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Article

Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations

William W. Burke-White[†] & Andreas von Staden^{††}

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I. INTRODUCTION

Over the last twenty years, the incidence of investor-state arbitrations, starting from a few odd cases per year, has grown to a sizable and steady flow

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of up to forty-some new cases annually.¹ With a cumulative total of at least 317 pending or decided cases as of the end of 2008—most of them before International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunals constituted under the ICSID Convention²—international investment arbitration has become “a part of the ‘normal’ investment landscape.”³ The growth in investor-state arbitrations has been fostered by the explosion in the number of bilateral investment treaties (BITs) during the same time period, which numbered a staggering 2676 treaties at the end of 2008.⁴ Many of these treaties contain provisions not only about the settlement of traditional interstate disputes, but also about procedures through which investors claiming to have been harmed by measures allegedly in violation of an applicable BIT provision can initiate arbitrations directly against the investment host state. It is on the basis of such dispute settlement provisions contained in BITs that most investor-state arbitrations are being initiated.⁵

The growth in investor-state arbitration has gone hand in hand with a diversification of the issues at stake in the underlying disputes. Far from being limited to merely technical questions, contemporary investment arbitrations frequently implicate the scope of the regulatory powers of the respondent states and reach well beyond the traditional concerns with simple expropriations and nationalizations. Instead, a much broader variety of regulatory and public goods disputes has come to be addressed through investment arbitration, ranging from the provision of basic public services, such as water and sanitation, to the maintenance of public order. The large number of arbitrations initiated against Argentina arising out of that country’s responses to the severe economic crisis from 2001 to 2002—forty-eight known proceedings in 2009⁶—fittingly illustrate this point. They implicate

1. See U.N. Conf. on Trade & Dev. [UNCTAD], *Latest Developments in Investor-State Dispute Settlement*, IIA Monitor No. 1, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/6/Rev1 (2009), available at http://www.unctad.org/en/docs/webdiaeia20096_en.pdf.

2. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. The Convention does not contain any substantive investment protection standards but instead provides states and investors with an institutional framework—through the creation of the International Centre for Settlement of Investment Disputes—that they can use to settle their investment disputes by way of conciliation or arbitration. For that purpose, and similar to the Permanent Court of Arbitration in The Hague, the Centre makes available panels of qualified conciliators and arbitrators, *id.* arts. 12-16, from which the disputing parties can choose, and provides basic rules for the constitution of arbitral tribunals and the procedures to be followed before them. Arbitration proceedings commence at the request of a contracting party or one of its nationals, *id.* art. 36, para. 1, and result in a binding award, *id.* art. 53, para. 1. Unless the parties agree on the body of rules to be applied, the tribunal shall base its decision on the domestic law of the state party to the dispute and any applicable rules of international law. *Id.* art. 42, para. 1. Contracting states pledge to execute any pecuniary obligations contained in an award within their domestic legal systems “as if it were a final judgment of a court in that State.” *Id.* art. 54, para. 1. While the review of an award as such is excluded, either party may request either a revision or the annulment of the award on the basis of an exclusive list of admissible grounds. *Id.* arts. 51-52. Many BITs include referral to ICSID as one of the provided dispute settlement mechanisms.

3. *Latest Developments in Investor-State Dispute Settlement*, *supra* note 1, at 2.

4. UNCTAD, *Recent Developments in International Investment Agreements (2008-June 2009)*, IIA Monitor No. 3, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/8 (2009), available at http://www.unctad.org/en/docs/webdiaeia20098_en.pdf.

5. *Latest Developments in Investor-State Dispute Settlement*, *supra* note 1, at 3.

6. *Id.*

nothing less than the host state's freedom and ability to speedily react to an economic collapse of massive proportions.

