

HAGUE YEARBOOK OF INTERNATIONAL LAW



ANNUAIRE DE LA HAYE DE DROIT INTERNATIONAL

Edited by

Nikos Lavranos, Ruth Kok *et al.*

2013

VOLUME 26



BRILL
NIJHOFF

LEIDEN | BOSTON

Table of Contents

Editorial vii

Private International Law

1 Hague Conference on Private International Law – Work in 2013 2
Micah R. Thorner and Rosa Huizinga

International Criminal Law

2 The Growing Rift between Africa and the International
Criminal Court: The Curious (Im)possibility of a Security
Council deferral 34
Abel S. Knottnerus

3 Sexual Violence against Men in Armed Conflicts: Insights
from International Criminal Tribunal for Former Yugoslavia
and the War Crimes Chamber of the State Court of Bosnia and
Herzegovina 57
Ioannis P. Tzivaras

Public International Law

4 Towards an Internet Framework Convention: The State of Play 84
Joanna Kulesza

5 *Sosa, Kiobel* and Pirates Inc.: Defining the ‘Modern’ Parameters
of the Archaic Alien Tort Statute 116
Jonathan L.H. Blaine

6 Responsibility for Crimes Committed by the Ottoman Empire
against the Armenian Population: Are the Rules of State
Succession to International Responsibility of Any Use? 141
Patrick Dumberry

7 Unilateral Legal Acts Revisited: Common Law v. Civil
Law Approaches and Lessons from the International Law
Commission’s (Failed) attempt to Codify Unilateral Acts of States 168
Eva Kassoti

8	Interpreting Reasons: The Interpretation of the 1962 <i>Temple of Preah Vihear</i> Judgment	201
	<i>Daniel Peat</i>	
9	The Development of International Law by the International Court of Justice	216
	<i>James Sloan and Christian J. Tams</i>	
10	The Applicability of International Law Standards to the Sanctions of the Security Council	239
	<i>Adil Sahban</i>	
11	Beyond Traditional Statehood Criteria: The Law and Contemporary Politics of State Creation	316
	<i>Ryal Wun</i>	
12	Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority / Indigenous Participatory Claims in the Case Law of the Human Rights Committee	359
	<i>Athanasios Yupsanis</i>	

International Investment Law and Arbitration

13	Financial Market Dispute Settlement: Making Sense out of Current Nonsense	412
	<i>Jeffrey Golden</i>	
14	The Margin of Appreciation in Investor-State Arbitration: The Prevalence and Desirability of Discretion and Deference	422
	<i>Jeanrique Fahner</i>	
15	More in 2013 than Ever Before: Inter-State and Investor-State Arbitrations at the Permanent Court of Arbitration	496
	<i>Yanying Li and Camille M. Ng</i>	
	About the Editorial Board	516
	About the AAA	518
	Note from the Secretary-General of the AAA	
	Note du Secrétaire général de l'AAA	519

14 The Margin of Appreciation in Investor-State Arbitration: The Prevalence and Desirability of Discretion and Deference

Jeanrique Fahner*

Abstract

This article investigates how arbitral tribunals in the field of international investment law have employed the margin of appreciation and whether its adoption is desirable in investor-state arbitration. In order to specify the analysis, the article proposes a new understanding of the margin, defining it as a measure of either discretion or deference, which is accorded by a reviewing institution to a respondent state and which translates into a non-intrusive standard of review. On the basis of this definition, the article concludes that tribunals have taken conflicting approaches concerning the margin, ranging from its explicit adoption to its explicit rejection. On the normative question, the article concludes that states are entitled to a measure of discretion under common investment treaty standards, while the notion of deference does not concord with the importance of independent arbitral review for the effective protection of foreign investments. Since the concept of the margin embodies both notions of discretion and deference, its adoption in investor-state arbitration is inappropriate.

1 Introduction

The margin of appreciation is probably the best known innovation of the European Court of Human Rights (ECHR). Its application enables the Court to strike a balance between its task of exercising supranational supervision and

* Jeanrique Fahner studied International Relations and Public International Law at Utrecht University, Université Panthéon-Assas (Paris II), University of Amsterdam, and Columbia University. Many thanks to dr. Catherine Brölmann and dr. Hege Elisabeth Kjos for their valuable comments on earlier drafts of this article.

the right of the member states to regulate their domestic affairs.¹ At the same time, the margin allows the Court to navigate between the universal aspirations of the Convention and the cultural differences among the member states.² By granting a margin of appreciation, the Court acknowledges that states are better placed to make certain assessments than an international court and that it should not substitute its own assessment for that of the national authorities.³

In recent years, it has been asserted that the margin of appreciation is spreading from Strasbourg to other international tribunals. Yuval Shany, most explicitly, identifies “a growing acceptance on the part of many international courts and tribunals of the margin of appreciation doctrine”.⁴ According to Shany, international tribunals other than the ECHR increasingly adopt the margin in order to accommodate tensions between international law and state policies. The margin enables them to reconcile their task of exercising meaningful review with a certain respect towards the prerogatives of states.⁵

This article investigates the prevalence and the desirability of the margin of appreciation in the field of international investment law.⁶ Within this field,

-
- 1 P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights. Third Edition* (Kluwer Law International, The Hague, 1998) p. 95: the margin “bears witness to the fact that the Convention places the Court at the crossroads of international judicial supervision and national sovereignty”.
 - 2 Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp, 2002) p. 3.
 - 3 See e.g., *United Communist Party of Turkey and Others v. Turkey*, 30 January 1988, ECHR [GC], no. 19392/92, *Reports of Judgments and Decisions 1998-I*, para. 47.
 - 4 Y. Shany, ‘Towards a General Margin of Appreciation Doctrine in International Law?’, 16:5 *European Journal of International Law* (2006) p. 939.
 - 5 J.S. Martinez, ‘Towards an International Judicial System’, 56:2 *Stanford Law Review* 2 (2003) p. 519.
 - 6 See for other fields of international law e.g., A.W. Stuart, ‘I Tell Ya I Don’t Get No Respect!’: The Policies Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals’, 23:3 *Law and Policy in International Business* (1992) pp. 749-790; S.P. Croley and J.H. Jackson, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Governments’, 90:2 *American Journal of International Law* (1996) pp. 193-213; A.G. Desmedt, ‘Hormones: “Objective Assessment” and (or as) Standard of Review’, 1:4 *Journal of International Economic Law* (1998) pp. 695-698; S. Zleptnig, ‘The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority’, 13:5 *European Business Law Review* (2002) pp. 427-457; M. Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford University Press, Oxford, 2003); C. Ehlermann and N.J.S. Lockhart, ‘Standard of Review in WTO Law’, 7:3 *Journal of Int’l Economic Law* (2004)

disputes between private investors and host states are commonly settled by international ad hoc arbitral tribunals, because most investment treaties grant investors the right to bring claims before such tribunals concerning the conduct of host state authorities. Over the past years, investors have initiated more and more of such claims, but at the same time the system of investor-state arbitration has come under growing criticism because of its perceived illegitimate intrusion into state sovereignty.⁷ Critics have wondered why unelected arbitrators should be mandated to overrule the decisions of democratically legitimized state organs, especially when they concern regulatory measures that have been adopted after public deliberation in the furtherance of common interests such as public health or the environment.⁸ In response to these concerns, commentators have proposed a recourse to the margin of

pp. 491-521; J. Bohanes and N.J.S. Lockhart, 'Standard of Review in WTO Law', in D.L. Bethlehem (ed.), *The Oxford Handbook of International Trade Law* (Oxford University Press, Oxford, 2009) pp. 378-436; A.T. Guzman, 'Determining the Appropriate Standard of Review in WTO Disputes', 42:1 *Cornell International Law Journal* (2009) pp. 45-76; M. Korotana, 'The Standard of Review in WTO Law', 15:2 *International Trade Law and Regulation* (2009) pp. 72-77; R. Becroft, *The Standard of Review in WTO Dispute Settlement. Critique and Development* (Edward Elgar Publishing, Cheltenham, 2012); J. Peel, 'Of Apples and Oranges (and Hormones in Beef): Science and the Standard of Review in WTO Disputes under the SPS Agreement', 61:2 *International and Comparative Law Quarterly* (2012) pp. 427-458; M. Schimmel and R. Widdershoven, 'Judicial Review after *Tetra Laval*. Some Observations From a European Administrative Law Point of View', in O. Essens, A. Gerbrandy, and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing, Groningen, 2009) pp. 51-78; J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 17:1 *European Law Journal* (2011) pp. 80-120; M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?', 2:4 *Journal of European Competition Law and Practice* (2011) pp. 295-314; J. Cot, 'The Law of the Sea and the Margin of Appreciation', in: T.M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff, Leiden, 2007) pp. 389-420.

7 See J.E. Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law, The Hague, 2011) pp. 75-84. See also S.W. Schill, 'International Investment Law and Comparative Public Law - An Introduction', in S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP 2010) p. 6, listing literature describing the "legitimacy crisis" of international investment law.

8 T. Chen, 'The Standard of Review and the Roles of ICSID Arbitral Tribunals in Investor-State Dispute Settlement', 5:1 *Contemporary Asia Arbitration Journal* (2012) pp. 23-43.

appreciation in order to rebalance the relationship between states and arbitral supervisors, and to bolster the legitimacy of investor-state arbitration.⁹

The first aim of this article is to investigate how international investment tribunals have employed the margin of appreciation so far. Through an investigation of representative cases concerning the review of host state regulation, the current practice of tribunals will be identified. The second aim of the article is to provide a normative assessment of the appropriateness of the margin in investor-state arbitration. The arguments for and against its adoption will be discussed and evaluated in the light of the object and purpose of the international investment regime.¹⁰ In this way, the article will evaluate whether the margin of appreciation can be legitimately transposed from the human rights context into the international investment context.

This article aspires to complement the existing literature by proposing a more differentiated understanding of the margin's prevalence and desirability. Many authors have rightly noted that although the term has become current in international legal practice, its precise meaning and effects remain fraught with ambiguities.¹¹ For that reason, the present article proposes an understand-

-
- 9 See e.g., W. Burke-White and A. von Staden, 'Private Litigation in a Public Law Sphere: the Standards of Review in Investor-State Arbitrations', 35:2 *Yale Journal of International Law* (2010) pp. 283-346; reprinted as: W. Burke-White and A. von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations', in S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) pp. 689-720; S.W. Schill, *The Multilateralization of International Investment Law* (Oxford University Press, Oxford, 2014) pp. 375-376; S.W. Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review', 3:3 *Journal of International Dispute Settlement* (2012) pp. 577-607; C. Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration', 4:1 *Journal of International Dispute Settlement* (2013) pp. 197-215.
- 10 Although the thousands of investment treaties currently in force are formally unrelated, it has become common to speak about a single 'regime', due to the substantive and procedural similarities among the treaties. See J.W. Salacuse, *The Law of Investment Treaties* (Oxford University Press, Oxford, 2010) pp. 5-16; J.E. Alvarez, 'The Present - Investment Arbitration as a Governance Tool for Economic International Relations? Is the International Investment Regime a Form of Global Governance?', in A.J. van den Berg (ed.), *Arbitration: The Next Fifty Years* (Kluwer Law International, Alphen aan den Rijn, 2012) pp. 137-160.
- 11 See e.g., J.A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', 11 *Columbia Journal of European Law* (2005) pp. 113-150; K.D. Tallent, 'The Tractor in the Jungle: Why Investment Arbitration Tribunals Should Reject a Margin of Appreciation Doctrine', in I.A. Laird and T.J.

ing of the margin that distinguishes between three different elements that can all be implied in the term: discretion, deference, and non-intrusive review. It is argued here that the margin embodies a measure of either discretion or deference, which is accorded by a reviewing institution to a respondent state and which translates into a non-intrusive standard of review. By focusing on these related but distinguishable elements, it is hoped that both the empirical and the normative study of the margin of appreciation becomes more precise.

2 Defining the Margin of Appreciation

More than fifty years have passed since the European Commission of Human Rights introduced the term ‘margin of appreciation’ in international law.¹² In the meantime, the notion has become a common element of the ECHR’s jurisprudence and the states party to the Convention have recently endorsed its use in Protocol No. 15.¹³ Outside the field of European human rights law, many

Weiler (eds.), *Investment Treaty Arbitration and International Law. Volume 3* (JurisNet, Huntington, 2010) pp. 124-128; J. Arato, ‘The Margin of Appreciation in International Investment Law’, 54:3 *Virginia Journal of International Law* (forthcoming, 2014).

12 The term ‘margin of appreciation’ appears to be derived from the French notion ‘*marge d’appréciation*’, which has been applied by the *Conseil d’Etat* in its review of the legality of administrative action. See H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff, Dordrecht, 1996) pp. 14-15. The term is also found in non-western jurisdictions, see e.g., *T.N. Godavarman Thirumulpad v. Union of India and Ors*, 6 July 2011, Supreme Court of India, para. 19, <<http://indiankanoon.org/doc/1725193/>>, visited on 27 May 2014: “As a result, environmental conflicts are ineradicable and environmental protection is always a matter of degree, inescapably requiring choices as to the appropriate level of environmental protection and the risks which are to be regulated. (...) In such cases, the Margin of Appreciation Doctrine would apply”.

13 Article 1 of Protocol No. 15 adds to the preamble of the Convention an affirmation “that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention”. It should be noted, however, that the application of the margin in European human rights law is not without its critics. See Y. Arai-Takahashi, ‘The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry’, in A. Føllesdal, B. Peters, and G. Ulfstein (eds.), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, Cambridge, 2013) pp. 78-81. For a very critical discussion, see Brauch, *supra* note 11.

courts and tribunals have also applied the term at some occasion.¹⁴ However, in spite of this apparent success of the margin, its precise meaning remains difficult to define. This is partly due to the fact that the Strasbourg organs have never provided a comprehensive explanation of the concept, but have developed its characteristics incrementally through a series of judgments.¹⁵

Admittedly, the ultimate effect of the margin of appreciation on the assessment of a particular case is relatively clear: the margin decreases the likelihood that the respondent state is found in breach of its international obligations, because the reviewing institution is inclined to accept the state's

14 See e.g., *Commission v. Italy*, 10 February 2009, CJEU [GC], Case C-110/05, para. 65, <<http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0110&lang1=en&type=TXT&ance=>>, visited on 27 May 2014: “[I]n the field of road safety a Member State may determine the degree of protection which it wishes to apply in regard to such safety and the way in which that degree of protection is to be achieved. Since that degree of protection may vary from one Member State to the other, Member States must be allowed a margin of appreciation and, consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter’s rules are disproportionate”; *United States - Tax Treatment for ‘Foreign Sales Corporations’*, 30 August 2002, WTO Art. 22.6 Arbitration, WT/DS108/ARB, Decision, para. 5.62, <www.wto.org/english/tratop_e/dispu_e/108_arb_e.doc>, visited on 27 May 2014: “Not only is a Member entitled to take countermeasures that are tailored to offset the original wrongful act and the upset of the balancing of rights and obligations which that wrongful act entails, but in assessing the ‘appropriateness’ of such countermeasures - in light of the gravity of the breach -, a margin of appreciation is to be granted, due to the severity of that breach”; *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, 19 January 1984, IACtHR, Advisory Opinion, para. 58, <www.corteidh.or.cr/docs/opiniones/seriea_04_ing.pdf>, visited on 27 May 2014: “One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them”. See also J. Cot, ‘Margin of Appreciation’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, <<http://opil.ouplaw.com/view/10.1093/law:epil/g780199231690/law-9780199231690-e1438?rskey=SxULL5&result=3&prd=EPIL>>, visited on 27 May 2014.

15 Yourow, *supra* note 12, p. 195, noting that the margin of appreciation is “a multifunctional tool in the hands of the Strasbourg authorities”, who have chosen “not to fix its identity in any permanent way”. See further C. van de Heyning, ‘No Place Like Home: Discretionary Space for the Domestic Protection of Fundamental Rights’, in P. Popelier, C. van de Heyning, and P. van Nuffel (eds.), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Intersentia, Antwerp, 2011) pp. 87-91; J. Gerards, ‘Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights’, in M. Claes and M. de Visser (eds.), *Constructing European Constitutional Law* (Hart, Oxford, forthcoming, 2014).

assessment of the contested issue.¹⁶ It is much more difficult, however, to define or explain the concept in more detail. The present section aspires to provide more clarity in this regard. The section commences with a description of the ECHR's practice, followed by a conceptual analysis of the findings.

2.1 *Core Elements in the Practice of the European Court of Human Rights*

The first use of the margin of appreciation by the Strasbourg organs occurred in the context of Article 15 of the Convention, which allows member states to derogate from their obligations in times of war or other public emergencies.¹⁷ In 1959, the European Commission on Human Rights reasoned:

While the concept of a 'public emergency threatening the life of the nation' is sufficiently clear, it is by no means an easy task to determine whether the facts and conditions of any particular situation fall within that concept. This being so, and having regard to the high responsibility which a Government has to the life of the nation, it is evident that a certain discretion – a certain margin of appreciation – must be left to the Government in determining whether there exists a public emergency

16 Andrew Legg has described this effect of the margin as the "assigning of additional weight to the views of the state"; A. Legg, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality* (Oxford University Press, Oxford, 2012) p. 21. *Comp. Mouvement Raëlien Suisse v. Switzerland*, 13 July 2012, ECHR [GC], no. 16354/06, *Reports of Judgments and Decisions 2012*, para. 66. The margin can be applicable to any domestic authority. *Handyside v. United Kingdom*, 7 December 1976, ECHR [P], no. 5493/72, *Series A no. 24*, para. 48: "This margin is given both to the domestic legislator (...) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force". An interesting question is whether the scope of the margin differs with regard to different domestic bodies. See Dean Spielmann's discussion of a 'reverse' or 'second-degree' margin of appreciation, "whereby discretionary powers can be distributed between executive and judicial authorities at the domestic level"; D. Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?'; in C. Barnard and M. Gehring (eds.), *Cambridge Yearbook of European Legal Studies. Volume 14, 2011-2012* (Hart, Oxford, 2012) pp. 412-415. See for the relevance of domestic judgments that find in favor of the individual applicant C. Hilson, 'The Margin of Appreciation, Domestic Irregularity and Domestic Court Rulings in the ECHR Environmental Jurisprudence: Global Legal Pluralism in Action', 2:2 *Global Constitutionalism* (2013) pp. 277-283.

17 S. Greer, *The European Convention on Human Rights. Achievements, Problems, and Prospects* (Cambridge University Press, Cambridge, 2006) pp. 222-223.

which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.¹⁸

Later, the limitations clauses of the Articles 8-11 became a common context for the application of a margin of appreciation. These clauses allow member states to limit fundamental rights when this is “necessary in a democratic society” for the protection of a legitimate aim such as public safety, public order, health or morals. According to the Court, the limitation clauses grant the member states a margin of appreciation when they strike a balance between individual rights and public interests. In *Handyside*, the Court ruled:

(...) it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context. Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation.¹⁹

The Court does not apply the margin of appreciation to all the cases brought before it. On the contrary, some Convention provisions have never been associated with the doctrine. For example, cases involving the prohibition of torture and inhuman or degrading treatment (Article 3) have traditionally been strictly scrutinized by the Court. Although it never explicitly rejected the application of the margin in this context, the Court has often noted the “absolute” character of the prohibition. Accordingly, it reasoned that its evaluation of cases involving Article 3 should be “a rigorous one”.²⁰

In order to further differentiate the application of the margin of appreciation in different cases, the Court has developed the notion of the “scope”,

18 *Lawless v. Ireland*, 19 December 1959, European Commission of Human Rights, Report, Series B 1960-1961, para. 90. See for details on the case B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press, Oxford, 2010) pp. 34-40.

19 *Handyside*, *supra* note 16, para. 48.

20 *Chahal v. United Kingdom*, 15 November 1996, ECHR [GC], no. 22414/93, *Reports of Judgments and Decisions 1996-V*, paras. 80-82, 96. See further J. Callewaert, ‘Is There a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?’, 19:1 *Human Rights Law Journal* (1998) pp. 6-9; D. Baldinger, *Rigorous Scrutiny versus Marginal Review. Standards on Judicial Scrutiny and Evidence in International and European Asylum Law* (Wolf Legal Publishers, Oisterwijk, 2013) p. 234.

