separation of powers as the pertinent benchmark. I conclude that since international courts and tribunals have only limited power over States, the concerns for judicial overreach that justify constitutional deference in the domestic context do not

[25] It also allows an international adjudicator to follow a policy of incrementalism, aiming to change State behaviour by a gradual decrease of deference. Lawrence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale L J 273, 314-317.

[26] But see Dimitrios Tsarapatsanis, 'The Margin of Appreciation as an Underenforcement Doctrine' in Petr Agha (ed), *Human Rights Between Law and Politics. The Margin of Appreciation in Post-National Contexts* (Hart 2017) 88: '[i]t is a somewhat peculiar feature of academic legal scholarship that adjudication is usually represented not as the activity of real-life judges marked by specific constraints, but as that of idealised decision-makers in a frictionless world'.

[27] Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 Eur Constit L Rev 173, 182; Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights L Rev 487, 489: '[i]f no politician ever criticised the rulings of the Strasbourg Court, such a state of affairs would be fundamentally at odds with the nature and role of the Court'.

[28] 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) Leiden J of Int'l L 335, 360: '[l]egitimate disagreement being constitutive of pluralist democracy, this is unavoidable and not a sign of decay'.

[29] James Egerton-Vernon, 'Is Investment Treaty Arbitration a Mechanism to Second-Guess Governments' Exercise of Administrative Discretion: Public Law or *Lex Investoria?*' in Ian Laird *et al* (eds), *Investment Treaty Arbitration and International Law. Vol 8* (Juris 2015) 220. See for example the submissions made by the European Union in *Russia – Measures concerning Traffic in Transit*, WTO, DS512, European Union Third Party Written Submission of 8 November 2017, para 35, arguing against 'unfettered discretion' as advocated by the respondent member.

apply. Moreover, constitutional deference jeopardises what is widely acknowledged to be the primary purpose of international adjudication, namely the effective resolution of concrete disputes. When adjudicators leave the interpretation and application of international law to domestic authorities, the content of international obligations remains unclear. Instead, international adjudicators should clarify the scope of such obligations, establishing in an affirmative manner where the boundary between State sovereignty and international commitment lies.

4.3.2 Arguments in Favour of Constitutional Deference: the Domestic Parallel

4.3.2.1 The Domestic Court Analogy

A common background for discussions about deference in international adjudication is the analogy with judicial review in the domestic context. Alec Stone Sweet argues that international courts 'perform many of the same functions that most constitutional courts do using similar techniques with broadly similar effects'.[30] Likewise, Steven Greer and Luzius Wildhaber consider that 'to a large extent, the ECtHR decides broadly the same kind of issues as a domestic supreme or constitutional court, and also in largely similar ways'.[31] In the context of investment arbitration, observers have also advanced the argument that arbitral review is functionally equivalent to domestic judicial review.[32] As pointed out by Gus van Harten:

[30] Alec Stone Sweet, 'Constitutionalism, Legal Pluralism and International Regimes' (2008) 16 Indiana J of Global Legal Studies 621, 642. Stone Sweet discusses the ECtHR, the WTO and the CJEU.

[31] Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2013) 12 Human Rights L Rev 655, 668.

[32] eg Stephan Schill, 'International Investment Law and Comparative Public Law. An Introduction' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 4; Federico Ortino, 'The Investment Treaty System as Judicial Review' (2013) 24 American Rev of Int'l Arbitration 437, 443. In international investment law, this approach is commonly associated with a 'public law' approach to the field. See for critical remarks Caroline Foster, 'A New Stratosphere? Investment Treaty Arbitration as "Internationalized Public Law"' (2015) 64 ICLQ 461; José Alvarez, '"Beware: Boundary Crossings" – A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17 J of World Investment and Trade 171; Stephan Schill, 'Editorial: The Constitutional Frontiers of International Economic Law' (2017) 18 J of World Investment and Trade 1.

> One of the core functions of the judiciary is to constrain the exercise of sovereign authority by executive government and, under many constitutions, by the legislature. When a judge invokes his or her public law competence to resolve a dispute between the state and a person or organization that is subject to regulation by the state, he or she determines matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state. The role of arbitrators under investment treaties is essentially the same.[33]

Arguments in favour of deference based on the domestic court analogy further claim that international courts should follow the lead of their domestic counterparts in adopting deferential standards of review. In the words of Stephan Schill: 'the domestic court parallel … suggests that deference in investment treaty arbitration is justified because domestic courts, when reviewing government conduct, regularly apply a certain degree of deference to implement the idea of the separation of powers'.[34]

The domestic court analogy raises difficult questions of great relevance to the debate about constitutional deference in international adjudication. Yet as with any analogy, the similarity between domestic judicial review and international adjudication is counterbalanced by certain differences. Before discussing some of these differences, it should be noted that the domestic court analogy requires some precision as to the type of domestic court used for the comparison, because different domestic courts exercise judicial review in different constellations.[35]

It has been noted that most domestic courts exercise 'horizontal' review: 'courts are reviewing the acts of a coordinate branch of the same government to determine their conformity

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[33] Gus van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 71. See also Gus van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Schill (ed), *International Investment Law and Comparative Public Law* (n 32) 631. cf *Int Thunderbird Gaming Corp v Mexico*, UNCITRAL, Arbitral Award of 26 January 2006, Separate Opinion of Thomas Wälde, para 13, comparing investment arbitration to 'judicial review relating to governmental conduct – be it international judicial review (as carried out by the WTO dispute panels and Appellate Body, by the European- or Inter-American Human Rights Courts or the European Court of Justice) or national administrative courts judging the disputes of individual citizens over alleged abuse by public bodies of their governmental powers'.

[34] Schill, 'Deference in Investment Treaty Arbitration' (n 9) 588.

[35] Christoph Möllers notes for instance that specialised constitutional courts 'may be understood best as hybrid entities that are neither appropriately described as courts nor as purely political actors'. Christoph Möllers, *The Three Branches. A Comparative Model of Separation of Powers* (OUP 2013) 141.

with the laws of that government'.[36] Yet international judicial review is 'vertical': it 'consists of the enforcement of superior norms by the organ charged with administering them against the entities subject to those norms'.[37] This verticality arguably applies to all the different regimes of international adjudication analysed in this study. For that reason, the appropriate domestic comparator would be federal courts in federal States rather than domestic courts in general.[38]

A more fundamental problem with the domestic court analogy concerns the choice of the domestic jurisdiction on which the comparison is based. Advocates of the analogy commonly suggest that it is possible to work with some sort of archetypical framework of domestic judicial review.[39] Yet in reality, domestic systems differ widely in their constitutional arrangements.[40] José Alvarez has criticised what he calls 'euro-centric comparativism'.[41] Writing in the context of international investment law, he argues that BITs do not 'assume that their treaty parties share the

[36] Carlos Vázquez, 'Judicial Review in the United States and in the WTO: Some Similarities and Differences' (2004) 36 George Washington Int'l L Rev 587, 596.

[37] ibid. Vázquez notes that this vertical form of review is comparable to the review of acts of States for conformity with federal law by federal US courts. For a comparison of the review exercised by WTO panels and United States domestic courts, see John Ryan, 'Interplay of WTO and US Domestic Judicial Review: When the Same US Administrative Determinations Are Appealed Under the WTO Agreements and Under US Law, Do the Respective Decisions and Available Remedies Coexist or Collide?' (2009) 17 Tulane J of Int'l and Comp L 353.

[38] See for some comparative considerations, Nicholas Aroney and John Kincaid, 'Comparative Observations and Conclusions' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries* (University of Toronto 2017). Aroney and Kincaid describe the great variations among the practices of federal courts, caused by federal and pre-federal history, differences among conceptions of political community, constitutional and institutional structures, etc. Given this diversity, it is unlikely that a specific system can provide general guidance for international practice.

[39] Burke-White and Von Staden focus on the United States and Germany, for two reasons: 'First, the legal systems of the United States and Germany are very different-one is based on common law, the other on civil law-and the similarities in the standards of review in both systems are, therefore, noteworthy. Second, the United States and Germany are two of the most significant players in the international investment system and have two of the longest standing BIT programs'. Burke-White and Von Staden, 'Private Litigation' (n 24) 314. cf Schill, 'Deference in Investment Treaty Arbitration' (n 9) 593: 'domestic comparisons cannot be restricted to the legal order of the host state nor other singular domestic legal orders. … it is necessary to look at how public law adjudicators both in different domestic administrative and constitutional systems, including those representative of the major legal systems of the world, and in supranational and international governance regimes, such as the WTO, human rights law, or the EU, fashion the standard of review in regard of government acts'.

[40] José Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) 7 J of Int'l Dispute Settlement 534, fn 87.

[41] Alvarez, '"Beware: Boundary Crossings"' (n 32) 220.

Western rule of law tradition'.[42] Consequently, comparisons with domestic legal systems require 'a truly global comparative exercise'.[43] One could envisage two different responses to this problem. First, it could be asserted that in spite of the obvious differences between domestic legal orders there is a widespread acceptance of the idea that some degree of judicial deference is appropriate when judges review the actions of other branches of government. This would still not, however, solve the question of how strict the standard of review should be. A second response could be that international adjudicators should adopt the standard of review applied by the domestic courts of the respondent State.[44] This is the approach taken in NAFTA Chapter 19 for binational panel review of antidumping and countervailing duty determinations.[45] Santiago Montt suggests that investment treaty tribunals should also adopt the standard of review applicable in the domestic courts of the respondent State:

> [W]hen confronting the issue of the proper level of deference towards legal applications of administrative agencies, investment treaty tribunals should follow the standards of review applied by domestic courts. Therefore, if the domestic courts of the defendant

[42] ibid. cf Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45, 68: 'given the rise of South-South BITs, does it make sense to interpret these treaties by reference to standards developed in North America and Western Europe without examining whether they have been embraced by states in general or by the treaty parties in particular?'.

[43] Alvarez, '"Beware: Boundary Crossings"' (n 32) 220. cf Hélène Ruiz Fabri, 'The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story' (2017) 27 EJIL 1076, 1078: 'international judges have to become comparatists, who are continuously involved in the practice of legal pluralism but no less aware of the specificity of the international setting in which they operate'.

[44] Domestic judicial restraint combined with strict scrutiny at the international level can create 'the paradox that standards of review are more intrusive on the global than the domestic level'. Thomas Cottier, 'The Role of Domestic Courts in the Implementation of WTO Law: The Political Economy of Separation of Powers and Checks and Balances in International Trade Regulation' in Martin Daunton *et al* (eds), *The Oxford Handbook on the World Trade Organization* (OUP 2012) 625.

[45] According to Article 1904, '[t]he panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority'. Annex 1911 refers to the applicable provisions in the domestic law of the three Member States. See Gilbert Gagné and Michel Paulin, 'The Softwood Lumber Dispute and US Allegations of Improper NAFTA Panel Review' (2013) 43 American Rev of Canadian Studies 413. See for a dispute in which the US argued that the panel had failed to apply the appropriate standard of review, *Certain Softwood Lumber Products from Canada*, NAFTA Art 1904 Extraordinary Challenge Committee, Opinion and Order of 10 August 2005. Ross Becroft, *The Standard of Review in WTO Dispute Settlement. Critique and Development* (Elgar 2012) 25.

> state apply a certain level of deference—be it high or low—there is no clear reason why arbitral tribunals should not apply at least that same level of deference.[46]

The advantage of this proposal is that it provides a precise method for determining the standard of review based on the domestic court analogy, and avoids reliance on an abstract standard purportedly shared by many domestic courts. Yet for other reasons, the proposal to adopt the intensity of review of the respondent State's courts is untenable. First of all, this approach would create structural differences in the way an international adjudicator reviews claims against different States. Admittedly, a certain differentiation among States is a logical consequence of deference, especially if such deference is conditional on certain local circumstances. At the same time, a structural differentiation regarding the over-all intensity of review adopted by the adjudicator, instead of a standard that would benefit any respondent State more or less equally in similar circumstances, is unacceptable without explicit treaty authorisation. Adopting a differential approach along these lines does not fit with the institution of supranational review for compliance with universal standards, and, ultimately, with the fundamental principle of international law establishing the sovereign equality of States.

Second, adopting the standard of review applicable in the relevant domestic court assumes that the function of the international adjudicator is only and entirely to substitute for domestic courts. However, various obvious differences between domestic and international courts in terms of applicable law and remedies refute an understanding that fully equalises the international adjudicator's task to that of domestic courts: international adjudicators apply primarily international law to the conduct of a State, including of its judiciary, to determine that State's international responsibility, whereas domestic courts normally apply domestic law to other domestic institutions and grant domestic remedies. Consequently, there are differences between the two forms of review even if international and domestic courts apply substantively equivalent norms to the same government conduct.[47]

This points to a more general problem with the domestic court analogy. A crucial difference between domestic judicial review and international adjudication concerns the impact of the judicial decisions adopted by domestic and international courts. Here important differences exist not only

[46] Santiago Montt, *State Liability in Investment Arbitration* (Hart 2009) 336.

[47] See André Nollkaemper, 'The Power of Secondary Rules to Connect the International and National Legal Orders' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011).

between the international and the domestic level, but also among the different international regimes, which possess diverse means of implementation and enforcement. Yet none of the international courts and tribunals discussed in this thesis has the authority that at least some domestic courts have, namely the power to strike down legislation or annul other acts of government. An international judicial decision has no immediate impact within the domestic legal order, which affects the traditional constitutional concerns over the legitimacy of judicial decision-making, as will be discussed in more detail in section 4.3.5.[48]

4.3.2.2 The Democratic Argument

Arguments based on the domestic court analogy often boil down to concerns for democratic accountability.[49] As in the domestic context, the legitimacy of majoritarian decision-makers is commonly considered to require judicial restraint in international courts and tribunals.[50] It has been argued that interference 'by unelected and unappointed arbitrators' with regulations that are promulgated by elected officials 'is not consistent with basic principles of democracy'.[51] The implications for judicial deference are clear: 'the reviewing international court should respect [the domestic authority's] democratic credentials and better responsiveness to the considerations of

[48] cf Schill, 'Deference in Investment Treaty Arbitration' (n 9) 580: the standard of review applied by arbitral tribunals 'cannot be developed, as is often done, in a comparative fashion solely by drawing on the standard of review applied by either domestic or international courts alone'.

[49] See for broader questions concerning the democratic legitimacy of international law, Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International and Global Governance* (CUP 2009); Samantha Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (2011) 4 Ethics and Global Politics 19.

[50] cf Anthea Roberts, 'The Next Battleground: Standards of Review in Investment Treaty Arbitration' (2011) Int'l Council for Commercial Arbitration Congress Series No 16, 178. See the special issue of 9 J of Int'l Dispute Settlement 2 (2018), introduced by Shai Dothan, 'Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies', 145. According to Josephine Asche, democratic legitimacy is the only convincing justification for the margin of appreciation of the ECtHR. Josephine Asche, *Die Margin of Appreciation. Entwurf einer Dogmatik monokausaler richterlicher Zurückhaltung für den europäischen Menschenrechtsschutz* (Springer 2018) 215.

[51] Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt J of Transnat'l L 775, 782.

domestic constituencies'.[52] Adjudicators should adopt a 'democratically informed standard of review' that would 'counsel at least some deference where another level of decision-making appears democratically more appropriate'.[53] Without such deference, the international court or tribunal will be repudiated for being 'not sufficiently respectful to democracy or, more precisely, to what local communities democratically decide'.[54]

A first preliminary objection to the democratic argument questions the relevance of the democratic quality of a domestic decision for its legality under international law. One could wonder 'why international courts or tribunals should feel influenced in any way by the operation of a domestic legal process', since 'international law is not necessarily interested in questions of domestic governance' and 'domestic law cannot be an excuse for a violation of international law'.[55] However, while it is true that domestic law cannot undo the legally binding nature of an international rule, this does not exhaust the debate. Disputes before international courts and tribunals often concern disagreement about how an open-ended international rule should be interpreted and applied to domestic public policies.[56] The democratic argument proposes that adjudicators should defer to democratically accountable decision-makers when making such determinations.

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[52] Ioannidis, 'Beyond the Standard of Review' (n 4) 101. See also Yuval Shany, 'Towards a General Margin of Appreciation Doctrine in International Law?' (2006) 16 EJIL 907, 919-921.

[53] Andreas von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standard of Review' (2012) 10 ICON 1023, 1026. Von Staden cautions that '[t]he defense of a democratically informed standard of review, as it is here understood, is limited to those instances in which the text of a legal instrument itself suggests some interpretive or decision-making freedom for the states party to it'. ibid 1027. Moreover, 'outward-looking norms that primarily seek to regulate relations between political communities are much less amenable to democratic deference' than inward-looking norms. ibid 1037. See also Steven Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights' (Council of Europe 2000) 33.

[54] Robert Gargarella, 'Democracy and Rights in *Gelman v Uruguay*' (2015) 109 AJIL Unbound 115, 119.

[55] Benedikt Pirker, 'Democracy and Distrust in International Law. The Procedural Democracy Doctrine and the Standard of Review Used by International Courts and Tribunals' in Gruszczynski and Werner, *Deference in International Courts and Tribunals* (n 3) 63. cf Article 27 VCLT. James Crawford, 'Democracy and the Body of International Law' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 96: 'national law, no matter how democratically established, is not an excuse for failure to comply with international obligations'.

[56] Lorenzo Cotula, 'Democracy and International Investment Law' (2017) 30 Leiden J of Int'l L 351, 361. Montt, *State Liability in Investment Arbitration* (n 46) 135.

A second preliminary objection holds that at least for democratic States, the choice to be bound by an international treaty is a democratic one.[57] Consequently, the adjudicator's mandate to interpret and apply the treaty derives its democratic legitimacy from the State's decision to accede to the treaty.[58] The crucial assumption in this argument is that the State's treaty commitment is a democratic choice. In reality, commentators have often lamented the undemocratic nature of treaty drafting and signing processes.[59] Moreover, as just noted, the democratic argument does not contest the legal bindingness of the international obligation as such. The point is that in interpreting and applying the obligation, regard should be had to democratic decisions relevant to the issue at hand. Even if the task of interpreting and applying international law has been delegated to an international court or tribunal, this does not necessarily mean that the determinations made by domestic democratic institutions have lost all relevance.

Upon closer inspection, the democratic argument raises intricate questions about the relationship between domestic democracy and international judicial supervision. To some extent, these questions revisit issues related to the legitimacy of judicial review known also from the domestic context,[60] where some theorists question why unelected judges should be able to overturn

[57] Geir Ulfstein argues that a State may make the democratic choice to assume international obligations in the pursuit of certain objectives which can be achieved better on the international than on the national level: '[t]he achievement of such objectives may provide a democratic legitimacy for restricting states' freedom through treaties establishing international tribunals'. Geir Ulfstein, 'The International Judiciary' in Jan Klabbers *et al*, *The Constitutionalization of International Law* (OUP 2009) 148. cf Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 Int'l Organization 217. For a rejection of the idea of 'self-binding' in constitutional theory, see Hubertus Buchstein, 'The Concept of "Self-Binding" in Constitutional Theory' in Enrique Peruzzotti and Martin Plot (eds), *Critical Theory and Democracy* (Routledge 2013).

[58] See for a defense from a US perspective, Henri Monaghan, 'Article III and Supranational Judicial Review' (2007) 107 Columbia L Rev 833.

[59] eg Markus Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' (2001) 35 J of World Trade 167, 176; Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' (n 33) 630; Gertrude Lübbe-Wolff, 'Democracy, Separation of Powers, and International Treaty-Making. The Example of TTIP' (2016) 69 Current Legal Problems 175; Peter Niesen, 'Constituent Power in Global Constitutionalism' in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Elgar 2017) 224-225 argues that the creation of international adjudication through treaties is by definition unauthorised, because domestically constituted powers do not have the authority to constitute new decision-making bodies.

[60] See for some similarities and differences, Samantha Besson, 'European Human Rights, Supranational Judicial Review and Democracy. Thinking Outside the Judicial Box' in Patricia Popelier *et al* (eds), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Intersentia 2011) 126-137.

decisions made by representative institutions.[61] In response to such concerns, proponents of judicial review argue that it serves to protect minority interests and to secure more nuanced implementations of democracy than mere majoritarianism.[62] Along these lines, Robert Spano rejects criticisms of the ECtHR claiming that it lacks democratic legitimacy. According to Spano, such criticism is 'misconceived as a matter of principle, as the whole point of judicial review, whether national or international, is to provide a check on democratic decision-making'.[63] The aim of deference, however, is not to nullify this function of judicial review, but to keep it within appropriate limits.[64]

As in the domestic context, the debate about deference in international adjudication has not only pitted judicial review against democracy in the abstract but focused on minority interests as well. A first strand of arguments repeats those commonly made in the domestic context. Eyal Benvenisti, for instance, has denounced the ECtHR's margin of appreciation, at least in cases concerning conflicts between majorities and minorities: 'no deference to national institutions is called for; rather, the international human rights bodies serve an important role in correcting some of the systemic deficiencies of democracy'.[65] In Benvenisti's view, democracy is prone to

[61] In domestic systems, notably in the US, this issue is known as the counter-majoritarian difficulty. See eg Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale L J 1346. There are, of course, variables that distinguish domestic judicial review from international review that may have a bearing on the democratic argument. Von Staden, 'The Democratic Legitimacy of Judicial Review' (n 53) 1028-1030. Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012) 70-73. There are, of course, differences that may be relevant for the democratic argument. It could be argued, for instance, that domestic judges are part of the domestic community, whereas international judges are not. Klabbers, *The Constitutionalization* (n 57) 147. Yet this is at the same time a crucial reason for having international review, as will be discussed in section 4.3.3.1.