Given these combined quantitative and qualitative changes, it is time to recognize that contemporary investor-state arbitrations are not merely another form of private law commercial arbitration, with one party now being a state, but that they are more fittingly understood as a form of dispute settlement that, like many domestic judicial proceedings, also operates in a public law context.⁷ Many of the ICSID arbitrations currently pending against Argentina and other states raise issues that can only be properly understood as public law questions. Yet many ICSID tribunals continue to employ standards of review developed from the private law origins of international arbitration. As a result, the perceived legitimacy⁸ of investor-state arbitration has come under threat in recent years in the eyes of some states. Ecuador and Bolivia, for instance, have denounced the ICSID Convention and other states, such as Argentina, Venezuela, and Nicaragua, have threatened to do so.⁹ Even from within the system, an annulment committee constituted under the ICSID Convention to review an award rendered by an ICSID tribunal against Argentina has scathingly critiqued the jurisprudential approach of the first-instance tribunal and raised larger questions about the system's legitimacy.¹⁰

We argue that the strict standards of review employed by many arbitral tribunals, while perhaps appropriate in commercial arbitration or in the context of specific technical questions, may be inappropriate with respect to many issues raised in modern investor-state arbitrations that are, at heart, public law questions. These public law questions require a tribunal to determine the state's basic powers, the extent of the state's ability to regulate in the public interest, and the state's capacity to make basic socioeconomic and political choices. We contend that part of the growing perception of a legitimacy gap in investor-state arbitration stems from the inappropriate standards of review applied by those tribunals when adjudicating public law elements of state conduct and from a lack of clear jurisprudential foundations for the choice of applicable standards of review. Further, we argue that in

7. We understand "public law" here to refer to arbitrations for which the critical issue on which the outcome turns to be whether the state has the power and legal ability to undertake regulation in the public interest. *See, e.g.,* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 59 HARV. L. REV. 1281, 1302 (1976); L. Harold Levinson, *The Public Law/Private Law Distinction in the Courts*, 57 GEO. WASH. L. REV. 1579 (1989) (discussing the legal distinctions between public and private law).

8. As an analytical and normative category in both law and politics, "legitimacy" has been the subject of an extensive literature of its own, which we cannot review in any detail here. In this Article, we adopt a general understanding of legitimacy "as relating to the justification and acceptance of political authority." Daniel Bodansky, *The Concept of Legitimacy in International Law*, in LEGITIMACY IN INTERNATIONAL LAW 309, 310 (Rüdiger Wolfrum & Volker Röben eds., 2009). In the case of ICSID, that political authority is exercised by ad hoc judicial bodies, that is, the arbitral tribunals constituted under it. At a minimum, and in line with Thomas Franck's position, judicial legitimacy is enhanced to the extent that proceedings are seen as having been procedurally fair. *See* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7 (1995). Procedural fairness and legitimacy are implicated in how a court or tribunal chooses the standard of review employed in a given area of law.

9. *See infra* notes 84-89 and accompanying text.

10. *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/08, Decision on Annulment, ¶¶ 95, 96-97, 125, 136, 146, 158 (Sept. 25, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4.

order to maintain the legitimacy of investor-state arbitration, not only from the investors' perspective, but also from that of respondent states, arbitral tribunals must adopt a more appropriate standard of review¹¹ for distinctly public law disputes or issues. Those standards should be derived not from the private law origins of international arbitration, but rather from the far more analogous situational context of comparative public law. As a result, such standards will have a more coherent jurisprudential foundation. Those standards will be, at times, more deferential to states' public law regulatory choices, yet will simultaneously protect legitimate investor interests. We argue that although a range of potential standards of review could be derived from a comparative public law approach, including a least restrictive alternative or proportionality analysis, due to the peculiar institutional capacity¹² of ad hoc arbitral tribunals, the most appropriate standard for the resolution of public law arbitrations is the "margin of appreciation" standard as developed by the European Court of Human Rights (ECtHR) and increasingly adopted by other tribunals.¹³