“width”, or “breadth” of the margin.²¹ The Court sometimes grants a wide margin, while in other cases, it applies a narrower margin. Over the years, the Court has identified a long list of factors that influence this scope.²² One of the factors is the importance of the right at stake for the individual complainant. Whenever the right concerned is “crucial to the individual’s effective enjoyment of intimate or key rights”, for example in the context of someone’s personal identity or sexuality, the margin will be narrowed.²³ Another factor taken into account is the nature of the interference by the member state. Cases involving the application of general social or economic policies, for example, will generally allow for a wide margin of appreciation. In *Hatton and Others*, the Court held that “in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic-policy maker should be given special weight”.²⁴ Finally, the most debated factor used by the Court in order to determine the width of the margin is the so-called ‘common ground’ or ‘European consensus’.²⁵ In *Handyside*, the Court noted that the notion of ‘public morals’ as employed in Article 10 could not be uniformly interpreted across the different member states: “it 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”.²⁶ Therefore, the Court refrained from imposing a uniform conception of morals on the member states and applied a margin of appreciation.

21 Arguably, the notion of the ‘scope’ of the margin was introduced in *Sunday Times v. United Kingdom*, 26 April 1979, ECHR [P], no. 6538/74, *Series A no. 30*, para. 59. The Court reasoned that “the protection of morals” allows for wider domestic discretion than “the far more objective notion” of “maintaining the authority of the judiciary”.

22 P. Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’, 19:1 *Human Rights Law Journal* (1998) pp. 5-6. A relatively comprehensive summary of the various factors can be found in *S. and Marper v. United Kingdom*, 4 December 2008, ECHR [GC], nos. 30562/04 and 30566/04, *Reports of Judgments and Decisions 2008*, para. 102.

23 *Dudgeon v. United Kingdom*, 22 October 1981, ECHR [P], no. 7525/76, *Series A no. 45*, para. 52.

24 *Hatton and Others v. United Kingdom*, 8 July 2003, ECHR [GC], no. 36022/97, *Reports of Judgments and Decisions 2003-VIII*, para. 97.

25 L.R. Helfer, ‘Consensus, Coherence and the European Convention on Human Rights’, 26:1 *Cornell International Law Journal* (1993) pp. 133-165; P.G. Carozza, ‘Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights’, 73:5 *Notre Dame Law Review* (1998) pp. 1217-1237.

26 *Handyside*, *supra* note 16, para. 48.

Since *Handyside*, the factor of the European consensus has become a central element in the Court's assessment of the margin's scope. When the Court identifies disagreement among the member states on a particular issue, this will widen the margin of appreciation granted to the responding state. Conversely, when it identifies a consensus among the member states, the margin will be narrowed.²⁷

2.2 *Dissecting the Margin: Discretion, Deference, and the Standard of Review*

In an attempt to provide more clarity on the margin's conceptual meaning, observers have noted the ECHR's polysemic use of the term: the margin denotes several related but conceptually distinctive ideas.²⁸ Indeed, it appears that at least three different concepts can be implied in the term 'margin of appreciation': discretion, deference, and non-intrusive standard of review. These three concepts, although related in multiple ways, need to be distinguished in order to get a comprehensive understanding of the ECHR's use of the margin.²⁹ They will be discussed in turn.

Discretion is the primary meaning of the term 'margin of appreciation'.³⁰ The ECHR considers that most of the norms codified in the Convention do not dictate absolute and specific obligations which do not leave the member states any freedom to act. Rather, most Convention provisions permit different courses of action within a certain range, and the member states have retained the power to prefer one course of action over legitimate alternatives.³¹ Understood this way, the Convention provisions serve as minimum stand-

27 According to the Court, agreement among the member states results in a certain degree of 'objectiveness'. *Sunday Times*, *supra* note 21, para. 59. See also *Christine Goodwin v. United Kingdom*, 11 July 2002, ECHR [GC], no. 28957/95, *Reports of Judgments and Decisions 2002-VI*, paras. 84-85.

28 J. Christoffersen, *Fair Balance. A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff, Leiden, 2009) p. 236.

29 Slightly different distinctions have been proposed by other authors. Shany distinguishes between "judicial deference" and "normative flexibility"; Shany, *supra* note 4, pp. 909-910. Christoffersen proposes a distinction between "discretion" and "subsidiarity"; Christoffersen, *supra* note 28, p. 236. See also Arai-Takahashi, *supra* note 13, pp. 64-65.

30 Christoffersen, *supra* note 28, p. 236: "it may be forgotten that the Contracting Parties enjoy a measure of discretion, which is independent of the subsidiarity of the Court's review and purely a consequence of the norms of the ECHR".

31 Commentators that focus on this aspect of the margin have defined it as the "maneuvering room" or "latitude" allowed to national authorities in the observance of their obligations. See resp. Yourow, *supra* note 12, p. 13; T.A. O'Donnell, 'The Margin of Ap-

ards, expressing the “lowest common denominator among diverse member states”.³² As a result, the Convention prohibits certain serious human rights violations but leaves states the freedom to evaluate and assess less serious interferences with human rights.³³ For instance, the right to freedom of religion clearly prohibits states from requiring members of parliament to swear allegiance to a particular religion.³⁴ It is less obvious, however, whether this right also prohibits the presence of crucifixes in state school classrooms. In the *Lautsi* case, the Court therefore held that “the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State”.³⁵ In other words, states enjoy a measure of discretion in deciding whether or not they allow crucifixes in state school classrooms.

The crucial question that needs to be answered by the Court in a particular case is whether the respondent state has remained within the limits of its discretion. The mere fact that a state is entitled to a certain measure of discretion with regard to a certain assessment, does not yet mean that the state complied with the Convention. Rather, the Court has to determine whether the state has exercised its discretion in a manner that is indeed compatible

preciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights’, 4:4 *Human Rights Quarterly* (1982) p. 475.

32 Arai-Takahashi, *supra* note 13, p. 63.

33 See Eva Brem’s discussion of “gross violations”, to which the margin is not applicable, E. Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, The Hague, 2001) pp. 407-411. *But, see also* Michael Hutchinson’s discussion and rejection of the idea that the Court applies the Convention as a minimum standard; M.R. Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’, 48:3 *International and Comparative Law Quarterly* (1999) p. 643: “It is clear from the jurisprudence that the width of the margin is perceived as capable of determining whether a State’s actions fall inside the margin, which can only mean that the floor is mobile, that is, it is not an absolute minimum at all. There would be little point in the Court affording a particularly wide margin in some particular case, if the actual borderline between breach and compliance was fixed”. Hutchinson’s argument fails to acknowledge that the applicability of the margin does not yet determine whether or not a breach has occurred.

34 *Buscarini and Others v. San Marino*, 18 February 1999, ECHR [GC], no. 24645/94, *Reports of Judgments and Decisions 1999-I*, paras. 38-39.

35 *Lautsi and Others v. Italy*, 18 March 2011, ECHR [GC], no. 30814/06, *Reports of Judgments and Decisions 2011*, para. 70. Technically, this case was decided under Art. 2 of Protocol No. 1, *lex specialis* of Art. 9.

with the treaty.³⁶ For this reason, the Court often re-iterates that “the margin of appreciation goes hand in hand with a European supervision”.³⁷ Consequently, whenever the Courts holds that the state is entitled to a margin, this should be seen as the first step of the Court’s assessment of whether the state has complied with its obligations. Indeed, in *Lautsi*, the Court first noted that the decision to allow crucifixes in state-schools falls within the margin and then proceeded to determine “whether the limit [of the margin] has been exceeded”.³⁸ In this context, it discussed a series of arguments for and against the presence of crucifixes in classrooms.³⁹ It then concluded that “the authorities acted within the limits of the margin of appreciation left to the respondent State”.⁴⁰ In sum, the acknowledgement of a margin of discretion by the Court does not end its review of the contested measure. Rather, it influences the manner in which the Court exercises its scrutiny.

The discretion acknowledged by the Court under certain Convention provisions is not the only form in which the margin appears. The Court also uses the margin of appreciation to describe an attitude of deference towards decisions made by national institutions. This attitude is a form of respect which prevents the Court from redoing the entire domestic decision-making process and from substituting its own view for that of the national institutions. In contrast to discretion, deference does not relate to the normative substance of

36 See G. Letsas, ‘Two Concepts of the Margin of Appreciation’, 26:4 *Oxford Journal of Legal Studies* (2006) pp. 711-714; reprinted in G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, Oxford, 2007) pp. 80-98.

37 *E.g.*, *Handyside*, *supra* note 16, para. 49.

38 *Lautsi*, *supra* note 35, para. 70.

39 *Ibid.*, paras. 71-75.

40 *Ibid.*, para. 76. *Comp. Odièvre v. France*, 13 February 2003, ECHR [GC], no. 42326/98, *Reports of Judgments and Decisions 2003-III*, para. 49. An interesting question is whether such conclusion implies tolerance rather than endorsement by the Court. See R. Moloo and J.M. Jacinto, ‘Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law’, in K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2011-2012* (Oxford University Press, Oxford, 2013) p. 551. Although the immediate result of endorsement and tolerance is similar, the distinction may be relevant with respect to cases in which the Court expresses some concern while not (yet) finding a violation. See *e.g.*, *Christine Goodwin*, *supra* note 27, paras. 92-93. See also Shany’s reference to “zones of legality”, related to the *Lotus* principle that all that is not prohibited is permissible. Shany, *supra* note 4, p. 912. See also L.R. Helfer and A. Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’, 107:2 *Yale Law Journal* (1997) p. 317: “the ECHR is able to identify potentially problematic practices for the contracting states before they actually become violations, thereby permitting the states to anticipate that their laws may one day be called into question”.

the applicable norm, but to the institutional relationship between the Court on the one hand and national authorities on the other hand. Deference does not concern the normative content of the treaty standard itself, but the division of interpretative powers between the Court and the member states. The Court often expresses an attitude of deference when it says that national authorities are “better placed” than an international court to make a certain assessment.⁴¹

The notion of deference is well-known from public law disputes within national legal orders. Such disputes have given rise to the question of whether or to what extent judges should be empowered to review and invalidate decisions of other government branches. Traditionally, this question has been answered with regard to constitutional notions of democratic legitimacy and the separation of powers.⁴² It is often argued that judges should defer to other government branches in public law disputes, in order not to usurp their powers, especially when those other branches can rely on a more direct democratic mandate than the judiciary itself. Accordingly, domestic judges commonly exercise judicial restraint in such disputes.⁴³ In this way, they acknowledge that many questions of legal interpretation evoke legitimate disagreement, especially when they concern controversial issues on which diverging opinions exist within or among pluralist societies.⁴⁴ Notions of deference respond to this normative uncertainty by asserting that the interpretative authority is not exclusively located with the adjudicator. Instead, other authorities are given a large say.

The ECHR applies comparable reasons for granting deference to national decision-makers. The Court has held that because of the direct democratic legitimation of national authorities, their choices should be given extra

41 See e.g., *Hatton*, *supra* note 24, para. 97.

42 See D.W. Jackson, ‘A Conceptual Framework for the Comparative Analysis of Judicial Review’, 19:1 *Policy Studies Journal* (1990) pp. 161-171.

43 J. Schokkenbroek, ‘The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights’, 19:1 *Human Rights Law Journal* (1998) pp. 30-31. See for a comparative account M.C. Tolley, ‘Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective’, 31:3 *Policy Studies Journal* (2003) pp. 421-440.

44 See A. von Bogdandy and I. Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification’, 23:1 *European Journal of International Law* 1 (2012) pp. 9-10, arguing that international adjudication involves “decision” and not merely “cognition”.

weight.⁴⁵ Moreover, compared to domestic public law courts, the ECHR has even stronger reasons for granting deference, because it has always seen its supervision as subsidiary to that of national institutions. In *Handyside*, the Court explained its understanding of subsidiarity:

The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (...). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted.⁴⁶

The subsidiarity of the Court's supervision is, to some extent, a consequence of the exhaustion of local remedies requirement imposed by the European Convention. Because of this requirement, issues can only be reviewed by the Court once they have already been reviewed by several national institutions, including the highest domestic court. In some cases, however, the Court does not only recognise the chronological priority of national decisions, but also their normative priority.⁴⁷ The Court acknowledges that national authorities are better equipped to make complex determinations that require specific technical expertise or the sampling of large amounts of factual data.⁴⁸ In addition, the Court has often held that national institutions have a "direct and continuous contact with the vital forces of their countries", which enables

45 *Hatton*, *supra* note 24, para. 97. See for a critical evaluation of this approach S. Wheatley, 'Minorities under the ECHR and the Construction of a "Democratic Society"', 51 *Public Law* (2007) p. 791: "[t]he Court has failed in its institutional role as external guarantor against the 'tyranny of the majority'".

46 *Handyside*, *supra* note 16, para. 48.

47 *Letsas*, *supra* note 36, p. 722. See e.g., *Mouvement Raëlien Suisse*, *supra* note 16, para. 64: "The Court cannot interfere with the choices of the national and local authorities, which are closer to the realities of their country, for it would thereby lose sight of the subsidiary nature of the Convention system". See also P.G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97:1 *American Journal of International Law* (2003) pp. 72-73.

48 See e.g., *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, ECHR [P], no. 10572/83, *Series A no. 165*, para. 33.

them to assess local needs and sentiments more accurately.⁴⁹ In such circumstances, the Court feels it should grant deference to national authorities.⁵⁰

Discretion and deference are two different manifestations of the margin of appreciation. The Court grants a margin either because it recognises the freedom of action permitted by the applicable Convention norm, or because it acknowledges the superior expertise or legitimacy of domestic institutions in making a certain determination. It has not yet become clear, however, in what manner the applicability of the margin changes the review exercised by the Court. The margin favours the cause of the respondent state, but at the same time, the discretion of the member states and the deference granted by the Court are not unlimited. Only the Court “is empowered to give the final ruling” on whether an interference with human rights is compatible with the Convention.⁵¹ This raises the question of how the Court combines the margin of appreciation with its task of giving a final ruling. The commonly accepted answer to this question is that the margin results in a non-intrusive standard of review.

The term ‘standard of review’ is often employed in national legal orders, notably in the common law tradition. Standards of review determine the intensity of judicial scrutiny, or, in other words, the amount of leeway granted to other decision makers. When no leeway is granted, an adjudicator exercises *de novo* review: he or she reconsiders the original decision in its entirety, re-evaluating all the different arguments involved and substituting his or her

49 *Buckley v. United Kingdom*, 25 September 1996, ECHR, no. 20348/92, *Reports of Judgments and Decisions 1996-IV*, para. 75.

50 The relevance of the arguments in favour of deference are dependent on the factors that the Court uses to determine the appropriate scope of the margin. For example, the relevance of the democratic legitimacy of a contested decision increases once the Court has noted that there exists no agreement among the member states on the issue. Conversely, when the Court identifies a strong consensus among the other states, it will be prepared to contest a national decision even when that decision has undeniable democratic support. See e.g., *Tyrer v. United Kingdom*, 25 April 1978, ECHR, no. 5856/72, *Series A no. 26*. See also *Hirst v. United Kingdom*, 6 October 2005, ECHR [GC], no. 74025/01, *Reports of Judgments and Decisions 2005-IX*. For a contrasting result see *A, B and C v. Ireland*, 16 December 2010, ECHR [GC], no. 25579/05, *Reports of Judgments and Decisions 2010*.

51 *Handyside*, *supra* note 16, para. 49. The Court’s statement seems to militate against the idea that the margin grants states the final authority on their compliance with the Convention. E.g., A. Føllesdal, ‘The Principle of Subsidiarity as a Constitutional Principle in International Law’, 2:1 *Global Constitutionalism* (2013) p. 59: the practice of according states a margin of appreciation “grants states the final authority to determine whether certain policies are in compliance with the ECHR”.

own conclusion for that of the original decision maker. Under a non-intrusive standard of review the reviewing institution applies a less stringent degree of scrutiny and executes a more superficial evaluation of the relevant issue.⁵²

In the context of the ECHR, it is widely accepted that the margin of appreciation influences the standard of review applied by the Court.⁵³ This conclusion is a logical inference from the Court's discourse on the 'scope' of the margin. It seems that when this scope is wide, the Court decreases the intensity of its scrutiny; conversely, when the margin is narrow, the Court is less lenient. For this reason, it has been asserted that the question of 'what is the scope of the margin of appreciation?' is another way of articulating the question of 'what is the appropriate intensity of review?'.⁵⁴

Standards of review can be formulated in at least two different ways. They can prescribe a certain relative intensity of scrutiny, such as the standards of 'de novo' and 'lenient scrutiny'. Alternatively, they formulate a certain normative requirement against which the reviewing institution evaluates the decision made by another authority. Such explicit standards of review specify the benchmark applied by the reviewing institution in order to determine whether the institutions under review have complied with the applicable legal norm.⁵⁵ Examples of such standards are the tests of 'good faith' or 'reasonableness'.⁵⁶ Under these standards, the adjudicators limit their review to verifying whether the contested decision was made in good faith or whether it was sufficiently reasonable.

In the case of *Sunday Times*, the ECHR rejected several explicit standards of review: its scrutiny was not limited to ascertaining whether the respond-

52 "Standards of review allocate decision-making power between institutional entities by fixing the reviewer's tolerance for perceived error on the part of the reviewed"; Stuart, *supra* note 6, p. 758. See also F. Ortino, 'The Investment Treaty System as Judicial Review', 24:3 *American Review of International Arbitration* (2013) pp. 458-461.

53 See e.g., Gerards, *supra* note 6, p. 105: "a margin of appreciation doctrine is a useful and flexible tool to determine the intensity of review of interferences with fundamental rights". See also Van Dijk and Van Hoof, *supra* note 1, p. 92: "the margin of appreciation emerges as a review doctrine, used by the Court for determining and justifying the intensity of its supervision which is considered appropriate in concrete cases".

54 Legg, *supra* note 1611, p. 224.

55 See Christoffersen, *supra* note 28, p. 262.

56 See e.g., *Associated Provincial Picture Houses v. Wednesbury Corporation*, 10 November 1947, Court of Appeal of England and Wales, <www.bailii.org/ew/cases/EWCA/Civ/1947/1.html>, visited on 27 May 2014.

ent state had acted “reasonably, carefully and in good faith”.⁵⁷ In later cases, however, the Court formulated some explicit standards. A well-known example is found in the case of *James and Others*, in which the Court assessed an interference with property rights on grounds of public interest: “[t]he Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation”.⁵⁸ It has been argued that more standards of this kind can be distilled from the case law of the Court, such as the test of proportionality.⁵⁹ In the case of *Markt Intern*, the Court ruled that it should “confine its review to the question wheth-

-
- 57 *Sunday Times*, *supra* note 21, para. 59. The Court returned to a debate that had surfaced in *Handyside*. The latter case concerned the prohibition of a schoolbook that was deemed obscene by the British authorities. Within the Commission, a debate occurred whether the Court should only review the decision of the English judge that predated the appeal to Strasbourg or whether it should directly review the compatibility of the British ban with the Convention. The responding government and a majority of the Commission were of the opinion that the Court had ‘only to ensure that the English courts acted reasonably, in good faith and within the limits of the margin of appreciation’. The minority of the Commission, on the other hand, asserted that the Court’s task was ‘not to review the Inner London Quarter Sessions judgment but to examine the schoolbook directly in the light of the Convention and of nothing but the Convention’. The Court replied to this dilemma rather ambiguously by stating: ‘it is in no way the Court’s task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation. However, the Court’s supervision would generally prove illusory if it did no more than examine these decisions in isolation; it must view them in the light of the case as a whole, including the publication in question and the arguments and evidence adduced by the applicant in the domestic legal system and then at the international level’, *Handyside*, *supra* note 16, para 47-50. In *Sunday Times*, the Court explicitly rejected the position taken by the majority of the Commission in *Handyside*. The Court rejected other precise standards of review in *Animal Defenders International v. United Kingdom*, 22 April 2013, ECHR [GC], no. 48876/08, *Reports of Judgments and Decisions* 2013, para. 110. Alec Stone Sweet and Jud Matthews have explained the Court’s course as a clash between German traditions of proportionality review and more deferential standards known in the United Kingdom; A. Stone Sweet and J. Matthews, ‘Proportionality, Judicial Review, and Global Constitutionalism’, in G. Bongiovanni, G. Sartor and C. Valentini (eds.), *Reasonableness and Law* (Springer, Dordrecht, 2009) p. 203.
- 58 *James and Others v. United Kingdom*, 21 February 1986, ECHR [P], no. 8793/79, *Series A* no. 98, para. 46.
- 59 N. Lavender, ‘The Problem of the Margin of Appreciation’, 4 *European Human Rights Law Review* (1997) pp. 380-390.

er the measures taken on the national level are justifiable in principle and proportionate”.⁶⁰ By stating that it should “confine” its review to proportionality analysis, the Court apparently applied proportionality as a non-intrusive standard of review.⁶¹

In the case of *Observer and Guardian*, the Court combined various of the elements mentioned so far: “what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’”.⁶² In this formula, the Court combined the tests of proportionality and reasonableness that were already mentioned in earlier cases.⁶³ In subsequent practice, however, the Court has refrained from developing a comprehensive spectrum of explicit standards of review.⁶⁴ Instead, the Court usually

60 *Markt Intern*, *supra* note 48, para. 33.