[62] Eg Lord Brown of Eaton-Under-Heywood, 'The Unaccountability of Judges: Surely their Strength not their Weakness' in Forsyth *et al*, *Effective Judicial Review* (n 1) 213: 'judges, by the very fact of their unaccountability to an electorate, are better placed than government to secure minority rights and interests and to safeguard the enduring values which all too easily are lost sight of in times of national danger or in the face of popular prejudice'.

[63] Spano, 'Universality or Diversity' (n 27) 488.

[64] cf Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2015) 25 EJIL 1019, arguing that international human rights courts should exercise 'weak' judicial review. A similar argument is made in the domestic context by Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012), focusing on 'open remedies', which declare a human rights violation but invite the other branches of government to decide what corrective action should be taken.

[65] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 NYU J of Int'l L and Politics 843, 847.

undermine the interests of minorities and therefore judicial review is necessary, not only at the national but also at the international level.[66] The domestic judicial process, dominated by judges of the majority, may fail to protect minorities: 'international judicial and monitoring organs are often their last resort and only reliable avenue of redress'.[67] Consequently, international supervisors should not defer to the respondent State: '[t]o grant [a] margin of appreciation to majority-dominated national institutions in such situations is to stultify the goals of the international system and abandon the duty to protect the democratically challenged minorities'.[68] In the words of Steven Wheatley: '[d]eference to the position of the "democratic" majority constitutes a failure … on the part of the Court to appreciate the nature of democracy and democratic decision-making in the contemporary age'.[69]

Concerns over the negative impact of judicial deference on minority interests have been expressed in the context of international investment law as well. Like domestic minorities, foreign investors can easily become a target of majoritarian democracy, especially in difficult times: 'foreign investors – being outsiders by definition – are most vulnerable in the public emergency context'.[70] Moreover, if domestic minorities normally have at least formal rights to participate in domestic decision-making, investors do not. It has been noted that 'the investor is an outsider to the democratic processes influencing the development and application of state regulatory measures'.[71] Indeed, '[a]s aliens, foreign investors generally do not have a participatory role in

[66] The minorities concerned are not necessarily composed of nationals, but can also include non-nationals, or 'the outsiders within': 'non-nationals who are either seeking to enter, are already within the country, or those whom the authorities seek to deport. These include refugees, asylum seekers, undocumented family members of citizens or lawful residents, or other non-citizens'. Eyal Benvenisti, 'The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy' (2018) 9 J of Int'l Dispute Settlement 240, 242.

[67] Benvenisti, 'Margin of Appreciation' (n 65) 848.

[68] ibid 850. cf 853: '[t]he doctrine of margin of appreciation, … essentially reverts difficult policy questions back to national institutions, in complete disregard of their weaknesses'.

[69] Steven Wheatley, 'Minorities under the ECHR and the Construction of a "Democratic Society"' [2007] Public L 770, 780.

[70] ibid.

[71] Kassi Tallent, 'The Tractor in the Jungle: Why Investment Arbitration Tribunals Should Reject a Margin of Appreciation Doctrine' in Ian Laird and Todd Weiler (eds), *Investment Treaty Arbitration and International Law. Volume 3* (JurisNet 2010) 130. cf *Técnicas Medioambientales Tecmed SA v Mexico*, ICSID ARB(AF)/00/2, Award of 29 May 2003, para 122. The ECtHR also recognises differences between nationals and non-nationals. See *James and Others v United Kingdom*, ECtHR (Plenary) 8793/79, Judgment of 21 February 1986, para 63. Tallent notes in the context of the ECtHR, 112: 'since state measures in the ECHR are most frequently challenged by nationals of the state

determining State regulation'.[72] For this reason, several scholars reject the adoption of the margin of appreciation in investor-State arbitration.[73]

Upon further reflection, concerns about minority interests are likely to subject deference to certain conditions, rather than to reject it altogether. Benvenisti notes that some societies may be able to set up 'effective domestic institutional and judicial guarantees that could compensate the numerical inferiority of the minority'.[74] In those circumstances, deference 'may be called for'.[75] Likewise, Wheatley argues that the ECtHR should 'evaluate the "democratic" legitimacy of impugned laws'.[76] He suggests that deference is appropriate when there is 'evidence of inclusive, consensus-seeking deliberations between the national authorities and minority groups, and legislation that can be defended in accordance with the principle of public reason'.[77] A similar argument could be made in the context of international investment law. Even if investors have no formal rights of participation in domestic decision-making, one can think of situations where they nonetheless exercise influence, or where their interests have been taken into account.[78] In such circumstances, their formal exclusion from decision-making procedures cannot pose an objection to deference on democratic grounds.[79]

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in question, … that Court's application of the MOA doctrine tends to presuppose the participation of the affected parties in the decision-making process leading to adoption and implementation of the state's challenged measure – *i.e.*, the democratic legitimization of norms'.

[72] Sarah Vasani, 'Bowing to the Queen: Rejecting the Margin of Appreciation Doctrine in International Investment Arbitration' in Laird and Weiler, *Investment Treaty Arbitration* (n 71) 167.

[73] Tallent, 'The Tractor in the Jungle' (n 71); Vasani, 'Bowing to the Queen' (n 72).

[74] Benvenisti, 'Margin of Appreciation' (n 65) 849.

[75] ibid. See also 853.

[76] Wheatley, 'Minorities under the ECHR' (n 69) 792.

[77] ibid.

[78] David Schneiderman, 'Investing in Democracy? Political Process and International Investment Law' (2010) 60 University of Toronto L J 909, 914-915: '[t]he corporate political activity and business risk literature suggests that foreign corporate actors can and do shape host domestic policy. Indeed, not only is corporate political power present and pervasive in most every part of the world, corporate power distorts political processes in ways that undermine democracy's rationales'. cf Cotula, 'Democracy and International Investment Law' (n 56) 360, pointing to 'the multiple real-world channels that businesses can use to affect policy, including high-level political access and diverse lobbying strategies'.

[79] Schneiderman, 'Investing in Democracy?' (n 78) 914: '[w]e might, instead, understand this worry over democratic processes as an attempt to legitimate controversial review by investment tribunals of high public-policy matters'.

The relevant inquiry, therefore, seems to be whether the decision under review actually demonstrates democratic qualities, in which case it would be entitled to deference.[80] This raises the issue of how to measure the democratic nature of a decision under review. Wheatley suggests that one needs to look for 'inclusive, consensus-seeking deliberations'.[81] Along the same lines, Stefan Zleptnig proposes a 'deliberation test', which would 'determine whether a proper deliberative process had taken place prior to the enactment of the national measure'.[82] If adjudicators find proof of 'democratic and public deliberation among citizens, politicians and scientists', they should adopt a deferential standard of review.[83] In practice, the next question would be how to identify the relevant stakeholders that need to be included in the deliberations. The relevant constituency cannot always be equalled to the electorate of the respondent State, as this would exclude, for instance, foreign investors and non-nationals entitled to human rights protection. Instead, 'the ultimate point of reference must be the individuals whose freedom is shaped by judicial decisions'.[84] The international adjudicator should look for 'the participation by

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Schneiderman considers that the argument may be appealing with regard to 'vulnerable persons unaccounted for in contemporary democratic processes', but that investors do not fall in this category.

[80] Proponents of deference on democratic grounds would probably accept this condition, as they can hardly envisage a *carte blanche* for domestic institutions merely because they rely on majoritarian decision-making. Indeed, Andreas von Staden does not advocate 'a one-for-all standard of review across the board for all courts and cases', and allows for the possibility that 'an international court, after careful consideration of the institutional setting within which it operates and of the law which it is charged to interpret and apply, comes to the conclusion that no deference to national decision-makers is warranted'. His 'democratically informed standard of review' requires that international courts and tribunals are 'sensitive to questions concerning the democratically appropriate level and institution of decision-making'. In other words, the determination of the appropriate intensity of review depends on a concrete assessment of 'which level of decision-making appears democratically more appropriate', and this is not necessarily the domestic level. Von Staden, 'The Democratic Legitimacy of Judicial Review' (n 53) 1026-1027, 1049.

[81] ibid. Andreas Føllesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 Int'l J of Const L 359, 363: 'when the governments are sufficiently responsive to the best interests of their and other citizens, and the domestic judiciary is independent, the ECtHR is not likely to be a better judge of whether there is a violation of the Convention'. cf *Hirst v United Kingdom (No 2)*, ECtHR (GC) 74025/01, Judgment of 6 October 2005, para 79.

[82] Stefan Zleptnig, 'The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority' (2002) 13 Eur Business L Rev 427, 455.

[83] ibid.

[84] Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014) 212. Alternatively, it could be proposed that the States party to the relevant treaty are the relevant democratic constituency.

affected and interested parties in the decision-making processes'.[85] A doctrine of democratic deference along these lines is appealing, because it would rebut two further objections against deference to domestic democracy: the issue of foreign affected constituencies and the issue of non-democratic respondent States.

As regards the first issue, it is a common objection against deference to domestic democratic institutions that these institutions may be accountable to their domestic electorate, but not to foreign stakeholders.[86] As noted by Michael Ioannidis, '[a] domestic decision that affects the condition of foreign actors cannot be deemed legitimate only on the basis that it responds to the considerations of *domestic* constituencies'.[87] The purpose of at least some forms of international adjudication is to serve 'as a corrective measure to the democratic problem of non-inclusion of all affected interests'.[88] In this context, commentators commonly follow Yuval Shany, distinguishing between 'inward-looking' norms, which regulate domestic conditions, and 'outward-looking' norms, which regulate external State conduct, and concluding that deference is more appropriate in the former case.[89] Yet even with regard to outward-looking norms, one could

[85] ibid 153.

[86] cf Steven Croley and John Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 AJIL 193, 209: 'national authorities that are parties to an antidumping dispute are not accountable to the GATT/WTO membership at large'; Patricia Hansen, 'Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment' (1999) 39 Virginia J of Int'l L 1017, 1067. See also, more generally, Robert Hudec, '"Circumventing" Democracy: The Political Morality of Trade Negotiations' (1993) 25 NYU J of Int'l L and Politics 311, arguing that 'there is more democracy to be achieved in making the international negotiating process work to the satisfaction of contending interests' than in purely domestic law-making.

[87] Ioannidis, 'Beyond the Standard of Review' (n 4) 102. cf Joshua Paine, 'Standard of Review (Investment Arbitration)' (2018) MPILux Research Paper Series 1, para 9.

[88] 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 3) 223. cf Croley and Jackson, 'WTO Dispute Procedures' (n 86) 209: '[t]he observation that national authorities, unlike agencies, are not accountable to the membership at large speaks to the very purpose of the dispute settlement process, indeed the GATT/WTO Agreement itself-an agreement that, at bottom, seeks to overcome the significant coordination or collective-action problems that its membership otherwise faces.'

[89] Shany, 'Towards a General Margin of Appreciation' (n 52) 16 EJIL 907, 920; Von Staden, 'The Democratic Legitimacy of Judicial Review' (n 53) 1037; Schill, 'Deference in Investment Treaty Arbitration' (n 9) 595-596; Klabbers, *The Constitutionalization* (n 57) 145.

envisage an inquiry verifying whether the domestic decision has assessed not only domestic preferences but also foreign interests.[90]

The second issue concerns non-democratic States. Whereas States party to the ECHR and the ACHR are by definition democracies,[91] this is not necessarily the case in other treaty regimes.[92] Anthea Roberts wonders if this should lead to 'a differential approach that subjected some States to intense scrutiny and others to mild review according to their internal political structure', and notes that such an approach would sit 'awkwardly with the traditional public international law approach of treating all States as equal regardless of their internal political constitution'.[93] Likewise, Stephan Schill point out that '[t]his would raise complex concerns as to sovereign equality as well as the question of whether investment treaty tribunals are well-positioned to pass judgment on the democratic quality of domestic institutions'.[94]

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[90] One could read the AB *US - Shrimp* decision in this way. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO DS58, AB Report of 12 October 1998, para 166-172. 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; Michael Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law' (2011) 12 German L J 1175, 1195-1199.

[91] See the Preamble as well as Protocol 1 Article 3 of the ECHR and *United Communist Party of Turkey and Others v Turkey*, ECtHR (GC) 19392/92, Judgment of 30 January 1998, para 45. Art 23 ACHR and *The Word 'Laws' in Article 30 of the American Convention on Human Rights*, IACtHR, Advisory Opinion OC-6/86 of 9 May 1986, para 34. See also the Inter-American Democratic Charter adopted by the Organization of American States. In reality, there is of course a 'varying range of "democratic quality"' among the States party to both Conventions. Føllesdal, 'Exporting the Margin' (n 81) 360. The African Charter contains political rights in Article 13. The African Charter on Democracy, Elections and Governance, however, is ratified by only a minority of African States. See also Jure Vidmar, 'Judicial Interpretations of Democracy in Human Rights Treaties' (2014) 3 Cambridge J of Int'l and Comp Law 532.

[92] Even if there may be a positive international legal norm of democratic governance, see Johannes Hendrik Fahner, 'Revisiting the Human Right to Democracy. A Positivist Analysis' (2017) 21 Int'l J of Human Rights 321.

[93] Roberts, 'The Next Battleground' (n 50) 178.

[94] Schill, 'Deference in Investment Treaty Arbitration' (n 9) fn 89. cf Andreas Kulick, 'Investment Arbitration, Investment Treaty Arbitration, and Democracy' (2015) 4 Cambridge J of Int'l and Comp L 441, 458: '[a]s different states exhibit different levels of democratic accountability, by law and in practice, should we differentiate according to how "good" a democracy is or how well it works? In any event, who would determine all this? If it were for the tribunal to determine, this would defeat the very purpose of granting more interpretative authority and/or deference to the contracting parties. Eventually, it would still be the tribunal who has the last word - not about the contents of the treaty obligation, but about whether a/the contracting party/ies is/are entitled to determine the contents of such obligations; and thereby ranking its/their level of democratic governance!'.

Andreas von Staden refrains from 'advocating differential treatment of democracies and non-democracies by international courts', since 'standards of review are a suitable instrument to protect, but not to spread, democracy'.[95] Consequently, deference can be accorded on grounds of sovereignty, rather than democracy, even if 'such deference also benefits non-democracies'.[96] The point for Von Staden is that democratic States 'want their democratic decision-making honored' and deference to States enables this.[97] The result, then, is an argument in favour of deference to States regardless of their constitutional system, because of the protection this offers to domestic decision-making procedures, including democratic ones. Yet this seems different from the 'democratically informed standard of review' advocated earlier by Von Staden. Unless the argument for deference to democracy is to become a broader argument for deference to States in general, it needs to propose a method of differentiation between less and more democratic decisions. Such a method does not need to focus primarily on the formal constitutional system of the State as a whole. Instead, it could assess whether the interests of relevant domestic and foreign constituencies have been taken into account by the relevant decision-maker, irrespective of whether the State concerned is formally a democracy or not.[98]

Accordingly, the various arguments raised for and against deference on democratic grounds can be reconciled in the form of a deference doctrine that accords deference to domestic decisions that result from deliberation involving the interests of all affected stakeholders, domestic and foreign. Such a doctrine comes close to the 'procedural review' that several scholars have advanced in different fields of international law.[99] In the context of the ECtHR, Janneke Gerards advocates that the Court should focus on the question of whether the domestic decision-making process respected 'the various requirements of procedural justice, transparency, accountability and

[95] Von Staden, 'The Democratic Legitimacy of Judicial Review' (n 53) 1046-1047.

[96] ibid, 1046.

[97] ibid.

[98] According to Føllesdal, this is the approach taken by the ECtHR. Føllesdal, 'Exporting the Margin' (n 81) 366: 'the proportionality test concerns *the particular piece of legislation or policy* — it is not a question of whether the state generally has a more deliberative or authoritarian mode of legislation. The [margin of appreciation] Doctrine thus avoids the unnecessary quagmire of determining the "democratic quality" of each state'; 369: '[t]he ECtHR does not engage in any explicit — and thus contentious — categorization of states as more or less democratic'.

[99] For an argument based on the transparency of domestic decision-making, see Hansen, 'Transparency' (n 86).

good governance'.[100] If the Court would find that the decision-making process fulfilled these criteria, the ECtHR 'would not be free to intervene for *substantive* reasons'.[101]

> If the national process of decision-making has been qualitatively good and well-balanced, if there are no indications that improper considerations have influenced the outcomes of the process or that certain groups have had insufficient opportunity to participate, and if there has been sufficient access to judicial remedies that meet the requirements of a fair trial and of procedural justice, the Court generally has to accept the outcome of such a procedure, even if it reflects a different balance or a different choice than the Court's judges would have preferred.[102]

A similar proposal has been made by Michael Ioannidis in the context of the WTO. He advocates for a 'procedural and participation-reinforcing criterion', which makes deference contingent upon 'the fulfilment of minimum due process requirements by the respective decision-maker, which would guarantee the inclusion and consideration of external interests'.[103]

Procedural review proposes conditional deference in order to mediate between the conflicting demands of domestic democracy and international review. The advantage of the method is that it provides for a real form of international control, without encroaching upon substantive decision-making powers. Moreover, a consistent use of procedural review by international adjudicators could improve and democratise domestic decision-making.[104] Still, procedural review does not, in my view, provide a final solution to the deference debate. In

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[100] Janneke Gerards, 'The Prism of Fundamental Rights' (2017) 8 Eur Const L Rev 173, 197-198. 'Procedural review does justice to the classic doctrine of the separation of powers between the judiciary, the legislature and the executive'.

[101] ibid 197.

[102] ibid.

[103] Ioannidis, 'Beyond the Standard of Review' (n 4) 109; Ioannidis, 'A Procedural Approach' (n 90) 1200. The proposal seems limited to provisions of WTO law that leave 'the adjudicating institutions substantial discretion', 1201. For obvious reasons, the participation of foreign stakeholders is more important in the context of WTO law than human rights law. Ioannidis subscribes to a 'conception of WTO law as a system coordinating the factual interdependence of its actors, rather than a regime directed to the harmonization of trade-related policies', 1199.

[104] cf Robert Howse, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization' (2000) 98 Michigan L Rev 2329, 2330, pointing out that the SPS provisions should be understood 'not as usurping legitimate democratic choices for stricter regulations, but as enhancing the quality of rational democratic deliberation about risk and its control'.

practice, adjudicators might not be able to make an assessment of the propriety of domestic decision-making, as it would require significant knowledge of and insight into domestic procedures. Moreover, as discussed in section 3.3.5, procedural review may actually constitute rather intrusive review, as it evaluates the democratic quality of such procedures. Instead of limiting the intensity of international review, a procedural approach shifts the focus of the adjudicator's analysis, replacing the specific content of the treaty obligation with a generic concept of good governance. Consequently, even if procedural review seeks to respect democratic preferences and to refrain from imposing policy choices, such deference is necessarily dependent on a review of the democratic quality of the contested decision, which is a different and potentially intrusive assessment.

The democratic argument, which is at the heart of calls for judicial deference in international courts, contrasts the legitimacy of domestic democratic decision-making with the voluntary, ideally democratic, choice of States to subject themselves to international judicial supervision. While there is clearly no easy way out of this conundrum, it is useful to consider again the relatively limited impact of international judicial decisions on the domestic legal order. Even if an international court or tribunal finds that a democratic decision breaches international law, this does not have the same consequences as a domestic judgment annulling a piece of legislation, because the State found in breach possesses a variety of means to mediate the consequences of the international ruling. Consequently, it is difficult to see why international adjudicators should give a decisive role to the democratic argument when determining their standard of review.

4.3.3 Arguments in Favour of Constitutional Deference: the International Dimension

4.3.3.1 State Sovereignty

Not only principles known from domestic constitutional law have been invoked in order to advocate judicial deference in the international context, but also notions specific to international law itself, notably the principle of State sovereignty.[105] In international law, the content and

[105] Croley and Jackson, 'WTO Dispute Procedures' (n 86) 211-212; Choudhury, 'Recapturing Public Power' (n 51) 777-779; Meinhard Hilf and Tim Salomon, 'Margin of Appreciation Revisited: The Balancing Pole of Multilevel Governance' in Marise Cremona *et al* (eds), *Reflections on the Constitutionalisation of International Economic Law:*

relevance of the notion of sovereignty are contested,[106] but it has been recognised by the ICJ as a 'fundamental principle', 'on which the whole of international law rests'.[107] Amongst other things, sovereignty is seen as 'not being subject to any higher authority', which results in 'the freedom of the state to exercise as it sees fit the powers at its disposal'.[108] The argument in favour of deference goes that international adjudicators should be mindful of such sovereignty when reviewing State conduct in the light of international law, in particular when dealing with domestic affairs.

In response, it can be argued that the principle of sovereignty has no relevance with regard to international legal obligations that have been voluntarily assumed. After all, '[t]he purpose of treaties – and of international law in general – is to limit the sovereignty of states in the particular sphere with which they are concerned'.[109] The assumption of treaty obligations has been described

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Liber Amicorum for Ernst-Ulrich Petersmann (Brill 2013) 40: '[i]n international law *respect for the sovereignty of nations* is a cause for granting those states a margin of appreciation'.