The crux of our argument is that the current standards of review utilized by investor-state arbitral tribunals are poorly suited for the public law subject matter that is now the focus of many arbitrations. We therefore call for a significant shift in the way in which arbitrators review state behavior. Our approach recognizes that arbitral tribunals often lack critical expertise in public law adjudication and are rarely embedded within the political communities whose public policy they review. We argue that importing a standard of review based on the margin of appreciation can help restore the legitimacy of the ICSID system and can give arbitrators a tractable standard to apply, commensurate with both the nature of public law disputes and the relative positioning of investor-state arbitral tribunals in the international system. Implementing a standard of review based on the margin of

11. For the purpose of this Article, we adopt the mainstream definition of "standard of review" as relating to "the nature and intensity of review by a court or tribunal of decisions taken by another governmental authority or, sometimes, by a lower court or tribunal." Jan Bohanes & Nicolas Lockhart, *Standard of Review in WTO Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 378, 379 (Daniel Bethlehem et al. eds., 2009).

12. Institutional capacity can be broadly defined as an institution's "ability to perform functions, solve problems, and set and achieve objectives." Sakiko Fukuda-Parr, Carlos Lopes & Khalid Malik, *Overview: Institutional Innovations for Capacity Development*, in *CAPACITY FOR DEVELOPMENT: NEW SOLUTIONS TO OLD PROBLEMS* 1, 8 (Sakiko Fukuda-Parr, Carlos Lopes & Khalid Malik eds., 2002). Contemporary uses of the concept generally recognize different dimensions that affect and determine institutional capacity, which may include staff, organizational structure, and material resources, but also a number of environmental factors such as the regulatory frameworks and the norms and values of the broader society within which institutions operate. See Org. for Econ. Co-operation & Dev. [OECD], *Institutional Capacity and Climate Actions*, OECD Doc. COM/ENV/EPOC/IEA/SLT (Nov. 2003) (prepared by Stéphane Willems & Kevin Baumert), available at http://www.iea.org/work/2004/cop10/aixg/institutional_capacity.pdf. In Part V, *infra*, we highlight expertise as the key critical element in the institutional capacity of courts and tribunals in general, and in ICSID ad hoc arbitral tribunals in particular.

13. While others have noted the possible utility of the "margin of appreciation" in investment arbitration, they have not provided a coherent argument for its application or a detailed treatment of the implications of such a standard of review in investment arbitration. See Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 *VAND. J. TRANSNAT'L L.* 775, 827 (2008) ("Overall, use of the margin-of-appreciation doctrine on a case-by-case basis allows for the inclusion of public interest issues into investment treaties . . .").

appreciation in public law arbitrations would significantly change the character of such dispute settlement and, admittedly, might reduce protections for investors in some circumstances. But, such a standard of review would better align with the character of both public law disputes and investor-state arbitral tribunals, thereby enhancing much needed perceptions of legitimacy in the ICSID system.

Notably, our approach differs from that of Alec Stone Sweet, who has led a small group of scholars advocating the use of proportionality analysis in investor-state arbitration. We differ with them because, unlike Stone Sweet, we base our argument on the changing subject matter of investor-state arbitrations toward public law and because we believe a standard of review based on the margin of appreciation is more appropriate to the relative expertise and embeddedness of such tribunals. In Part V in particular, we use Stone Sweet's work as a counterpoint to highlight the distinct nature of the margin of appreciation as a standard of review separate from proportionality analysis.

Our argument proceeds in four parts. Part II substantiates our contention that elements of many contemporary investor-state disputes are best seen in the context of public law rather than commercial, private law. Part III addresses the shortcomings in the standards of review employed by many investment arbitral tribunals, especially in the context of arbitrations against Argentina relating to that country's economic and political crisis in 2001 to 2002, the growing perception of a legitimacy gap in investor-state arbitration, and the need for alternative standards for reviewing state public law regulation. Part IV then places the standards used by ICSID tribunals to date in the context of available alternative standards through a comparative public law analysis at both the international and domestic levels. That comparative analysis reveals that judicial deference to political decisionmakers is widespread, normatively legitimate, and relatively consistently applied—especially where they are better placed to assess factual circumstances and make decisions accordingly. Part V delineates what we contend is the best way forward in adjusting the standard of review in investment arbitration to the increasingly public-law-related substance matter at stake in many investor-state disputes. We note that while proportionality-based approaches are preferable to the currently prevailing approach, adoption of the margin of appreciation is more appropriate to the unique context of ad hoc international arbitration for reasons of institutional capacity and expertise. Part VI concludes.