61 This is controversial, however. Later case-law seems to suggest that the proportionality test as mandated by the limitation clauses invites the Court to apply a margin of appreciation. *See e.g., S. and Marper*, *supra* note 22, paras. 101-102. *See also* Burke-White and Von Staden, *supra* note 9, p. 283, arguing that the margin of appreciation, as a standard of review, includes a marginal proportionality test. *See also* Arai-Takahashi, *supra* note 2, pp. 14-15. In the context of investor-state arbitration, the standard of proportionality has been advocated in B. Kingsbury and S.W. Schill, ‘Public Law Concepts to Balance Investor’s Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality’, in Schill, *supra* note 9, pp. 75-104. *See also* M. Andenas and S. Zleptnig, ‘Proportionality: WTO Law in Comparative Perspective’, 42:3 *Texas International Law Journal* (2007) pp. 370-427; reprinted as M. Andenas and S. Zleptnig, ‘Proportionality and Balancing in WTO Law: A Comparative Perspective’, in K. Alexander and M. Andenas (eds.), *The World Trade Organization and Trade in Services* (Nijhoff, Leiden, 2008) pp. 147-171; M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, Oxford, 2012); B. Pirker, *Proportionality Analysis and Models of Judicial Review. A Theoretical and Comparative Study* (Europa Law Publishing, Groningen, 2013).

62 *Observer and Guardian v. United Kingdom*, 26 November 1991, ECHR [P], no. 13585/88, Series A no. 216, para. 59.

63 Lavender criticizes this combination by arguing that the former test is part of the latter; Lavender, *supra* note 59, p. 389.

64 *See* Christoffersen, *supra* note 28, pp. 253-268. *See also*, and more critically, Arato, *supra* note 11: “The deeper problem with the margin is that it entails no particular standard of review. As regards the scope and degree of deference due to national decision-makers, the margin of appreciation is essentially *contentless*. And indeed, (...), as constructed by the ECHR the doctrine is contentless by design. By contrast to the varied standards of review considered above the margin of appreciation does not entail any concrete linguistic standard or specific test”.

describes the intensity of its scrutiny in more relative terms, corresponding with the wider or narrower scope of the margin.⁶⁵

The conceptual analysis undertaken in this subsection has demonstrated that the margin of appreciation appears in different forms. It can describe a measure of discretion, as well as a measure of deference, while the result of either of them is that the Court decreases the intensity of its scrutiny by applying a non-intrusive standard of review. Although both discretion and deference have this same effect, the conceptual background of the two concepts is rather different. Discretion, on the one hand, refers to the freedom of action permitted by the minimum standards codified in the Convention, while deference, on the other hand, refers to the respect owed by the Court toward national decision-makers because of their expertise and democratic legitimacy. In the remainder of this article, the differences between discretion and deference will inform the analysis of both the prevalence and the desirability of the margin of appreciation in international investment law.

3 The Prevalence of the Margin of Appreciation in Investor-State Arbitration

In 2010, it was contended that the case of *S.D. Myers v. Canada*⁶⁶ was “one of the few (if only) examples of an investment tribunal employing a *de facto* margin of appreciation to the State’s decision”.⁶⁷ Three years later, another observer wondered whether there is now an emerging “discourse of deference”, noting that “an increasing number of tribunals have acknowledged the desirability of deference or have approached the standard of review with an understanding of the need for deference”.⁶⁸ Recently, another author concluded that restraint is very uncommon in present-day investor-state arbitration, demonstrating that an overwhelming majority of arbitrators “assumed far-reaching authority to oversee states intensively in relation to legislative and

65 Janneke Gerards argues that recent practice of the Court is actually moving away from clear standards toward the application of the margin as a “primarily rhetorical device”; Gerards, *supra* note 15.

66 *S.D. Myers, Inc. v. Canada*, 13 November 2000, UNCITRAL, Merits Award <www.italaw.com/sites/default/files/case-documents/ita0747.pdf>, visited on 1 June 2014.

67 Tallent, *supra* note 11, p. 131.

68 Henckels, *supra* note 9, p. 214.

executive decision-making”.⁶⁹ These three quotations show that empirical investigations of the prevalence of the margin easily produce diverging results.

It should be noted that the identification of the margin of appreciation in a particular case is not without methodological difficulties. A first question is whether the analysis should focus on the tribunal’s explicit comments on the intensity of its review or whether the investigator should rather determine whether the tribunal’s reasoning is non-intrusive in substance. The assertion of a tribunal that it applies a lenient standard of review does not necessarily imply that it actually does so and vice versa. This is a problem often noted by commentators in the context of the ECHR. It has been remarked:

[T]here does not always appear to be a close correspondence between the language of deference and the actual test applied by the court. It all too often occurs that the court elaborately reasons that a wide margin of appreciation should be left to the state, but it then carefully assesses the facts of the case to find out which interests were at stake and what weight should be accorded to these interests.⁷⁰

This point should be taken into account when the practice of investor-state tribunals is under investigation. If the explicit language of a tribunal endorsing a lenient approach cannot always be taken at face value, the analysis should also probe into whether the legal reasoning of the tribunal is truly non-intrusive in practice.

A second point relates to the context in which the margin of appreciation is being applied. It is unlikely that an international adjudicator exercises lenient scrutiny with regard to any question which it has to answer. On the contrary, the appropriate amount of discretion depends on the legal substance of the applicable norm, while the rationales for granting deference to national decision-makers depend on the characteristics of the assessment at stake. For these reasons, the ECHR applies a margin of appreciation only in the con-

69 G. van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, Oxford, 2013) p. 17; see also p. 162: “[T]he clear tendency was for the arbitrators to assert explicitly or implicitly an expansive role for themselves to decide whether the choices and conduct of another decision-maker were correct based on the arbitrators’ resolution of ambiguous legal language, the arbitrators’ preference for one or another legal test or doctrine, and the arbitrators’ evaluation of the origins, purposes, motivations, effects, implications, or other aspects of the decisions under review”.

70 Gerards, *supra* note 6, p. 106.

text of certain Convention provisions and specific assessments, such as the question of whether a certain infringement of human rights is necessary in a democratic society.⁷¹ Within the context of investment law, arbitrators have to make various sorts of assessments that have provoked respondent states to demand discretion and deference. In the next subsection, a number of cases will be discussed that concern one specific assessment: the review of public interest regulation. It appears that this type of assessment provides the most common context for debates about the intensity of review in investor-state arbitration.⁷²

Tribunals are required to review public interest regulation when investors complain of regulatory measures allegedly adopted by the host state in

71 See e.g., *Handyside*, *supra* note 16, para. 48.

72 Of course, the review of public interest regulation is not the only one in which issues of discretion or deference arise. See for alternative contexts in which the margin of appreciation surfaced in investor-state arbitration e.g., *Ioan Micula et al. v. Romania*, 24 September 2008, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, <www.italaw.com/sites/default/files/case-documents/ita0530.pdf>, visited on 1 June 2014. In this case, the respondent challenged the adopted nationality of one of the claimants. The tribunal responded: “the State conferring nationality must be given a ‘margin of appreciation’ in deciding upon the factors that it considers necessary for the granting of nationality”, *ibid.* para. 94. See also *Frontier Petroleum Services Ltd. v. Czech Republic*, 12 November 2010, UNCITRAL, Final Award, <www.italaw.com/sites/default/files/case-documents/ita0342.pdf>, visited 1 June 2014. This case concerned the review of a domestic refusal to enforce an arbitral awards under the New York Convention. *Ibid.*, para. 527: “The Czech courts concluded that the full recognition and enforcement of the Final Award would have been contrary to Czech public policy. In regard to this decision, it is not necessary for this Tribunal to determine whether the findings of the Czech courts meet the applicable standard of international public policy, or to determine the precise contents of that standard. States enjoy a certain margin of appreciation in determining what their own conception of international public policy is. This Tribunal determines that it is sufficient to examine whether the conclusion reached by the Czech courts applied a plausible interpretation of the public policy ground in Article V(2)(b) of the New York Convention. Put another way, was the decision by the Czech courts reasonably tenable and made in good faith?”. See also *Electrabel S.A. v. Hungary*, 30 November 2012, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, <www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf>, visited on 1 June 2014. This case concerned Hungary’s obligation under EU law to terminate power purchase agreements because they involved state aid. The claimant argued that Hungary should have challenged the decision of the European Commission, but the tribunal rejected this claim: “Hungary was entitled to a modest margin of appreciation in arriving at its own discretionary decision in regard to such proceedings”, *ibid.* para. 6.92.

the furtherance of some public interest. It is commonly considered that such measures do not easily breach investment treaty provisions, but in some circumstances they may be found to violate obligations such as the expropriation standard or the fair and equitable treatment standard. Tribunals may conclude that the public interest allegedly served by the measure is only a pretext for taking foreign property or protecting domestic firms. Moreover, even when the regulation appears to be *bona fide*, it may be found that its adoption violated the investor's legitimate expectations or that its application had a disproportionate impact on the value of the investment.⁷³ When arbitral tribunals assess such claims, they frequently engage in discussions about the intensity of their scrutiny, having to decide to what extent the applicable norm leaves a measure of discretion to the state and to what extent the tribunal should defer to the state's understanding of the public interest and of the suitability of the chosen measure.⁷⁴

73 The legitimacy of regulatory measures under international investment law has received wide attention. See e.g., T. Wälde and A. Kolo, 'Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law', 50:4 *International and Comparative Law Quarterly* (2002) pp. 811-848; V. Been and J.C. Beauvais, 'The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine', 78:1 *N.Y.U. Law Review* (2003) pp. 30-143; J.B. Fowles, 'Swords Into Plowshares: Softening the Edge of NAFTA's Chapter 11 Regulatory Expropriations Provisions', 36:1 *Cumberland Law Review* (2005) pp. 83-102; S. Montt, *State Liability in Investment Treaty Arbitration* (Hart, Oxford, 2009) pp. 231-291; K. Yannaca-Small, 'Indirect Expropriation and the Right to Regulate: How to Draw the Line?', in: K. Yannaca-Small (ed.), *Arbitrations under International Investment Agreements. A Guide to the Key Issues* (Oxford University Press, Oxford, 2010) pp. 445-477; R. Moloo and J. Jacinto, 'Environmental and Health Regulation: Assessing Liability Under Investment Treaties', 29:1 *Berkeley Journal of International Law* (2011) pp. 1-65; C. Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', 15 *Journal of International Economic Law* 1 (2012) pp. 223-255; V.S. Vadi, 'Global Health Governance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law', 48:1 *Stanford Journal of International Law* (2012) pp. 93-130.

74 Tsai-fang Chen has labeled this context "the next frontier of the changing role of the IC-SID tribunals". Chen, *supra* note 8, p. 38. The issue also exists in the domestic context, having been described by Tom Zwart as the "bipolar scheme created by the need for judicial review and agency autonomy"; T. Zwart, 'The Scope of Review of Administrative Action From a Comparative Perspective', in O. Essens, A. Gerbrandy, and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing, Groningen, 2009) p. 25.

The following overview describes a number of cases in which the review of public interest regulation played a crucial role. The section analyses the cases in some detail, and while the selection is certainly not comprehensive, it aims to exemplify various different approaches to the margin of appreciation. The purpose of this section is to demonstrate through an analysis of representative cases how arbitrators have responded to questions of discretion and deference and how they have calibrated their standard of review.

3.1 Myers v. Canada

The case of *Myers v. Canada*⁷⁵ was initiated by S.D. Myers, Inc., an Ohio based enterprise active in the remediation of PCBs or polychlorinated biphenyls, a highly toxic compound used in electrical equipment. In 1993, Myers Canada was founded to attract Canadian customers to have their PCB waste destroyed in Myers' facilities in the United States. However, in 1995, the Canadian authorities decided to close their border for the export of PCBs. The decision was based on the Canadian Environmental Protection Act and deemed necessary to "ensure that Canadian PCB wastes are managed in an environmentally sound manner in Canada and to prevent any possible significant danger to the environment or to human life or health".⁷⁶ After eighteen months, the ban was lifted. Myers complained that, during this period, Canada had breached its obligations under Chapter 11 of the North American Free Trade Agreement (NAFTA). Amongst other things, the claimant argued that the ban amounted to a violation of the national treatment standard (Article 1102), the international minimum standard of treatment (Article 1105) and the prohibition of expropriation without compensation (Article 1110).⁷⁷

75 *S.D. Myers v. Canada*, *supra* note 66. An application for judicial review of this award was refused by the Federal Court of Canada on 13 January 2004.

76 *Ibid.*, para. 123.

77 See for a discussion, C.H. Brower II, 'International Decisions. *S.D. Myers, Inc.*', 98:2 *American Journal of International Law* (2004) pp. 339-348. More critical is B.T. Hodges, 'Where the Grass is Always Greener: Foreign Investor Actions against Environmental Regulations under NAFTA's Chapter 11, *S.D. Myers, Inc. v. Canada*', 14:2 *Georgetown International Environmental Law Review* (2001) p. 403: "The decision reached by the arbitral panel was plainly wrong in light of the body of international law under which States are obliged to operate. (...) Perhaps the most notable impact of this decision is that it validates a mechanism by which a foreign, private company can invalidate environmental regulations promulgated in accordance with domestic law and international obligations". For a laudatory evaluation, see T. Weiler, 'A First Look at the Interim Merits Award in *S.D. Myers, Inc. v. Canada*: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection', 24:2 *Hastings International and Com-*

The *Myers* tribunal quickly dismissed the claim for expropriation. It held that “[r]egulatory conduct by public authorities is unlikely to be the subject of a legitimate complaint under Article 1110 of the NAFTA”.⁷⁸ Nonetheless, the tribunal remarked that it would not be distracted by the legal form of the government measure: a tribunal “should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure”.⁷⁹ In the case of the PCB ban, the tribunal concluded that no expropriation had occurred, because Meyers’s rights had only been temporarily curbed and no other party had received any benefits from this.⁸⁰

In the context of the minimum standard of treatment, the tribunal explained that its task was not to correct national decisions:

When interpreting and applying the ‘minimum standard’, a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections”.⁸¹

The tribunal then proceeded to explain its interpretation of the minimum standard:

The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from

parative Law Review (2001) p. 188: “The *Myers* case demonstrates that there is a definite need for investment protection in the NAFTA, as blatantly discriminatory measures can apparently emerge even from a country such as Canada, with a stable government, fully functioning legal institutions, and a highly developed economy”.

78 *S.D. Myers v. Canada*, *supra* note 66, para. 281.

79 *Ibid.*, para. 285.

80 *Ibid.*, para. 287.

81 *Ibid.*, para. 261.

the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders”.⁸²

According to the *Myers* tribunal, a regulatory measure could only violate Article 1105 when a high level of injustice or arbitrariness has been reached.⁸³ In making this assessment, a tribunal should acknowledge the “high measure of deference” that follows from the international right of states to regulate domestic matters.⁸⁴ While using the term ‘deference’, the *Myers* tribunal seems

82 *S.D. Myers v. Canada*, *supra* note 66, para. 263.

83 The interpretation of Article 1105 NAFTA has given rise to considerable debate. In July 2001, the Free Trade Commission (FTC), made up of representatives from the NAFTA member states, issued several ‘Notes of Interpretation of Certain Chapter 11 Provisions’. On Article 1105, the FTC decided that this provision “prescribes the customary international law minimum standard of treatment of aliens”, and does not “require treatment in addition to or beyond that which is required by the customary international law minimum standard”; NAFTA Free Trade Commission, ‘Notes of Interpretation of Certain Chapter 11 Provisions’, 31 July 2001, <www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>, visited on 1 June 2014. See C.H. Brower II, ‘Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105’, 46:2 *Virginia Journal of International Law* (2006) pp. 347-364; A. Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’, 104:2 *American Journal of International Law* (2010) pp. 18-181; M. Pappas, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, Oxford, 2013). NAFTA tribunals have continued to develop diverging interpretations of the contents of the customary law minimum standard and the extent to which this standard has evolved over time. *Comp. e.g.*, *Mondev International, Ltd. v. United States*, 11 October 2002, ICSID Case No. ARB(AF)/99/2, Award, paras. 114-125, <www.italaw.com/sites/default/files/case-documents/ita1076.pdf>, visited on 1 June 2014; *International Thunderbird Gaming Corporation v. Mexico*, 26 January 2006, UNCITRAL, Arbitral Award, para. 194, <www.italaw.com/sites/default/files/case-documents/ita0431.pdf>, visited on 1 June 2014; See *e.g.*, *Glamis Gold, Ltd. v. United States*, 8 June 2009, UNCITRAL, Award, paras. 612-616, <www.italaw.com/sites/default/files/case-documents/ita0378.pdf> visited on 27 May 2014.

84 The *Myers* tribunal’s notion of a “high measure of deference” has had a lasting impact. Respondent states commonly refer to the award to convince tribunals to grant them a margin of appreciation and many tribunals have quoted the “high measure of deference” with approval. See *e.g.*, *GAMI Investments, Inc. v. Mexico*, 15 November 2004, UNCITRAL, Final Award, para. 92, <www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf>, visited on 1 June 2014; *Saluka Investments BV v. Czech Republic*, 17 March 2006, UNCITRAL, Partial Award, para. 305, <[For use by the Author only | © 2014 Koninklijke Brill NV](http://www.italaw.com/sites/default/files/case-</p>
</div>
<div data-bbox=)

to refer to what is called ‘discretion’ in this article. The tribunal reasoned that because Article 1105 only prohibits measures that reach a certain level of injustice or arbitrariness, states retain a wide freedom to regulate their domestic affairs, in accordance with the general approach of international law toward domestic matters.

In spite of the tribunal’s lenient interpretation of Article 1105, other parts of the award suggest a more intrusive approach. The tribunal quickly dismissed Canada’s arguments in defence of the export ban. It concluded that “there was no legitimate environmental reason for introducing the ban”.⁸⁵ On the contrary, “Canada’s policy was shaped to a very great extent by the desire and intent to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that were owned by Canadian nationals”.⁸⁶ Accordingly, the tribunal found a violation of NAFTA Article 1102, the standard of national treatment, while the majority also found a violation of Article 1105.⁸⁷

In the end, the *Myers* award shows an ambiguous approach to the intensity of review. On the one hand, the tribunal asserted that its review under Article 1105 should be non-intrusive and that only a highly unjust or arbitrary measure could constitute a violation of this standard. On the other hand, the tribunal was apparently easily convinced that Canada’s justification for the contested measure was implausible.⁸⁸ In addition, in spite of the high measure of

documents/itao740.pdf>, visited on 1 June 2014; *Gemplus S.A. et al. and Talsud S.A. v. Mexico*, 16 June 2010, ICSID Case No. ARB (AF)/04/3 and ARB (AF)/04/4, Award, para. 6.26, <www.italaw.com/sites/default/files/case-documents/itao357.pdf>, visited on 1 June 2014; *Joseph Charles Lemire v. Ukraine*, 14 January 2010, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, para. 505, <www.italaw.com/sites/default/files/case-documents/itao453.pdf>, visited on 1 June 2014; *Deutsche Bank A.G. v. Democratic Socialist Republic of Sri Lanka*, 23 October 2012, ICSID Case No. ARB/09/02, Dissenting Opinion of Makhdoom Ali Khan, para. 86, <<http://italaw.com/sites/default/files/case-documents/italaw1273.pdf>>, visited on 1 June 2014.

85 *S.D. Myers v. Canada*, *supra* note 66, para. 195.

86 *Ibid.*, para. 162.

87 *Ibid.*, para. 266.