[106] Attila Tanzi, 'Remarks on Sovereignty in the Evolving Constitutional Features of the International Community' (2010) 12 Int'l Community L Rev 145. A well-known critique of sovereignty is provided by Louis Henkin, 'Sibley Lecture, March 1994. Human Rights and State "Sovereignty"' (1995) 25 Georgia J of Int'l and Comp L 31: 'as applied to states in the international system, "sovereignty" is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology'. Different interpretations of sovereignty have of course different implications, see eg Edward Guntrip, 'Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law' (2016) 65 ICLQ 829. For a historical analysis of different understandings of sovereignty, see Ulrich Haltern, 'Tomuschats Traum: Zur Bedeutung von Souveränität im Völkerrecht' in Pierre-Marie Dupuy *et al* (eds), *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat* (Engel 2006). See for a defense of the continuous relevance of sovereignty, Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 EJIL 599; Brad Roth, 'State Sovereignty, International Legalilty and Moral Disagreement' in Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity* (Hart 2008). Matthew Happold, 'Introduction' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 3: '[r]ecent events … have indicated how great a resonance ideas of sovereignty and independence continue to have for many states in the world today'.

[107] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ, Judgment of 27 June 1986, para 263. See also para 212. See also para 258: 'A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems.'

[108] Hélène Ruiz Fabri, 'Human Rights and State Sovereignty: Have the Boundaries been Significantly Redrawn?' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 34. See also 37: 'sovereignty implies the right to freely choose the political regime and internal organization of the state, to choose its economic system and to control its natural resources, and to govern the status of goods and people on its territory'.

[109] Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Ybk Int'l L 48, 60.

as a 'voluntary relinquishment' of some part of sovereignty,[110] which is in itself a sovereign choice.[111] It would appear somewhat insincere for a contracting State to invoke sovereignty afterwards, with the purpose of diminishing the obligations agreed upon.[112] Consequently, the fact that a State is called to account for lack of execution of its obligations does not as such raise problems of sovereignty.[113]

Yet even if a commitment to international rules is a sovereign decision to limit one's own sovereignty, this does not necessarily mean that sovereignty is no longer relevant when such rules

[110] Vasani, 'Bowing to the Queen' (n 72) 167: 'States signatories to a BIT, by definition, relinquish a certain amount of sovereignty in exchange for increased investment, development, and economic prosperity'. Kassi Tallent speaks about 'a voluntary relinquishment' of sovereignty. Tallent, 'The Tractor in the Jungle' (n 71) 129. See also James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 122-124. cf *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, WTO DS8, AB Report of 4 October 1996, under F: 'The *WTO Agreement* is a treaty -- the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.' See for similar examples in panel reports, Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (CUP 2015) 258-259.

[111] Crawford, 'Sovereignty as a Legal Value' (n 110) 118: sovereignty means that States are 'presumed to have full authority to act not only internally but at the international level, to make (or not to make) treaties and other commitments, to relate (or not to relate) to other states in a wide variety of ways, to consent (or not to consent) to resolve international disputes'.

[112] In a similar vein, John Jackson describes the hesitance of State to submit themselves to international supervision. John Jackson, 'The Great 1994 Sovereignty Debate: United State Acceptance and Implementation of the Uruguay Round Results' (1997) 36 Columbia J of Transnat'l L 157, 175: '[i]f a nation has consented to a treaty and the norms it contains, why should it object to an external process that could rule on the consistency of that nation's actions with the treaty norms? It might be argued that such objections manifest a lack of intent to follow the norms-sort of accepting the treaty with fingers crossed behind the back.'

[113] Ruiz Fabri, 'Human Rights and State Sovereignty' (n 108) 35. In the field of human rights, moreover, it could be argued that sovereignty is conditional upon the protection of human rights. See eg Johan van der Vyer, 'Sovereignty' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013); Luke Glanville, 'Sovereignty' in Alex Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016). Yet even if this argument would be accepted, it would only apply to the most serious forms of human rights violations.

are being interpreted and applied.[114] As noted by Alexander Orakhelashvili, '[t]he crucial question is whether sovereignty is residual to treaty obligations, or whether it continues impacting their content once these obligations are assumed'.[115] In practice, the outer limits of international obligations are often unclear. The adoption of an intrusive standard of review to assess conduct that coincides with those limits would enable 'the adjudicating bodies to interfere with the Members' sovereign choices even when there is no adequate consensual and textual basis for this'.[116] If instead the adjudicator gives prevalence to notions of sovereignty, the result would likely be a narrow interpretation of the obligation concerned, recalling the interpretative principle of *in dubio mitius* or other forms of restrictive interpretation.[117]

The principle of *in dubio mitius* is commonly rejected by academics, even though practice is not so univocal.[118] The debate about restrictive interpretation mirrors the debate about deference: opponents of *in dubio mitius* commonly argue that it impedes an 'effective' interpretation of treaty provisions that are meant to put limits on State sovereignty.[119] In response, one can point to the common arguments in favour of judicial deference, such as the epistemic capacities and democratic legitimacy of domestic decision-makers. Moreover, in the long run, an 'effective'

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[114] Jorge Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas *et al* (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014), arguing that the relationship between customary concepts of sovereignty and treaty rules need to be clarified.

[115] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 414. Orakhelashvili himself seems to follow the first line of thought: '[t]he sovereignty factor has no independent relevance in interpreting treaties. The extent of sovereign freedom *in casu* is merely a consequence of the position that obtains through and after the interpretation of a treaty by using normal interpretative methods'. See also 291: '[t]he content of rules and obligations depends not on sovereignty as such, but on the pre-determined methods of interpretation designed to discern that content'.

[116] Ioannidis, 'Beyond the Standard of Review' (n 4) 100.

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

[118] See section 3.2.1.5. For a critical account see eg 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) 735-736: '[i]t would be difficult to find real obligations in international law, … if one required absolute and specific clarity devoid of any ambiguity before accepting that treaty language creates obligations. … The interpretive strategy pursued by the reductionist approach means that the moment an obligation of a State needs interpretation (and that means most of the time), it should not be considered an obligation of the State'.

[119] Lauterpacht, 'Restrictive Interpretation' (n 109).

interpretation of treaty obligations may well need to be cautious because an extensive approach may persuade States to refuse compliance or to withdraw.

For current purposes, it is important to note that *in dubio mitius* is technically not a form of deference but a maxim of treaty interpretation. Even if the two may often be conflated in practice, there is an important conceptual difference: deference leaves a certain interpretative authority to the respondent State, whereas *in dubio mitius* results in an actual interpretation rendered by the court or tribunal itself, albeit one that construes the obligation in the narrowest way possible. As I will discuss in more detail in section 4.3.5, restrictive interpretation can achieve many of the aims that deference is thought to accomplish, such as giving a certain leeway for State sovereignty and domestic policy freedom. Yet the advantage of restrictive interpretation is that it provides clarity on the content of the minimum standard embodied in the applicable legal rule, whereas deference leaves the definition of that minimum standard to the respondent State.

4.3.3.2 Subsidiarity

Besides sovereignty, the principle of subsidiarity is commonly advanced in favour of judicial deference in international courts and tribunals.[120] Some fields of international adjudication are built on an assumption of subsidiarity, namely the regional human rights regimes.[121] Both the European and Inter-American human rights courts, as well as the African Commission, have confirmed that their protection is provided on a subsidiary basis.[122] This subsidiarity is a logical

[120] Sovereignty and subsidiarity are not necessarily compatible. According to Josephine Asche, subsidiarity replaces sovereignty. Asche, *Die Margin of Appreciation* (n 50) 149.

[121] Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AJIL 38; Gerald Neuman, 'Subsidiarity' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013). See also Marisa Iglesias Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights' (2017) 15 Int'l J of Const L 393. Subsidiarity is well-known as a structural principle in federations and in the EU. See eg James Fleming and Jacob Levy (eds), *Federalism and Subsidiarity* (Nomos 2014); Alexia Herwig, 'Federalism, the EU and International Law: On the Possible (and Necessary) Role of Subsidiarity in Legitimate Multilevel Trade Governance' in Elke Cloots *et al* (eds), *Federalism in the European Union* (Hart 2012).

[122] *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium*, ECtHR (Plenary) 1474/62, Judgment of 23 July 1968, Law I B, para 10; *Cabrera García and Montiel Flores v Mexico*,

consequence of the exhaustion of local remedies that is required before the human rights courts can exercise their review, unless such remedies are found to be ineffective. At the same time, the case-law of both the ECtHR and the IACtHR suggests that subsidiarity entails more than the factual anteriority of domestic review. Besides 'procedural subsidiarity', one can envisage some sort of 'substantive subsidiarity', which 'qualifies the intensity and content of the review' by the international adjudicator.[123] Under the approach of the ECtHR, this 'substantive subsidiarity' translates into the margin of appreciation and the fourth-instance doctrine, which both appear in the jurisprudence of the IACtHR as well.[124]

If substantive subsidiarity is understood as being related to but not dependent on procedural subsidiarity, the question arises to what extent subsidiarity should be taken into account in other fields of international adjudication as well.[125] There has been considerable debate about the relevance of a principle of subsidiarity in international law and politics, discussing whether it could be helpful for demarcating the proper spheres of domestic and international regulation. Inevitably, such debates concern not only the pertinence of subsidiarity, but also its definition. Subsidiarity exists in different forms in different contexts, and 'the resulting vagueness has only contributed to

IACtHR, Judgment of 26 November 2010, para 16; *Prince v South Africa*, ACHPR, 255/2002, Communication of December 2004, para 50-52.

[123] Samantha Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?' (2016) 61 American J of Jurisprudence 69, 79-83; Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 Eur L J 80, 104. For an argument that subsidiarity not only restricts the review of the ECtHR but also places responsibilities on States, see Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 Human Rights L Rev 313.

[124] But see Markus Jachtenfuchs and Nico Krisch, 'Subsidiarity in Global Governance' (2016) 79:2 Law and Contemporary Problems 1, 20: 'subsidiarity is strong in the European but not in the inter-American human rights system'. cf the discussion in sections 2.3 and 2.4. See for an argument that subsidiarity is a neutral concept, whereas the margin of appreciation favours the State, Federico Fabbrini, 'The Margin of Appreciation and the Principle of Subsidiarity: A Comparison' (2015) 15 iCourts Working Papers Series.

[125] Andreas Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?' in Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity* (Hart 2008); Andreas Føllesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law' (2013) 2 Global Constitutionalism 37; Jachtenfuchs and Krisch, 'Subsidiarity' (n 124) 1; Paolo Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions' (2016) 61 American J of Jurisprudence 51; Machiko Kanetake, 'Subsidiarity in the Practice of International Courts' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels. Contestations and Deference* (Hart 2016); Andreas Føllesdal, 'Subsidiarity and the Global Order' in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer 2014).

the appeal of the concept'.[126] Samantha Besson proposes a 'minimal common concept of subsidiarity', which entails a two-pronged principle: first, local institutions should have a priority in decision-making, and second, this priority can only be reversed when a higher institution has better capacities.[127] Markus Jachtenfuchs and Nico Krisch consider that subsidiarity is 'a rebuttable presumption for the local', reflecting the idea that 'self-government is typically more meaningful on a smaller scale'.[128] They also note that in order to be meaningful, a concept of subsidiarity needs criteria for determining in what circumstances the presumption can be rebutted.[129] In the absence of such criteria, subsidiarity 'can appear to do little actual work, being a mere placeholder for substantive conceptions of the proper distribution of powers between different levels of government'.[130]

Often, the primary criterion used in order to assess issues of subsidiarity is economic efficiency in problem-solving.[131] Consequently, the presumption for the local will be rebutted if a State's relatively weak administrative, financial, legal, or political capacities render international decision-making more effective.[132] Yet the notion of effectiveness itself begs for criteria that

[126] Jachtenfuchs and Krisch, 'Subsidiarity' (n 124) 5. A relatively sophisticated use of subsidiarity is found in EU law, where Article 5(3) of the Treaty on the European Union provides that 'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

[127] Besson, 'Subsidiarity in International Human Rights Law' (n 123) 86. This is a simplified paraphrasing of Besson's own words: 'first of all, the individual/smaller/lower/internal unit or entity should have priority (or so-called "primarity") in doing certain things and that, secondly, this priority may or should be reversed only when the individual/smaller/lower/internal unit or entity cannot do so, or not sufficiently well, and/or when the collective/larger/higher/external one can do so better'.

[128] Jachtenfuchs and Krisch, 'Subsidiarity' (n 124) 6, 1.

[129] ibid 6.

[130] ibid 7. Føllesdal, 'The Principle of Subsidiarity' (n 125) 61: '[t]he principle of subsidiarity stands in need of substantive interpretation, which must be guided by normative considerations'. See also Tomer Broude, 'Selective Subsidiarity and Dialectic Deference in the World Trade Organization' (2016) 79 L and Contemporary Problems 53, 73: '[s]ubsidiarity is hardly a rule or a principle, unless it is clearly stated as one, with clear parameters. It is rather a vernacular, a discursive device of negotiation over power and authority among a multiplicity of actors, pulling and pushing in different directions'.

[131] Jachtenfuchs and Krisch, 'Subsidiarity' (n 124) 7. cf Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 Netherlands Q of Human Rights 324, 357: '[i]f the [ECtHR] starts to grapple with the tiniest details and technicalities, it risks trivialising itself and the whole human-rights movement'.

[132] Jachtenfuchs and Krisch, 'Subsidiarity' (n 124) 7.

determine what needs to be achieved effectively and how to measure its accomplishment. A supposedly neutral application of effectiveness seems problematic in the context of international regimes that seek to balance opposing aims: '[u]nlike in some domestic contexts, efficiency is hardly appropriate as a key criterion in the global realm where diverse societies and political systems pursue different aims – differences that deserve respect but that a focus on comparative efficiency suppresses'.[133]

Moreover, in the context of adjudication specifically, a presumption for the local seems difficult to reconcile with the creation of international supervision in the first place. Apart from regimes that are deliberately based on some notion of subsidiarity, namely the regional human rights systems, other international supervisory regimes seem instead based on a presumption for the supranational.[134] In those regimes, States have mandated international adjudicators to exercise review and, without an indication to the contrary, it seems that supranational review is the starting point. The premise of subsidiarity that understands 'the main social function of public international law as *supplementing* domestic law' seems applicable to only some fields of international law.[135] In other fields, the normative assumption underlying the principle of subsidiarity is contradicted by the choice of States to endow international institutions with the power to review compliance with international law. Apparently, it was considered necessary to create international systems of dispute settlement that could resolve disputes between sovereign States and evaluate domestic

[133] ibid 21. Føllesdal points out, moreover, that subsidiarity does not necessarily imply deference to States, but may equally well challenge the central role of the State in international law on behalf of smaller units and, ultimately, the individual. Føllesdal, 'The Principle of Subsidiarity' (n 125) 61. cf Carozza, 'The Problematic Applicability' (n 125) 62: '[w]here sovereignty draws binary lines (internal vs. external, domestic vs. international, sovereign vs. non-sovereign, etc.), subsidiarity entails a set of fluid, interconnected, and conditioned layers between the individual person and the most comprehensive community, in which the boundaries of state sovereignty are always only provisional and permeable'.

[134] Itzcovich, 'One, None and One Hundred Thousand Margins' (n 23) 298, notes that this problem applies, to some extent, even in the context of the human rights regimes: 'the argument from subsidiarity, brought to its extreme conclusions, would call into question the point of having the European Convention and a common standard of human rights protection'.

[135] Føllesdal, 'The Principle of Subsidiarity' (n 125) 38. Apart from human rights, it could be argued that subsidiarity applies also to international investment law. Yet the circumstance that an exhaustion of local remedies can occur but is often not required, makes it difficult to provide structural deference on this basis. If tribunals would adopt a principle of subsidiarity when an exhaustion of local remedies has taken place, this would make it less appealing for investors to exhaust local remedies.

measures having an impact on foreign interests. For this reason, the principle of subsidiarity cannot provide a decisive argument for deference beyond the fields of human rights law.

4.3.4 Arguments against Constitutional Deference

4.3.4.1 Deference as an Abdication of the Judicial Task

The most general argument against constitutional deference in international adjudication holds that it runs contrary to the duty of an international adjudicator. Deference would erode the independent review that an international court and tribunal is requested to provide, in particular because the adjudicator is requested to determine whether the respondent State has complied with its obligations under international law.[136] In this way, deference is seen, not as strengthening but as decreasing the legitimacy of international adjudication.[137] In various fields of international law, and in human rights law and investment law in particular, the availability of independent review by an adjudicator who is not related to the respondent State is considered of crucial importance.[138] Deference would undermine that neutrality.[139] Absent a specific stipulation in the relevant treaty, such a deviation from the judicial task should not be permitted.[140]

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[136] Eirik Bjorge, 'Been There, Done That: The Margin of Appreciation and International Law' (2015) 4 Cambridge J of Int'l and Comparative L 181, 190: '[i]nternational courts and tribunals' according to states a margin of appreciation simply undermines, in the context of a treaty such as the Whaling Convention, the regulations the convention sets out, thus weakening the obligations, and concomitant rights, undertaken by, and accorded to, the member states.'

[137] Vasani, 'Bowing to the Queen' (n 72) 164: 'ceding to State-centred claims in decisions lacking substantive analysis undoubtedly decreases the legitimacy of the adjudicatory body'.

[138] Thomas Wälde, 'The Specific Nature of Investment Arbitration' in Philippe Kahn and Thomas Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff 2007) 55-56.

[139] But, see Burke-White and Von Staden, 'Private Litigation' (n 24) 332-333: 'lack of embeddedness suggests the need for greater deference to decisions made by institutions that are more culturally, legally, and politically embedded'.

[140] Egerton-Vernon, 'Is Investment Treaty Arbitration a Mechanism' (n 29) 231: 'if States truly want tribunals to employ an alternative standard of review, allowance for this can easily be made through the drafting or redrafting of their BITs'. cf José Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law 2011) 478.

The ECtHR's use of the margin of appreciation has repeatedly been condemned as an abdication by the Court of its supervisory task:[141] cases relying on the margin 'have been generally criticised as denials of justice for individuals, abdications by the Court of its duty of adjudication in difficult or sensitive issues or as a judicial diluting technique of the strict conditions laid down in the European Convention'.[142] It has been argued that deference frees the Court 'from having to do the real and challenging work of interpreting the meaning and contours of the rights that are protected in the Convention'.[143] In other words, 'the [margin of appreciation] represents an abdication of the independent adjudicator's responsibility to decide complex, sensitive, difficult, and often politically-charged cases in a thoughtful and reflective manner that entails a strict and substantive analysis of whether a State's actions confirm with – or are violative of – its international obligations'.[144]

The claim that deference constitutes an abdication of the judicial task reminds of classic debates about whether a *non liquet* is acceptable in international adjudication. *Non liquet* is a Latin

[141] This leaves aside the widespread criticism that the ECtHR is inconsistent in its use of the margin of appreciation. See eg Yutaka Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in Andreas Føllesdal *et al* (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 79-80, with further references.

[142] Ignacio de la Roasilla del Moral, 'The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine' (2006) 7 German L J 611, 611-612. cf Fionnuala Ni Aolain, 'The Emergence of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 Fordham Int'l L J 101, 115, writing in the context of emergencies: '[t]he margin of appreciation doctrine has been a crucial aspect of the retreat from substantive scrutiny … with the result that responses to emergency are state focused, to the detriment of individual rights'.

[143] Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2005) 11 Columbia J of Eur L 113, 149. cf Lord Lester of Herne Hill, 'Universality Versus Subsidiarity: a Reply' [1998] Eur Human Rights L R 73, 80, describing the ECtHR's use of the margin of appreciation in *Otto-Preminger-Institut v Austria*, ECtHR, 1347/87, Judgment of 20 September 1994: 'this extreme degree of judicial restraint involves abdicating from the task of discerning and articulating the criteria appropriate to the difficult problems raised by this type of case'. See also Tallent, 'The Tractor in the Jungle' (n 71) 125: 'there is little doubt that the MOA doctrine hinders the ECHR's ability to render the well-reasoned decisions that presumably are necessary to elucidate and develop the protections set out in the Convention'. cf Michele de Salvia, 'Contrôle européen et principe de subsidiarité: faut-il encore (et toujours) émarger à la *marge d'appréciation*?' in Paul Mahoney *et al* (eds), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdall* (Heymanns 2000) 385: 'une utilisation généralisée de la notion de la marge d'appréciation aurait-elle pour résultat que le principe de sécurité juridique, inhérent à l'ensemble de la CEDH, pourra être atteint dans sa substance même'.

[144] Vasani, 'Bowing to the Queen' (n 72) 163.

expression that literally means 'it is not clear'.[145] A finding of *non liquet* expresses the conclusion of a court that the law is unclear and that it can therefore not decide the case. Its permissibility in international adjudication was the topic of a debate between Hersch Lauterpacht and Julius Stone in the late 1950s.[146] According to Stone, there are limits to the 'law-creating responsibility [we can] sensibly place on international courts', and therefore a *non liquet* is a prudent conclusion in cases of uncertainty.[147] According to Lauterpacht, however, 'the function of the judge to pronounce in each case *quid est juris* is pre-eminently a practical one. He is neither compelled nor permitted to resign himself to the *ignoramibus* which besets the perennial quest of the philosopher'.[148] Consequently, Lauterpacht advocated a prohibition of *non liquet*: 'a court … must not refuse to give a decision on the ground that the law is non-existent, or controversial, or uncertain and lacking in clarity'.[149] Contemporary arguments against deference can be understood in the same way:[150] international courts and tribunals should not abdicate their task to interpret and apply international law by deferring to domestic authorities.[151]

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[145] John Barton *et al*, *The Evolution of the Trade Regime. Politics, Law, and Economics of the GATT and the WTO* (Princeton 2006) 79.