II. INVESTMENT ARBITRATION AS PUBLIC LAW

International economic disputes, and particularly international arbitrations, have often been understood as private law disputes.¹⁴ From its

14. See, e.g., David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 63 (“[W]e read the move to international economic law as the displacement of one discipline by another—from public law to private law, from a concern with national sovereignty to an international order removed from sovereign forms, from law to policy, and from adjudication to administration, with economics replacing politics as law’s sidekick and nemesis.”); Joel R. Paul, *The Isolation of Private*

inception, international commercial arbitration offered a mechanism through which private actors could engage in third party settlement of largely contractual disputes.¹⁵ While classical international commercial arbitration was rightly seen in this private law context, the rise of investment treaty arbitration after the proliferation of BITs in the 1990s¹⁶ has opened a vast new realm of international economic adjudication. Recently, commentators have come to recognize that, unlike much earlier international economic law and, particularly, international commercial arbitration, investment treaty arbitration is now best understood in a public law, rather than private law, context.¹⁷ Yet in practice, investment treaty arbitration still continues to operate as if it were purely private law.¹⁸ Importantly for our purposes, 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.

Admittedly, the distinctions between public law and private law are not always clear, particularly in states that do not follow Roman law's traditional division between the two.¹⁹ For our purposes, it is not necessary, nor perhaps even possible, to cleanly separate public and private law in all spheres. Rather, what is necessary is to identify arbitrations or issues within arbitrations that raise public law issues. The arbitrations that we would classify as falling within the public law sphere are those in which the outcome-determinative issue in the arbitration requires a determination of the state's power and legal authority to undertake regulation in the public interest.²⁰ That is distinct from a private law arbitration, in which the tribunal might be required to determine,

International Law, 7 WIS. INT'L L.J. 149 (1988).

15. See generally HERSC LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (1927) (discussing the private law basis of international arbitration).

16. See UNCTAD, *Bilateral Investment Treaties 1959-1999*, at 25-123, U.N. Doc. UNCTAD/ITE/IIA/2 (Dec. 2000) (prepared by Abraham Negash), available at <http://www.unctad.org/en/docs/poiteiid2.en.pdf>; Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT'L ORG. 811 (2006); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 75 (2005).

17. See GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006).

18. In some limited respects, investment treaty arbitration has begun to move in this public law direction through, for example, allowing amicus briefs. See *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make Amicus Curiae Submissions (Feb. 12, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC519_En&caseId=C19 (permitting parties that were not party to the case to submit amicus curiae briefs).

19. See Levinson, *supra* note 7, at 1585-86.

20. See Chayes, *supra* note 7, at 1302; see also Levinson, *supra* note 7, at 1593 ("[T]he concept of public law, in today's society, recognizes the existence of a government that may legitimately exercise some powers unavailable to private parties, such as the powers of taxation, currency control, eminent domain, law enforcement, and military and foreign affairs. The government is, in turn, obliged to exercise its powers in the public interest, within the bounds established by the Constitution and other law.").

say, whether the state made a particular payment or fulfilled a contractual provision.

At the very least, much of investment treaty arbitration today must be understood as public regulatory or administrative law. Gus Van Harten describes investment arbitration as “a uniquely internationalized arm of the governing apparatus of states, one that employs arbitration to review and control the exercise of public authority,”²¹ resulting in “a unique form of public law adjudication”²² which “is used to resolve *regulatory* disputes between individuals and the state as opposed to reciprocal disputes between private parties or between states.”²³ Given its regulatory character, Van Harten and Martin Loughlin characterize investment arbitration “as a comprehensive form of global administrative law.”²⁴ Similarly, Barnali Choudhury contends that “the arbitrators governing these [investment] disputes are now regularly reviewing . . . domestic public interest issues.”²⁵ Asha Kaushal notes that investment tribunals “outside of the state apparatus . . . subject public regulatory state actions to scrutiny.”²⁶ And Cai Congyan concludes that in contrast to earlier investment arbitrations, which often arose in response to economically motivated expropriations by host states, “[m]any indirect expropriation claims since the 1990s . . . challenged host states’ measures, which have nothing to do with economic consideration, but intend to protect fundamental public goods, for example, environment, public health, and national security.”²⁷