88 The *Myers* tribunal is not the only one that announced a lenient standard of review but appeared to exercise strict scrutiny in practice. See *Técnicas Medioambientales Tecmed S.A. v. Mexico*, 29 May 2003, ICSID Case No. ARB (AF)/00/2, Award, para. 97, <www.italaw.com/sites/default/files/case-documents/itao854.pdf>, visited on 1 June 2014, para. 122: “Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due defer-

injustice or arbitrariness required for a breach of Article 1105, the majority did not undertake a separate analysis under this Article but only referred to its findings under Article 1102.⁸⁹

3.2 International Thunderbird v. Mexico

In 2002, the Canadian company International Thunderbird Gaming brought claims against Mexico concerning the closure of its gaming facilities by Mexican authorities.⁹⁰ According to the claimant, the prohibition of gambling found in Mexican law was not applicable to its services because they entailed only “games of skills and abilities” and not games of chance, but according to the Mexican authorities, Thunderbird’s machines constituted prohibited

ence, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure”; Tallent, *supra* note 11, p. 133: “the *Tecmed* tribunal did *not* give deferential review to the State’s application of the measures at issue in that case. To the contrary, it reviewed the purpose behind the measures in detail”. According to Tallent, *Tecmed* is an exemplary award, proving that tribunals are well capable of undertaking a balanced and well-reasoned review of state conduct, without relying on deference. Caroline Henckels agrees that *Tecmed* is not a deferential decision, but in her opinion, this is why the award is flawed. The *Tecmed* type of review is “unsatisfactory from the perspective of the need for international investment law to provide sufficient policy space for host states”; Henckels, *supra* note 9, p. 209; *Gemplus S.A. et al. and Talsud S.A. v. Mexico*, 16 June 2010, ICSID Case No. ARB (AF)/04/3 and ARB (AF)/04/4, Award, para. 6.26, <www.italaw.com/sites/default/files/case-documents/ita0357.pdf>, visited on 1 June 2014: “in assessing the Respondent’s conduct later in this Award, this Tribunal accords to the Respondent a generous measure of appreciation, applied without the benefit of hindsight”; *Comp. Van Harten*, *supra* note 69, p. 94: the award suggests “*faux* restraint in that the tribunal professed in passing that it would show deference but appeared to proceed with categorical review of whether the state violated the treaty”.

89 The majority of the tribunal was of the opinion that a breach of Article 1102 sufficed to establish a breach of Article 1105 as well. *See* for a rejection this idea, the FTC ‘Notes of Interpretation’, *supra* note 83: “[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)”. *See also Loewen Group, Inc. and Raymond L. Loewen v. United States*, 26 June 2003, ICSID Case No. ARB(AF)/98/3, Award, para. 128, <www.italaw.com/sites/default/files/case-documents/ita0470.pdf>, visited on 1 June 2014.

90 *Thunderbird v. Mexico*, *supra* note 83.

gambling equipment.⁹¹ The tribunal determined that it was not empowered to decide whether Thunderbird's services were prohibited under Mexican law.⁹² More importantly, it held that NAFTA's Chapter 11 did not preclude a prohibition of gambling such as the one found in Mexican law:

Mexico has in this context a wide regulatory 'space' for regulation; in the regulation of the gambling industry, governments have a particularly wide scope of regulation reflecting national views on public morals. Mexico can permit or prohibit any forms of gambling as far as the NAFTA is concerned. It can change its regulatory policy and it has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct.⁹³

The tribunal held that regulatory measures could only give rise to a valid claim under the minimum standard of treatment if they amounted to "a gross denial of justice or manifest arbitrariness falling below acceptable international standards".⁹⁴ Mexico's application of its gambling law in the case at hand did not trespass this threshold. The tribunal dismissed Thunderbird's argument that an official opinion issued by the *Secretaría de Gobernación* (SEGOB) had sufficed to create a legitimate expectation that the company's services were allowed under Mexican law.⁹⁵ It also rejected Thunderbird's complaint that its due process rights had been violated during the administrative proceedings. The tribunal did not find "anything reproachable" about the administrative order that followed an administrative hearing where Thunderbird was present.⁹⁶

The *Thunderbird* tribunal confirmed the idea that states party to NAFTA have a wide freedom to regulate in the public interest. Only a gross denial

91 *Ibid.*, paras. 131, 133.

92 *Ibid.*, para. 125.

93 *Ibid.*, para. 127.

94 *Ibid.*, para. 194. See further the discussion *supra* note 83.

95 *Ibid.*, paras. 166, 196. See S. Fietta, "The 'Legitimate Expectations' Principle under Article 1105 NAFTA. *International Thunderbird Gaming Corporation v. The United Mexican States*", 7:3 *Journal of World Investment and Trade* (2006) pp. 423-432.

96 *Thunderbird v. Mexico*, *supra* note 83, para. 198. Arbitrator Thomas Wälde disagreed with both points, holding that Thunderbird could rely on legitimate expectations created by SEGOB's opinion and that the enforcement of the law contained discriminatory elements. *International Thunderbird Gaming Corporation v. Mexico*, December 2005, UNCITRAL, Separate Opinion of Thomas Wälde, <www.italaw.com/sites/default/files/case-documents/ita0432.pdf>, visited on 1 June 2014. Wälde's Opinion will be further discussed in section 4.4 of this article.

of justice or manifest arbitrariness could give rise to a breach in this context. The type of review exercised by the *Thunderbird* tribunal resembles the margin of appreciation, according states a measure of discretion in complying with their international obligations and applying a correspondingly lenient standard of review.

3.3 Enron v. Argentina

The deep economic crisis that hit Argentina from 2001 to 2002 and the measures that the Argentine government took in response have resulted in numerous investor-state arbitration cases against Argentina.⁹⁷ It is in the context of these cases that the discussion about discretion and deference in international investment arbitration has attracted the most attention.⁹⁸ This is not surprising given the fact that the review of emergency measures has always provoked judicial restraint by both domestic and international judges.⁹⁹

The claimants in the Argentine cases complained of losses inflicted by the recovery measures that the Argentine government took to stabilize the economy. Amongst these measures were a bank deposit freeze, a devaluation of the peso through the termination of its peg to the dollar, a default on the country's external debt and a conversion of deposits and loans into pesos.¹⁰⁰ According

-
- 97 United Nations Conference on Trade and Development, 'Recent Developments in Investor-State Dispute Settlement 2012', *International Investment Agreements - Issue Notes 2013 No. 1*, p. 2, <<http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=453>>, visited on 1 June 2014; W.W. Burke-White and A. von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', 48:2 *Virginia Journal of International Law* (2008); J.E. Alvarez and G. Topalian, 'The Paradoxical Argentina Cases', 6:3 *World Arbitration and Mediation Review* (2012) pp. 491-544; J. Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis', 59:2 *International and Comparative Law Quarterly* (2010) pp. 325-371.
- 98 S. Vasani, 'Bowling to the Queen: Rejecting the Margin of Appreciation Doctrine in International Investment Arbitration', in I.A. Laird and T.J. Weiler (eds.), *Investment Treaty Arbitration and International Law. Volume 3* (JurisNet, Huntington, 2010) pp. 149-150.
- 99 See for a comparative account: C. Binder and A. Reinisch, 'Economic Emergency Powers: A Comparative Law Perspective', in: S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) pp. 503-540.
- 100 See Burke-White and Von Staden, *supra* note 9, pp. 289-290; R.D. Bishop and R. Aguirre Luzi, 'Investment Claims: First Lessons from Argentina', in: T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, London, 2005) pp. 425-469; B. Setser and A. Gelpert, 'Pathways Through Financial Crisis: Argentina', 12:4 *Global Governance* (2006) pp. 465-488.

to the claimants, the recovery measures violated several BIT-standards, but Argentina contended that the measures were justified by the severity of the economic crisis and its consequences for the social and political stability of the state. Specifically, in cases initiated by U.S. investors, Argentina argued that Article XI of the Argentina-U.S. BIT exempted it from liability. This Article provided that the BIT would not preclude the application of measures necessary for the maintenance of public order or the protection of essential security interests. In addition, Argentina invoked the customary law doctrine of necessity as codified in Article 25 of the Articles on State Responsibility, arguing that the recovery measures were “the only means” to “safeguard an essential interest against a grave and imminent peril”.¹⁰¹

Like most other tribunals deciding on the Argentine emergency measures, the *Enron* tribunal held that the Argentine recovery pack violated various BIT-provisions, “even assuming that the Respondent was guided by the best of intentions, which the Tribunal has no reason to doubt”.¹⁰² The tribunal further decided that Argentina could not rely on the customary law defence of necessity, because there was no grave and imminent peril threatening an essential interest of the state, and because Argentina had substantially contributed to the crisis.¹⁰³ On the requirement that the emergency measures had to be the “only means” available, the tribunal concluded: “it is not the task of the Tribunal to point out which alternative was recommendable, only to determine whether the choice was made was the only way available, and this does not appear to be the case”.¹⁰⁴

The debate on the appropriate standard of review was further ignited because Argentina, backed up by Anne-Marie Slaughter and William Burke-White, argued that Article XI of the US-Argentina BIT was “self-judging”, meaning that each state would be “the sole judge of when the situation requires measures of the kind envisaged by the Article, subject only to a determination of good faith by tribunals”.¹⁰⁵ *Enron*, supported by its expert José Alvarez, contended that Article XI was not self-judging because such an

101 Vasani, *supra* note 98, pp. 150-152.

102 *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, 22 May 2007, ICSID Case No. ARB/01/3, Award, para. 268, <www.italaw.com/sites/default/files/case-documents/ita0293.pdf>, visited on 1 June 2014.

103 *Ibid.*, paras. 305-307, 311-312.

104 *Ibid.*, para. 309. *Comp. CMS Gas Transmission Company v. Argentina*, 12 May 2005, ICSID Case No. ARB/01/8, Award, para. 323, <www.italaw.com/sites/default/files/case-documents/ita0184.pdf>, visited on 1 June 2014.

105 *Enron v. Argentina*, *supra* note 102, para. 324; see S.W. Schill and R. Briese, ‘If the State Considers’: Self-Judging Clauses in International Dispute Settlement’, in A. von Bog-

“extraordinary exception” should be explicitly defined by the treaty.¹⁰⁶ The tribunal agreed with the claimants. It noted that the object and purpose of the BIT was to protect international investments in situations of economic difficulty, and that any possibility for the state to escape its treaty obligations should be interpreted restrictively. Designing Article XI as a self-judging clause would be “definitely inconsistent” with this object and purpose: “[i]n fact, the Treaty would be deprived of any substantive meaning”.¹⁰⁷ Moreover, the *Enron* tribunal agreed with the claimants that a self-judging provision should be clearly designated as such by the treaty: “[t]ruly exceptional and extraordinary clauses such as a self-judging provision normally must be expressly drafted to reflect that intent”.¹⁰⁸ As the BIT did not contain such designation, Article XI could not be self-judging.

Of course, the tribunal’s conclusion that Article XI was not self-judging did not yet imply that *de novo* review was the only alternative possibility and that Argentina was not entitled to any deference at all. Indeed, two other tribunals reviewing the Argentine emergency measures, in the cases of *LG&E* and *Continental Casualty*, also rejected the argument that Article XI was self-judging, but they nonetheless applied a good faith review or granted an explicit margin of appreciation.¹⁰⁹ The *Enron* tribunal, however, did not grant any deference to the respondent, concluding that “the judicial control must be a substantive one”.¹¹⁰ The arbitrators noted:

Judicial determination of the compliance with the requirements of international law in this matter should not be understood as if arbitral tribunals might be wishing to substitute for the functions of the sovereign State, but simply responds to the duty that in applying international law they cannot fail to give effect to legal commitments that are binding on the parties and interpret the rules accordingly.¹¹¹

dandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law Vol. 13* (Brill, Leiden, 2009) pp. 61-140.

106 *Enron v. Argentina*, *supra* note 102, para. 327.

107 *Ibid.*, para. 332.

108 *Ibid.*, para. 335. *Comp. CMS v. Argentina*, *supra* note 104, para. 370.

109 *Comp. LG&E Energy Corp. v. Argentina*, 3 October 2006, ICSID Case No. ARB/02/1, Decision on Liability, paras. 212, 214 <www.italaw.com/sites/default/files/case-documents/ita0460.pdf>, visited on 1 June 2014; *Continental Casualty Co. v. Argentina*, 5 September 2008, ICSID Case No. ARB/03/9, Award, para. 187, <www.italaw.com/sites/default/files/case-documents/ita0228.pdf>, visited on 3 June 2014.

110 *Enron v. Argentina*, *supra* note 102, para. 339.

111 *Ibid.*, para. 340. *Comp. CMS v. Argentina*, *supra* note 104, para. 373.

Relying on its conclusion with regard to the customary law defence, the tribunal concluded that Article XI was not applicable and that the claimants were entitled to compensation.¹¹²

The *Enron* tribunal's findings on the necessity defence have been annulled by an annulment committee on the grounds that the tribunal manifestly exceeded its powers.¹¹³ The committee took issue, especially, with the tribunal's discussion of the "only means"-requirement of the customary law defence of necessity.¹¹⁴ In the interpretation of the tribunal, this requirement would only be met if there were truly no other measures that could possibly have been adopted. Argentina argued that this interpretation would make the whole principle of necessity redundant, since it was almost always possible to conceive of some alternative response to an emergency.¹¹⁵ The committee concluded that the tribunal should have explained why it insisted on a literal interpretation of the "only means"-requirement.¹¹⁶ It also complained that the tribunal should have clarified how the question of relevant alternatives should be answered:

Does the tribunal determine this at the date of its award, when the tribunal may have the benefit of knowledge and hindsight that was not available to the State at the time that it adopted the measure in question? Or does the Tribunal determine whether, on the basis of information reasonably available at the time that the measure was adopted, a reasonable and appropriately qualified decision maker would have concluded that there was a relevant alternative open to the State? Or does customary international law recognise that reasonable minds might differ in relation to such a question, and give a 'margin of appreciation' to the State in question? In that event, the relevant question for the Tribunal might be whether it was reasonably open to the State, in the cir-

¹¹² *Enron v. Argentina*, *supra* note 102, para. 339.

¹¹³ Conform Art. 52(1)(b) ICSID Convention. *Enron Creditors Recovery Corp. v. Argentina*, 30 July 2010, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, <www.italaw.com/sites/default/files/case-documents/ita0299.pdf>, visited on 1 June 2014. See for a comprehensive overview M. Wilson, 'The *Enron v. Argentina* Annulment Decision: Moving a Bishop Vertically in the Precarious ICSID System', 43:2 *University of Miami Inter-American Law Review* (2012) pp. 347-376. See also J.E. Alvarez, 'The Return of the State', 20:2 *Minnesota Journal of International Law* (2011) pp. 247-249.

¹¹⁴ *Enron v. Argentina*, Annulment Decision, *supra* note 113, paras. 368-378.

¹¹⁵ *Ibid.*, para. 353 sub m.

¹¹⁶ *Ibid.*, paras. 377-378.

cumstances as they pertained at the relevant time, to form the opinion that no relevant alternative was open.¹¹⁷

The annulment committee did not provide its own answers to these questions, but it seemed to favour some deference towards the Argentine authorities, for two reasons. First, the committee apparently believed that it was unfair to review national decision-making without acknowledging that the tribunal possessed more information than the relevant authorities at the time the decision was taken. Second, the committee suggested that the question of how to respond to an economic crisis is the object of legitimate disagreement. In such a situation, the committee seemed to believe, it is appropriate to restrict arbitral review to a standard of reasonableness.

The disagreement between the *Enron* tribunal and the annulment committee illustrates the divergent results reached by the many tribunals reviewing the Argentine emergency measures.¹¹⁸ Although the Argentine claim that Article XI is self-judging has been widely rejected, tribunals have adopted different degrees of scrutiny.¹¹⁹ The positions range from an explicit adoption of the margin of appreciation to its explicit rejection: while the *Continental Casualty* tribunal accorded a “significant margin of appreciation” to Argentina,¹²⁰ the

¹¹⁷ *Ibid.*, para. 372.

¹¹⁸ A. Reinisch, ‘Necessity in International Investment Arbitration - An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS v. Argentina* and *LG&E v. Argentina*’, 8:2 *Journal of World Investment and Trade* (2007) pp. 191-214; M. Waibel, ‘Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*’, 20:3 *Leiden Journal of International Law* (2007) pp. 637-648. But, see also J.E. Alvarez, ‘The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime’, in K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy* (Oxford University Press, Oxford, 2012) p. 467: “the *Argentine Gas Sector Cases*, for all their differences, reach many strikingly similar legal conclusions”. See also S.A. Alexandrov, ‘On the Perceived Inconsistency in Investor-State Jurisprudence’, in J.E. Alvarez and K.P. Sauvant (eds.), *The Evolving International Investment Regime. Expectations, Realities, Options* (Oxford University Press, Oxford, 2007) pp. 60-69.

¹¹⁹ E.g., *CMS v. Argentina*, *supra* note 104, para. 339; *LG&E v. Argentina*, *supra* note 109, para. 214; *Continental Casualty v. Argentina*, *supra* note 109, paras. 182, 187; *El Paso Energy International Company v. Argentina*, 31 October 2011, ICSID Case No. ARB/03/15, Award, para. 604, <www.italaw.com/sites/default/files/case-documents/ita0270.pdf>, visited on 1 June 2014.

¹²⁰ *Continental Casualty v. Argentina*, *supra* note 109, para. 181, footnotes 270 and 351. But see Alvarez, *supra* note 7, p. 370: “[i]ronically, the decision that arguably interferes the most with the sovereign right to regulate is the one that on the surface appears to be most deferential to it, namely *Continental Casualty*”. According to Alvarez, the award

Siemens tribunal objected against the adoption of “a margin of appreciation not found in customary international law or the Treaty”.¹²¹

3.4 Glamis Gold v. United States

Between 1994 and 2002, the Canadian mining company Glamis Gold planned to commence open pit mining on federal lands in California. The company possessed mining rights on these lands, but their actual execution raised environmental and cultural concerns, in particular among the Native Americans to whom the area was of spiritual value.¹²² In 2003, Glamis brought a claim against the United States under NAFTA Chapter 11, arguing that the Department of the Interior unduly delayed permission for the project and that the State of California made the project economically unfeasible through its new reclamation requirements.¹²³ According to the claimants, these actions amounted to an expropriation and a breach of the fair and equitable treatment standard. Both claims were rejected by the tribunal.¹²⁴

In the context of Glamis’ complaint that the conduct of the United States was arbitrary, the respondent argued that it was entitled to discretion and deference. The U.S. contended that states party to NAFTA have a wide discretion to impose regulatory policies and that arbitral tribunals should adopt domestic notions of deference such as those common in the U.S. and Canada. According to the respondent, these standards acknowledge that courts lack specific expertise and a democratic mandate to overrule decisions of the other branches of government.¹²⁵ For similar reasons, the tribunal’s threshold for

“erroneously appears to presume that all regulatory actions need to be explained as ‘necessary’ under Article IX of the United States-Argentina BIT”. Alvarez’ reading of the award seems to result from the choice of the tribunal to commence its analysis with verifying whether the necessity defence applied to the contested measures, before discussing whether they would otherwise violate treaty standards. This choice does not necessarily presume, however, that all contested measures had to be justified by necessity. On the contrary, the award suggests that even if the necessity defence would have failed, not all contested measure would have constituted a breach of the BIT. *Continental Casualty v. Argentina*, *supra* note 109, paras. 261-263.

121 *Siemens A.G. v. Argentina*, 17 January 2007, ICSID Case No. ARB/02/8, Award, para. 354, <www.italaw.com/sites/default/files/case-documents/ita0790.pdf>, visited on 1 June 2014. The comment was made in the context of the calculation of damages. Other parts of the award suggest a more lenient approach, *see e.g.*, paras. 255, 273.

122 *Glamis Gold*, *supra* note 83, para. 10.

123 *Ibid.*, para. 11.

124 *Ibid.*, paras. 536, 828-829.

125 *Ibid.*, paras. 591-595.

finding arbitrariness constituting a violation of Article 1105 should be very high.¹²⁶

The tribunal agreed with the respondent that Article 1105 could only be violated by acts that were “sufficiently egregious and shocking”, such as “a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons”.¹²⁷ The tribunal reached this conclusion on the basis of an analysis of the history and development of the minimum standard under NAFTA and customary international law.¹²⁸ It then ruled that the respondent was not entitled to any further deference:

The Tribunal disagrees that domestic deference in national court systems is necessarily applicable to international tribunals. In the present case, the Tribunal finds the standard of deference to already be present in the standard as stated, rather than being additive to that standard. The idea of deference is found in the modifiers ‘manifest’ and ‘gross’ that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning.¹²⁹

The tribunal continued to verify whether the contested government actions did reach the threshold of “sufficiently egregious and shocking”.¹³⁰ With regard to the conclusions of the American authorities on the unique cultural characteristics of the mining area, the arbitrators held: “[i]t is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency”.¹³¹ With regard to the complaint that the Californian legislation was arbitrary, the tribunal held that a breach of the minimum standard would

126 *Ibid.*, para. 597.

127 *Ibid.*, para. 616. For a critique of this interpretation, see M.C. Ryan, ‘*Glamis Gold, Ltd. v. the United States* and the Fair and Equitable Treatment Standard’, 56:4 *MacGill Law Journal* (2011) pp. 919-959.

128 See further the discussion *supra* note 83.

129 *Glamis Gold*, *supra* note 83, paras. 617, 23.