[146] Iain Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 2 EJIL 264; Hernández, *The International Court of Justice* (n 2) 254-280.

[147] Julius Stone, '*Non Liquet* and the Function of Law in the International Community' (1959) 35 British Ybk of Int'l L 124, 152.

[148] Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 72.

[149] Hersch Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law' in Elihu Lauterpacht (ed), *Hersch Lauterpacht. International Law. Collected Papers, Vol 2 The Law of Peace Part 1 International Law in General* (CUP 1975) 216. The debate concerned not only the proper role of courts, but also the 'completeness' of international law as an ontological matter. See Hernández, *The International Court of Justice* (n 2) 254.

[150] The debate also resembles contemporary discussions about lawmaking by international courts. See Gleider Hernández, 'International Judicial Lawmaking' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Elgar 2016).

[151] For a defence of 'non liquet' in the context of the WTO, see Dale Oesterle, 'Just say "I Don't Know": a Recommendation for WTO Panels Dealing with Environmental Regulations' (2001) 3 Environmental L Rev 113. A controversial question is whether the ICJ's *Nuclear Weapons* Advisory Opinion constitutes a 'non liquet'. See Mariano Aznar-Gómez, 'The 1996 Nuclear Weapons Advisory Opinion and *Non Liquet* in International Law' (1999) 48 ICLQ 3. *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, Dissenting Opinion of Judge Higgins, para 2: 'in paragraph 2 E of its *dispositif*, the Court effectively pronounces a *non liquet* on the key issue on the grounds of uncertainty in the present state of the law, and of facts'.

Apart from the general observation that deference constitutes an abdication of the judicial task, it has been argued in human rights law and investment law that deference dilutes the protection offered by international law to individuals and investors. Some have argued that the margin of appreciation is 'inconsistent with the very idea of human rights, depriving individuals of that legal protection to which they are expressly entitled' under international human rights law.[152] The same argument has been raised in investment law. Sarah Vasani, for instance, argues that the importation of the margin of appreciation into investment law would 'undermine investor protection'.[153]

Deference to respondent States can indeed limit the protection offered to individuals and investments but it is debatable whether this provides a convincing argument against deference. First of all, with regard to investment law, it has become accepted to understand this field as having a wider purpose than merely investment protection.[154] Even if some have argued that 'the main, overriding, purpose of investment treaties … is to protect the investor and its proprietary and contractual rights against governmental risk',[155] most scholars recognise that the field has broader goals. As pointed out by Federico Ortino, the protection of foreign investment is only an instrument used in order to foster economic interactions between States and, in that way, to increase their prosperity.[156] This ultimate goal might sometimes justify limits on investment protection. The

[152] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 229. cf Oren Gross and Fionnuala Ni Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 Human Rights Q 625, 628: 'critics point to the pervasive and pernicious effects of the margin of appreciation doctrine on the substantive protection of fundamental rights, brought about by a judicial attitude of undue deference to the concerns of states over individuals, the protection of whose rights is the main concern of the European Convention'. The effects of deference are different in cases concerning conflicts between different human rights rather than between the State on the one hand and the individual on the other. Stijn Smet, 'When Human Rights Clash in "the Age of Subsidiarity". What Role for the Margin of Appreciation?' in Agha, *Human Rights Between Law and Politics* (n 26) 56.

[153] Vasani, 'Bowing to the Queen' (n 72) 165.

[154] Stephan Schill and Vladislav Djanic, 'Wherefore Art Thou? Towards a Public-Interest Based Justification of International Investment Law' (2018) 33 ICSID Rev 29, 33.

[155] Wälde, 'Interpreting Investment Treaties' (n 118) 723. See *Tokios Tokeles v Ukraine*, ICSID ARB/02/18, Decision on Jurisdiction of 29 April 2004, para 31; *Sempra Energy International v Argentina*, ICSID ARB/02/16, Decision on Jurisdiction of 11 May 2005, para 142.

[156] Ortino, 'The Investment Treaty System' (n 32) 440-441. Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (CUP 2011) 30-31. cf *Saluka Investments BV v Czech Republic*,

Saluka tribunal reasoned that an interpretation of a BIT 'which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations'.[157] The same line of reasoning could be adopted with regard to the tribunals' intensity of review: intrusive standards of review may, in the long run, decrease the willingness of States to allow foreign investments and to remain part of international regimes of investment protection.[158]

In human rights law, the protection of an individual's rights is arguably the ultimate goal of the relevant international regimes. Yet even in this context, the conclusion cannot be that international human rights courts should always prioritise the rights of individual applicants. A human rights court which engages in persistently intrusive review, risks disobedience, indifference or withdrawal from the side of States party to the regime.[159] Michael Donnelly notes that:

> Advocates of global human rights statutes, courts and treaties should reconsider an overly ambitious and unnecessarily globalist strategy rooted in judicial review and global constitutionalism. … Although human rights can (and should) be used exhortationally to encourage sovereign states to consider how important moral norms can (and should) be respected and protected within the context of their own diverse societies, a human rights project that imposes an ever-expanding universalist framework of substance and enforcement will yield more negative reactions, making it more difficult for advocates to help those they seek to help. By demanding too much, the entire human rights project may become jeopardised.[160]

UNCITRAL, Partial Award of 17 March 2006, para 300. See also *Lemire v Ukraine*, ICSID ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010, para 273; *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA*, ICSID ARB/03/17, Decision on Liability of 30 July 2010, para 200.

[157] *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para 300.

[158] cf Burke-White and Von Staden, 'Private Litigation' (n 24) 285.

[159] Laurence Burgorgue-Larsen, 'Les methods d'interprétation de la Cour interaméricaine des droits de l'homme. *Justice in Context* (2014) 97 Revue trimestrielle des droits de l'homme 31, 64: 'une jurisprudence audacieuse, qui joue avec les limites de l'interprétation évolutive, peut vite exaspérer et engendrer de multiples résistances'. Such an approach may also overcharge the Court's own capacities. See Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael Madsen (eds), *The European Court of Human Rights Between Law and Politics* (OUP 2011).

[160] Michael Donnelly, 'Democracy and Sovereignty vs International Human Rights: Reconciling the Irreconcilable?' (2018 forthcoming) Int'l J of Human Rights.

Moreover, a human rights court cannot ignore the legitimate aims that certain restrictions on individual rights can have, as recognised by the limitation clauses in regional human rights treaties. The protection of individual rights finds its limits in the legitimate balancing of such rights against other public interests.[161] Consequently, the crucial question before an international human rights courts is not how to maximise the protection of individual human rights, but to review whether restrictions of such rights comply with the requirements of the treaties, which include a considerable number of exceptions. Therefore, the observation that deference may lead to a less favourable outcome for the individual applicant does not add anything to the more general argument that deference constitutes an abdication of the judicial task. That latter argument is, in the end, a somewhat dramatic way of restating the aim of deference, which is precisely to give respondent States a say in the interpretation and application of an international rule. As the previous sections of this study have shown, adjudicators may have various reasons for doing so, such as the democratic legitimacy of domestic decision-making. However, as will be discussed in more detail later on, such interests will be better served by a restrictive interpretation of treaty rules. Under that approach, adjudicators do not abdicate their judicial task, but provide a response that leaves respondent States a policy space beyond the limits of their explicit treaty obligations.

4.3.4.2 Procedural Fairness

Another criticism raised against a limited intensity of review is that it would grant an advantage to the respondent State and thereby jeopardise the fairness of the review exercised by an international court or tribunal. There are two different aspects to this argument: first, deference could be seen as a violation of the principle *nemo iudex in sua causa*, according to which no-one should be a

[161] Greer, 'The Margin of Appreciation' (n 53) 33: '[t]he principles of democracy, legality, subsidiarity, and proportionality give national democratic institutions a legitimate role in demarcating rights from public interests for several good reasons. First, since drawing such lines will involve weighing difficult and controversial matters concerning the collective interest, it is fundamentally political rather than judicial by nature. Secondly, national authorities are in a better position to obtain and assess local knowledge which the Court may either not have or the significance of which it may misjudge. Thirdly, there may be a range of equally defensible places where such lines could be drawn each of which may attract support from sections of public opinion in the state concerned, and some of which may be more appropriate in some member states than in others. For the Court to substitute its own conception of what is appropriate might, therefore, result in it taking sides in the resolution of genuine human rights/public interest dilemmas which are not amenable to any straightforward legal solution.'

judge in their own case. Second, it could be argued that deference conflicts with the equality between the disputing parties because it favours the respondent State.

It could be argued that when an international court or tribunal defers to a respondent State, that State is made a judge in its own case. This would conflict with the principle of *nemo iudex*, which has been considered a general principle of law as well as an expression of the principle of good faith.[162] Yet upon reflection, this argument does not hold. First of all, even if there is an intuitive fairness to the principle of *nemo iudex*, it has many exceptions in practice. In the domestic context, the law often 'makes officials or institutions the judges of their own prerogatives, power, or legal authority', and in international law this is also the case.[163] Moreover, it is debatable whether *nemo iudex* is logically applicable to a respondent State, especially when the case concerns domestic public policies. In most democratic systems, the adoption of such policies requires a coalition of diverse political parties and the support of several different institutions.[164] Indeed, '[t]he democratic decision-making process that leads to the disputed law involves a large number of different and often opposed actors'.[165] Consequently, there is 'no single actor' judging its own cause. When a respondent State defends its legislation or policies before an international court or tribunal, it is effectively defending the compromise reached between competing domestic factions. Admittedly, in cases that concern purely inter-State issues, the pertinence of *nemo iudex* might be stronger. Nonetheless, adjudicators may see good reasons to defer to respondent States, even if this would run contrary to *nemo iudex*. The principle does in itself not provide any guidance on how such competing arguments should be balanced against the ideal of impartiality that *nemo iudex* embodies.[166]

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[162] G Schwarzenberger, 'The Nemo Judex in Sua Causa Maxim in International Judicial Practice' (1972) 1 Anglo-American L Rev 482, 491.

[163] Adrian Vermeule, 'Contra *Nemo Iudex in Sua Causa*: The Limits of Impartiality' (2012) 122 Yale L J 384, 387. In international practice, the principle of *compétence de la compétence* is an example of this. See chapter 3, n 70. Another example is the self-judging clauses discussed in section 3.2.3.2 Vermeule concludes that the principle 'amounts to little more than a banal counsel that impartiality is sometimes an important value in institutional design', 389.

[164] ibid. cf Waldron, 'The Core' (n 61) 1400-1401; Jeremy Waldron, 'Legislatures Judging in Their Own Case' (2009) 3 Legisprudence 125.

[165] Bellamy, 'The Democratic Legitimacy' (n 64) 1038-1039.

[166] cf Vermeule, 'Contra *Nemo Iudex*' (n 163) 420: '[a] well-rounded analysis should see the impartiality of decisionmakers as one institutional good among others, to be pursued, or not, as a larger calculus of institutional optimization suggests'.

The second argument against deference on grounds of procedural fairness is that it destabilises the equality between the disputing parties. This argument is primarily relevant to investment law and human rights law. In the inter-State context, a State which is applicant in one case can be respondent in another, meaning that it would also benefit from deference once its own policies are under review.[167]

In the context of investment law, it has been argued that arbitral tribunals are 'intended to be *neutral* arbiters of disputes without preconceived biases'.[168] The argument holds that irrespective of the fact that the respondent is a sovereign State, both parties should be treated equally.[169] Deference would jeopardise this principle.[170] According to Thomas Wälde, it would lead to a 'procedural asymmetry to the benefit of the state'.[171] He denounced 'a deep-seated sentiment of deference to governments' based on an 'exalted view of the state'.[172]

> While such century-old attitudinal approaches are rarely made explicit or consciously present, they do influence the way legal concepts are formulated when the novel mechanism of international foreign investor versus host state arbitration is viewed. Such (mostly subconsciously held) views then help to explain either the preference for a substantial measure of 'deference' towards the state, both in procedure and in the scope of material control of international disciplines over state conduct; or, on the other hand, a preference for a true 'equality of arms'.[173]

[167] I therefore disagree with Eirik Bjorge, 'Been There, Done That' (n 136) 190: 'the granting of a margin of appreciation to one state may, by effectively giving to that state a free rein vis-à-vis another state, runs the risk of enlarging the sovereignty of the former by encroaching upon the sovereignty of the latter'.

[168] Vasani, 'Bowing to the Queen' (n 72) 163.

[169] ibid 163-164.

[170] Egerton-Vernon, 'Is Investment Treaty Arbitration a Mechanism' (n 29) 219.

[171] Thomas Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State. Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms' (2010) 26 Arbitration Int'l 3, 15. Wälde seems mostly concerned with 'abuse of a Respondent State's resources and powers and the means available to arbitral tribunals to redress the balance'. Thomas Wälde, '"Equality of Arms" in Investment Arbitration: Procedural Challenges', in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 162.

[172] Wälde, 'Procedural Challenges' (n 171) 9, 10. See also at 11: '[deference] meets head-on the principle of equality of arms'.

[173] ibid 11.

According to Wälde, 'the modern practice of international adjudication has moved, in criminal, civil and human rights litigation, beyond an unconditional acceptance of deference to the state'.[174] The principle of equality of arms, in his view, 'is now the dominant concept countervailing' notions of deference.[175]

The principle of equality of disputing parties is well-established in international law.[176] The Statute of the ICJ refers to the need to avoid placing parties 'in a position of inequality before the Court'.[177] Also the UNCITRAL Arbitration rules recognise the principle.[178] In the context of the WTO, party equality has been linked to the principle of 'due process', which 'guarantees that

[174] ibid 14.

[175] ibid.

[176] See generally Frédérique Coulée, 'Le principe du contradictorie devant la Cour Internationale de Justice et le Tribunal International du Droit de la Mer' in Hélène Ruiz Fabri and Jean-Marc Sorel (eds), *La principe du contradictoire devant les juridictions internationales* (Pedone 2004); Eve Bain, 'When Some Are More Equal than Others: The Need for a More Substantive Conception of "Equality of the Parties" in Investment Arbitration' in Lisa Sachs and Lise Johnson (eds), *Yearbook on International Investment Law and Policy 2015-2016* (OUP 2018). See for examples from the case law of investment tribunals, the ECtHR and the International Tribunal for Human Rights Violations in the former Yugoslavia, Thomas Wälde, 'Procedural Challenges' (n 171) 26 Arbitration Int'l 3. For the ICJ, see Robert Kolb, 'General Principles of Procedural Law' in Andreas Zimmermann *et al* (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 799.

[177] Statute of the International Court of Justice, Article 35 para 2. In the context of its review of a judgment of the Administrative Tribunal of the International Labour Organisation, the Court referred to 'a central aspect of the good administration of justice: the principle of equality before the Court of the organization on the one hand and the official on the other'. *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, ICJ, Advisory Opinion of 1 February 2012, para 35, 47. cf *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, ICJ, Advisory Opinion of 23 October 1956, 13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ, Judgment of 27 June 1986, para 31, 59, 70, 284, dealing with the non-appearance of one party.

[178] United Nations Commission on International Trade Law, Arbitration Rules (2013) Article 17(1): 'the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case'.

the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute'.[179]

The principle of equality recognised in international practice relates primarily to the procedural right of both parties to have ample opportunity to submit and respond to claims, arguments, and evidence.[180] Beyond the right to be heard, it is difficult to see how a principle of party equality could exclude all forms of deference. Especially in contexts where only the respondent party is a State, some different forms of treatment may follow logically from the structural differences between a State on the one hand and an investor or human person on the other.[181] States are tasked with balancing competing interests in the pursuit of the common good and, for that reasons, possess powers and responsibilities that individuals do not have. Consequently, States and private parties are by definition different, and it is debatable to what extent adjudicators should strive for an artificial approximation of equality. Even in the narrow context of the right to be heard, it is accepted that States have some unique privileges, such as State secret privilege which may justify the non-disclosure of politically sensitive evidence.[182]

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[179] *Canada – Continued Suspension of Obligations in the EC-Hormones Dispute*, WTO DS321, AB Report of 16 October 2008, para 433. In *Australia – Apples*, the panel summarised that 'due process also ensures procedural equality between the parties'. *Australia - Measures Affecting the Importation of Apples from New Zealand (Australia – Apples)*, DS367, Panel Report of 9 August 2010, para 7.7.

[180] cf *Judgment No 2867* (n 177) para 47: '[b]oth the Fund and Ms Saez García have had adequate and in large measure equal opportunities to present their case and to answer that made by the other; and that, in essence, the principle of equality in the proceedings before the Court … has been met'. See also the arbitration rules listed by Wälde, 'Procedural Challenges' (n 171) fn 35, some of which refer only to the obligation to give parties equal opportunity to present their case.

[181] Laurence Sinopoli, 'Le principe du contradictoire et la Cour europeenne des droits de l'homme' in Hélène Ruiz Fabri and Jean-Marc Sorel (eds), *La principe du contradictoire devant les juridictions internationales* (Pedone 2004) 79, writing about the ECtHR: 'sa fonction premiere n'est pas d'appliquer, de manier, d'observer le principe du contradictoire mais de controler le respect du contradictoire par d'autres juridictions, principalement par les juridictions nationales des Etats contractants'.

[182] International Bar Association, 'IBA Rules on the Taking of Evidence in International Arbitration' (2010), Article 9(2)(f), which allows the exclusion of evidence on 'grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution'. Audley Sheppard, 'The Approach of Investment Treaty Tribunals to Evidentiary Privileges' (2016) 31 ICSID Rev 670. Thomas Wälde notes other 'asymmetries' that favour the respondent State, such as the power to issue interpretative decisions under NAFTA. Wälde, 'Procedural Challenges' (n 171) 16-18. Assymetries may also work against the State, when it does not make use of its superior capacities in terms of evidence production. Dinah Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe' (2003) 13 Duke J of Comp and Int'l L 95, 140.

Accordingly, insofar as deference to a respondent State is considered to jeopardise a principle of equality, it appears that such a wide principle, going beyond an equal right to be heard, does not exist in international law. Such an absolute principle of equality would ignore structural differences between States and other disputing parties, while deference is an acknowledgement of these differences.

4.3.4.3 Universalism and Uniformity

A final argument commonly raised against judicial deference in international adjudication is the claim that it would endanger the uniform interpretation of international law and its application within different States.[183] Ernst-Ulrich Petersmann has described this problem in the context of the WTO by using the metaphor of the tower of Babel:

> Many international dispute settlement proceedings arise because governments construe their respective rights and obligations in a mutually conflicting manner. In contrast to constitutional democracies where the separation of legislative, executive and judicial powers may prompt courts to exercise "judicial self-restraint" vis-à-vis discretionary foreign policy decisions, WTO dispute settlement proceedings lead to "rulings" by the General Council itself, which has also the power to adopt formal interpretations of the WTO Agreement. An assumption of the legitimacy of diverging national interpretations could transform the WTO into a "tower of Babel" and conflict with the declared objective of the WTO dispute settlement procedures "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" (Article 3:3 of the DSU).[184]

Indeed, deference by the dispute settlement system of the WTO could produce 'a multiplicity of interpretations'.[185] Deference of a domestic court granted to an administrative agency does not risk

[183] According to Becroft, this is 'perhaps the strongest argument against deference'. Becroft, *The Standard of Review* (n 45) 32.

[184] Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (Kluwer 1997).

[185] Vázquez, 'Judicial Review' (n 36) 36 George Washington Int'l L Rev 587, 603.

the existence of 'a single interpretation of the law throughout the legal system'.[186] Deference by a WTO panel or the AB, however, would imply deference to more than one hundred 'potentially different interpretations of the same instrument'.[187]

A concern for uniformity has also been raised in other fields. In the context of international investment law, Stephan Schill has expressed the importance of 'a uniform application and interpretation of international law'.[188] In human rights law, Eyal Benvenisti argues that the ECtHR's margin of appreciation 'is at odds with the concept of the universality of human rights'.[189] He fears that the concept leads to different outcomes in similar cases, raises concerns about judicial double standards, and threatens the credibility of international human rights bodies to develop universal standards.[190] According to Benvenisti, the Court 'relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality'.[191] Consequently, the margin of appreciation may 'lead to legal fragmentation, allowing different application of the ECHR in different national jurisdictions'.[192] In human rights law, debates about the margin of appreciation commonly mirror those about the tensions between the universality and relativity of human rights.[193]

The various commentators rightly note that deference can pose a risk to a uniform interpretation or application of international law, but a different question is whether such

[186] ibid.

[187] ibid.

[188] Schill, 'Deference in Investment Treaty Arbitration' (n 9) 601. Arguably, the problem is less present in a bilateral context. Egerton-Vernon, 'Is Investment Treaty Arbitration a Mechanism' (n 29) 220-221.

[189] Benvenisti, 'Margin of Appreciation' (n 65) 844.

[190] ibid. See also 852: 'the court also relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality'. Geir Ulfstein, 'The European Court of Human Rights and National Courts: A Constitutional Relationship?' in Oddný Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection. Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge 2016) 52.

[191] Benvenisti, 'Margin of Appreciation' (n 65) 852.