At least some investment arbitration today may transcend even the public regulatory or administrative context and play a quasi-constitutional function. Modern investment arbitration often deals not just with traditional issues of expropriation²⁸ or national treatment²⁹ that would constitute regulatory or administrative disputes, but also with disputes that legitimate or invalidate exercises of regulatory power and, in extreme cases, even the fundamental rights of citizens within the state.

The set of arbitrations brought against Argentina after the country’s economic collapse in late 2001 exemplifies this new feature of investment

21. VAN HARTEN, *supra* note 17, at 70.

22. *Id.* at 10.

23. *Id.* at 4.

24. Van Harten & Loughlin, *supra* note 17, at 123.

25. Choudhury, *supra* note 13, at 778. Choudhury continues, “investment arbitrations engage the public interest when they implicate issues concerning the common interest, such as . . . the best interest of the state and its citizens.” *Id.* at 792.

26. Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT’L L.J. 491, 518 (2009).

27. Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT’L ECON. L. 457, 477 (2009).

28. See, e.g., *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155 (addressing how to determine whether expropriation has occurred within the NAFTA framework).

29. *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)98/3, Award (June 26, 2003), <http://www.state.gov/documents/organization/22094.pdf>; *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), <http://www.state.gov/documents/organization/16586.pdf>; *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C566_En&caseId=C163.

arbitration. In the last weeks of 2001, Argentina experienced a financial collapse of catastrophic proportions.³⁰ In response to the crisis, which has been likened to the Great Depression of the 1930s in the United States,³¹ Argentina adopted a number of measures to stabilize the economy and restore political confidence. Among these efforts was a significant devaluation of the peso through the termination of the currency board that had pegged the peso to the U.S. dollar, the pesification of all financial obligations,³² and the effective freezing of all bank accounts through a series of measures known collectively as the *Corralito*.³³ Thereafter, Argentina has become subject to no fewer than forty-three ICSID arbitrations brought by investors who assert that Argentina's response to the crisis harmed investments protected by various BITs, violating fair and equitable treatment clauses or constituting indirect expropriation.³⁴ Each of the cases against Argentina discussed in this Article is based on this same set of underlying facts, as investors challenged various aspects of Argentina's recovery package and its impacts, particularly in the oil and gas, transportation, and banking sectors. Argentina's potential liability from these cases alone could be greater than US\$8 billion, more than the entire financial reserves of the Argentine government in 2002.³⁵

Argentina's legal response to the cases brought by U.S. investors has largely relied on particular BIT provisions that allow a state to take actions for the protection of its essential security or the maintenance of public order.³⁶ Specifically, Argentina has presented two arguments in the alternative. First, Argentina has argued that the nonprecluded measures (NPM) provisions of its BIT with the United States, which permit actions necessary to protect a treaty partner's essential security interests,³⁷ are self-judging and that Argentina was, consequentially, entitled to invoke this provision as a defense to investor

30. See PAUL BLUSTEIN, *AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA* 1-2 (2005). For a discussion of the economic background to the collapse, see Mario Damill, Roberto Frenkel & Martín Rapetti, *The Argentinean Debt: History, Default and Restructuring*, in *OVERCOMING DEVELOPING COUNTRY DEBT CRISES* 179 (Barry Herman, Jose Antonio Ocampo & Shari Spiegel eds., 2010).