130 *Ibid.*, paras. 762, 779, 803. See S.W. Schill, ‘*Glamis Gold, Ltd. v. United States* (Note)’, 104:2 *American Journal of International Law* (2010) p. 257: “The tribunal thereby constitutes a trend in investment jurisprudence to grant significant leeway to domestic institutions to regulate in the public interest in the absence of an investor-state contract or specific assurances by the state that aim at inducing investment”.

131 *Glamis Gold*, *supra* note 83, para. 779.

not occur only because the tribunal found “that an agency acted in way with which the tribunal disagrees or a State passed legislation that the tribunal does not find curative of all the ills presented”.¹³² Rather, the only inquiry for the tribunal to make was whether the state had gone below the bottom line of the minimum standard. According to the arbitrators, the United States had not done so.¹³³

The *Glamis Gold* tribunal provided a nuanced approach to the question of the intensity of arbitral review. It confirmed the idea that investment tribunals are not mandated to revise and correct national decisions, but the reason why it deemed intrusive review inappropriate did not result from a comparison with domestic public law adjudication, but from the limited scope of the applicable treaty standard. According to the tribunal, Article 1105 protected only against acts of a very serious nature and not against any measure that could be considered wrong in some respect. Put differently, Article 1105 allowed states a wide measure of discretion, and for this reason only lenient review was appropriate. The tribunal further held that because the respondent was entitled to discretion, no further recourse to deference was necessary. This latter argument has received some criticism, for example from Caroline Henckels, who warned that the *Glamis* tribunal conflated “the normative content of fair and equitable treatment with the concept of deference based on external factors”.¹³⁴ The reason for this “conflation” appears to be a practical consideration. The tribunal apparently concluded that while both discretion and deference result in lenient review, there was no need for ‘extra’ deference on the basis of institutional factors in addition to the discretion already embodied in Article 1105.¹³⁵

¹³² *Ibid.*, para. 803.

¹³³ *Ibid.*, paras. 528-529.

¹³⁴ Henckels, *supra* note 9, p. 214.

¹³⁵ *Comp. Christoffersen, supra* note 28, p. 235: “We may - at least for analytical purposes - talk of a ‘pure’ discretion derived from the substance of the ECHR and an ‘enlarged’ discretion flowing in part from the subsidiary interpretation and application of the ECHR”.

3.5 Lemire v. Ukraine

The case of *Lemire v. Ukraine*¹³⁶ followed upon earlier arbitration proceedings that had been settled in 2000.¹³⁷ The claimant, an American citizen and the owner of a music radio station in Ukraine, contended that the respondent had failed to comply with the settlement agreement and continued to act in violation of the Ukraine-U.S. BIT. Lemire complained that Ukraine deliberately hindered his business, for example by refusing to award him licenses to expand his services.¹³⁸ In addition, Lemire argued that a legal requirement to play Ukrainian music for half of the time, introduced in 2006, violated the prohibition of performance requirements codified in the BIT.¹³⁹

In assessing Lemire's claim concerning the awarding of licenses, the tribunal focused on the procedural quality of the national measures. Describing a deferential approach, the tribunal set a high threshold for finding a violation:

The Tribunal is not thereby suggesting that a breach occurs if the National Council makes a decision which is different from the one the arbitrators would have made if they were the regulators. The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal's sole duty is to consider whether there has been a treaty violation. A claim that a regulatory decision is materially wrong will not suffice. It must be proven that the State organ acted in an arbitrary or capricious way. A regulatory organ charged with the attribution of licences on a competitive basis plainly violates essential notions of fairness if it refuses to consider the information provided by a qualified applicant, or if it engages in favouritism.¹⁴⁰

Applying the chosen standard of review to the case, the tribunal found that the Ukrainian decision-making processes indeed violated Lemire's rights: "the procedure was marred by significant shortcomings" which facilitated

¹³⁶ *Lemire v. Ukraine*, *supra* note 84. The tribunal decided on remaining issues in the Award of 28 March 2011. An application for annulment was declined on 16 July 2013 in a decision that has not been made publicly available.

¹³⁷ *Joseph Charles Lemire v. Ukraine*, 18 September 2000, ICSID Case No. ARB(AF)/98/1, Award, <www.italaw.com/sites/default/files/case-documents/ita0452.pdf>, visited on 1 June 2014.

¹³⁸ *Lemire v. Ukraine*, *supra* note 84, paras. 213-215.

¹³⁹ *Ibid.*, para. 218.

¹⁴⁰ *Ibid.*, para. 283.

“arbitrary or discriminatory decision-taking”.¹⁴¹ The claim concerning the local music requirement was rejected:

As a sovereign State, Ukraine has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by its Parliament and Government. The prerogative extends to promulgating regulations which define the State’s own cultural policy. The promotion of domestic music may validly reflect a State policy to preserve and strengthen cultural inheritance and national identity”.¹⁴²

The tribunal quoted the “high measure of deference” from *S.D. Myers* and added that this deference was “reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community”.¹⁴³ Pointing to similar practices in other states, it concluded that the local music requirement did not violate the fair and equitable treatment standard nor the local content rule,¹⁴⁴ because “the underlying reasons” of the requirement “were not to protect local industries and restrict imports, but rather to promote Ukraine’s cultural inheritance”.¹⁴⁵ This purpose was compatible with the BIT, according to the tribunal.

The *Lemire* tribunal restricted its review to a verification of whether national authorities did not act in an “arbitrary or capricious way”.¹⁴⁶ This was intended as a lenient standard of review, although Ukraine was found in breach. The *Lemire* tribunal further confirmed the respondent state’s right to discretion with regard to regulatory policies. The award suggests that such policies do not violate BIT standards, as long as their “underlying reasons” are not discriminatory. The approach of the *Lemire* tribunal is reminiscent of the margin of appreciation, comprising a lenient standard of review on grounds of both discretion and deference.

141 *Ibid.*, para. 419.

142 *Ibid.*, para. 505.

143 *Ibid.*, para. 505.

144 *Ibid.*, para. 507. Article II.6 of the BIT prohibited “performance requirements (...) which specify that goods or services must be purchased locally”.

145 *Ibid.*, para. 510.

146 *Ibid.*, para. 283.

3.6 Chemtura v. Canada

In *Chemtura v. Canada*,¹⁴⁷ a U.S. producer of agricultural pesticides objected to a Canadian decision to terminate its sale of products based on an insecticide called lindane.¹⁴⁸ According to Canada, the decision was a valid exercise of its regulatory powers, but the claimant argued that Canada's assessment of its products was flawed and that the respondent had thwarted its attempts to have the decision lawfully re-evaluated.¹⁴⁹

The parties in *Chemtura v. Canada* disagreed about whether the domestic regulatory agencies of the respondent should be granted a margin of appreciation under Article 1105 NAFTA. According to the respondent, investment tribunals are not "tasked with a substantive evaluation of regulatory science".¹⁵⁰ They should acknowledge, like domestic administrative law courts, that they do not possess scientific expertise nor the authority "to decide amongst a range of acceptable scientific outcomes, which one a State should have chosen".¹⁵¹ The tribunal answered:

[T]he Tribunal is of the opinion that the assessment of the facts is an integral part of its review under Article 1105 of NAFTA. In assessing whether the treatment offered to the Claimant's investment was in accordance with the international minimum standard, the Tribunal must take into account all the circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and public policy determination. This is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be conducted *in concreto*.¹⁵²

The tribunal in *Chemtura v. Canada* refused to engage in an "abstract" discussion of the margin of appreciation. Instead, it held that its assessment under Article 1105 should adapt to all the specific circumstances of the case. The

147 *Chemtura v. Canada*, 2 August 2010, UNCITRAL, Award, <www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf>, visited on 1 June 2014.

148 *Ibid.*, paras. 92-93.

149 *Ibid.*, paras. 93, 97.

150 *Chemtura v. Canada*, 23 October 2009, UNCITRAL, Government of Canada Post-Hearing Brief, para. 12, <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/chemtura-10.pdf>, visited on 1 June 2014.

151 *Ibid.*, para. 15.

152 *Chemtura v. Canada*, *supra* note 147, para. 123.

tribunal's remarks suggest that it would exercise strict scrutiny and make an independent assessment of the facts, but that it would grant some deference to the determinations of highly specialized agencies. Indeed, the arbitrators noted that its task was not "to determine whether certain uses of lindane are dangerous, whether in general or in the Canadian context".¹⁵³ Still, the tribunal was required to assess Chemtura's argument that the Canadian measures were taken on the basis of trade objectives instead of health concerns. Within that context, the tribunal noted that that "[i]rrespective of the state of science, (...) the Tribunal cannot ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s".¹⁵⁴ It concluded that the claimant had failed to prove that the Canadian agencies had acted in bad faith or that Canada had violated its obligations under NAFTA in any other way.¹⁵⁵

It appears that the review exercised by the *Chemtura* tribunal focused on the good faith of the national authorities.¹⁵⁶ Noting the specialized nature of the assessment at stake, the tribunal did not engage in an exhaustive discussion of the scientific appropriateness of the Canadian measures. The tribunal did review, however, whether the alleged health risks were not a pretext for Canada to protect certain trade interests. In making this assessment, the tribunal conducted a *prima facie* review of the health risk argument, concluding that the investor's allegations of bad faith were unconvincing.¹⁵⁷ This approach seems to be concordant with the margin of appreciation, although the tribunal refused to adopt the margin explicitly.

153 *Ibid.*, para. 134.

154 *Ibid.*, para. 135.

155 *Ibid.*, paras. 138, 163, 180, 193, 225, 237, 267.

156 *Ibid.*, paras. 137-138.

157 Y. Fukunaga, 'Standard of Review and "Scientific Truths" in the WTO Dispute Settlement System and Investment Arbitration', 3:3 *Journal of International Dispute Settlement* (2012) p. 573. According to Fukunaga, the "the tribunal confined itself to an examination of whether the respondent acted in bad faith in conducting a risk assessment to support the adoption of the regulations". See also C.E. Foster, 'Adjudication, Arbitration and the Turn to Public Law "Standards of Review": Putting the Precautionary Principle in the Crucible', 3:3 *Journal of International Dispute Settlement* (2012) pp. 535-536. According to Foster, the *Chemtura* tribunal "rejected an approach based on concepts of review". The tribunal "refrained from enquiring into the correctness of the science relied upon by Canada, yet simultaneously the Tribunal took comfort from pertinent aspects of the scientific evidence". It should be noted that the *Chemtura* approach might have been different if the investor had not complained of bad faith but of a lack of proportionality, for example.

3.7 Paushok v. Mongolia

In *Paushok v. Mongolia*,¹⁵⁸ the Russian owner of the gold mining company Golden East-Mongolia brought claims against Mongolia under the Mongolia-Russia BIT. Amongst other things, Paushok complained about the introduction of a windfall profit tax in 2006 after a sharp increase in gold prices. According to Paushok, the tax breached various BIT standards, because it was an unreasonable, discriminatory, and arbitrary measure, imposed with undue haste in violation of Paushok's legitimate expectations.¹⁵⁹

The tribunal ruled that legislation as such is not exempt from review by an investment tribunal: “[a]ctions by legislative assemblies are not beyond the reach of bilateral investment treaties. A State is not immune from claims by foreign investors in connection with legislation passed by its legislative body”.¹⁶⁰ Nonetheless, the arbitrators also noted that their personal opinion about a piece of legislation was not decisive for their review under a BIT:

[T]he fact that a democratically elected legislature has passed legislation that may be considered as ill-conceived, counter-productive and excessively burdensome does not automatically allow to conclude that a breach of an investment treaty has occurred. If such were the case, the number of investment treaty claims would increase by a very large number.¹⁶¹

The tribunal concluded that the Mongolian windfall profit tax did not violate the Mongolia-Russia BIT. It noted that the claimant did not possess a stability agreement¹⁶² and therefore decided that no legitimate expectations were violated. The short time frame in which the contested tax was adopted did not imply that the legislative process was not transparent:

[l]egislative assemblies in all countries regularly adopt legislation within a very short time and, sometimes, without debates, especially if there

158 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, 28 April 2011, UNICTRAL, Award on Jurisdiction and Liability, <www.italaw.com/sites/default/files/case-documents/ita0622.pdf>, visited on 1 June 2014.

159 *Ibid.*, para. 257-258.

160 *Ibid.*, para. 298.

161 *Ibid.*, para. 299.

162 Such ‘stability agreement’ or ‘stabilization clause’ is “an agreement between a State and an investor for the purpose of stabilizing (freezing), at least to a certain extent and for a certain period of time, the taxes payable by an investor and/or other legislative, regulatory or administrative measures affecting it”. *Ibid.*, para. 97.

is urgency and there is unanimity of views among parliamentarians. The recent worldwide economic crisis has led to such steps adopted by legislative assemblies in all kinds of democratic countries.¹⁶³

In response to the claim that the tax regime's distinction between gold and copper was discriminatory, the tribunal held that claimants had not succeeded "in demonstrating that this was an abusive or irrational decision and that it constituted discriminatory treatment".¹⁶⁴ As to the reasonableness of the tax, the tribunal noted that it was "generally considered excessive" and probably resulted in many negative economic consequences for the respondent, but to conclude from this that the treaty had been violated was "a step that the Tribunal is not ready to take".¹⁶⁵ On the claimant's argument that the tax was "not in the public interest", the tribunal held:

[t]he definition of public interest is one that varies considerably from one State to another and it is a subject of significant public debate within each State, specially when controversial legislation or regulation is proposed. This is more a subject for political debate than arbitral decisions.¹⁶⁶

The *Paushok* tribunal reaffirmed the idea already present in *Myers* that a tribunal's mere disagreement with a contested act of government is not sufficient to find a BIT violation. On one occasion, the *Paushok* tribunal mentioned an explicit standard of review, verifying whether the contested measure was "abusive or irrational".¹⁶⁷ Although the tribunal did not apply this standard in a systemic manner, other parts of the award confirm that the tribunal applied a high threshold for finding regulatory measures in violation of the BIT.

3.8 Conclusions

The overview of cases provided in this section has produced a patchwork of different approaches to the margin of appreciation in the review of public interest regulation. The positions taken by the various tribunals range from the explicit adoption of the margin to its explicit rejection. Nonetheless, it appears that a majority of the tribunals reviewing public interest regulation

¹⁶³ *Ibid.*, para. 304.

¹⁶⁴ *Ibid.*, para. 316.

¹⁶⁵ *Ibid.*, para. 321.

¹⁶⁶ *Ibid.*, para. 328.

¹⁶⁷ *Ibid.*, para. 316.

adopted a lenient standard of review. Some of them formulated something akin to a precise standard of review, such as the “arbitrary or capricious”-standard of the *Lemire* tribunal.¹⁶⁸ Others did not resort to such specific formulations, but most of them also made clear that their review would be non-intrusive. To this extent, the approach of most tribunals seems concordant with the margin of appreciation.

In the context of this article, an important question is whether the tribunals adopted their lenient standards of review on grounds of discretion or deference. At first sight, it appears that most of the tribunals accorded a degree of deference to the respondent states. They commonly expressed in some way that tribunals are not mandated to substitute their own evaluations for those of the national authorities, because their only task is to review compliance with treaty obligations. It should be noted, however, that such statements do not necessarily imply deference. From the legal framework established by the relevant treaties already follows that investor-state tribunals are only required to apply treaty provisions and not to impose their political or economical opinions on respondent states. Deference does not describe the self-evident fact that a tribunal’s task is limited to reviewing compliance with treaty obligations, but rather the determination that its review is conducted in a non-intrusive manner because of the normative priority of national determinations. When this inference is absent, ostensibly deferential language seems to serve only a rhetorical function.

For some tribunals, discretion was the decisive rationale for applying a non-intrusive standard of review. These tribunals considered that the standards codified in investment treaties prohibit only acts of gross injustice. According to the *Glamis Gold* tribunal, for instance, Article 1105 NAFTA protects only against government conduct that is “surprising, shocking, or exhibits a manifest lack of reasoning”.¹⁶⁹ This approach implies that respondent states have a wide freedom to regulate and, consequently, arbitral review has to be non-intrusive. Some commentators have criticized this approach for conflating the normative content of treaty provisions with the applicable standard of review.¹⁷⁰ It is found here that this conflation is inevitable. When tribu-

168 *Lemire v. Ukraine*, *supra* note 84, para 283.

169 *Glamis Gold*, *supra* note 83, paras. 616.

170 A.K. Bjorklund, ‘Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims’, 45:4 *Virginia Journal of International Law* (2005) footnote 277: “A number of cases and commentators have suggested that mere errors should not implicate international responsibility. (...) This trope, conflates the notion of a standard of review and a standard of state responsibility”.

nals are requested to review compliance with a discretionary norm, recourse to a lenient standard of review is a reasonable way of exercising supervision without neglecting the respondent's right to discretion. The standard or review formulates the benchmark that the reviewing institution applies to evaluate whether the state has remained within the limits of its discretion. It may sometimes be difficult to draw a clear line between the standard of protection and the standard of review, but this is not necessarily problematic because a non-intrusive standard of review is the logical corollary of a discretionary norm.

4 The Desirability of the Margin of Appreciation in Investor-State Arbitration

The previous section of this article has shown that investors, respondents, and tribunals have advanced different arguments for and against the margin of appreciation in investor-state arbitration. The present section aspires to disentangle the various issues involved and to provide for a normative evaluation of the different arguments in the light of the object and purpose of the investment regime. This normative benchmark allows a focus on the specific characteristics of international investment law in order to evaluate whether the margin of appreciation fits in this context. Other authors have taken broader perspectives, such as a concern for democratic legitimacy.¹⁷¹ The approach taken here is more restricted and seeks only to verify whether the margin fits with the principal rationales of the regime itself. It is considered that the international investment regime stems from the will of signatory states, which, for present purposes, serves as a sufficient source of legitimacy.¹⁷²

Before turning to an analysis of the object and purpose of the international investment regime, the present section will investigate two alternative normative benchmarks for evaluating the appropriateness of a margin of appreciation in investor-state arbitration, namely the text of common investment

171 A. von Staden, 'Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review', 10:4 *International Journal of Constitutional Law* (2012) pp. 1023-1049.

172 A potential criticism of this approach points out that investment treaties can be signed by executive branch officials who bypass domestic democratic decision-making procedures. See E. Benvenisti and G.W. Downs, 'Toward Global Checks and Balances', 20:3 *Constitutional Political Economy* (2009) pp. 366-387. However, legitimacy concerns of this kind relate to the domestic rather than the international level.

treaty provisions and the so-called ‘nature’ of investor-state arbitration. The section will then move to an analysis of the object and purpose of the regime, before considering the main arguments in favour of deference, namely the democratic legitimacy of domestic institutions and their relative expertise.

4.1 *The Text of Treaty Standards*

Standards of review are almost never explicitly codified in treaty norms. The margin of appreciation as developed by the ECHR does not rely on a specific provision of the European Convention, but was adopted by the Strasbourg institutions themselves.¹⁷³ It is nonetheless possible that treaty norms shed light on the appropriate standard of review as envisaged by the state parties. Self-judging clauses, for example, clearly indicate that only lenient review is intended by the signatory states. States sometimes employ such clauses when they want to retain a certain right to non-compliance, most often in circumstances related to security issues, and when they want to reserve judgment on these matters for themselves. The self-judging nature of the provision is visible from language such as “if the state considers” or “if the state determines”.¹⁷⁴ An example of a self-judging clause is Article XIV(1) of the Mozambique-U.S. BIT (1998):

This Treaty shall not preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.¹⁷⁵

It is sometimes asserted by treaty signatories that self-judging clauses are exempted from any judicial review. India and Singapore, for example, decided in their Comprehensive Economic Cooperation Agreement (2005) that the security exceptions of the treaty were non-justiciable.¹⁷⁶ In the absence of such notice, however, it is commonly accepted that self-judging clauses are subject

¹⁷³ Yourow, *supra* note 12, pp. 14-15.

¹⁷⁴ Schill and Briese, *supra* note 105, pp. 69-70.

¹⁷⁵ *Comp. Art. XI of the Argentina-U.S. BIT*: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests”. Although Argentina repeatedly argued that this clause was self-judging, not one tribunal accepted this argument. *See also Art. 2102(1) NAFTA*.