[192] Ulfstein, 'The European Court of Human Rights' (n 190) 52. cf Pierre Lambert, 'Marge nationale d'appréciation et controle de proportionnalité', in Frédéric Sudre (ed), *L'interprétation de la Convention européenne des droits de l'homme* (Bruylant 1998) 85-89.

[193] Legg, *The Margin of Appreciation* (n 61) 40-66; Ben Golder, 'On the Varieties of Universalism in Human Rights Discourse' in Agha, *Human Rights Between Law and Politics* (n 26). The criticims voiced against the margin of appreciation in this context is also raised against use of the European consensus by the ECtHR, eg Shelton, 'The Boundaries' (n 182) 134.

differentiation is problematic.[194] Arguably, it is actually an important function of judicial deference to allow for a differentiated implementation of international law, in accordance with local values and circumstances. There are several reasons why such differentiation is justified. First of all, many norms of international law actually require or allow that local conditions be taken into account.[195] An example is provided by exception clauses that justify deviations from certain norms in the interest of public morals, such as Article 10(2) of the ECHR. That article allows for restrictions on the freedom of expression if they 'are necessary in a democratic society ... for the protection of health or morals'. In *Handyside*, the Court noted that:

> [I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject.[196]

The logical consequence of this observation is that a certain restriction may be justifiable in one Member State, but not in another, dependent on the actual content of local morals. Similar considerations could apply in the context of the public morals exceptions of Article XX GATT

[194] On a very general level, calls for uniformity may result from overly ambitious views on the international legal order. cf Report of the Study Group of the ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', A/CN.4/L.682 (13 April 2006) para 493: '[t]he international legal system has never enjoyed the kind of coherence that may have characterized the legal orders of States'. See further Mario Prost, *The Concept of Unity in Public International Law* (Bloomsbury 2012). See also Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas *et al* (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014). See for a defense of the merits of pluralism in international law, Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 Modern L Rev 183; Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2010); Jonathan Kuyper, 'The Democratic Potential of Systemic Pluralism' (2014) 3 Global Constitutionalism 170.

[195] As noted by Yuval Shany: 'the same conduct which was "reasonable" or "proportional" in one set of circumstances, might be deemed "unreasonable" or "disproportional" in different circumstances'. Shany, 'Towards a General Margin of Appreciation' (n 89) 923. See also Costa, 'On the Legitimacy' (n 27) 180: the ECHR 'does not command or even aspire to strict uniformity throughout Europe in the protection of human rights'.

[196] *Handyside v United Kingdom*, ECtHR (Plenary) 5493/72, Judgment of 7 December 1976, para 48.

and Article XIV of the General Agreement on Trade in Services (GATS).[197] In the latter context, a WTO panel held:

> We are well aware that there may be sensitivities associated with the interpretation of the terms "public morals" and "public order" in the context of Article XIV. In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. … More particularly, Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values.[198]

Yet all of this might still not pose serious problems concerning uniformity because the differentiation is a consequence of different circumstances that the relevant treaty norm identifies as relevant.[199] The issue becomes more problematic when deference is granted on the basis of circumstances that are not identified as relevant by the applicable treaty rule. For example, a common rationale for judicial deference is democratic legitimacy, which implies a degree of differentiation dependent on the democratic quality of the decision under review. This could mean that a certain measure is found to be in breach of an international obligation in one State, whereas no such breach is found for another State where it is proven that the impugned measure enjoys democratic support. International courts and tribunals are hesitant to express such differentiation

[197] Robert Howse and Joanna Langille, 'Permitting Pluralism: The *Seal Products* Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2012) 37 Yale J of Int'l L 367, 431-432: 'the WTO should respect pluralism, allowing countries to justify their trade-related actions through noninstrumental reasoning that may seem compelling to certain countries or peoples, even if frivolous or perhaps superstitious to others.' Emilie Conway, 'De quelques apports de la doctrine de la "marge d'appréciation" à l'interprétation de l'exception de moralité publique en droit de l'Organisation mondiale du commerce (OMC)' (2013) 54 Cahiers de droit 731. Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Hart 2013) 177-185.

[198] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WTO DS285, Panel Report of 10 November 2004, para 6.461. But cf in the same case the AB Report of 7 April 2005, para 304. For a discussion, see Oisin Suttle, 'What Sorts of Things are Public Morals? A Liberal Cosmopolitan Approach to Article XX GATT' (2017) 80 Modern L Rev 569.

[199] Strictly speaking, differentiation on the basis of different local circumstances is not deference. Adjudicators can themselves assess local circumstances such as the content of public morals, *de novo*. Deference comes into play only when that assessment is left to the respondent State to make.

explicitly,[200] and they may not need to, because they normally judge only one respondent State in a particular case. Still, differentiation is a logical consequence of conditional deference.

Some scholars propose a distinction between the interpretation and application of international norms, suggesting that different levels of deference should apply to each.[201] Interpretation is understood as 'determining the meaning of a rule', whereas application concerns 'determining the consequences which the rule attaches to the occurrence of a given fact'.[202] Constitutional deference seems to be more easily accepted in the context of application than interpretation. For instance, in the context of the ECtHR it has been noted that '[i]t is one thing that States are in a better position to evaluate factual circumstances arising in their country, but why should they be better placed than the Court to interpret their obligations under the Convention in general?'.[203] Indeed, '[i]t is the Court which is endowed with the power of interpreting the Convention, which indeed is the primary function of any judicial body'.[204]

To some extent, a distinction between norm interpretation and application could address concerns over the impact of deference on the uniformity of international law. In human rights law, the longstanding debate over the universality versus the relativity of human rights is commonly

[200] The ECtHR seems to express this type of differentiation in the context of electoral rights in *Paksas v Lithuania*, ECtHR (GC) 34932/04, Judgment of 6 January 2011, para 96: '[t]he margin in this area is wide, seeing that there are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision. Thus, for the purposes of applying Article 3 of Protocol No. 1, any electoral legislation or electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another'.

[201] Nino Tsereteli, 'Emerging Doctrine of Deference of the Inter-American Court of Human Rights' (2016) 20 Int'l J Human Rights 1097, 1098-1099, 1107. See also Shany, 'Towards a General Margin of Appreciation' (n 89) 910; Steven Greer, 'What's Wrong with the European Convention on Human Rights?' (2008) 30 Human Rights Q 680, 698: '[t]here is no genuine scope for national discretion on the part of domestic non-judicial bodies concerning how Convention rights should be understood. However, there is a legitimate national discretion on the question of whether the disputed conduct is compatible with those rights thus defined'.

[202] Joshua Paine, 'On Investment Law and Questions of Change' (2018) 19 J of World Investment and Trade 173, 179. For a general discussion of the distinction see Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 J of Int'l Dispute Settlement 31.

[203] Kratochvíl, 'The Inflation of the Margin' (n 131) 332.

[204] ibid. cf Paine, 'Standard of Review' (n 87) 7: 'in some areas international adjudicators will be well-equipped to make the relevant determinations and this will militate against deference to the national level, such as with regard to the interpretation of international norms'. Schill, 'Deference in Investment Treaty Arbitration' (n 9) 602.

resolved along similar lines.[205] Indeed, '[i]t is generally accepted that the universal value of human rights does not necessarily involve the universal implementation of these rights'.[206] Most commentators 'accept that human rights are universal at the conceptual, global and international levels, while simultaneously relative in terms of national, regional and cultural implementation'.[207] Nonetheless, in practice, it is difficult to draw a sharp distinction between interpretation and application. International courts and tribunals are not normally asked to provide abstract interpretations of an international rule, but to judge upon its application in a concrete dispute. As a consequence, the interpretation of a norm takes place through its application in specific factual circumstances.[208]

An international treaty provides a minimum standard to which States commit, in spite of their differences.[209] Consequently, an international adjudicator applying that standard has to identify the content of the commitment, seeking an interpretation that corresponds to the compromise reached among the States parties.[210] Yet this exercise is impossible when a treaty is

[205] Eva Brems, *Human Rights: Universality and Diversity* (Kluwer 2001); Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Hart 2013) 36-43.

[206] Yvonne Donders, 'Do Cultural Diversity and Human Rights Make a Good Match?' (2010) 61 Int'l Social Science J 15, 16. Yvonne Donders and Vincent Vleugel, 'Universality, Diversity, and Legal Certainty: Cultural Diversity in the Dialogue Between the CEDAW and State Parties', in Kanetake and Nollkaemper, *The Rule of Law* (n 125) 324: '[i]t is increasingly agreed that the universal value and application of human rights does not necessarily imply the *uniform implementation* of these rights'.

[207] Steven Greer, 'Universalism and Relativism in the Protection of Human Rights in Europe: Politics, Law and Culture', in Agha, *Human Rights Between Law and Politics* (n 26) 20, 34-35. Andreas von Staden, 'Book Review of Andrew Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality' (2013) 13 Human Rights L R 795, 796: '[u]ltimately, the debate about universality versus relativism of human rights is about the depth, or level of detail, of legal regulation at which uniformity is to be achieved or pluralism to be tolerated'. See also Eyal Benvenisti and Alon Harel, 'Embracing the Tension between National and International Human Rights Law: the Case for Discordant Parity' (2017) 15 Int'l J of Const L 36; Alison Dundes Renteln, 'The Unanswered Challenge of Relativism and the Consequences for Human Rights' (1985) Human Rights Q 514, with further references.

[208] Joshua Paine, 'On Investment Law' (n 202) 179.

[209] cf Johan Callewaert, 'Quel avenir pour la marge d'appréciation?' in Mahoney, *Protecting Human Rights* (n 143), emphasising the 'common understanding' of human rights mentioned in the Preamble of the European Convention of Human Rights.

[210] This reasoning justifies the ECtHR's reliance on a European consensus. See also Alec Stone Sweet and Thomas Brunell, 'Trustee Courts and the Judicialization of International Regimes. The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization' (2013) 1 J of L and

applied to issues about which the parties never agreed.[211] In such circumstances, the legitimacy of deference is dependent on the importance of uniformity for the accomplishment of the aims of the treaty. International legal commitments that depend on reciprocity require a uniform application. By contrast, if reciprocity is not a vital component of the compromise, uniformity is of less relevance, even if the treaty embodies a broad commitment to shared standards. Consequently, objections to deference based on its negative impact on the uniformity of international law are less convincing in the latter context.

4.3.5 Taking Stock: a Purposeful Rejection of Constitutional Deference

The question of constitutional deference evokes complicated matters of political theory and legal philosophy, and relates to other fundamental debates in international law touching upon controversial issues such as State sovereignty, democracy, and pluralism. Several of the arguments raised against deference by some scholars provide a reason in favour of deference to other scholars. For instance, whereas some denounce the risk that deference poses to a uniform application of international law, others appreciate the diversity and pluralism that results from deference. Some consider it problematic that international courts subject domestic democracy to review, whereas others advocate such review as an indispensable prerequisite for legitimate governance. Moreover, many of the arguments for and against deference are incommensurable, which complicates making a final, over-all assessment. It is difficult to weigh, for instance, an argument in favour of deference on grounds of democratic accountability against the argument that the parties in a dispute should

Courts 61. For criticism see eg Shelton, 'The Boundaries' (n 182) 134: 'it risks moving to the lowest common denominator, halting the teleological approach that emphasizes the objective of protecting human rights'. See also Shai Dothan, 'In Defence of Expansive Interpretation in the European Court of Human Rights' (2014) 3 Cambridge J of Int'l and Comp L 508, 517-518, noting that 'recalcitrant states' had a disproportionate impact on the drafting of the Convention, whereas new member States have not had an impact at all.

[211] Lord Mackay of Clashfern, 'The Margin of Appreciation and the Need for Balance' in Mahoney, *Protecting Human Rights* (n 143) 842, noting that the 'broad terms of the Convention make possible a wide variety of interpretations'. Lord Mackay also observes that the Court rules mostly through majority judgments, demonstrating disagreement even within the Court.

be treated equally. In response to this complexity, I propose a focus on the notion of the separation of powers as the determinant rationale.

Questions of constitutional deference are by definition closely related to the concept of the separation of powers, since deference is a tool to shift the boundary between judicial and other powers.[212] Consequently, the question of whether such deference in international courts and tribunals is appropriate is a different way of asking how to separate the powers of international adjudicators on the one hand and States on the other. In the domestic context, judicial deference has emerged as a response to the ambiguous role ascribed to courts within constitutional frameworks. The judiciary provides a check on the powers exercised by other branches of government, ensuring that political institutions cannot monopolise public power.[213] At the same time, the judiciary is itself a branch of government whose powers should be restricted.[214] Courts should not overstep their powers and encroach upon those of others. Consequently, the separation

[212] Claus-Dieter Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law' (2004) 7 JIEL (2004) 491, 493: '[i]n any legal system, including both EU and WTO law, standard of review is one of the mechanisms used to guarantee the separation of powers'.

[213] Mikael Madsen, 'Bolstering Authority by Enhancing Communication: How Checks and Balances and Feedback Loops can Strengthen the Authority of the European Court of Human Rights' in Joana Mendes and Ingo Venzke (eds), *Allocating Authority. Who Should Do What in European and International Law?* (Hart 2018). This role is sometimes emphasised as an argument against deference. See for the latter argument in the US context, Philip Hamburger, '*Chevron* Bias' (2016) 84 George Washington L Rev 1187. Lord Hoffmann of the United Kingdom House of Lords famously held that: 'the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference'. Earlier, he considered 'although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts'. *R v British Broadcasting Corp*, UK House of Lords, Judgment of 10 April 2003, para 75-76.

[214] Alexander Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962): '[t]he least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known'.

of powers requires some form of judicial review, but at the same time it poses limits to such review, in order to prevent a *gouvernement des juges*.[215] It has been noted that:

> When courts defer to the decision-maker, they give effect to the limits of their constitutional mandate. If the courts were not to pay respect to the responsibility of the other branches in this way, they would simply fail in their constitutional duty. Giving latitude to the other branches, therefore, is a constitutional imperative prescribed by the separation of powers.[216]

Doctrines of judicial deference enable courts to play this delicate role.[217] They allow the judiciary to secure the separation of powers without becoming monocratic itself.

Once the separation of powers is identified as the normative foundation of judicial deference, the question arises to what extent this rationale requires judicial deference in the international context as well. In response, I submit that the limited powers of international courts and tribunals militate against such deference. Even if international courts have the power to review State conduct against international norms, the impact of their decisions on the domestic legal sphere is limited. The distribution of actual power between an international court on the one hand and a respondent State on the other as a matter of international law and politics heavily favours the latter. International judicial decisions have no immediate impact on the domestic legal order and States possess a variety of both lawful and unlawful means to resist compliance. Consequently, there is no real need for deference in international courts and tribunals, as their power over

[215] The notion *gouvernement des juges* became popular through Edouard Lambert's 1951 book, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis. L'expérience américaine du contrôle judiciaire de la constitutionalité des lois*. See Luc Heuschling's review in 59 Revue internationale de droit comparé 958 (2007).

[216] Tom Zwart, 'Deference Owed under the Separation of Powers', in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (OUP 2007) 87-88: '[w]hen courts defer to the decision-maker, they give effect to the limits of their constitutional mandate. If the courts were not to pay respect to the responsibility of the other branches in this way, they would simply fail in their constitutional duty. Giving latitude to the other branches, therefore, is a constitutional imperative prescribed by the separation of powers.' cf Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 269: '[t]he judicial review of legislation is an obvious encroachment upon the principle of the separation of powers'.

[217] See for a discussion of the practice of the United States Supreme Court in this respect, Katy Harriger, 'Judicial Supremacy or Judicial Defense? The Supreme Court and the Separation of Powers' (2011) 126 Political Science Q 201; Becroft, *The Standard of Review* (n 45) 10-11.

respondent States is weak as a matter of law and fact. Since there is no real possibility that international adjudicators become 'super-legislators',[218] separation of powers concerns do not justify the adoption of constitutional deference.

This conclusion rejecting constitutional deference is further strengthened by the conceptual confusion that deference creates. Whereas deference leaves the interpretation and application of international law obscure, it is preferable that adjudicators provide an affirmative conclusion on the scope and content of the relevant obligations. This does not mean that adjudicators should always maximise the content of international law or adopt expansive interpretations. On the contrary, adjudicators may have good reasons to consider State sovereignty and the legitimacy of domestic decision-making when interpreting international obligations. A constructive incorporation of such concerns, however, would lead to restrictive interpretation rather than constitutional deference. Unlike deference, restrictive interpretation provides clarity about the content of international obligations, in accordance with the adjudicator's judicial task.

4.3.5.1 The Separation of Powers and the Perks of Sovereignty

The concept of the separation of powers stipulates that in order to prevent monocracy, governmental powers should be distributed over different institutions. In a famous passage in *De l'Esprit des Lois*, Montesquieu considered that:

> Lorsque, dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement. … Tout serait perdu, si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçaient ces trois pouvoirs: celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers.[219]

[218] José Alvarez, 'What are International Judges for? The Main Functions of International Adjudication' in Cesare Romano *et al* (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 171.

[219] Charles-Louis de Secondat de Montesquieu, *De l'esprit des lois* (1758), Livre XI, Chapitre VI. See for a discussion of Montesquieu's doctrine in its historical context, Armin Uhler, *Review of Administrative Acts. A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (Michigan 1942) 3-

The separation of powers prevents such an accumulation of power. It is 'a device for ensuring that no single political actor has too much power or can direct the political system to his or her own purposes'.[220] Domestic system implement the separation of powers in different ways,[221] but the pertinence of its fundamental rationale is widely recognised.[222] It prevents abuses of power and facilitates careful and accountable decision-making.[223]

In international legal scholarship, there has been some debate about the relevance of the separation of powers at the international level. Commentators commonly note that the differences between the domestic and the international context impede a direct importation of the logic of the separation of powers to the international level. As noted by Joana Mendes and Ingo Venzke, it may be 'questionable to look at the allocation of authority in international and European law in light of an idea of the separation of powers that matured in a domestic context of governance that has taken a different, more defined, constitutional setup'.[224] At the same time, they note that 'the core normative programme that is vested in separation of powers thinking – above all that authority

18. Other classic expressions are found in the works of John Locke and in the *Federalist Papers*. See Möllers, *The Three Branches* (n 35) 16-40.

[220] Anthony Lang and Antje Wiener, 'A Constitutionalising Global Order: An Introduction' in Lang and Wiener, *Handbook on Global Constitutionalism* (n 59) 11.

[221] See also David Landau and David Bilchitz, 'The Evolution of the Separation of Powers in the Global South and Global North' in David Landau and David Bilchitz (eds), *The Evolution of the Separation of Powers. Between the Global North and the Global South* (Elgar 2018) 19, arguing that 'traditional conceptions of the separation of powers may be less applicable in the global south, potentially leading to more flexible and aggressive conceptions of the judicial role'. See also, Neil Parpworth, 'The South African Constitutional Courts: Upholding the Rule of Law and the Separation of Powers' (2017) 61 J of African L 273.

[222] Constance Grewe and Hélène Ruiz Fabri, *Droits constitutionnels européens* (PUF 1995) 359. Maurice Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 2. In spite of all sorts of criticism raised against the principle, 'it is still widely held to be a procedural and institutional prerequisite for providing the state and its laws with legitimacy'. Hans-Martien ten Napel *et al*, 'Introduction' in Hans-Martien ten Napel and Wim Voermans (eds), *The Powers that Be. Rethinking the Separation of Powers. A Leiden Response to Möllers* (Leiden University Press 2015) 12.

[223] Daniel Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 Yale L J 1490, 1534.

[224] Joana Mendes and Ingo Venzke, 'Introducing the Idea of Relative Authority' in Mendes and Venzke, *Allocating Authority* (n 213) 18. cf Venzke and Von Bogdandy, *In Whose Name?* (n 84) 125: '[t]he maxim of the democratic separation of powers cannot simply be transferred onto the exercise of international public authority without further ado'; 193: 'we are dealing with a question of the separation of powers, though in a new guise, given the institutional set-up of international law'.

be divided and connected in specific ways that combines ways of acting with legitimacy assets – that is an idea that does travel well and that is insightful for the exercise of authority beyond the state'.[225]

Often, discussions about the relevance of the notion of the separation of powers to international law focus on the existence or absence of a horizontal balance of power within international organisations, searching for the classical division between legislative, executive, and judicial powers.[226] Along similar lines, one can envisage a multilevel separation of powers between domestic and international legislative and executive institutions on the one hand, and the judiciary, both national and international, on the other. In furtherance of such a separation, one can distinguish between legal assessments, to be undertaken by international courts and tribunals, and political ones, to be left to domestic or international political institutions. A separation of powers along these lines would be reminiscent of the controversial 'political question' doctrine that exists in some domestic jurisdictions.[227] Yet where the distinction between legal and political questions is already difficult to make in the domestic context, it is even more so on the international level.[228] As the ICJ repeatedly noted, 'so many questions which arise in international life' have both legal and political aspects, which suggests that a distinction between legal and political questions in international adjudication would be a matter of framing rather than substance.[229] Moreover, some systems of international adjudication have the expressly stated purpose of 'de-politicizing'

[225] Mendes and Venzke, 'Introducing the Idea' (n 224) 18.

[226] Eoin Carolan, 'Balance of Powers' in Lang and Wiener, *Handbook on Global Constitutionalism* (n 59) 214. cf *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ, Judgment of 26 November 1984, para 89-98, where the Court discusses the US' claim that the dispute should be dealt with by other UN organs.