31. See, e.g., *Liberty's Great Advance: Liberalism Has Brought Sharp Reductions in Both Poverty and International Inequality*, *ECONOMIST*, June 28, 2003, at 4, 6 ("Argentina has endured an economic collapse to match the Great Depression of the 1930s . . .").

32. See Law No. 25561, Jan. 7, 2002, 29810 B.O. 1, available at <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=71477>.

33. See Decree No. 1570/2001, Dec. 3, 2001, 29787 B.O. 1, available at <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=70355>. For a recounting of the key measures taken in response to the crisis, see, for example, Brad Setser & Anna Gelpern, *Pathways Through Financial Crisis: Argentina*, 12 *GLOBAL GOVERNANCE* 465, 470-79 (2006).

34. For a list of concluded and pending cases before ICSID, see International Centre for Settlement of Investment Disputes, <http://www.worldbank.org/icsid/cases/cases.htm> (last visited Mar. 28, 2010).

35. Gabriel Bottini, Counsel, Office of the Att'y Gen., Republic of Arg., *Issues of Jurisdiction and Merits Arising from the Argentine Litigation at ICSID*, Lecture at the University of Pennsylvania Journal of International Economic Law Symposium: International Investment and Transnational Litigation: Challenges of Growing and Expanding Investor State Disputes (Feb. 2, 2007).

36. See generally William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Nonprecluded Measures Provisions in Bilateral Investment Treaties*, 48 *VA. J. INT'L L.* 307 (2008) (analyzing exceptions to substantive standards of protection included in bilateral investment treaties with a view to safeguarding, inter alia, a state's essential security interests and public order).

37. See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 [hereinafter U.S.-Argentina BIT].

claims.³⁸ Second, Argentina has argued that even if the NPM clauses are not self-judging, the requirements of the essential security and public order provisions of the U.S.-Argentina BIT were met, which in turn relieved Argentina of any liability.³⁹

The defenses on which many of these arbitrations against Argentina have turned move well beyond traditional private law conceptions of international arbitration and into the realm of public law. These arbitrations have come to assume the character of quasi-constitutional disputes—not constitutional in the sense of implicating changes to the state’s written constitution, but constitutional in the sense that they relate to changes to the state’s economic and social constitution, even beyond the regulatory or administrative model of international arbitration advanced by Van Harten and Loughlin. The scope of what can qualify as Argentina’s essential security interests, for example, strikes at the very core of state sovereignty and the primary function of government,⁴⁰ and at least in the Argentine understanding, the notion of “public order” also encompasses the role of functioning governmental institutions.⁴¹ More generally, Argentina’s ability to develop a political and economic response to the extraordinary financial collapse implicated the state’s ability to meet its citizens’ basic needs and to ensure their fundamental rights. At the very least, these disputes set two primary values against one another: the rights of investors guaranteed by the applicable BIT and the ability of the state to pursue its most basic objectives of providing domestic order, peace, and stability. To the degree that investment treaty arbitrations contrast such values and turn on basic issues of state identity and fundamental rights, rather than on fact, attribution, or damages, they become public law disputes and even begin to evidence aspects of constitutional adjudication.⁴²

38. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶¶ 332-355 (May 12, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4. For further discussion, see Burke-White & von Staden, *supra* note 36.

39. See CMS, ICSID Case No. ARB/01/8, Award, ¶¶ 332-355.

40. In a different context, Judge Hersch Lauterpacht has recognized that it is “doubtful whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security.” HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 188 (1933).

41. The equally authoritative Spanish language version of the U.S.-Argentina BIT uses the term “orden público.” See *Tratado Suscrito con los Estados Unidos de América Sobre la Promoción y Protección Recíproca de Inversiones*, Sept. 21, 1992, art. XI, <http://www.eumed.net/libros/2005/lg/a05.htm>. It should be noted that the civil law concept of “ordre public,” originating in France with the Napoleonic Code, is broader in scope than its English-language cognate and is generally understood to encompass a country’s basic value system as a whole, expressed not only through its criminal laws but through all of its domestic legislation and regulations. See Ignaz Seidl-Hohenveldern, *Ordre Public (Public Order)*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 788, 788-89 (Rudolf Bernhardt ed., 1997); Wyndham A. Bewes, *Public Order (Ordre Public)*, 37 *L.Q.R.* 315, 318 (1921). The concept of “orden público” has been part of Argentine law since at least 1869, when it was included in Article 14 of the country’s Civil Code. See Max Habicht, *The Application of Soviet Laws and the Exception of Public Order*, 21 *AM. J. INT’L L.* 238, 241 (1927).