¹⁷⁶ *Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore (2005)*, Art. 6.12(4), <www.commerce.nic.in/ceca/toc.htm>, visited on 3 June 2014.

to a good faith review in accordance with Article 26 of the Vienna Convention on the Law of Treaties.¹⁷⁷

Self-judging clauses are not often found in investment treaties. Common BIT provisions, such as the expropriation standard and the fair and equitable treatment standard, do normally not contain any self-judging elements. It is nonetheless argued by Rahim Moloo and Justin Jacinto that the text of such provisions provides some indication as to which standard of review is appropriate, at least with regard to public interest regulation: “inherent in the treaty standards is a textual basis for according some degree of deference to the ability of the country to regulate in the public interest”.¹⁷⁸ Moloo and Jacinto argue that investment treaty provisions do not set absolute limits to the right of states to regulate in the public interest.¹⁷⁹ To the extent that the treaties restrict this right, they do so only in terms of open-ended principles, such as ‘fairness’ and ‘equity’, and not through rules that are either breached or complied with.¹⁸⁰ Consequently, the treaties do not impose precise obligations, but only prescribe a balancing of the interests involved.¹⁸¹ For that

177 Schill and Briese, *supra* note 105, pp. 61-140. See also D. Eisenhut, ‘Sovereignty, Nationals Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with regard to “Security Exceptions”, 48:4 *Archiv des Völkerrechts* (2010) pp. 431-466.

178 Moloo and Jacinto, *supra* note 40, p. 541.

179 *Ibid.*, at 541. *Comp.* the classic interpretation principle *in dubio mitius*, which rules that in case of treaty ambiguity, the scope of obligations assumed by states should be interpreted restrictively. See, critically, T.W. Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’, in C. Binder, U. Kriebaum, A. Reinisch, and S. Wittich (eds.), *International Investment Law for the 21st Century* (Oxford University Press, Oxford, 2009) pp. 733-736. See also *Total S.A. v. Argentina*, 27 December 2010, ICSID Case No. ARB/04/1, Decision on Liability, para. 115 <www.italaw.com/sites/default/files/case-documents/itao868.pdf>, visited on 1 June 2014: “signatories of such treaties do not thereby relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties. Such limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed”.

180 Moloo and Jacinto, *supra* note 40, p. 541. The distinction between the two categories is not unproblematic, however. See P.J. Schlag, ‘Rules and Standards’, 33:2 *UCLA Law Review* (1985) pp. 379-430.

181 *Comp.* Schill, *supra* note 7, p. 7, noting concerns over “the vagueness, or even ambiguity, of investment treaties, which, on the basis of broadly formulated principles of investment protection, restrict state sovereignty without giving arbitral tribunals clear guidance as to the scope of obligations assumed under the treaties”.

reason, Moloo and Jacinto argue, tribunals should employ a “degree of deference” toward national decision-makers when reviewing compliance with such treaty norms.¹⁸²

Contrary to the argument of Moloo and Jacinto, it is proposed here that the openness of a treaty provision does not automatically imply that arbitral review should be non-intrusive. Certainly, it is possible that contracting states formulate standards in an open-ended way to leave themselves some room for discretion and to prevent international supervisory bodies from exercising strict scrutiny.¹⁸³ If such intentions can be proven, a non-intrusive standard of review is indeed appropriate.¹⁸⁴ Yet a concern about strict supervision may not be the principal reason behind open-ended language in treaty provisions. States may also feel that open-ended provisions are inevitable because future developments can never be fully foreseen. In addition, open-ended language may be the result of a compromise between states that would otherwise not have been able to reach an agreement.¹⁸⁵ In such circumstances, states may have chosen to leave it to international tribunals to solve remaining uncertainties, and non-intrusive review would not concord with this choice. Instead, tribunals could legitimately interpret the open norms according to their own views and exercise a *de novo* review of the contested measure.¹⁸⁶

In sum, the open-ended language of treaty provisions cannot provide a decisive argument for or against the margin of appreciation. Unless states party have clearly expressed a preference for a non-intrusive standard of review, for example through self-judging clauses, the debate about the margin has to move beyond the mere text of treaty provisions.

4.2 *The Nature of the Investment Regime*

Quite a number of academic observers have stressed the “public law nature” of investor-state arbitration and its implications for an appropriate standard of review. Anthea Roberts, for example, criticizes “the failure of some arbitral tribunals to recognize the public nature of investment treaty arbitration”.¹⁸⁷

182 Moloo and Jacinto, *supra* note 40, p. 567.

183 Comp. Shany, *supra* note 4, p. 915.

184 The ECHR seems to interpret most Convention provisions from this perspective. See *supra* section 2.2.

185 See further K.W. Abbot and D. Snidal, ‘Hard and Soft Law in International Governance’, 54:3 *International Organization* (2000) pp. 434-450.

186 See Wälde, *supra* note 179, p. 735.

187 A. Roberts, ‘The Next Battleground: Standards of Review in Investment Treaty Arbitration’, *International Council for Commercial Arbitration Congress Series No. 16* (2011) p. 173. See also Schill, *supra* note 7, pp. 3-37.

William Burke-White and Andreas von Staden complain of the “inappropriate standards of review applied by those tribunals when adjudicating public law elements of state conduct”.¹⁸⁸ They argue that investment tribunals should apply standards of review that suit the public law character of the issues at stake.¹⁸⁹ The present subsection will discuss whether the focus on the nature of investor-state arbitration is decisive for the debate on the margin of appreciation.

According to Burke-White and Von Staden, legal issues fall within the scope of ‘public law’ when they relate to the power and the legal ability of a state to regulate in the public interest.¹⁹⁰ Stephan Schill defines ‘public law disputes’ as “disputes about the lawfulness of the exercise of public authority of states”.¹⁹¹ Clearly, all the arbitration cases discussed in the previous section of this article fall within the scope of these definitions.¹⁹²

188 Burke-White and Von Staden, *supra* note 9, p. 285.

189 Gus van Harten has addressed other characteristics of investor-state arbitration that fail to reflect its public law nature: a lack of accountability, openness, coherence, and (financial) independence. G. van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford, 2007) p. 152.

190 Burke-White and Von Staden, *supra* note 9, p. 285. Burke-White and Von Staden do not consider every investor-state arbitration as a public law case. They identify two types of public law disputes: “regulatory/administrative” and “quasi-constitutional” disputes. The first category comprises cases that arise from tensions between the rights of the investor under a BIT and the right of the state to achieve permissible policy aims. The category of ‘quasi-constitutional’ disputes comprises cases in which a state’s essential interests are at stake and that impact its social and economic constitution. According to Burke-White and Von Staden, both categories of cases require public law standards of review, the latter category even stronger than the former. The identification of both types of cases relies on subject matter and treaty text. At the end of their article, the authors note that the public law cases are only a “relatively narrow but important subset of cases”. With regard to “the vast majority of cases in which such issues do not arise”, they do not propose any deferential standard of review.

191 Schill, *supra* note 9, p. 586.

192 Several authors have identified further characteristics of investor-state arbitration that demonstrate its “public law nature”. It is noted, for example, that the domestic relationship between the disputing parties of an arbitration case is a hierarchical one between governor and governed, although the parties are formally equal before the tribunal. In addition, investor-state arbitration cases have a direct impact on the domestic society of the host state, because the contested measures govern matters of public concern. Finally, investment tribunals influence the development of public international law, because their awards become often publicly available and serve as a jurisprudential tool for interpreting investment treaties. These various elements, it is argued, show that investor-state arbitration belongs to the realm of public law. See Roberts, *supra* note 187,

Burke-White and Von Staden assert that the public law nature of investor-state arbitration is a recent phenomenon. They notice that while traditional investment disputes concerned “simple expropriations and nationalization”, contemporary disputes deal with a wide variety of issues that concern the state’s right to regulate and distribute public goods.¹⁹³ According to Burke-White and Von Staden, investment tribunals have often failed to take this shift into account. They preserved the standards of review that originated from classic commercial arbitration: “investment treaty arbitrators still apply standards of review developed from arbitration’s private contract law origins. Today, these private law approaches are incompatible with and inappropriate to investment treaty arbitration’s new public law functions”.¹⁹⁴

Burke-White and Von Staden rightly point out that the subject matter of present-day investor-state arbitrations is increasingly diverse. Investment tribunals are nowadays required to review measures as varied as economic recovery plans, water concessions, affirmative action schemes, bans on harmful chemicals, environmental protection rules, and anti-tobacco legislation.¹⁹⁵ It should be noted, however, that this diversification relates to the type of state measure that is being contested, rather than to the ‘public law’ nature of the dispute. Cases concerning “simple expropriations and nationalizations” also involve the public law powers of the state and can relate to public interests as

p. 174-175; Schill, *supra* note 7, p. 15. See also G. van Harten and M. Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law, 17:1 *European Journal of International Law* (2006) pp. 121-150; S.W. Schill, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’, 52:1 *Virginia Journal of International Law* (2011) pp. 57-102; Wälde, *supra* note 179, pp. 724-727; G. Cordero Moss, ‘Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?’, in C. Binder, U. Kriebaum, A. Reinisch, and S. Witzich (eds.), *International Investment Law for the 21st Century* (Oxford University Press, Oxford, 2009) pp. 782-797; C. Brown, ‘Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law’, in S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford 2010) pp. 659-688.

193 Burke-White and Von Staden, *supra* note 9, p. 284.

194 *Ibid.*, at 288. Comp. A. Stone Sweet and F. Grisel, ‘Transnational Investment Arbitration: From Delegation to Constitutionalization?’, in P. Dupuy, F. Francioni, and E. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford, 2009) p. 136: arbitrators “are now finding themselves weighing the rights of investors against the public purposes being pursued by States (...). They have even begun to use some of the same techniques and procedures that administrative and constitutional judges have evolved in order to enhance legal effectiveness and political legitimacy”.

195 Schill, *supra* note 9, pp. 577-578.

well. Therefore, the shift in subject matter does not primarily concern a shift towards ‘public law’ disputes. Rather, the expanding scope of investment disputes seems to result from the growing number of investment treaties containing elaborate substantive provisions, inducing investors to become more assertive in claiming their rights, even when the contested measure is of a regulatory nature and does not appear to target the investor specifically. Of course, one may argue that this development calls for a new reflection on standards of review. In that case, however, the reason for such a reflection is that investor claims cover an increasingly wide spectrum of state measures, rather than a shift towards public law disputes.

Regardless of whether the public law nature of investor-state arbitration should be considered a recent phenomenon, many authors contend that this public law nature requires tribunals to apply non-intrusive standards of review. It is not self-evident, however, that a public law dispute calls for arbitral self-restraint. It should be noted that the International Court of Justice, which commonly deals with public law disputes, albeit in an interstate context, has denounced the margin of appreciation, at least in one instance.¹⁹⁶ Moreover, several investor-state arbitration tribunals have also rejected the margin.¹⁹⁷ It is possible that this rejection stems from a failure of the arbitrators to appreciate the public law nature of the dispute, as argued by Burke-White and Von Staden. It is equally possible, however, that the tribunals saw convincing reasons for rejecting the margin in spite of the public law nature of the dispute at hand. In that case, the identification of a dispute as a public law case does not necessarily imply that non-intrusive standards of review should be applied.

The advocates of the margin in investment law often rely on comparisons with other legal contexts to substantiate their call for deference. From a comparison with domestic public law or administrative law disputes follows the argument that deference is due because of the separation of powers doctrine and notions of democratic legitimacy.¹⁹⁸ A comparison with the ECHR may show that, at least in some instances, domestic institutions are better

196 *Oil Platforms (Iran v. United States)*, 6 November 2003, ICJ, *I.C.J. Reports 2003*, para. 73. Yuval Shany argues this rejection of the margin was inconsistent with other judgments of the Court. See Shany, *supra* note 4, pp. 936-940.

197 *Siemens v. Argentina*, *supra* note 121, para. 354; *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L. (Renta 4) v. Russia*, 20 July 2012, SCC V (024/2007), Award, para. 22 <www.italaw.com/sites/default/files/case-documents/ita1075.pdf>, visited on 1 June 2014.

198 See for a discussion of this argument Schill, *supra* note 9, p. 592.

placed to balance conflicting interests.¹⁹⁹ The example of the WTO dispute settlement bodies may serve to demonstrate that international supervisors are poorly equipped to re-evaluate factual determinations made by national institutions.²⁰⁰ These arguments merit further investigation and will be discussed later on. It should be noted beforehand, however, that a comparison with other legal contexts can never provide a definite argument for the margin in the context of investor-state arbitration, because this context is different from other fields of law in important respects.²⁰¹ Compared to domestic courts, investment tribunals operate in a different institutional context where the separation of powers doctrine does not necessarily apply. Investment tribunals differ from the ECHR because that Court provides protection only on a subsidiary basis after an exhaustion of local remedies.²⁰² The WTO dispute settlement system only allows interstate claims.²⁰³ Such differences provide

199 See E.M. Freeman, 'Regulatory Expropriation Under NAFTA Chapter 11: Some Lessons From the European Court of Human Rights (Note)', 42 *Columbia Journal of Transnational Law* (2003) p. 211.

200 V. Vadi and L. Gruszczynski, 'Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal', 16:3 *Journal of International Economic Law* (2013) p. 617. See *EC Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, Appellate Body of the WTO, Report, WT/DS26/AB/R, WT/DS48/AB/R, *DSR 1998:I*, para. 117.

201 *Comp.* A. Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 107:1 *American Journal of International Law* (2013) p. 49, demonstrating "that analogies from other legal fields frequently point to distinct (and sometimes clashing) solutions as a result of differences in the structures, assumptions, and normative commitments of their underlying paradigms". See also Vadi and Gruszczynski, *supra* note 200, pp. 618-622.

202 See for a more detailed comparison: C. Tomuschat, 'The European Court of Human Rights and Investment Protection', in C. Binder, U. Kriebaum, A. Reinisch, and S. Witech (eds.), *International Investment Law for the 21st Century* (Oxford University Press, Oxford, 2009) pp. 636-656. See *Renta 4 v. Russia*, *supra* note 197, para. 22: 'human rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of 'margins of appreciations' that apply to the former'. The *Renta 4* tribunal engaged in an explicit discussion of the ECHR's approach because the Court had reached different conclusions concerning basically the same facts. *OAO Neftyanaya Komaniya Yukos v. Russia*, 20 September 2011, ECHR, no. 14902/04, para. 665, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106308>>, visited on 28 May 2014.

203 See further Alvarez, *supra* note 7, pp. 38-40.

obvious rebuttals to arguments based on comparisons with these contexts. Therefore, the remainder of this section will evaluate the different arguments from the perspective of investor-state arbitration as a unique type of dispute settlement. The choices made by other institutions are relevant to this assessment as far as the rationale behind those choices is equally convincing in the specific context of international investment law.

4.3 *The Object and Purpose of the International Investment Regime*

Having concluded that the text of most treaty provisions and the public nature of investor-state arbitration cannot provide decisive arguments for or against the margin of appreciation, the present subsection identifies the object and purpose of the investment regime as an alternative benchmark. It has been argued by Yuval Shany that international judicial bodies derive the power to formulate their own standards of review from their more general power to determine their own procedures.²⁰⁴ This power is arguably bound, however, by the object and purpose of the treaty that the court or tribunal is requested to apply, because that object and purpose is also the ultimate aim of the supervisory proceeding itself.²⁰⁵

In the field of international investment law, the identification of the object and purpose of the relevant treaties has created some disagreement. On the one hand, it has been argued that the protection of foreign investment is the obvious object and purpose of BITs and similar multilateral treaties: “it is hard to dispute the notion that the main, overriding, purpose of investment treaties (at times called investment protection treaties) is to protect the investor and its proprietary and contractual rights against governmental risk”.²⁰⁶ On the other hand, it has been pointed out that investment treaties normally contain more objectives than only investment protection.²⁰⁷ For example,

204 Shany, *supra* note 4, pp. 911.

205 Comp. Article 31 (1) of the Vienna Convention on the Law of Treaties. For the role of the ‘object and purpose’ of a treaty as an interpretative canon in treaty interpretation by arbitral tribunals, see C. Fernández de Casadevante Romani, *Sovereignty and Interpretation of International Norms* (Springer, Heidelberg, 2007) pp. 166-167. See also, critically, T. Roe and M. Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press, Cambridge, 2011) pp. 29-31: “[t]he parties to a treaty may have entered into it for a variety of reasons, so that its object and purpose can only be described in such general terms as to detract from its utility as an interpretative tool. (...) The extent to which the concept has any independent utility might therefore be doubted”.

206 Wälde, *supra* note 179, 732.

207 See Ortino, *supra* note 52, pp. 438-446.

the 2012 U.S. Model BIT, while referring in its title to “the encouragement and reciprocal protection of investment”, also expresses the desire to “promote greater economic cooperation”, to “stimulate the flow of private capital and the economic development of the Parties”, and to “maximize effective utilization of economic resources and improve living standards”.²⁰⁸ Consequently, various tribunals have determined that the aim of investment protection should be considered in the light of broader objectives. The *Saluka* tribunal, commenting on the Czech Republic-Netherlands BIT, held that “the protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations”.²⁰⁹ Similarly, the tribunal in *Suez v. Argentina* concluded that the protection of foreign investment is actually not the ultimate aim of the Argentina-France BIT and the Argentina-Spain BIT:

When one examines the stated purposes of both BITs, one sees that they have broader goals than merely granting specific levels of protection to individual investors. In the case of Argentina-France BIT and the Argentina-Spain BIT, the Contracting States are seeking to further economic cooperation between them. The protection and promotion of foreign investment, while important to attaining that goal, are only a means to that end.²¹⁰

The *Lemire* tribunal also determined that the protection of foreign investments is secondary to the overall treaty aim of economic development:

The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital. But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. Economic development is an

208 United States Department of State, 2012 Model BIT, <www.state.gov/documents/organization/188371.pdf>, visited on 3 June 2014. A multilateral investment treaty like the Energy Charter Treaty can have as much as fifty objectives. Wälde, *supra* note 179, pp. 758-762.

209 *Saluka v. Czech Republic*, *supra* note 84, para. 300.

210 *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentina*, 30 July 2010, ICSID Case No. ARB/03/17, Decision on Liability, para. 200, <www.italaw.com/sites/default/files/case-documents/itao813.pdf>, visited on 1 June 2014.

objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy.²¹¹

The remarks of the *Saluka*, *Suez*, and *Lemire* tribunals contradict the idea that the protection of foreign investment should be the overriding rationale in the interpretation and application of investment treaties, because this aim is secondary to the broader aim of economic development. In order to evaluate the standpoint of the tribunals, it is helpful to consider the historical impetus behind the development of the present investment regime.

In the second half of the previous century, capital-exporting countries started pushing for the development of international legal frameworks that would protect the investments of their nationals in emerging economies. Without such framework, investors were dependent on the vague and fluid norms of customary international law and the possibly unsteady protection of domestic law. The precariousness of this situation has been famously described by Thomas Wälde in his separate opinion to the *Thunderbird* award. Wälde identified the position of the foreign investor as one of “structural weakness”, because of his exposure to the regulatory and administrative powers of the host state.²¹² Investment treaties aspired to remedy this vulnerability: they were “meant to compensate for the weaknesses of foreign investors by a regime of intensified protection”.²¹³ The treaties offered protection that was relatively clear in content and enforceable through international arbitration. Capital-importing states agreed with the novel system, in order to attract foreign investment for the benefit of their domestic economy.²¹⁴ To

211 *Lemire v. Ukraine*, *supra* note 84, para. 273. See also *El Paso Energy International Company v. Argentina*, 31 October 2011, ICSID Case No. ARB/03/15, Award, para. 604, <www.italaw.com/sites/default/files/case-documents/ita0270.pdf>, visited on 1 June 2014.

212 *Thunderbird v. Mexico*, Separate Opinion of Thomas Wälde, *supra* note 96, para. 33.

213 *Ibid.* Wälde’s comments are made in the context of the legitimate expectations requirement under the fair and equitable treatment standard. See S. Fietta, “The ‘Legitimate Expectations’ Principle under Article 1105 NAFTA. *International Thunderbird Gaming Corporation v. The United Mexican States*”, 7:3 *Journal of World Investment and Trade* (2006) pp. 423-432.