[227] John Harrison, 'The Political Question Doctrines' (2018) 67 American University L Rev 457. For a critical discussion of the doctrine of the 'actes de gouvernement' in the French context, see Paul Duez, *Les actes de gouvernement* (Dalloz 2006).

[228] Jed Odermatt, 'Patterns of Avoidance: Political Questions before International Courts' (2018) 14 Int'l J of L in Context 221, 223. Odermatt submits, however, that it is useful to distinguish between 'political questions' and 'politically sensitive' disputes, of which the latter would not necessarily fall under the former.

[229] eg *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para 13; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004, para 41. cf Lauterpacht, *The Function of Law* (n 148) 171-173; Brigitte Stern, 'Are Some Issues Too Political to Be Arbitrable?' (2009) 24 ICSID Rev 90, 97: '[a]s soon as a State appears on the scene, political elements follow … a State's action is always driven by considerations of public interest, involving political choices'.

disputes by subjecting them to the scrutiny of international adjudicators.[230] In other words, such forms of international adjudication are precisely created to shift certain disputes from political actors to international courts and tribunals.[231]

For the purposes of discussing judicial deference towards respondent States, a vertical application of the separation of powers is more relevant. This approach acknowledges that the review exercised by international courts and tribunals concerns primarily the responsibility of the respondent State as a whole, which may include the actions of the judiciary. From this point of view, the domestic judiciary forms part of the decision-making framework of the State, rather than of a multilevel judiciary checking the powers of domestic legislative and executive institutions.[232] Consequently, in regard to the vertical relationship between an international adjudicator and a respondent State, the focus is not on a functional distribution of different tasks but on the appropriate distribution of power between these different vertical levels, with the aim of avoiding an excessive accumulation of power.[233]

Several scholars have noted the possible relevance of the separation of powers doctrine for international judicial deference specifically. Anthea Roberts notes that 'the domestic justification for deferential standards of review is derived from and justified by the constitutional law concept of separation of powers', but wonders to what extent this rationale is 'applicable in relations between States and international tribunals'.[234] Stephan Schill adopts the language of the separation of powers to propose a nuanced understanding of the role of investment arbitration tribunals, which

[230] The International Centre for Settlement of Investment Disputes (ICSID) has this stated perspective. See Ibrahim Shihata, 'Towards a Greater Depoliticization of Investment Disputes: the Role of ICSID and MIGA' (1986) 1 ICSID Rev 1, 4.

[231] A different question is whether this approach works in reality, see for an empirical assessment Geoffrey Gertz *et al*, 'Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?' (2018) 107 World Development 239.

[232] Ioannidis, 'Beyond the Standard of Review' (n 4) 92-93: 'the issues surrounding the standard of review are even more challenging at the international level … [W]hile an intrusive standard of review employed by a domestic court means more power for the judiciary vis-à-vis the legislature or the administration, an intrusive standard of review employed by an international court means more power for the judiciary *and at the same time* more power for the international level of governance'.

[233] To some, this aspect concerns a 'division' rather than a 'separation' of powers. See Jeremy Waldron, 'Separation of Powers in Thought and Practice?' (2013) 54 Boston College L Rev 433. Others prefer the term 'balance' of powers, see Carolan, 'Balance of Powers' (n 226) 212.

[234] Roberts, 'The Next Battleground' (n 50) 178.

does not copy the domestic principle of the separation of powers at the international level, but rather adds an extra – international – layer to it: 'in concretizing the standard of review one must draw on both international and domestic law and practice regarding the allocation of power between public institutions in a separation of powers framework'.[235]

In furtherance of these suggestions, I suggest that the notion of the separation of powers as applied to the vertical relationship between an international adjudicator and a respondent State does not require judicial deference in international courts and tribunals. Compared to decisions adopted by domestic courts, international decisions have only a limited impact on the domestic legal order. None of the international courts and tribunals investigated in this study has the power to strike down domestic legislation.[236] Even if an international decision aspires to effectuate a change in domestic legislation or politics, such change can only occur through the mediation of the State itself. Therefore, concerns about a *gouvernement des juges* cannot have the same relevance at the international level as at the domestic level. The main threat that the principle of the separation of powers seeks to address, namely monocracy, is less persuasive with regard to international than domestic courts. The following short overview of remedies in international courts and tribunals further explains the point, while noting some relevant differences between the regimes.

Disputes before the ICJ and the ITLOS are generally unlikely to have a wide impact on domestic legal orders because of their subject matter. Even so, the ICJ is generally 'cautious' in

[235] Schill, 'Deference in Investment Treaty Arbitration' (n 9) 580. See also 607: '[r]econceptualizing the standard of review in a separation of powers-framework that understands investment treaty tribunals as having a dual function as domestic and international courts, which need to balance their authority with that of states by recourse to comparative public law, may therefore be one piece in the puzzle in enhancing the legitimacy of the current system of international investment protection'.

[236] Greer and Wildhaber, 'Revisiting the Debate' (n 31) 674. cf Venzke and Von Bogdandy, *In Whose Name?* (n 84) 197: 'as a rule international courts can only determine a violation of the law; they do not possess the authority to declare that an internationally unlawful act is void or inapplicable'. Başak Çalı, 'International Judicial Review' in Lang and Wiener, *Handbook on Global Constitutionalism* (n 59) 292. The IACtHR has sometimes come close to assuming this power. See below n 262 and accompanying text. For an argument that, ideally, international courts should have this power, see Antonio Cassese, 'Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012). See also Eckart Klein, 'Should the Binding Effect of the Judgments of the European Court of Human Rights be extended?' in Mahoney, *Protecting Human Rights* (n 143).

ordering specific State conduct.[237] Declaratory judgments are the most common remedy awarded by the ICJ, and they leave it 'to the discretion of the wrongdoing state to take appropriate measures to comply with international law'.[238] In international investment law, the emphasis is not on primary remedies, which have a preventive or restorative function, but on secondary remedies, which have a compensatory function.[239] It has been noted that even if tribunals have formally the option to order primary remedies, '[t]he vast majority of awards … goes straight to compensation and does not even bother to discuss other remedies, which are also hardly ever addressed by the parties'.[240] Consequently, adverse awards have no direct impact on the domestic legality of the contested measure, if still relevant.[241] Some scholars have argued that large damage awards or

[237] Christine Gray, 'Remedies' in Romano, *The Oxford Handbook of International Adjudication* (n 218) 877.

[238] ibid 876. Andrea Gattini, 'Domestic Judicial Compliance with International Judicial Decisions: Some Paradoxes' in Ulrich Fastenrath *et al* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011). For some salient examples, see *LaGrand (Germany v United States)*, ICJ, Judgment of 27 June 2001, para 125; *Avena and Other Mexican Nationals (Mexico v United States)*, ICJ, Judgment of 31 March 2004, para 131.

[239] Anne van Aken, 'Primary and Secondary Remedies in International Investment Law and National State Liability. A Functional and Comparative View' in Schill (ed), *International Investment Law and Comparative Public Law* (n 32) 723: 'whereas municipal legal orders tend to be reluctant to grant pecuniary damages and require the use of (preventive) primary remedies against the (illegal) act *per se*, international investment law most heavily relies on *ex post* secondary remedies'. The *LG&E* tribunal considered that it risked 'undue interference' with Argentina's sovereignty if it would seek to compel Argentina to modify an existing legal situation 'by annulling or enacting legislative and administrative measures'. *LG&E Energy Corp v Argentina*, ICSID Case No ARB/02/1, Award of 25 July 2007, para 87. See also *Achmea BV v* Slovakia, PCA 2013-12, Award on Jurisdiction and Admissibility of 20 May 2014, para 251. See also Berk Demirkol, 'Remedies in Investment Treaty Arbitration' (2015) 6 J of Int'l Dispute Settlement 403.

[240] Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review. A Theoretical and Comparative Study* (Europa Law 2013) 346. Pirker compares investment arbitration to an insurance contract, providing investors with a venue to recover economic damage incurred by a failed investment. 'As a result, arbitrators' main task seems to consist mostly in determining a violation and finding appropriate compensation than in re-assessing the balancing of interests undertaken by a legislator or administrator in order to suggest a "better" balance'. See also Andreas Kulick, 'Book Review of Stephan Schill (ed), International Investment Law and Comparative Public Law' (2011) 22 EJIL 917, 922; Choudhury, 'Recapturing Public Power' (n 51) fn 114. See for some examples of tribunals considering restitution, Diane Desierto, 'State Controls over Available Remedies in Investor-State Arbitration' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2017) 279-281.

[241] Benedikt Pirker notes that 'the investor has typically already left the country and is simply looking for compensation'. Pirker, *Proportionality Analysis* (n 240) 347. Stephan Schill, *The Multilateralization of International Investment Law* (CUP 2009) 373: investment treaties 'only entitle to damages in case the host State violates its obligations without assuming normative supremacy'. Schill also notes, however, that 'damages as a remedy sufficiently pressure States into complying with and incorporating the normative guidelines of investment treaties into

even the possibility of such awards restrains domestic decision-making,[242] but the evidence that would support a causal link of this kind is tentative.[243] It has been concluded that:

> [T]he regulatory chill thesis assumes that the prospect of having to pay compensation will cause States to forbear from taking action, despite compelling regulatory objectives. While the apprehension of international liability may prompt reflection and

their domestic legal order'. cf Burke-White and Von Staden, 'Private Litigation' (n 24) 294: '[a]n even stronger case for alternative standards of review … arises in a subset of these public law disputes involving what we have termed quasi-constitutional adjudication. These disputes implicate changes to a state's economic and social constitution, which have wide ranging ramifications. These are cases in which a state's essential interests are at stake and in which the result of the litigation will impact the social and economic life of the state. … In these cases, the need for public law standards of review is even more urgent as arbitral tribunals are transformed into public law, quasi-constitutional adjudicators.'

[242] eg Ray Jones, 'NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to be Embraced or a Sword to Be Feared?' [2002] Brigham Young University L Rev 527, 545; Choudhury, 'Recapturing Public Power' (n 51) fn 319.

[243] Ashley Schram *et al*, 'Internalisation of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill' (2018) 9 Global Policy 193. See for examples of case studies eg Kyla Tienhaara, 'What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries' (2006) 6 Global Environmental Politics 73, 96, noting that 'the threat of arbitration clearly influenced the [Indonesian] government decision to allow open-cast mining to proceed in protection forests'; Kyla Tienhaara, 'Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana' (2006) 6 Int'l Environmental Agreements: Politics, Law and Economics 371, 392: 'the chilling effect is found both in the threat of lost investment and the threat of arbitration'; Gus van Harten and Dayna Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 J of Int'l Dispute Settlement 92, 93, noting that '[g]overnment ministries have changed their decision-making to account for trade concerns including ISDS'. Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital* (CUP 2013) 181-187. In her empirical study Mavluda Sattorova looked for positive, 'good governance' effects of investment law and arbitration on host States, but concluded that: 'host states do not necessarily respond to their encounter with investment treaty law by becoming more risk-averse and compliant with good governance norms'. Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance* (Hart 2018) 196. Cotula, 'Democracy and International Investment Law' (n 56) 362: '[m]ethodological challenges constrain systematic evidence, because information about government action and its motivations is often not in the public domain, and because counterfactuals – whether authorities would have acted differently in the absence, or presence, of an applicable investment treaty – are typically not available'.

> careful tailoring of means to ends, it seems less likely to cause abandonment of legislation at the heart of a government's mandate.[244]

Unlike investment arbitration, the dispute settlement system of the WTO pursues actual compliance with the conclusions and recommendations of panels and the AB.[245] According to the DSU, the objective of the WTO's dispute settlement is 'usually to secure the withdrawal' of measures found to be WTO-inconsistent.[246] In such cases, the panels and the AB 'shall recommend that the Member concerned bring the measure into conformity', and 'prompt compliance' with such recommendations 'is essential in order to ensure effective resolution of disputes'.[247] In other words, the WTO system of remedies is 'prospective': its purpose is the elimination of the WTO-inconsistency.[248] As a consequence, the potential impact of adverse WTO rulings on the domestic

[244] Jack Coe and Noah Rubins, 'Regulatory Expropriation and the *Tecmed* Case: Context and Contributions' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 599. cf Sattorova, *The Impact of Investment Treaty Law* (n 243) 17: '[w]here the costs of breaching investment treaty provisions are less than the host state's gain from the same breach, the availability of monetary remedies may in fact render it considerably more attractive for the host state to choose breach over compliance. As long as the injured investor is compensated for its losses, investment treaty law implicitly allows host states to effectively opt out from the obligation to treat foreign investors in accordance with good governance standards'; 124: '[t]he primacy of monetary remedies and the relatively limited space for non-pecuniary relief in investment treaty law points to the subordinate role that compliance plays in the hierarchy of the international investment regime's goals'.

[245] José Alvarez distinguishes investment arbitration from the WTO regime, noting that 'the point of investor-State dispute settlement is to secure a compensatory remedy for past harms done', whereas the purpose of WTO remedies is 'to get States accused of violations to correct their mistakes'. Alvarez, *The Public International Law Regime* (n 140) 52. See also Diane Desierto, 'Relative Authority and Institutional Decision-making in World Trade Law and International Investment Law' in Mendes and Venzke, *Allocating Authority* (n 213) 289. For a general introduction to WTO remedies, see Manfred Elsig *et al*, 'Dispute Settlement Mechanism – Analysis and Problems' in Daunton, *The Oxford Handbook on the World Trade Organization* (n 44); Mitsuo Matsushita *et al*, *The World Trade Organization: Law, Practice, and Policy* (3rd edn OUP 2015) 111-154.

[246] WTO Dispute Settlement Understanding, Article 3(7).

[247] ibid, Articles 19(1) and 21(1).

[248] *United States – Subsidies on Upland Cotton (US – Upland Cotton)*, WTO DS267, Art 21.5 AB Report of 2 June 2008, fn 494. cf Andrea Hamann, *Le contentieux de la mise en conformité dans le règlement des différends de l'O.M.C.* (Brill 2014) 725: '[t]raduit dans le vocabulaire du droit international général, c'est dire que le système de l'O.M.C. s'inscrit tout entier dans l'objectif de maintenir la légalité, ou de la rétablir lorsqu'elle est compromise'.

legal order is larger than in the other regimes mentioned so far.[249] Yet, even in this context, that impact is not immediate. First of all, the decisions adopted by panels or the AB formally need to be adopted by the Dispute Settlement Body (DSB).[250] While a rejection of a panel or AB report is a merely theoretical option because of the negative consensus rule, the possibility of discussion within the DSB allows the member found to be non-compliant to raise concerns and assess support among other members.

> The debate gives the opportunity to the losing party to let off steam and voice its disappointment, and sometimes even vent its frustration at having lost or having made arguments that could find no favour with the panel or the Appellate Body. Sometimes, it even serves as a forum where the winning party can caution the judicial organs that some aspects of the report should not be carried too far or too easily be extrapolated to other areas of WTO law. The debate becomes particularly valuable, when not only the winning party crows victory and the losing party protests more or less vehemently, but when other Members join the debate and go beyond some perfunctory remarks to support or to express doubts about the report that has just inevitably been adopted.[251]

Moreover, in spite of its formal insistence on compliance, the DSU recognises the possibility of non-compliance, balanced by compensation or retaliation.[252] Even if the potential resort to

[249] For that reason, Pieter Jan Kuijper advocates that in the WTO, 'we should go in the direction of accepting compensation and suspension of concessions as full alternatives to compliance'. Pieter Jan Kuijper, 'Remedies and Retaliation in the WTO: Are They Likely to Be Effective? The State Perspective and the Company Perspective' (1997) 91 ASIL Proceedings 282, 284-285.

[250] WTO Dispute Settlement Understanding, Article 16(4), Article 17(14). Barton, *The Evolution of the Trade Regime* (n 145) 85: 'members dissatisfied with a particular decision typically signal disapproval, often through a diplomatic statement at a DSB meeting'.

[251] Pieter Jan Kuijper, 'WTO Institutional Aspects' in Daniel Bethlehem *et al* (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 122.

[252] Judith Bello, 'The WTO Dispute Settlement Understanding: Less is More' (1996) 90 AJIL 416, 417: '[c]ompliance with the WTO, as interpreted through dispute settlement panels, remains elective. … any WTO member may exercise its sovereignty and take action inconsistent with the WTO Agreement, provided only that it compensates adversely affected trading partners or suffers offsetting retaliation'. Bello's views on the legality of breach were challenged by John Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation' (1997) 91 AJIL 60; John Jackson, 'International Law Status of WTO DS Reports: Obligation to Comply or Option to "Buy-Out"?' (2004) 98 AJIL 109.

retaliation is commonly considered to have the function of inducing compliance,[253] it has nonetheless been concluded that the DSU 'affords WTO members the option to violate WTO obligations for a measured "price"', which is restricted to undo the harm done by the violation to complaining members, and not designed to 'coerce compliance'.[254] Irrespective of the question of whether sustained non-compliance would be legal, it is clear that the DSU gives losing members room for manoeuvre, which decreases the risk of an overly powerful dispute settlement system.

The decisions of regional human rights courts, finally, have the largest potential to impact the domestic legal order. Traditionally, these courts have focused on declaratory judgments, sometimes combined with compensation: '[t]o grant measures carrying a purpose beyond that of compensation was considered as interfering with the sovereign role of states to determine, by themselves, the ways in which to redress violations'.[255] The ECtHR has repeatedly considered that its judgments are 'essentially declaratory' and leave 'to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation'.[256] A decision of the Court 'cannot of itself annul or repeal' measures found to be in violation of the Convention.[257] Yet in practice, even if the Court's jurisdiction is limited to the victims that brought the case, it is 'inevitable that the Court's decision will have effects extending beyond the confines' of a

[253] Geraldo Vidigal, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective' (2013) 16 JIEL 505, 523-525. For an argument that focusing exclusively on compliance as the purpose of retaliation overlooks other purposes, notably mutually agreed solutions, see Michelle Limenta, *WTO Retaliation: Effectiveness and Purposes* (Bloomsbury 2017).

[254] Alan Sykes, 'The Dispute Settlement Mechanism: Ensuring Compliance?' in Martin Daunton *et al* (eds), *The Oxford Handbook on the World Trade Organization* (OUP 2012) 561, 568. For an argument in favour of introducing financial compensation in the WTO, see Marco Bronckers and Naboth van den Broek, 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement' (2005) 8 JIEL 101.

[255] Leiry Cornejo Chavez, 'New Remedial Responses in the Practice of Regional Human Rights Courts: Purposes beyond Compensation' (2017) 15 ICON 372, 391.

[256] *Marckx v Belgium*, ECtHR (Plenary) 6833/74, Judgment of 13 June 1979, para 58; *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2)*, ECtHR (GC) 32772/02, Judgment of 30 June 2009, para 61. Article 13 of the Convention does not oblige States to provide a remedy allowing challenges to domestic law on the ground of being contrary to the Convention. *James and Others* (n 71) para 85.

[257] *Marckx v Belgium* (n 256) para 58. Mark Villiger, 'Binding Effect and Declaratory Nature of the Judgments of the European Court of Human Rights: An Overview' in Anja Seibert-Fohr and Mark Villiger (eds), *Judgments of the European Court of Human Rights – Effects and Implementation* (Nomos 2014). Alec Stone Sweet, 'Sur la constitutionnalisation de la Convention européenne des droits de l'homme: cinquante ans après son installation, la Cour européenne des droits de l'homme conçue comme une cour constitutionnelle' (2009) 80 Revue trimestrielle des droits de l'homme 923, 933-934.

particular case, in particular when it deals with general issues of public policy.[258] The Court has often held that the Convention obliges States to implement appropriate measures to secure not only the rights of individual applicants but also of others in the same position.[259]

Moreover, the ECtHR as well as the IACtHR have begun to move beyond compensatory remedies, ordering States to reform legislation and 'to implement actions and programs which are normally decided within domestic negotiations of states policy agendas'.[260] The IACtHR has confirmed that it is 'competent to order a State to annul a domestic law when its terms violate [Convention] rights'.[261] In another case, it ruled that domestic amnesty laws violate the Convention and 'lack legal effect'.[262] Reference should also be made to the Court's doctrine of 'Conventionality control', which obliges domestic courts to judge domestic law and practice

[258] *Marckx v Belgium* (n 256) para 58. See for examples of policy changes instigated by ECtHR jurisprudence, Shelton, 'The Boundaries' (n 182) 134, 147. An example of legislative change in response to an ECtHR judgment against another State occurred in the Netherlands in the wake of the *Marckx* judgment. Michael Goldhaber, *A People's History of the European Court of Human Rights* (Rutgers 2007) 21. For changes instigated by IACtHR jurisprudence, see James Cavallaro and Stephanie Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 AJIL 768, 787, noting, however that the IACtHR's influence is weaker than that of the ECtHR.

[259] eg *S and Marper v United Kingdom*, ECtHR (GC) 30562/04 Judgment of 4 December 2008, para 134. Antonio Cassese argued that the Court should go further and 'after finding that a breach of the Convention has occurred on account of an inconsistent national law, *enjoin* the responsible state to change that law'. Cassese, 'Towards a Moderate Monism' (n 236) 197.

[260] Cornejo Chavez, 'New Remedial Responses' (n 255) 392. See Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn CUP 2013) 214-217, for cases where the IACtHR ordered legislative reform. Also Cassese, 'Towards a Moderate Monism' (n 236) fn 15. Thomas Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 Stanford J Int'l L 279; Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalism: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 Int'l Criminal L Rev 665, 684-694.