214 See for a critical account K. Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, Cambridge, 2013) p. 120, describing “the imperialist origins of international investment law”. According to Miles, the investment regime was imposed by powerful states on developing states in order to ensure the same high-level investment protection that was available

them, the treaties provided a means to attract investors and subsequent flows of capital and technology.²¹⁵ For these reasons, the mutual interest in signing a BIT has been described as “a grand bargain: a promise of protection of capital in return for the prospect of more capital in the future”.²¹⁶ This background supports the conclusion that the object and purpose of investment treaties is the encouragement of foreign investment through the provision of international protection.²¹⁷

For the purposes of this article, the crucial question is whether the object and purpose described so far have a bearing on the appropriateness of the margin of appreciation in the context of investor-state arbitration. In order to answer this question, it is helpful to revisit the distinction between discretion and deference proposed earlier in this article. Although both components of the margin have similar results as far as they produce non-intrusive stand-

in colonial times. See also A.T. Guzman, “Why LCDs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties”, 38:4 *Virginia Journal of International Law* (1998) pp. 639-688. See for a refutation of this idea Alvarez, *supra* note 7, pp. 119-151; J.E. Alvarez, ‘Contemporary International Law: An “Empire of Law” or the “Law of Empire”?’, 24:5 *American University International Law Review* (2009) pp. 811-842. See also M. Sornarajah, *The International Law on Foreign Investment. Third Edition* (Cambridge University Press, Cambridge, 2010) pp. 1-8, 19-79; O.T. Johnson Jr. and J. Gimblett, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’, in K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2010-2011* (Oxford University Press, Oxford, 2012) pp. 649-692; A.F. Lowenfeld, *International Economic Law. Second Edition* (Oxford University Press, Oxford, 2008) pp. 467-591; K.J. Vandeveld, ‘A Brief History of International Investment Agreements’, 12 *University of California at Davis Journal of International Law and Policy* (2005) pp. 157-194.

215 See Foster, *supra* note 157, p. 527, pointing out that the balance of interests given effect in an investment treaty is not the one between the interests of the investor and the host state, but the one between the interests of the contracting states.

216 J.W. Salacuse and N.P. Sullivan, ‘Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain’, 46:1 *Harvard International Law Journal* (2005) p. 77. While it is controversial whether BITs actually achieve their objective, Salacuse and Sullivan conclude that the grand bargain has been realized: “there is strong evidence to show that they [BITs] both protect and promote FDI in developing countries and the United States. BITs have a particularly strong effect on encouraging FDI in developing countries”, p. 111.

217 Federico Ortino distinguishes between the ‘object’, “the substantial content”, and the purpose, “the reason for establishing the substantial content of the treaty”. He concludes that the object and purpose of a standard BIT is “to ensure the protection of foreign investments (object of the BIT) in order to intensify economic cooperation, encourage/promote international capital flows and increase the prosperity of both contracting parties (purpose of the BIT)”; Ortino, *supra* note 52, pp. 440-441.

ards of review, the two rationales have a different conceptual background. Therefore, in order to reach a comprehensive conclusion on the appropriateness of the margin, the appropriateness of both discretion and deference needs to be discussed separately.

As to discretion, it may seem at first sight that the object and purpose of investment treaties do not allow states any freedom in complying with the obligation to protect foreign investments, because the encouragement of foreign investment is best served by an absolute measure of protection. Upon further consideration, however, this interpretation cannot be sustained. The treaty aim of encouraging foreign investment certainly demands a stable and clear measure of protection, but investors cannot expect this protection to be absolute or unlimited. As noted by Tsai-fang Chen, “it would be quite absurd to argue that by entering into BITs, the States forgo the right to regulate in the areas of economic development, public health or environmental protection”.²¹⁸ The aim of encouraging foreign investment does not require states to prioritize the interests of the investor over other societal interests and to guarantee maximum profitability in all circumstances.²¹⁹ For that reason, the standards codified in investment treaties should be understood as minimum standards that leave states a certain degree of discretion in observing them.

The importance of recognising the regulatory discretion of host states has been illustrated by the *Saluka* tribunal. This tribunal held that an expansive interpretation of investment treaty standards would threaten the ultimate treaty aim of encouraging foreign investment, because host states might become hesitant about allowing foreign investments: “an interpretation 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”.²²⁰ If a tribunal would grant too much protection, in the opinion of the respondent state, this state might become reluctant to allow a further ex-

218 Chen, *supra* note 8, p. 39; Arato, *supra* note 11: “[I]t is uncontroversial that state action cannot be considered unfair and inequitable solely because it negatively affects a foreign investor’s bottom line. States retain significant authority to regulate in the public interest, even if such authority is curtailed by their treaty obligations—and it will often happen that legitimate regulatory measures will reduce the value of an investment without entailing any violation of the foreign investor’s rights”.

219 *Comp. Total v. Argentina*, *supra* note 179, para. 115.

220 *Saluka v. Czech Republic*, *supra* note 84, para. 300. See, approvingly, B. Stern, ‘The Future of International Investment Law: A Balance Between the Protection of Investors and the States’ Capacity to Regulate’, in J.E. Alvarez and K.P. Sauvant (eds.), *The Evolving*

pansion of foreign investment. In this way, an overly expansive interpretation of the treaty standards would have counterproductive effects on the investment regime. Instead, tribunals should leave host states a measure of discretion in their treatment of foreign investments and limit their review to verifying whether the authorities respected the bottom line codified in the treaty standard. The previous section of this article has demonstrated that many tribunals indeed followed this approach when reviewing public interest regulation. The tribunals commonly determined that investment treaty standards only protected against host state conduct which reached a high threshold of injustice. Less serious interferences with foreign investments were left to the discretion of the host state because the treaty standards did not univocally protect against such measures.

In addition to discretion, the margin of appreciation can also embody a degree of deference. It appears that this latter notion, in contrast to discretion, does not concord with the investment regime's object and purpose. While discretion depends on the normative scope of the applicable treaty standard, deference originates from a respect for the determinations of national authorities because of their democratic legitimacy or institutional capacity. Such respect seems to be incompatible with the investment regime's emphasis on the independent international supervision of investor-state disputes.

Thomas Wälde has convincingly argued that the crucial contribution of investment treaties to the protection of foreign investment is their codification of the investor's right to initiate international arbitration: "[i]t is the creation of arbitral jurisdiction, I suggest, and not the formulation of substantive investment protection obligations in national laws and treaties which is the pivot around which international investment law turns".²²¹ By granting foreign investors the right to initiate investor-state arbitration to review contested government measures, the treaties allow investors to bypass the domestic institutions of the respondent when they want to obtain a final judgment on whether contested measures are reconcilable with the treatment promised to

International Investment Regime. Expectations, Realities, Options (Oxford University Press, Oxford, 2007) pp. 174-192.

221 T.W. Wälde, 'The Specific Nature of Investment Arbitration', in P. Kahn and T.W. Wälde (eds.), *New Aspects of International Investment Law* (Martinus Nijhoff, Leiden, 2007) p. 56.

them in the applicable treaties.²²² This is the core contribution to the protection of foreign investments, according to Wälde, because “[t]he crucial lever for investment risk is who controls and applies the law”.²²³

There are several reasons why arbitral review is of great importance to the protection of foreign investments. Unlike national institutions, arbitral tribunals have no institutional relationship to the respondent. In domestic courts, “[t]he investor is exposed to a national judiciary which in most – or all – higher risk countries is under the control of the Government and far from impartial”.²²⁴ Moreover, even when the good faith of domestic courts is not in doubt, investors are at a disadvantage compared to nationals confronting their own government, because they are less familiar with the habits, customs, and prejudices of the national system: “the foreign investor is in a much more vulnerable, exposed position than a national citizen confronting his administration before national courts”.²²⁵ For these reasons, arbitral review has been advanced as the optimal avenue for settling disputes about the lawfulness of host state conduct. If arbitral tribunals would grant deference to domestic institutions in reviewing investor claims, they would erode the specific protection offered by the establishment of international supervision. They would shift the power to interpret treaty requirements back to the

222 Access to investor-state arbitration is, in principle, not dependent on an exhaustion of local remedies. See Article 26 ICSID Convention: “A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention”. *Comp. e.g.*, Art. 1121 NAFTA: “A disputing investor may submit a claim under Article 1116 to arbitration only if (...) (b) the investor and, (...) the enterprise, waive their right to initiate or continue before any waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 (...)”. In spite of these provisions, the exhaustion of local remedies continues to arouse some controversy. See *e.g.*, Foster, *supra* note 268, pp. 266-267: “it is proper to consider local remedies as relevant to the substance of certain treaty claims, including those for fair and equitable treatment, effective means and expropriation, at least to the extent they concern appealable judicial or administrative decisions”. *Comp.* U. Kriebaum, ‘Local Remedies and the Standards for the Protection of Foreign Investment’, in C. Binder, U. Kriebaum, A. Reinisch, and S. Wittich (eds.), *International Investment Law for the 21st Century* (Oxford University Press, Oxford, 2009) p. 461: “to reintroduce an exhaustion of local remedies requirement via the back door would have a number of negative consequences”.

223 *Ibid.*, p. 55.

224 *Ibid.*

225 *Thunderbird v. Mexico*, Separate Opinion of Thomas Wälde, *supra* note 96, para. 33.

host state.²²⁶ In this way, the central form of protection offered by investment treaties would be neutralized.

The advocates of deference in investor-state arbitration often rely on the same arguments as those raised above to support the appropriateness of discretion. They consider that deference is necessary to prevent states from losing their faith in the investment regime. It has been warned that between 2007 and 2012, Bolivia, Ecuador, and Venezuela denounced the ICSID Convention while Australia and South Africa have also taken steps to limit the right of foreign investors to initiate international arbitration proceedings.²²⁷ William Burke-White and Andreas von Staden argue that these choices were caused by the condemning awards issued against Argentina and the perceived lack of legitimacy of these awards.²²⁸ To restore the legitimacy of investor-state arbitration, Burke-White and Von Staden contend, tribunals should accord deference to national institutions.²²⁹

It is concluded here that discretion provides an better response to the concerns voiced by Burke-White and Von Staden. Arguably, the central concern of states engaged in investor-state arbitration is whether arbitral tribunals do

226 *Comp. Wälde, supra note supra note 179*, pp. 734: there is “no universal and unconditional principle of international law or of interpretation that State actions should receive ‘deference’, with quite an unclear meaning but tending towards self-judging, de-legalizing treaty obligations, and in effect ‘restrictive interpretation’”.

227 See Allen and Overy, ‘South Africa seeks to exclude recourse to international arbitration for foreign investors’, 4 November 2013, <www.allenoverly.com/publications/en-gb/Pages/South-Africa-seeks-to-exclude-recourse-to-international-arbitration-for-foreign-investors.aspx>, visited on 3 June 2014. It should be noted, however, that in spite of the attention that the denunciations have received, more states have ratified ICSID in the same period, including Cape Verde, Qatar, Moldova, South Sudan, Kosovo, Montenegro, Canada, and Sao Tome and Principe. See <<https://icsid.worldbank.org/ICSID/Servlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>>, visited on 3 June 2014. Of course, states can reply in less radical ways to concerns about intrusive review. Some states have already adopted new BIT language that narrows the scope of certain provisions, for example by explicitly excluding non-discriminatory regulatory measures in the public interest from the scope of the expropriation standard. However, these approaches do not solve concerns related to BITs that are concluded without such escapes. See B. Choudhury, ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?’, 41:3 *Vanderbilt Journal of Transnational Law* (2008) pp. 822-823; Chen, *supra* note 8, pp. 31-34; Roberts, *supra* note 83, pp. 179-225.

228 Burke-White and Von Staden, *supra* note 9, pp. 299-300; Henckels, *supra* note 9, pp. 199-200.

229 Burke-White and Von Staden, *supra* note 9, pp. 344-345.

not put restrictions on state action in ways that they never envisaged. For this reason, tribunals should identify the scope of treaty provisions in accordance with their object and purpose as intended by the signatory states. In other words, instead of granting deference to respondent states, tribunals should determine to what extent states were entitled to a measure of discretion under the applicable treaty norm. As long as arbitral tribunals acknowledge a right to discretion as envisaged by the signatory states, respondents do not need to be concerned about overly intrusive encroachments upon their regulatory autonomy.²³⁰ Moreover, an award gains in clarity when the tribunal determines whether or not the contested measure fell within the limits of the respondent's discretion, instead of reaching the same outcome through the adoption or rejection of deference. The latter approach distracts the focus of the dispute from the lawfulness of a contested measure toward the institutional differences between national authorities and arbitral tribunals.

4.4 *The Democratic Legitimacy of Domestic Institutions*

In contrast to the conclusion reached in the previous subsection, advocates of the margin of appreciation in investor-state arbitration often argue in favour of deference. They have contended that tribunals should defer to determinations made by domestic institutions because of their democratic legitimacy and practical expertise. These two types of arguments will be discussed in some more detail.

In the opinion of the ECHR, an important reason for granting a margin of appreciation to respondent states is the democratic legitimacy of national decisions.²³¹ Unlike domestic legislative and administrative institutions, the Court does not have a clear democratic mandate. The same can be said of arbitral tribunals. Santiago Montt has noted that adjudication by international arbitral tribunals easily transforms unelected adjudicators into policymakers, especially when they interpret and apply open-ended norms.²³² Consequently, to some observers, the democratic legitimacy of contested measures is an important reason for granting deference to the respondent state.²³³ Stephan

230 *Comp. Glamis Gold*, *supra* note 83, para. 617; *see also* Moloo and Jacinto, *supra* note 40, p. 54: “countries have not substantially abridged their ability to engage in *bona fide* regulatory conduct such that additional deference might be needed to respect a country's sovereign right and responsibility to regulate in the public interest”.

231 *See e.g.*, *Hatton*, *supra* note 24, para. 97.

232 Montt, *supra* note 73, pp. 135-136. *Comp. Paushok v. Mongolia*, *supra* note 158, para. 299.

233 Barnali Choudhury argues that investor-state arbitration suffers from a broader democratic deficit that not only concerns the undemocratic review of democratically adopted measures, but also a lack of transparency and arbitral accountability. Choudhury advances several solutions to these problems in addition to a margin of appreciation

Schill, for example, argues that democratic legitimacy “militates for granting deference to a host state’s determination of the content of domestic policies, such as the desired level of environmental protection, of determining what is in the domestic public interest, whether an expropriatory measure served a public purpose, or whether a measure taken is generally suitable and necessary to achieve that aim”.²³⁴ In a similar vein, Caroline Henckels argues that tribunals should not decide about policy choices which allow for legitimate disagreement, because such choices are best made by domestic institutions that have a democratic mandate to do so.²³⁵

The problematic relationship between democratic decision-making and judicial review is an issue well-known from domestic constitutional debates. Indeed, the comparison with domestic judicial review is a common source for the argument that international courts, like domestic public law courts, should defer to democratically legitimized decision-makers. It should be noted, however, that even within the national context, the debate on the legitimacy of judicial review is not settled. Proponents of strong judicial review for example point out that courts serve to protect pre-political fundamental rights against a possible tyranny of the majority.²³⁶ In addition, strong judi-

to cure the problems related to the review of democratically legitimized measures. Choudhury, *supra* note 227, pp. 775-832.

234 Schill, *supra* note 9, p. 600.

235 Henckels, *supra* note 9, pp. 205-207. Henckels labels this the “regulatory autonomy” rationale for deference, thereby avoiding the need to verify the democratic quality of a state or of a particular measure.

236 *Comp. S v. Makwanyane and Another*, 6 June 1995, Constitutional Court of South Africa, para. 88, <<http://www.saflii.org/za/cases/ZACC/1995/3.html>>, visited on 3 June 2014: “The very reason for (...) vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process”. The same reasoning is applied by Eyal Benvenisti to discard use of the margin of appreciation in cases that involve minority interests. “My argument is that while resort to the margins doctrine may be justified in certain matters that affect the general population in a given society, the doctrine is inappropriate when conflicts between majorities and minorities are examined”; E. Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’, 31:4 *NYU Journal of International Law and Politics* (1999) pp. 843-854. *Comp. A. Føllesdal, ‘Much Ado About Nothing? International Judicial Review of Human Rights in Well-Functioning Democracies’, in A. Føllesdal, J.K. Schaffer, and G. Ulfstein (eds.), The Legitimacy of International Human Rights Regimes. Legal, Political and Philosophical Perspectives* (Cambridge University Press, Cambridge, 2014) p. 284: “minority protection of some kind, with authority placed outside the legislature itself, may be a component of any set of workable majoritarian democratic institutions worth respecting”.

cial review serves a proper separation of powers because it checks the power of the other branches of government and prevents them from becoming too powerful.²³⁷ Within the context of this article, the point is not to repeat these debates. It should be borne in mind, however, that even though deferential standards of review may have become widely accepted in liberal democracies, the theoretical foundations of these standards are not uncontested.²³⁸

A more pressing question in the present context is to what extent the rationales for deferential review in domestic public law adjudication can be transposed to the international level. Andreas von Staden argues that, in principle, the arguments that apply in the domestic context apply to the international context as well: “[a]fter all, the national acts that international courts assess against applicable international law standards emanate, for the most part, from laws and policies adopted by national parliaments and executives”.²³⁹ However, Von Staden also acknowledges that international courts have a specific mandate to apply and interpret a certain international legal instrument. It could be argued that the characteristics of an investment treaty mitigate the relevance of the democratic nature of contested national measures. Kassi Tallent, for example, argues that when a state signs an investment treaty, this amounts to “a voluntary relinquishment of its sovereignty”.²⁴⁰ According to Tallent, the states party to an investment treaty traded some fraction of their sovereignty for the expected benefits of foreign investment. This reasoning could imply that states can no longer invoke the democratic legitimacy of domestic decisions once they have accepted certain obligations under international law, possibly even with democratic approval.²⁴¹ In the opinion of Von Staden, however, the mere act of signing a treaty that assigns certain adjudi-

237 See Van Harten, *supra* note 189, p. 71: “[o]ne 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”.

238 See Legg, *supra* note 16, pp. 70-73.

239 Von Staden, *supra* note 171, p. 1030.

240 Tallent, *supra* note 11, p. 129. In a similar vein, Vasani, *supra* note 98, pp. 167: “States signatories to a BIT, by definition, relinquish a certain amount of sovereignty in exchange for increased investment, development, and economic prosperity”. *Comp. Alvarez, supra* note 7, p. 369: “entry into a treaty is an exercise of a State’s right of self-determination; it is in effect an exercise of sovereignty, not a renunciation of it.

241 This argument may have specific problems in federations. See Bjorklund, *supra* note 170, pp. 889-890. See also Montt, *supra* note 73, pp. 141-144, noting that developing countries acceded to the BIT network under problematic circumstances and that the “incompleteness”, or vagueness, of investment treaties mitigate the value of consent.

catory tasks to an international tribunal does not yet end the discussion of how these tasks should be carried out:

The democratic legitimacy of the allocation of competences is not exhausted by the initial act of ratification of the underlying agreement, if only because the formal allocation of (sometimes broadly defined) competences and their exercise in practice are two different things. The allocation of competences by way of treaty ratification therefore needs to be complemented with democratically informed standards that guide to their exercise in practice.²⁴²

According to Von Staden, a voluntary relinquishment of sovereignty does not relieve a tribunal from the obligation to take the democratic legitimacy of domestic decisions into account. He does not specify, however, why this obligation continues to exist. It is a fundamental principle of international law that domestic law can never excuse a state's failure to honour international obligations.²⁴³ From this perspective, it is questionable why the domestic legitimacy of a contested measure should be taken into account when an arbitral tribunal reviews a state's compliance with international obligations. The domestic legitimacy of democratically adopted measures does not impact the obligations that a state has undertaken under international law. Therefore, when tribunals review compliance with these obligations, there is no reason to grant a margin of appreciation to the domestic authorities on the grounds that they are democratically legitimized.

In the context of investor-state arbitration, the democratic argument creates further problems. One may wonder, for example, to what extent and how arbitral tribunals should investigate the democratic quality of a contested measure. Obviously, certain organs of a state have a less clear and direct democratic support than others. One could argue that deferential standards of review should differentiate in that respect.²⁴⁴ Moreover, the democratic

242 Von Staden, *supra* note 171, p. 1033.

243 Vienna Convention of the Law of Treaties, Article 27.

244 The *Thunderbird* tribunal held that it should scrutinize the procedural quality of administrative decisions in a more lenient manner than that of judicial decisions: "[t]he administrative due process requirement is lower than that of a judicial process"; *Thunderbird v. Mexico*, *supra* note 83, para 200. *Comp.*, in the ECHR context, S. Wheatley, 'Minorities under the ECHR and the Construction of a "Democratic Society"', 51 *Public Law* (2007) p. 792. Alternatively, it could be argued that judicial decisions merit more lenient scrutiny, because of the presumed independence of the judiciary. See e.g., *Ros-InvestCo U.K. Ltd. v. Russia*, 12 September 2010, SCC V (079/2005), Final Award, paras.

argument also supposes differentiation among states, because not all states party to BITs are democracies.²⁴⁵ Anthea Roberts wonders:

Is this justification for deferential review applicable when dealing with States that are not robust democracies? If not, would deference result in a differential approach that subjected some States to intense scrutiny and others to mild review according to their internal political structure? Such an approach would play into concerns about investment treaty arbitration applying different standards to Western and non-Western states and sits awkwardly with the traditional public international law approach of treating all states as equal regardless of their internal political constitution.²⁴⁶

Von Staden argues that the differences between more and less democratic states are not relevant in this context. To avoid this type of distinction, deferential standards of review can be “conceptualized not as deference to democracy, but to national sovereignty”.²⁴⁷ The point is that a standard of review protective of sovereignty and therefore applicable to any state regardless of its internal constitution, still serves to protect the democratic legitimacy of contested decisions in a democratic state. As noted by Von Staden, “[t]he fact that such deference also benefits non-democracies is true, but irrelevant, if the perspective taken is that of those members that have chosen

274, <www.italaw.com/sites/default/files/case-documents/ita0720.pdf>, visited on 1 June 2014: “[O]ne will have to take into account the different functions held by administrative organs and judicial organs of a state and the resulting differences in their discretion when applying the law and in the appeals available against their decisions. In view of these specific aspects of the conduct of national courts, the specific criteria for denial of justice have been developed in international law”. Schill, *supra* note 9, pp. 596-597.

245 Føllesdal, *supra* note 51, p. 60: “The implication may be that such margins of appreciation should be broader for democracies - e.g., within in the EU - than for non-democratic states. The assessment of the democratic quality of any given state is no easy task, however - and underscores the risk of according courts and other treaty bodies too much discretion”. See also I. de la Roasilla del Moral, “The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine”, 7:6 *German Law Journal* (2006) pp. 622-623.

246 Roberts, *supra* note 187, p. 178. For a discussion of an eventual international right to democracy, see J. d’Aspremont, “The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks”, 22:2 *European Journal of International Law* (2011) pp. 549-570.

247 Von Staden, *supra* note 171, p. 1046.

to be governed democratically and want their democratic decision-making honoured".²⁴⁸ The reluctance of Roberts and Von Staden to advocate a differentiated approach to deference is understandable. It is questionable, however, whether Von Staden's conflation of concerns for democracy with concerns for sovereignty is convincing. Von Staden reasons from the perspective of the democratic state that demands respect for its democratic decision-making. From the perspective of the investor, this argument is probably not convincing. Generally, an investor will object to deference being granted to the respondent, but when the contested measure clearly expresses the will of the people in the host state, some deference towards the democratic will may be acceptable. This does not mean that the same willingness also applies to non-democratic decisions. In addition, there is a logical twist in Von Staden's argument. If democratic concerns are the real motives behind his proposal, he should agree with a differentiation along the lines of internal constitutions. If a concern for sovereignty is the ultimate rationale, the arguments focused on democracy cannot play a central role.

A final argument against deference on democratic grounds in investor-state arbitration relates to the position of the foreign investor in the domestic scheme. As long as democracy is understood as self-government,²⁴⁹ the fact that foreign investors do normally not participate in domestic decision-making processes in the host state militates against deference on grounds of democracy. As Kassi Tallent puts it: "[u]nlike in the ECHR system, where the international adjudicatory body relies on the democratic legitimization of norms at the state level, no such reliance is appropriate in the investment protection context, where the investor is an outsider to the democratic processes influencing the development and application of state regulatory measures".²⁵⁰ The exclusion of foreign investors from domestic politics does not only distinguish investor-state arbitration from the ECHR,²⁵¹ but also from domestic public law adjudication. The main rationale for deferential

248 *Ibid.*

249 *Ibid.*, p. 1024.

250 Tallent, *supra* note 11, p. 130.

251 It should be noted that the ECHR has acknowledged the differences between nationals and foreign investors in this respect. In *James and Others*, the Court held: 'non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption'. *James and Others*, *supra* note 58, para. 63. However, in the Court's approach, these differences resulted in a differentiated approach to compensation rather than in a differentiated approach to the standard of review applicable to the contested measure.

standards of review in domestic public law disputes is the idea that the will of the population as expressed through its elected representatives should not be overruled by an unelected judge. Clearly, this rationale cannot apply in the same manner to investor-state arbitration, because the foreign investor does not belong to the democratic constituency of the host state. The *Tecmed* tribunal noted:

[I]t should be also considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitle to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors.²⁵²

Sarah Vasani has pointed out that foreign investors are not only excluded from democratic decision-making, but that they are sometimes specifically targeted by it. She explains that foreign investors are easily viewed as aliens and “others” by the population of the host state. Especially in times of economic difficulties or other tensions, it is common that communities direct their fear, anger and other negative emotions toward foreign investors.²⁵³ In this context, an arbitral tribunal cannot legitimately defer to the public will.

4.5 *The Expertise of Domestic Institutions*

In addition to the democratic legitimacy argument, proponents of deference often rely on the idea that national decision-makers are “better placed” than an international tribunal to make certain assessments, arguing that domestic authorities have a “better knowledge or institutional capacity”, which enables them to make more accurate evaluations.²⁵⁴ It should be noted that this argument cannot provide a general basis for deference. Rather, the relevant question is whether national authorities have more expertise with regard to a certain issue, and only if this is the case, the tribunal should defer to them within the context of this specific issue.²⁵⁵ The proponents of deference point to at least two types of questions that can better be answered by domestic institutions than by an investment tribunal: first, questions of a technical na-

²⁵² *Tecmed v. Mexico*, *supra* note 88, para. 122. The tribunal referred to *James and Others*, *supra* note 58.

²⁵³ Vasani, *supra* note 98, pp. 167.

²⁵⁴ Schill, *supra* note 9, p. 602.

²⁵⁵ *Ibid.*, at 602.

ture, such as scientific or economic assessments, and, second, assessments of the public interest.

In the previous section of this article, it has been demonstrated that tribunals sometimes grant deference to specialized domestic agencies. The tribunal in *Glamis Gold*, for example, refused to review a national determination as to the cultural value of a certain landscape.²⁵⁶ The reluctance of tribunals to engage in technical discussions is understandable and legitimate, especially when the issue is controversial among experts. According to Yuka Fukunaga, a deferential standard of review is appropriate in these circumstances. Fukunaga argues that where controversial scientific questions have no “correct” answer, “an arbitral tribunal is less suited to making a determination regarding the scientific facts compared with the government that adopts a measure based on the facts”.²⁵⁷ It could be noted, however, that national authorities do not always possess more expertise regarding a technical issue. On the contrary, sometimes the claimant may be the party that is “better placed” to make a certain assessment.²⁵⁸

A different question is whether deference towards one of the parties is the best remedy to issues of expertise. It should be noted that international courts in other fields of law are also increasingly confronted with questions of a scientific nature.²⁵⁹ In their joint dissenting opinion to the case of *Pulp Mills (Argentina v. Uruguay)*, judges Al-Khasawneh and Simma asserted that the International Court of Justice was not “in a position adequately to assess and weigh complex scientific evidence”.²⁶⁰ They lamented the fact that the Court

256 *Glamis Gold*, *supra* note 83, para. 779.

257 Fukunaga, *supra* note 157, p. 575.

258 Vasani, *supra* note 98, pp. 168-169. In some areas of economic law, the ‘business judgment rule’ is applied to technical decisions made by corporate actors. Wälde, *supra* note *supra* note 179, pp. 734-735.

259 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality* (Cambridge University Press, Cambridge, 2011). Foster argues against deference: “The adjudication of disputes under public international law ought to involve the straightforward application by an international court or tribunal of the relevant legal rules in the circumstances before it, without any presupposition that one disputant or the other deserves particular deference. (...) [u]nless and until the relevant rules and institutions are amended, WTO panels and other international adjudicatory bodies will continue to have to engage in the science of the various disputes coming before them in order to determine members’ compliance with existing legal obligations, including their substantive elements”, p. 17.

260 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, *I.C.J. Reports 2010*, para. 4.

had not grasped the opportunity to develop a methodology for complex scientific matters. Pointing to examples from the WTO and interstate arbitration, the dissenters argued that, in such cases, the Court should have recourse to independent experts: “in a case concerning complex scientific evidence and where, even in the submissions of the Parties, a high degree of scientific uncertainty subsists, it would have been imperative that an expert consultation, in full public view and with the participation of the Parties, take place”.²⁶¹ Arguably, the same argument applies in the context of investor-state arbitration. Although investor-state arbitration is of a clearly adversarial nature and tribunals depend on the parties to bring arguments before them, there is no reason why tribunals should not appoint experts to share their expertise on disputed scientific issues. Both the UNCITRAL and ICSID Arbitration Rules allow for this possibility.²⁶² Reliance on experts seems more appropriate than deference to the respondent, especially when the claimant disputes the assessments made by the national authorities.²⁶³ When tribunals have recourse to experts, a lack of expertise on the side of the arbitrators is no longer a reason for granting deference.

It has been argued that national institutions are better placed, not only to make technical assessments but also to determine what is in the public interest. Caroline Henckels contends that domestic authorities are more competent “to discern and evaluate local conditions, as they are usually more closely acquainted with local issues, sensitivities and traditions”.²⁶⁴ Andreas von Staden and William Burke-White share this notion of proximity or embeddedness. They warn that arbitrators lack close ties to the social, political and legal environment of the host state, already because arbitrators cannot,

261 *Ibid.*, para. 17.

262 Article 29 of the UNCITRAL Arbitration Rules (2010) reads: “[a]fter consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal (...)”. Rule 36(b) of the ICSID Arbitration Rules reads: “with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself (...)”. Art. 43 of the ICSID Additional Facility Arbitration Rules reads: “The Tribunal may: (...) (c) appoint one or more experts, define their terms of reference, examine their reports and hear from them in person”.

263 An alternative solution is offered by Caroline Foster. She argues that tribunals should rely on the precautionary principle in cases of scientific uncertainty. Foster, *supra* note 157, p. 525-558. In practice, this approach will have the same result as deference, at least in cases where investor’s rights are threatened by regulatory measures based on alleged scientific facts.

264 Henckels, *supra* note 9, p. 205.

in principle, have the nationality of a party to the dispute. Burke-White and Von Staden further argue that the arbitrators' lack of embeddedness in the socio-political context of the dispute calls for deference towards the national authorities: it "suggests the need for greater deference to decisions made by institutions that are more culturally, legally, and politically embedded".²⁶⁵ Such deference is mandatory because the perceived legitimacy of arbitral decisions depends on a certain resonance with the culture and values of the relevant socio-political environment.²⁶⁶

The lack of proximity between an arbitral tribunal and the socio-political context of the investment dispute cannot be denied. A different question is, however, whether this lack of proximity is a reason for deference. It could be argued that the distance between the arbitrators and the local environment is actually a main advantage of the investor-state arbitration system. One of the core rationales behind the current system was the 'depoliticisation' of investor-state disputes. The settlement of such disputes was moved from domestic fora to ad hoc tribunals precisely because domestic courts were possibly too closely related to the socio-political environment of the host state.²⁶⁷ Indeed, as noted by George Foster, one of the central purpose of investment treaties is to give investors "ample opportunity to exit the domestic arena when the need arises, in order to obtain an independent assessment of host States' conduct".²⁶⁸ When a tribunal would grant deference because of its lack of proximity to the local situation, this rationale of investor-state arbitration would be made undone.

In addition, it should be noted that an investment tribunal makes a different type of assessment than national institutions. Domestic authorities

265 Burke-White and Von Staden, *supra* note 9, p. 333.

266 *Ibid.*

267 Tallent, *supra* note 11, pp. 129-130. See also Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 10: "The Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement". See also Alvarez, *supra* note 7, pp. 43-44.

268 G.K. Foster, 'Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration', 49:2 *Columbia Journal of Transnational Law* (2011) p. 267.

determine how the public interest can be served and how conflicting interests can be balanced. These assessments are different from the ones made by investment tribunals, as they have often acknowledged.²⁶⁹ An investment tribunal is not asked to give its general opinion on a certain measure, because the ultimate aim of an investor-state arbitration is not to challenge a government measure in the abstract, but only to evaluate whether it has violated the investor's rights and whether compensation is due.²⁷⁰ Unlike domestic courts in many countries, an investment tribunal has no power to strike down legislation or invalid it in any other way.²⁷¹ Consequently, apart from an eventual obligation to compensate, an award has no consequences for the legality of the contested measure.²⁷² A state "can choose to maintain the regulation at issue in the dispute even if the arbitrators find that the regulation offends a state's investment treaty obligations".²⁷³ Ultimately, an arbitral tribunal only determines whether the economic costs associated with a certain measure should be borne by the foreign investor or by the domestic society. This specific and narrow aim mitigates the relevance of the socio-political embeddedness of the arbitral tribunal, because the tribunal is not requested to review the socio-political appropriateness of the contested measure. It is only

269 *E.g.*, *Lemire v. Ukraine*, *supra* note 84, para. 283; *Paushok v. Mongolia*, *supra* note 158, para. 328; *Renta 4 v. Russia*, *supra* note 197, para. 179.

270 *Renta 4 v. Russia*, *supra* note 197, para. 23. *Comp.* also the Statement of the United States on the Mexican agrarian reforms of the early 20th century: "The purpose of this program, however desirable, is entirely unrelated to and apart from the real issue. The issue is not whether Mexico should pursue social and economic policies designed to improve the standard of living of its people. The issue is whether in pursuing them the property of American nationals may be taken without making prompt payment of just compensation under international law", quoted in Miles, *supra* note 214, p. 76.

271 A.T. Katselas, 'Do Investment Treaties Prescribe a Deferential Standard of Review? A Comparative Analysis of the U.S. Administrative Procedure Act's Arbitrary and Capricious Standard of Review and the Fair and Equitable Treatment and Arbitrary or Discriminatory Measures Treaty Standards', 34:1 *Michigan Journal of International Law* (2012) p. 140: "The potential incorporation of a constitutional law doctrine into investment arbitration is thus problematic, as it could suggest that tribunals should scrutinize host-state laws that are alleged to infringe BIT standards as if they had the power to nullify the laws, or at least to require that host states do so".

272 Although the "policy cost" of a condemning award may imply that the host government is required to "repeal or modify other similar but unrelated measures"; J.W. Salacuse, *The Law of Investment Treaties* (Oxford University Press, Oxford, 2010) p. 389.

273 Choudhury, *supra* note 227, p. 819. He notes, however, that states who do not adjust their policies may face further arbitration claims from other foreign investors.

mandated to review compliance with investment treaty obligations and this assessment can be considered its ultimate expertise.²⁷⁴

4.6 Conclusions

Investment treaty provisions seldom indicate whether respondent states are entitled to a margin of appreciation in observing their international obligations. Except in the case of self-judging clauses, the text of treaty provisions does not stipulate which standard of review should be applied by an arbitral tribunal. Therefore, other considerations have to be taken into account when determining on the desirability of the margin. The present section has assessed this question in the light of the object and purpose of investment treaties, which is the encouragement of international capital flows through foreign investment. In doing so, the section has made a distinction between two different rationales for applying a non-intrusive standard of review: discretion and deference. It appears that discretion often fits with the object and purpose of investment treaty, while deference does not.

Common investment treaty provisions embody minimum standards that allow states a measure of discretion in balancing the investor's rights against other societal interests. The aim of an investment treaty is not to guarantee the maximal profitability of foreign investments, but rather to provide a level of protection that makes them feasible and attractive. For this reason, states party to investment treaties are entitled to a measure of discretion in observing their treaty obligations. They have retained a certain measure of policy space to reconcile investment protection with other societal interests, as long as they comply with the minimum standards embodied in the treaties. Due acknowledgement of the limited scope of treaty provisions will prevent concerns among states about overly intrusive encroachments on their regulatory autonomy.

274 Another specific type of expertise concerns the interpretation and application of domestic law. Tribunals may feel compelled to defer to domestic courts when reviewing their decisions. See Schill, *supra* note 9, pp. 596-598. See on the review of a denial of justice claim, *Mondev v. United States*, *supra* note 83, para. 126-127: “[i]t is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. (...) In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment”. A lack of expertise concerning the application and interpretation of domestic law could also be remedied with a recourse to experts.

Deference, however, is not compatible with the central role played by independent arbitral review in the current investment protection regime. Access to investor-state arbitration serves to provide investors with the possibility of enforcing treaty standards against host states in an unbiased international forum. The adoption of deference would erode this special layer of protection. Admittedly, in certain contexts, national institutions may be better placed than an arbitral tribunal to make a specific assessment, because domestic agencies can rely on specialized agencies with specific expertise in determining scientific facts, but deference is not the best response to a lack of expertise on the side of the arbitrators. Instead, tribunals should invite external experts to inform them about scientific issues.

5 Final Conclusions

The ECHR's impressive expertise in balancing the regulatory autonomy of states against the right of individuals to effective supervision at the international level has prompted scholars to advocate the adoption of the margin of appreciation in other fields of law. This article has investigated the extent to which investor-state arbitration tribunals have adopted the margin and whether such borrowing is indeed desirable in the field of international investment law. In order to specify both inquiries, the article has proposed a new definition of the margin of appreciation. It has defined the margin as a measure of either discretion or deference, which is granted by an international tribunal to the domestic institutions of a respondent state when reviewing its conduct against international obligations, and which requires the tribunal to lower the intensity of its review. In the practice of the ECHR, both discretion and deference compel the Court to soften the rigor of its scrutiny, but it is emphasized here that the two notions have rather different conceptual backgrounds. Discretion denotes a freedom to act that is left to states by norms which impose only minimum obligations, while deference describes an attitude of respect employed by a reviewing institution toward the determinations made by other authorities.

Taking this definition as the starting point, the article has analysed how various investment tribunals reviewing public interest regulation have approached the margin of appreciation. It has been found that the tribunals have formulated different answers to questions of discretion and deference, and that they have applied diverging standards of review to the conduct of respondent states. Some tribunals have explicitly adopted the margin of appreciation, while others have rejected a non-intrusive standard of review. At

present, there seems to be no agreement or emerging consensus among tribunals, although a relatively large number of tribunals has recognized a measure of discretion when reviewing public interest regulation.

The normative evaluation undertaken in the last part of this article has assessed the desirability of the margin of appreciation in the light of the object and purpose of the regime, which is the encouragement of international capital flows through the protection of foreign investment. From this perspective, it has been concluded that states are entitled to a measure of discretion under common investment treaty standards. While the expansion of foreign investment is encouraged by a stable measure of protection, investment treaties do not oblige states to guarantee the maximal profitability of foreign investments at the expense of other societal interests. Rather, they prevent domestic authorities from interfering with investments in such an unforeseeable manner that foreign investors would be discouraged from investing. For that reason, the standards codified in investment treaties should be understood as minimum standards that leave states a certain degree of discretion in observing them.

The margin of appreciation does not only refer to a measure of discretion but also to an attitude of deference toward decisions made by national institutions on grounds of their expertise and democratic legitimacy. Such deference, it is concluded here, does not fit with the responsibilities of arbitral tribunals as envisaged by the states party to investment treaties. The recourse to investor-state arbitration was specifically designed to provide investors with a dispute settlement forum unrelated to the host state. If arbitral tribunals would grant deference to domestic institutions, this special layer of protection would be eroded. It would shift the power to review compliance back to the host state itself and reduce the extra protection offered by arbitral review.

Discretion and deference both result in a margin of appreciation, or, in other words, a non-intrusive standard of review, but they should not be confused for that reason. Discretion relates to the normative content of a treaty norm, whereas deference originates from the institutional differences between domestic authorities and arbitral tribunals. Consequently, when a tribunal grants discretion in reviewing compliance with a certain treaty norm, it clarifies the scope of the obligation undertaken by signatory states. Recourse to deference could possibly produce the same result as far as the liability of the respondent is concerned, but this would leave the normative content of the applicable norm uncertain.

Various arbitral tribunals have already followed the approach advocated in this article. They have asserted that treaty violations do not occur because of mere disagreement with host governments but only because of serious

infringements of investor rights. In doing so, the tribunals have allowed respondent states a measure of discretion in their observance of investment treaty obligations and found a workable middle ground between the protection of foreign investment on the one hand and a recognition of the regulatory autonomy of states on the other hand, in accordance with the object and purpose of the investment regime.

What do these conclusions say about the desirability of the margin of appreciation? It has become clear that although the concept of the margin has a certain coherence in the context of European human rights law, upon closer inspection the term denotes different concepts that have rather divergent meanings. The term often hides the precise rationale that is being relied on in order to soften the intensity of international review. For this reason, the term should not easily be transplanted from human rights law into other fields of international law. In the context of investor-state arbitration, tribunals have sound reasons for acknowledging a measure of discretion but not for granting deference. Therefore, the adoption of the term ‘margin of appreciation’ is undesirable in the interests of clarity. It appears that, in spite of the success of the margin in European human rights law, the term is not a one-size-fits-all solution to tensions between international supervision and state sovereignty. Instead of borrowing the approach of the ECHR, investment arbitration tribunals should define their standard of review on the basis of the unique features of the regime in which they function.