[261] *Garibaldi v Brazil*, IACtHR, Judgment of 23 September 2009, para 173. See also *Case of "The Last Temptation of Christ"*, IACtHR, Judgment of 5 February 2001, para 40: 'any norm of domestic law, irrespective of its rank (constitutional or infraconstitutional), can, by its own existence and applicability, per se engage the responsibility of a State Party to a human rights treaty'. See, generally, Letizia Seminara, *Les effets des arrêts de la Cour interaméricaine des droits de l'homme* (Bruylant 2009).

[262] *Barrios Altos v Peru*, IACtHR, Judgment of 14 March 2011, para 44. Manuel Góngora Mera, *Inter-American Judicial Constitutionalism. On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (IIDH 2011) 54.

against the Convention and its interpretation by the Court.[263] In the context of the ECtHR, a similar obligation is not explicitly recognised, but domestic courts commonly apply the Court's jurisprudence,[264] while the pilot-judgment procedure provides 'roadmaps towards compliance with the Convention beyond the individual case'.[265] Of course, these developments have been received with both approval and disapproval, depending on broader perspectives as to whether the human rights courts should show activism or restraint.[266] For current purposes, the relevant point is that the increasing intrusiveness of human rights remedies, in combination with the breadth and depth of the jurisprudence, render concerns about the impact of international judgments on domestic decision-making powers more pressing with regard to the regional human rights courts than with regard to the other institutions investigated in this study.[267]

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[263] For a critical analysis, see Jorge Contesse, 'The International Authority of the Inter-American Court of Human Rights: a Critique of the Conventionality Control Doctrine' (forthcoming 2018) Int'l J of Human Rights.

[264] For a comparative overview, see Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law* (Intersentia 2014). See for an overview of resistance, Giuseppe Martinico, 'National Courts and Judicial Disobedience to the ECHR: A Comparative Overview' in Arnardóttir and Buyse, *Shifting Centres* (n 190). The binding nature of ECtHR judgments was addressed by the German Constitutional Court in the *Görgülü* case. See Jörg Gerkrath, 'L'effet contraignant des arrêts de la CEDH vu à travers le prisme de la Cour constitutionnelle allemande' (2006) 67 Revue trimestrielle des droits de l'homme 713; Lech Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe' (2008) 6 Int'l J of Constitutional L 509.

[265] Andreas Paulus, 'From Implementation to Translation: Applying the ECtHR Judgments in the Domestic Legal Orders' in Seibert-Fohr and Villiger, *Judgments of the European Court of Human Rights* (n 257) 267-268. See also, in the same volume, Jacek Chlebny, 'How a National Judge Implements Judgments of the Strasbourg Court'. Giuseppe Franco Ferrari, 'National Judges and Supranational Laws. On the Effective Application of EU Law and ECHR' in Giuseppe Martinico and Oreste Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Law: A Comparative Constitutional Perspective* (Europa Law 2010). Catherine van de Heyning, 'Constitutional Courts as Guardians of Fundamental Rights. The Constitutionalisation of the Convention through Domestic Judicial Adjudication' in Patricia Popelier *et al* (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013). See for an explanation and application of the pilot judgment procedure, *Greens and MT v United Kingdom*, ECtHR, 60041/08, Judgment of 23 November 2010, para 106-115, ordering the respondent to 'introduce legislative proposals to amend' the ban on prisoners' voting.

[266] eg Thomas Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia J of Transnat'l L 351; Malarino, 'Judicial Activism' (n 260) 665.

[267] cf Geir Ulfstein, 'A Transnational Separation of Powers?' in Matthew Saul *et al* (eds), *The International Human Rights Judiciary and National Parliaments. Europe and Beyond* (CUP 2017) 30: '[j]udical review by the ECtHR is formally undertaken at the international level, but through its effects on national legal systems, it represents a new transnational separation of powers'.

Moving from the law to the reality of international affairs, it should be noted that States possess a variety of means to resist the enforcement of adverse rulings of international courts, which further limits the potential impact of such rulings.[268] Compliance with international judgments and decisions is not straightforward, but often an 'uncertain and, at times, lengthy process shaped by political and social dynamics'.[269] States can ignore rulings, refuse enforcement, or withdraw from the regime.[270] The point here is not to negate the legal bindingness of international judicial decisions[271] or to advocate non-compliance, but only to emphasise that the impact of such decisions on domestic legal orders is relatively limited, both as a matter of law and

[268] cf Bello, 'The WTO Dispute Settlement Understanding' (n 252) 417. cf Sykes, 'The Dispute Settlement Mechanism' (n 254) 565-566: 'even if Professor Jackson is right as a formal, 'legal' matter [about the illegality of breach], so what? Nothing in Jackson's argument negates the fact that violators can simply choose not to comply with rulings as a practical matter'. See also Karen Alter, 'Delegating to International Courts: Self-Binding vs. Other-Binding Delegation' (2008) 71 L and Contemporary Problems 37, 74, noting that 'courts rely primarily on voluntary compliance' and that 'the stronger the enforcement mechanism, the less likely it is to actually be used'.

[269] Alexandra Huneeus, 'Compliance with Judgments and Decisions' in Romano, *The Oxford Handbook of International Adjudication* (n 218). cf José Alvarez, 'State Sovereignty is Not Withering Away: A Few Lessons for the Future' in Cassese, *Realizing Utopia* (n 236) 35.

[270] Such resistance may be justified by 'legitimacy concerns that largely outstrip the legitimating power of formal legality'. André Nollkaemper, 'Conversations Among Courts' in Romano, *The Oxford Handbook of International Adjudication* (n 218) 536. See also Colm O'Cinneide, 'Saying "No" to Strasbourg: When Are National Parliaments Justified in Refusing to Give Effect to Judgments of International Human Rights Courts?' in Saul, *The International Human Rights Judiciary* (n 267); and, in the same volume, Andreas Føllesdal, 'Law Making by Law Breaking? A Theory of Parliamentary Civil Disobedience against International Human Rights Courts'. International investment law contains different options, depending on the applicable procedural framework, to legally challenge awards. See Jean-Christophe Honlet *et al* (eds), 'ICSID Annulment' and Lars Markert and Helene Bubrowski, 'National Setting Aside Proceedings in Investment Arbitration' in Marc Bungenberg *et al* (eds), *International Investment Law. A Handbook* (Hart 2015); Freya Baetens, 'Keeping the Status Quo or Embarking on a New Course? Setting Aside, Refusal of Enforcement, Annulment and Appeal' in Kulick, *Reassertion of Control* (n 240) 105-113.

[271] cf Von Staden, 'The Democratic Legitimacy of Judicial Review' (n 53) 1024: '[t]hat such international judicial review is in most cases a weak version of the domestic counterpart practiced by many national supreme and constitutional courts in that judgments of courts beyond the state do not normally result in the non-applicability or even nullity of conflicting national legislative, executive, or judicial acts …, is formally correct, but does not necessarily yield different outcomes: States that lose a case before an international court remain under the legal obligation to comply with the judgment in question, following from the binding nature of international judgments as laid down in most courts' statutes as well as from the generally applicable rules of state responsibility'.

politics.[272] The limited range of remedies available under international law, the cautious approaches adopted by most international adjudicators, and the options available to States to contest and reject adverse rulings, both legal and illegal, reduce the persuasiveness of concerns over judicial tyranny at the international level.[273]

Instead of focusing on remedies, scholars regularly emphasise the extent to which States party to a regime are able to correct international judicial decisions with which they do not agree. In domestic legal systems which provide the possibility of a legislative override, this reduces the need for judicial deference.[274] It has been argued that such overrides are largely absent in international law.[275] Writing about the WTO, Michael Ioannidis observes that '[i]n contrast to the domestic context, where the application of an overly intrusive standard of review by the courts might trigger the corrective reaction of other decision-makers, such as the legislature, there is,

[272] Even in the fields of human rights, there is some reason for scepticism in this regard. cf Möllers, *The Three Branches* (n 35) 214: '[t]o date, there is no effective protection of human rights outside of democratic states. This holds true even for the member states of the most effective regional system of international human rights protection: the European Convention on Human Rights. To the citizens of its members, it makes considerably more of a difference whether they live in Russia or in Sweden than whether they live within or beyond the ECHR system'.

[273] cf Venzke and Von Bogdandy, *In Whose Name?* (n 84) 197: '[t]his apparent weakness of international adjudication turns out to be a support for its legitimacy'. Çali, 'International Judicial Review' (n 236) 293: 'international judical review does not raise the same intensity of problems that are highlighted in the context of strong domestic judicial review: in all its manifestations, international judicial review is a weak form of judicial review'. Andreas von Staden has explained the scarcity of horizontal checks and balances in international organisations because of the strenght of vertical checks and balances, including veto powers, (the threat of) exit, treaty amendment and renegotiation, non-compliance and minimalist compliance. Vertical checks and balances on global governance arrangements 'always exist as a consequence of the nature of the international legal and political system in which states, as the formal masters of the treaties, can exercise their own authority as principals, through lawful or, if need be "unlawful" vetos and some other strategies'. Andreas von Staden, 'No Institution is an Island: Checks and Balances in Global Governance' in Mendes and Venzke, *Allocating Authority* (n 213) 138-139.

[274] A quite explicit example is section 33 of the Canadian Charter of Rights and Freedoms. See Peter Hogg and Allison Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 Osgoode Hall L J 75.

[275] eg Choudhury, 'Recapturing Public Power' (n 51) 788-789. Klabbers, *The Constitutionalization* (n 57) 151: '[u]nlike the situation in national law, individual national law-makers are not in a position to change the law if they disagree with the decisions of international tribunals. The counter-majoritarian character of international tribunals may thus be more strongly felt than in relation to national courts'. In the context of the ECtHR, Mikael Madsen proposes three different mechanism to enhance dialogue between the Court and the member States of the Council of Europe. Madsen, 'Bolstering Authority' (n 213) 96-98.

practically speaking, no such mechanism in the WTO'.[276] The formal or practical absence of a legislative override could be interpreted as an argument in favour of deference: '[u]sing an intrusive standard of review in this institutional context means, in effect, that the intrusion cannot be fought back'.[277] Anne Peters notes that, for that reason, judicial law-making is more problematic at the international than at the domestic level.[278]

In response, it should first be noted that mechanisms comparable to a legislative override are not entirely absent in international law. Previous sections of this study have discussed the power of the NAFTA Free Trade Commission to issue binding interpretations of the Agreement, and some tribunals have compared this mechanism to a legislative override.[279] Moreover, in the trade law context, Article IX:2 of the WTO Agreement provides that 'the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations' of covered Agreements.[280] According to the Appellate Body, this 'exclusive authority', which is not shared with panels or the AB,[281] can produce interpretations that are 'binding on all Members, including in respect of all disputes in which these interpretations are relevant'.[282] In theory, this mechanism gives the Membership the opportunity to correct interpretations provided by panels or the AB.[283]

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[276] Ioannidis, 'Beyond the Standard of Review' (n 4) 94. Herwig and Serdarevic, 'Standard of Review (n 88) 231.

[277] ibid.

[278] Anne Peters, 'Proportionality as a Global Constitutional Principle' in Lang and Wiener, *Handbook on Global Constitutionalism* (n 59) 262.

[279] *ADF Group Inc v United States*, ICSID ARB(AF)/00/1, Award of 9 January 2003, para 177; *Methanex Corp v United States*, UNCITRAL, Final Award of 3 August 2005, Part IV C para 22.

[280] Marrakesh Agreement establishing the WTO, Article IX:2.

[281] *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, WTO DS8, AB Report of 4 October 1996, 13: '[t]he fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere'. See also Article 3(9) of the DSU.

[282] *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WTO DS406, AB Report of 4 April 2012, para 257. Interpretations developed by panels and AB are binding only on the parties to the dispute, para 258.

[283] Claus-Dieter Ehlermann and Lothar Ehring, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements' (2005) 8 JIEL 803, 812-813, 819. See further 813: '[a]n independent (quasi-)judicial system, in which norms are clarified and thereby developed, should not be left without a counterweight (that is democratically more directly legitimized). If legislative response to judicial developments is not available or not working, the independent (quasi-)judiciary becomes an uncontrolled decision-maker and is weakened in its legitimacy. In domestic systems, such mechanisms of legislative response are usually available and important from a democratic point of view.' Tarcisio Gazzini, 'Can Authoritative

In practice, the mechanism has hardly been used,[284] possibly because it requires a heavy majority of three-fourths of the Members. Disagreement with the AB may not have reached such levels, even if certain decisions were considered controversial by many.

The fact that most regimes establishing international supervision do not contain corrective mechanisms like Article IX:2 WTO is not surprising in light of the limited impact of international decisions discussed earlier. Apparently, States generally consider that the risk posed by subjecting themselves to international supervision is not serious enough to necessitate a legislative override mechanism. Accordingly, the absence of such mechanisms is no reason for judicial deference. Even if States are subjected to the review of international courts and tribunals, their legal and factual powers are not limited in such a significant way that the separation of powers between international adjudicators and domestic institutions would be jeopardised. Moreover, States have the possibility to withdraw from the regime, which provides a corrective mechanism unparalleled in the domestic context.[285]

4.3.5.2 The Purpose of International Courts and Tribunals

The relatively weak impact of international remedies demonstrates that most international courts and tribunals have not been established to effectively intrude into the domestic legal order. This absence of strong judicial review in international courts and tribunals can be explained by reference to the purpose of these institutions. Apart from the regional human rights courts, international courts and tribunals do not have the purpose of legitimising the exercise of public power in a constitutional sense by providing checks on political institutions. Rather, international adjudication serves to settle disputes within sectoral fields of international law that have more

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Interpretation Under Article IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members?' (2008) 57 ICLQ 169, 181.

[284] Ehlermann and Ehring, 'The Authoritative Interpretation' (n 283) 8 JIEL 803, 818-819.

[285] Egerton-Vernon, 'Is Investment Treaty Arbitration a Mechanism' (n 29) 231. For a discussion general discussion of treaty exit, see Laurence Helfer, 'Exiting Treaties' (2005) 91 Virginia L Rev 1579. As to treaty amendment, 'the processes of negotiating international treaties, especially those of global reach, are slow and protracted'. Venzke and Von Bogdandy, *In Whose Name?* (n 84) 124. According to Venzke and Von Bogdandy, withdrawal 'can hardly be regarded as adequate, since it usually offers no realistic opportunities of choice', 125. See also Klabbers, *The Constitutionalization* (n 57) 127, noting that if States want to participate in international cooperation, their formal freedom to leave may be limited in practice.

instrumental aims. The execution of this mandate does not require that international judicial decisions have an immediate impact on the domestic legal order.[286]

The purpose of international adjudication can be analysed on a general level or on the level of the specific courts and tribunals.[287] On a general level, international adjudication serves to resolve disputes about rights and obligations under international law and to clarify the meaning of international norms.[288] On the level of the individual institutions, the ICJ and the ITLOS have the purpose of settling interstate disputes in the interest of peace.[289] Investment arbitration serves to provide foreign investors with a remedy to recover losses incurred because of host State conduct.[290] The purpose of the WTO dispute settlement system is explicitly mentioned in Article 3(2) of the DSU: 'it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of

[286] Likewise, there is generally not much political will for giving international law direct effect. Thomas Cottier, 'A Theory of Direct Effect in Global Law' in Armin von Bogdandy *et al* (eds), *European Integration and International Co-ordination* (Kluwer 2002); Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say. On the Relationship Between International and Domestic Constitutional Law' (2008) 6 ICON 397; Hélène Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?' (2014) 25 EJIL 151.

[287] The reference to the 'purpose' of international supervision is related to but not necessarily identical to the 'object and purpose' of the constitutive treaty. See for that latter notion Isabelle Buffard and Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 Austrian Rev of Int'l and Eur L 311; David Jonas and Thomas Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 Vanderbilt J of Transnat'l L 565.

[288] Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 Leiden J of Int'l L 49, 51: 'many scholarly treatises seem to take it as obvious that international courts are exclusively, or at least predominantly, instruments for settling disputes'. Even if Von Bogdandy and Venzke argue against one-dimensional understandings that ignore other functions, they acknowledge that '[a] first main function is and remains that of settling disputes in individual cases': '[w]hile this one-dimensional view is insufficient, the function of settling disputes certainly remains most salient'. Çali, 'International Judicial Review' (n 236) 295.

[289] Sir Franklin Berman, 'The International Court of Justice as an "Agent" of Legal Development?' in Christian Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 10, writing about both the PCIJ and the ICJ: 'this was to be *an institution for settling disputes*, and by doing so it was to contribute to world peace'. For the history behind the intricate system of dispute settlement established by the United Nations Law of the Sea Convention, see Sean Murphy, 'International Judicial Bodies for Resolving Disputes between States' in Romano, *The Oxford Handbook of International Adjudication* (n 218) 194-195.

[290] Pirker, *Proportionality Analysis* (n 240) 347. See for different perspectives on the field, Johannes Hendrik Fahner, 'The Contested History of International Investment Law. From a Problematic Past to Current Controversies' (2015) 17 Int'l Community L Rev 373.

interpretation of public international law'.[291] Article 3(7) adds that 'the aim of the dispute settlement mechanism is to secure a positive solution to a dispute'.[292] The purpose of the regional human rights courts, finally, can be seen as the protection of human rights against State interference.[293]

The foregoing gives a simplified overview of the purpose of international adjudication, which is in reality a contested topic.[294] States party to a constitutive treaty can have diverging views on the purpose of an international court or tribunal, and such views can change over time.[295] Moreover, the purpose of international adjudication can be seen differently by other stakeholders or by the adjudicators themselves.[296] Yet for now, such disagreement is only of limited relevance, because I will primarily make a negative claim about the purpose of international adjudication, namely that international courts and tribunals, with the exception of the human rights courts, do not share a fundamental purpose of domestic judicial review, which is to legitimise the exercise of State power.

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[291] WTO Dispute Settlement Understanding, Article 3(2).

[292] ibid Article 3(7).

[293] cf American Convention on Human Rights, Preamble: 'the essential rights of man … justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states'. *Hurtado v Peru*, IACtHR, Judgment of 26 January 1999 (preliminary objections), para 47: 'the purpose of International Law of Human Rights is to provide individuals with the means of protection of internationally recognized human rights against the State'. See for evolving understandings of the ECtHR's purpose, Wildhaber, 'Rethinking' (n 159).

[294] See David Caron, 'International Courts and Tribunals: Their Role amidst a World of Courts' (2011) 26 ICSID Rev 1; Alvarez, 'What are International Judges for?' (n 218); Von Bogdandy and Venzke, 'On the Functions' (n 288). A related debate inquires whether international courts should be considered agents or trustees. See eg Karen Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14 Eur J of Int'l Relations 33; Stone Sweet and Brunell, 'Trustee Courts' (n 210). The distinction concerns the extent of the court's discretionary authority and its accountability to a larger beneficiary than the States party to the constitutive treaty.

[295] Ortino, 'The Investment Treaty System' (n 32) 439-440. See also Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 5: '[i]nstitutions set up for the achievement of definite purposes grow to fulfil tasks not wholly identical with those which were in the minds of their authors at the time of their creation'. For this reason, I use the term 'purpose' rather than 'function', because the latter is only descriptive, while the former has a normative character.

[296] See Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 31-35, arguing that the purpose as understood by States party to a treaty deserve priority.

Within the domestic constitutional order, courts form part of an intricate system of checks and balances which are designed to prevent individual actors from seizing power at the cost of others and to preclude a tyranny of the majority. Courts play a delicate role within this exercise: by providing a check on other branches of government, they help to legitimise the exercise of government power. The logic of constitutional deference has been developed in this context, allowing judges to execute their mandate in a balanced manner, without arrogating the powers of other, notably the majoritarian, branches of government.

Many States have outsourced part of this constitutional mandate to international human rights courts, conscious that domestic institutions may not always be able to execute their mandate as they should. The role of the human rights courts is arguably complementary to domestic judicial review, preventing domestic excesses of power that would jeopardise the constitutional legitimacy of State power.[297] Alec Stone Sweet notes that '[l]a Convention est à ce jour un élément structurel important du droit interne des Hautes Parties Contractantes' and that 'la Cour de Strasbourg, par sa jurisprudence, est capable de changer fondamentalement les systèmes politico-légaux pour bon nombre de paysages politiques'.[298]

The review of the human rights courts is concerned with the legitimacy of State conduct in a broad, constitutional sense, and for that reason it is fundamentally different from that of other international adjudicators. The practice of the ECtHR and the IACtHR shows that these courts review virtually any type of government action, suggesting that international human rights law is actually a form of supranational public law.[299] As a consequence, the core arguments in favour of

[297] Greer and Wildhaber, 'Revisiting the Debate' (n 31) 674: 'the case for constitutional justice does not advocate that the Court should become a "constitutional court". It maintains, rather, that the Court is effectively one already'. See also David Kosař, 'Policing Separation of Powers: A New Role for the European Court of Human Rights' (2012) 8 Eur Constit L Rev 33, 62, noting that the ECtHR 'has been increasingly intervening in separation of powers within CoE member states', which 'calls for a particularly careful approach by the ECtHR and for a greater deference by the ECtHR to domestic actors'. See also Greer, 'What's Wrong' (n 201), advocating a 'constitutional mandate' for the ECtHR, rather than an 'individual justice model'. Evert Alkema, 'The European Convention as a Constitution and its Courts as a Constitutional Court' in Mahoney, *Protecting Human Rights* (n 143).

[298] Stone Sweet, 'Sur la constitutionnalisation' (n 257) 934-935.

[299] JG Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn Manchester Press 1993) 9: '[s]ince there is no aspect of national affairs which can be said to be without implications for one or other of the rights protected by the Convention, there is no matter of domestic law and policy which may not eventually reach the European Court'.

judicial deference have stronger validity in this context.[300] It is therefore unsurprising that both the ECtHR and the IACtHR recognise that their review is based on the principle of subsidiarity, even if their adherence to that principle may vary in practice. The notion of subsidiarity, of which judicial deference is a logical corollary, puts certain limits to the review powers of these courts, which would otherwise be in a position to impose their preferred answers to controversial policy questions on respondent States.

Yet the role of other international courts is not to legitimise the exercise of public power in a constitutional sense but to fulfil a narrower mandate, such as facilitating economic exchange or maintaining peace. Indeed, most international adjudicators deal only with a specific field of law.[301] This points to a fundamental difference between constitutional orders on the one hand and international law on the other:

> International institutions inevitably have functional authority over one or another specific sector of human activity, never the formal or effective power to coordinate various sectors into a single coherent fabric of law …. Constitutional systems, by contrast, paradigmatically govern and unite all aspects of the common good within their territories and for all persons subject to their authority.[302]

The fact that international courts and tribunals are only charged with the supervision of specific sectors of governance suggests that they are not tasked with reviewing the legitimacy of State conduct in a domestic constitutional sense. For that reason, it is confusing the use the label 'judicial review' to describe the purpose of these institutions. As noted by Başak Çali, to equalise the function of international courts and tribunals to judicial review entails a 'qualitative shift in how

[300] cf Samatha Besson, 'Human Rights as Transnational Constitutional Law' in Lang and Wiener, *Handbook on Global Constitutionalism* (n 59) 244: international human rights courts 'cannot and should not be identified with other international courts that enforce international law top-down and claim ultimate interpretative authority over domestic courts'.

[301] Von Staden, 'No Institution is an Island' (n 273): the 'authority of regional and global governance arrangements is relative … because each arrangement has jurisdiction only over a specified issue area, or subset thereof, and only over those states that have voluntarily submitted to it'.

[302] Carozza, 'The Problematic Applicability' (n 125) 59.

we understand the purpose and the role of international courts and tribunals in the international legal order'.[303]

> With the exception of human rights courts and the Court of Justice of the European Union, none of the institutions carry out judicial review of domestic decisions and legislation in ways similar to domestic courts. Indeed, outside the domain of courts that are able to rely on a bill of rights, the shift from an inter-state dispute resolution paradigm towards public-law judicial review-type functions, for inter-state institutions, such as the ICJ and the WTO, remains contested.[304]

Armin von Bogdandy and Ingo Venzke have warned against a 'one-dimensional' understanding according to which the only function of international courts is to settle individual disputes.[305] They note that various international courts have a function of 'controlling and legitimating public authority': '[t]hey move into the space of political decision-making that has, at least traditionally, been reserved for administrations or legislatures'.[306] Indeed, international adjudicators review State conduct in ways that can partly overlap with the review exercised by domestic courts, both in terms of subject matter and applicable rules. Yet this overlap does not mean that the function of international review should be equated with domestic judicial review. Even if international courts and tribunals review exercises of public power against legal rules, this does not mean that the purpose of such review is to secure the legitimacy of public power in a constitutional sense.[307]

Still, a variety of scholars have advocated precisely such an understanding of international adjudication. Especially within the paradigm of 'constitutionalisation', scholars argue that international courts and tribunals should pursue global justice in international affairs and advance the fulfilment of fundamental rights in any field of international law.[308] On this view, international

[303] Çali, 'International Judicial Review' (n 236) 291.

[304] ibid 294-295.

[305] Von Bogdandy and Venzke, 'On the Functions' (n 288) 53.

[306] ibid 58.

[307] Federico Ortino argues that 'the main object of an investment treaty is the establishment of a system of judicial review reserved for foreign investors'. Ortino, 'The Investment Treaty System' (n 32) 443.

[308] eg Ernst-Ulrich Petersmann, 'Need for a New Philosophy of International Economic Law and Adjudication' (2014) 17 JIEL 639, 668: 'all governance institutions - including international organizations - have duties to respect, protect,

courts and tribunals are 'agents of the "international community" bent on the pursuit of "justice" broadly understood'.[309] These approaches suggest that especially in circumstances where States and other political actors fail to do so, international courts and tribunals should engage in activism in the interest of the common good.[310] Such suggestions, however, are controversial. The ineffectiveness of political avenues of international law-making suggests that States disagree about the content of global justice. In that situation, it is difficult to see why international adjudicators should be encouraged to expand international law in ways they see fit.

When international adjudicators are requested to review domestic measures against international law, they do so in light of rules and obligations with a limited scope.[311] Even if open-ended standards are common in some fields, they apply within the confines of a specific sectoral regime. For example, in international investment law, treaty standards concern only the relationship between a host State and an investor. If international adjudicators were charged with ensuring good governance in a broad sense, their review would need to assess domestic policies in a comprehensive manner, balancing all the different interests involved in light of a complete legal framework. Granting this task to a variety of international adjudicators, in addition to the

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and fulfill cosmopolitan rights and contribute to institutionalized protection of "principles of justice" constituting, limiting, regulating, and justifying multilevel governance of transnational [public goods]'; Ernst-Ulrich Petersmann, 'Between "Member-Driven" WTO Governance and "Constitutional Justice": Judicial Dilemmas in GATT/WTO Dispute Settlement' (2018) 21 JIEL 103, 118: 'the universal recognition of individual rights of access to justice in national, regional, and worldwide legal systems … confirms this need for conceiving multilevel "judicial governance" as an "international judiciary" deriving its ultimate legitimacy from protecting "constitutional justice", equal rights of citizens and transnational rule of law'. See also Robert Howse and Ruti Teitel, 'Global Judicial Activism, Fragmentation, and the Limits of Constitutionalism in International Law' in Fastenrath, *From Bilateralism to Community Interest* (n 238).

[309] Alvarez, 'What are International Judges for?' (n 218) 173.

[310] Some have argued that the absence of a legislative body at the international level 'international courts should engage vigorously in lawmaking'. For a critical reflection, see Venzke and Von Bogdandy, *In Whose Name?* (n 84) 125. In the context of the WTO, see Robert Howse, 'Moving the WTO Forward – One Case at a Time' (2009) 42 Cornell Int'l L J 223, 228: '[i]n the presence of political and diplomatic impasse, the judiciary has an enhanced role in the preservation of the legitimacy of the system through evolving its practices to reflect shifting conceptions of legitimate international order'; Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 EJIL 9.

[311] cf Möllers, *The Three Branches* (n 35) 209, writing about the WTO: '[t]he dispute settlement bodies must come to their decisions in a judicial fashion and in a narrow and depoliticized way. The Dispute Settlement Bodies are therefore not allowed to assess the relationship between free trade and environmental protection as such but may only answer a narrowly defined legal question'. Niesen, 'Constituent Power' (n 59) 226.

domestic court system and the regional human rights courts, would risk repetitive reviews with conflicting outcomes. It also seems problematic to entrust such wide-ranging review to international adjudicators with expertise in narrow fields of international law.[312] Indeed, such approaches turn international courts and tribunals into actors of global governance, expanding their authority beyond the settlement of disputes within a confined legal framework.[313] Consequently, the conflation of judicial review in a constitutional sense and the settlement of disputes in sectoral fields of international law raises concerns about the legitimacy of the review exercised by international courts and tribunals, to which advocates of judicial deference seek to respond. By contrast, I argue that such concerns can be better addressed by a reaffirmation of the limited purpose of the relevant regimes and a distinction between international dispute settlement on the one hand and the judicial review exercised by domestic and human rights courts on the other.[314]

As long as the purpose of international courts and tribunals is understood in accordance with their narrow mandate and their limited powers in terms of the remedies they can impose, there is no need for constitutional deference in international adjudication. The review of international courts and tribunals is concerned with compliance with sectoral rules of international law and their

[312] cf Statute of the International Tribunal for the Law of the Sea, Article 2: '[t]he Tribunal shall be composed of a body of 21 independent members, … of recognized competence in the field of the law of the sea'; ICISD Convention, Article 14: '[p]ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance'; WTO DSU, Article 8(1): 'Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member', Article 17(3): 'The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'. Egerton-Vernon, 'Is Investment Treaty Arbitration a Mechanism' (n 29) 220. Jan Neumann and Elisabeth Türk, 'Necessity Revisited: Proportionality in World Trade Organization Law after *Korea – Beef*, *EC – Asbestos* and *EC – Sardines*' (2003) 37 J of World Trade 199, 231-233.

[313] Moreover, it seems difficult to justify why such review is available only to investors in the case of investment law or only to States or international organisations in the case of the WTO. Also the extent to which such visions of constitutionalisation are potentially dominated by particular domestic experiences is also problematic. Hélène Ruiz Fabri, 'Reflections on the Necessity of Regional Approaches to International Law Through the Prism of the European Example: Neither Yes nor No, Neither Black nor White' (2011) 1 Asian J of Int'l L 83, 97.

[314] I made this argument for investment arbitration specifically in Johannes Hendrik Fahner, 'From Dispute Settlement to Judicial Review? The Deference Debate in International Investment Law' in Michael Duchateau *et al* (eds), *Evolution in Dispute Resolution. From Adjudication to ADR?* (Eleven 2016) 80-85.

decisions have no bearing on the legitimacy of impugned measures as a matter of constitutional justice. Within that limited context, concerns over the distribution of powers between States and international adjudicators do not justify constitutional deference. Indeed, international courts and tribunals have neither the purpose nor the power to restrain domestic decision-making in ways that would raise concerns in light of the principle of the separation of powers.

4.3.5.3 The Ambiguities of Deference and the Alternative of Restrictive Interpretation

The case against constitutional deference in international adjudication is further strengthened by more practical concerns about the impact of deference on legal reasoning. Previous parts of this study have revealed conceptual ambiguities within the concept of deference that complicate disputes and obscure the final outcome of the case. When courts or tribunals adopt a deferential standard of review, it is often difficult to understand how this impacts upon the adjudicator's assessment. A first problem is that the distinction between complete and limited deference, even though formally convincing, proves difficult to apply in practice. Various attempts have been made to specify intermediate standards of review, such as specific tests or indications of a wider or narrower margin of appreciation.[315] Yet in practice, these standards tell us little about the ways in which the adjudicators exercise their review, beyond an increased likelihood that they will accept the decision made by the recipient of deference.[316] For this reason, it is unsurprising that academic debates about deference inevitably focus on exclusionary rather than limited deference. If there were a genuine alternative between exclusionary deference and *de novo* review, it would probably be acceptable to most opponents as well as proponents of deference.

A related difficulty with judicial deference in practice concerns the question of whether deference is the starting point or the outcome of the judicial assessment. If deference is the starting point of the analysis, this would mean that the adjudicators limit the intensity of their review and apply a deferential standard of review. Yet in reality, deference often functions as the outcome of the judicial assessment, expressing the conclusion that a certain assessment should be left to domestic decision-makers. The margin of appreciation plays precisely this dual role in the

[315] See section 3.3.

[316] cf D'Aspremont and Mbengue, 'Strategies of Engagement' (n 9) 266. Even if one follows Andrew Legg's concept of deference as a form of second-order reasoning, it is difficult to see how the final overall balancing of the different first- and second-order arguments takes place.

jurisprudence of the ECtHR: if the Court considers the margin of appreciation relevant, this sometimes means that the Court will adopt a deferential standard of review; yet it can also mean that the issue will be left to the appreciation of the respondent State.[317]

If deference is used as the *starting point* of the judicial assessment of the merits,[318] this suggests a bifurcation of the dispute: an initial series of arguments will be devoted to the calibration of the appropriate intensity of review; once this standard has been set, the merits of the dispute will be reviewed in accordance with the chosen intensity of review. Upon closer inspection, this bifurcation is often redundant in practice, because the arguments raised in the first stage can often be incorporated equally well in the second stage.[319] For instance, arguments related to local circumstances and the regulatory space of States that are often raised in favour of deference can be assessed by the adjudicators themselves when they interpret and apply rules of international law. Consequently, a preliminary debate over the appropriate standard of review adds an extra layer to the dispute that is hardly helpful to the resolution of the merits but rather prolongs and complicates the matter.[320]

If, alternatively, deference is the *outcome* of the judicial assessment, it is unclear what the state of the law is after the delivery of the judgment. Of course, this application of deference will

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[317] See the discussion in section 2.3.2. Oddný Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 European Constitutional L Rev 27, 47: 'partial deference engaging the systemic and normative elements alike is by no means the only possible result of applying the margin of appreciation doctrine. The Court may also in some instances defer completely to other decision makers'.

[318] *Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v Uruguay*, ICSID ARB/10/7, Award of 8 July 2016, Concurring and Dissenting Opinion of Gary Born, para 142: 'deference to sovereign measures is the starting point, but not the ending point, of evaluation of fair and equitable treatment claims'.

[319] Michael Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 ICLQ 638, 648-649. In addition, it is difficult to verify whether the chosen level of deference has been applied in reality. Kratochvíl, 'The Inflation of the Margin' (n 131) 337-340; Gerards, 'Pluralism' (n 123) 106; Alvarez, *The Public International Law Regime* (n 140) 370; Van Harten, *Sovereign Choices* (n 59) 94.

[320] cf the discussion of the ECtHR's judgments on prisoner disenfranchisement by Marco Goldoni and Pablo Marshall, noting that the dispute 'was framed in a decidedly depoliticised way or, more specifically, that the political value of the right to vote was never really put at stake'; that 'instead of focusing on the content of the right at stake, much of the conflict has taken place around the question of which institution ought to decide on the case'; and that 'the obsession for the jurisdictional question and the blindness towards the content of the right to vote have hampered a proper analysis of the role of proportionality analysis in all the relevant decisions'. Marco Goldoni and Pablo Marshall, 'The Prisoner's Dilemma. The Margin of Appreciation as Proportionality or Recognition?' in Agha, *Human Rights Between Law and Politics* (n 26) 111-112.

result in the finding that the contested measure does not breach the international obligations invoked against it. Yet that implication is not explicitly established by the adjudicators; instead, it is left to the respondent State to make the final determination as to the compatibility between the contested measure and international law. Consequently, a judgment that ends with judicial deference does not unequivocally affirm that the impugned policy is not in breach of international law, but leaves that question open.[321]

One wonders what the added value of such deference is in comparison with an affirmative ruling that the contested measure is in accordance with international law.[322] In many ways, the two options have a similar result: the respondent State is found to be compliant with international law.[323] Yet constitutional deference adds an intermediate stage in the reasoning process, allowing the adjudicator to avoid adopting a clear position on the issue. Possibly, this use of deference is appealing to a court or tribunal because it leaves room for flexibility in future cases. It could suggest the existence of a wider obligation beyond the minimum standard applied by the adjudicator. In addition, deference is a way of shifting the responsibility for a certain decision back to the domestic authorities. Yet all of this seems difficult to justify in the light of the purpose of international adjudication, which is to provide a solution to a dispute and clarity about the meaning of international law.

A rejection of deference does not necessarily mean that the interpretation adopted by the adjudicator will be expansive.[324] For many of the reasons advanced in favour of deference, such as democratic accountability and State sovereignty, adjudicators may find reason to interpret international obligations restrictively, leaving the State a wide policy space.[325] Constitutional deference is not indispensable to reach such a result. Instead, a judgment could focus on how to strike a balance between the aims pursued by an international norm and the demands of State

[321] Deference as the outcome of a judicial assessment reminds of the notion of 'non liquet'. See section 4.3.4.1.

[322] Hutchinson, 'The Margin of Appreciation' (n 319) 648: '[w]hatever phraseology it adopts, the Court has to decide whether a State has violated the Convention or not. This means that in any event we are only ever interested in the bottom edge of the margin of appreciation … This takes us back towards the idea of a minimum floor, … this time, however, without invoking the idea of a margin of appreciation above it, an idea which is superfluous anyway'.

[323] Paul, 'Governing from the Margins' (n 24) 99.

[324] Itzcovich, 'One, None and One Hundred Thousand Margins' (n 23) 301.

[325] cf Allan, 'Judicial Deference' (n 2) 116: '[m]atters relevant to deference are *internal* to ordinary legal analysis, just as application of the ordinary standards of review is itself dependent on close engagement with an almost infinite variety of circumstances, in which legal principle must accommodate specific demands of governance.'

sovereignty. This is what the debate should be about, and well-known techniques of treaty interpretation, such as systemic integration and proportionality analysis, can be helpful to adjudicators in that regard.[326] Unlike constitutional deference, however, interpretation focuses primarily on the content and scope of the relevant legal rule and not on the institutional differences between international adjudicators and domestic authorities.

In human rights law, the fact that deference obscures the reasoning of the adjudicator and leaves the final outcome of the assessment uncertain is less problematic than in other fields of international law. In accordance with the principle of subsidiarity, international human rights law is not primarily effectuated through a top-down imposition of decisions on domestic institutions, but through an internalisation of human rights at local levels. Constitutional deference encourages this by giving domestic decision-makers a say in the interpretation and application of human rights law. Moreover, whereas other adjudicators can resort to restrictive interpretation if they want to balance the demands of an international legal regime against State sovereignty, this option is not always available to human rights courts. Controversial cases before these courts do not necessarily concern the balance between State sovereignty and individual rights, but often require a balancing of competing human rights. Restrictive interpretation provides no solution in such cases, which is why constitutional deference has extra appeal in that context.

4.4 Conclusions

International adjudicators are faced with demands for deference in a great variety of cases. Respondent States request deference because they consider that adjudicators lack the expertise to make assessments that are ultimately not legal but scientific, or because the adjudicators are not empowered to decide an issue of public policy which is ultimately not legal but political. This chapter has sought to provide an answer to the normative question of whether deference is due in

[326] Schill and Djanic, 'Wherefore Art Thou?' (n 154) 44-47, suggesting the use of systemic integration and proportionality analysis in addition to deference in order to accommodate competing public interests in the interpretation and application of international investment law. 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, 108: 'the goal of being deferent towards State policy choices may be equally reached by applying the principle of proportionality'. Rumiana Yotova, 'Systemic Integration: An Instrument for Reasserting the State's Control in Investment Arbitration?' in Kulick, *Reassertion of Control* (n 240).

these circumstances. In order to do so, I have suggested a distinction between epistemic and constitutional deference, which relates to the two different arguments just mentioned. The limited expertise of international adjudicators justifies epistemic deference to more qualified authorities to the extent that the dispute involves technical or scientific assessments. Such epistemic deference does not necessarily benefit the respondent State but can also be accorded to other parties or experts.

The question of constitutional deference asks whether it is appropriate that an international judge has the final say on an issue of public policy. In order to respond to this question, I focus on the principle of the separation of powers as the decisive rationale underlying judicial deference. In furtherance of this rationale, domestic standards of review allow courts to review the conduct of other institutions without overstepping the limits of their own power. Transposing this logic to the international level, I conclude that judicial overreach in international adjudication is no genuine risk. International courts have only limited power over States, who possess a variety of means to mediate the effects of an adverse international ruling. Whenever an international court or tribunal finds a domestic measure in breach of international law, the respondent State has the choice to adapt the measure as it sees fit, to retain the measure and pay compensation, to ignore the ruling, or to withdraw from the regime. Consequently, concerns over the proper distribution of powers between States and international adjudicators cannot justify constitutional deference.

The weak forms of review existing at the international level correspond with the limited purpose of international adjudication. Apart from the human rights courts, international adjudicators do not have the purpose of legitimising public power in a constitutional sense. Their purpose is 'more mundane, but no less important: to resolve the dispute between the Parties in a reasoned and persuasive manner'.[327] The resolution of disputes in sectoral fields of international law does not require a general evaluation of the legitimacy of government conduct in light of a full range of relevant public and private interests. Only the human rights courts are potentially tasked with making such assessments, because their review covers practically any field of public policy. Moreover, the human rights courts are integrated in domestic constitutional frameworks securing the legitimate exercise of public power, and their judgments can instigate profound changes in the domestic legal order. Consequently, concerns about a legitimate distribution of decision-making

[327] *Romak SA v Uzbekistan*, PCA AA280, Award of 26 November 2009, para 171. The section of the award addressed whether arbitral tribunals were bound to follow previous jurisprudence.

powers between international courts and respondent States are more justified in this context than elsewhere.

Constitutional deference gives domestic institutions a say in the interpretation and application of international rules. This engagement of local authorities is important in the human rights context as it encourages the internalisation of human rights at different levels. By contrast, in other fields of international law, the effect of deference is less beneficial because it complicates and protracts disputes. Instead of leaving the answer to a controversial legal question unanswered, international adjudicators other than the human rights courts should provide a solution to the legal dispute that is before them. Such an answer could involve restrictive interpretation, justified by concerns over democratic accountability, respect for State sovereignty or pragmatic fears of non-compliance. The answer could also be bold and expansive, risking a push-back by States or a refusal to comply. In either case the adjudicator will at least have provided an answer, striking a balance between the aim of the international norm at issue and the prerogatives of State sovereignty. A reference to deference will only obscure how this balance is struck.