42. See MILTON KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 1-2 (2001) (illustrating that the role of the courts in constitutional disputes is to balance the conflict between fundamental rights); Bernhard Schlink, *The Dynamics of Constitutional Adjudication*, 17 *CARDOZO L. REV.* 1231, 1234 (1996) (describing the role of constitutional adjudication as mediating the conflict between fundamental rights); see also Matthew Adler, *Law and Incommensurability:*

Investment treaties and, particularly, their NPM provisions,⁴³ offer states a range of defenses that require tribunals to weigh primary values, adjudicate fundamental rights, and take into account basic social and cultural policies. These defenses allow, for example, actions necessary to protect “public morals” or “public health,” or to respond to states of emergency.⁴⁴ Beyond the Argentine cases, it is easy to imagine similar defenses in investment treaty arbitration. Take, for example, a hypothetical claim by a German company that had invested in Pakistan under the Germany-Pakistan BIT,⁴⁵ which contains a “public health or morality” NPM provision, precluding liability for state actions necessary to protect public morals. Assume further that the German company had invested in a factory manufacturing leather goods used for erotic purposes by European consumers.⁴⁶ Should Pakistan then enact a regulation banning the production of such goods on grounds that they violate public morals, an arbitral tribunal would have to determine the meaning and scope of “public morality” based on an interpretation of the term contained in the NPM clause of the Germany-Pakistan BIT. The rights of German investors and the protection of Pakistani public morals would be in direct conflict. The ability of Pakistan to regulate on the basis of prevailing religious and moral views would be at stake.

Similar public law or even quasi-constitutional disputes have already become relatively common within the framework of the WTO based on the exceptions contained in the General Agreement on Tariffs and Trade⁴⁷ (GATT) and the General Agreement on Trade in Services⁴⁸ (GATS). In the case of *Cross-Border Supply of Gambling and Betting Services*,⁴⁹ the United States raised a defense under Articles XIV(a) and XIV(c) of the GATS, asserting that the regulations restricting internet gambling were “necessary to protect public morals.”⁵⁰ The WTO panel found that the U.S. actions were neither necessary to protect public morals nor consistent with the *chapeau* of Article XIV of the GATS. Thereafter, the Appellate Body reversed in part,

Introduction, 146 U. PA. L. REV. 1169, 1169-70 (1998) (commenting on the challenges encountered in the conflict between fundamental rights); Eric. A. Posner, *The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis*, 146 U. PA. L. REV. 1185, 1185-86 (1998) (critiquing the theory of incommensurability when adjudicating between fundamental rights); Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001) (stating that fundamental rights of nonhuman beings and the rights of human beings often come into conflict and require adjudication within the framework of constitutional law).

43. See generally Burke-White & von Staden, *supra* note 36, at 318-26.

44. For concrete examples, see Burke-White & von Staden, *supra* note 36, at 332-35.

45. Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Protocol, ¶ 2, Nov. 25, 1959, 457 U.N.T.S. 24.

46. This hypothetical is grounded in the reality of a Pakistani business involved in the production of such goods and facing pressures for reasons of public morality. See Adam B. Ellick, *Lacy Threads and Leather Straps Bind a Business*, N.Y. TIMES, Apr. 28, 2009, at A8.

47. General Agreement on Tariffs and Trade arts. XX, XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 187 [hereinafter GATT].

48. General Agreement on Trade in Services arts. XIV, XIVbis, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1144, 1168 (1994).

49. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

50. *Id.* ¶ 114.

finding that the U.S. regulations were “necessary to protect public morals” but affirmed the panel’s determination that the measures were inconsistent with the *chapeau*.⁵¹ Again, the dispute turned on the scope of the state’s right to regulate and give expression to prevailing public morals, an issue central to definitions of national identity and contrasting quasi-constitutional values.⁵²

While a growing number of international arbitrations raise issues of public law concern, not all disputes and not all elements of any given dispute fall into this public law category. In order for international arbitral tribunals to develop alternate standards of review that are more appropriate in the public law context, it is necessary to clarify the types of disputes and issues that ought to be treated as part of public law and to which our argument for alternative standards of review therefore applies. Two classes of such disputes can be identified: first, those of a merely regulatory or administrative character which merit public law standards of review and, second, a subset of these disputes, which we term quasi-constitutional, in which an even stronger argument for alternative standards of review can be made.

In both the regulatory/administrative and quasi-constitutional sets of disputes, there are two independent, but cumulative elements for determining that public law standards of review are appropriate: subject matter and text. First, the subject matter of these disputes must be clearly of a public law nature. Second, the particular provision of the BIT being invoked either by the claimant or respondent must include trigger language indicating that states sought to maintain some freedom of action to regulate in these circumstances and that, as a matter of formal treaty interpretation, public law standards of review are appropriate. The cumulative nature of these two elements ensures that public law standards of review are, in fact, appropriate, and it safeguards against states merely claiming that a dispute is part of the public law so as to benefit from a more deferential standard of review.

The first element of this analysis is satisfied in any arbitration whose subject matter is essentially part of public law.⁵³ By public law, here, we refer to arbitrations for which, in the words of Abram Chayes, “the subject matter of the lawsuit is not a dispute between private individuals about private rights,

51. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *US—Gambling*].

52. For another recent case hinging on the GATT’s public morals exception, see Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Jan. 19, 2010).

53. Martin Shapiro describes public law as governing “the internal processes of government bodies and their relations to one another and to the citizens.” Martin Shapiro, *Public Law and Judicial Politics*, in 2 *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 365, 366 (Ada W. Finifter ed., 1993). Jack Goldsmith and Daryl Levinson suggest that international law and public law share much in common. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 *HARV. L. REV.* 1791, 1795 (2009) (describing both international law and public law as sharing the “distinctive aspiration of public law regimes to constitute and constrain the behavior of state institutions and the distinctive difficulty these regimes face of not being able to rely fully on these same state institutions for implementation and enforcement”). U.S. courts have already made fundamental transitions from private law to public law reasoning. See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 *COLUM. L. REV.* 1432, 1432 (1988) (“Not until the 1960s did courts, in concert with Congress, begin to develop an independent public law—a set of principles that owed their origin not only to traditional private law, but also to the ideas that gave rise to administrative regulation in the first place.”).

but a grievance about the operation of public policy.”⁵⁴ These are essentially the types of disputes that Van Harten has rightly recognized as the new direction of ICSID, in which arbitral tribunals “review and control the exercise of public authority.”⁵⁵

These public law disputes juxtapose two basic sets of rights that cannot be easily reconciled. On one side of this conflict of rights are investors who are entitled pursuant to a BIT to, for example, fair and equitable treatment.⁵⁶ On the other side is the state, which has a right to achieve permissible policy aims as specified in a BIT. In the Argentine cases, for example, U.S. investors had rights to fair and equitable treatment that were incompatible with the state’s right to protect its essential security and public order. This is a classic public law tension. Such disputes are now relatively frequent in investor-state arbitrations and include not just the NPM-type defenses raised by Argentina, but also a range of cases in which investors challenge basic regulatory activities of the host state as well as actions undertaken by the state to provide public services.⁵⁷

An even stronger case for alternative standards of review derived from comparative public law arises in a subset of these public law disputes involving what we have termed quasi-constitutional adjudication. These disputes implicate changes to a state’s economic and social constitution, which have wide ranging ramifications. These are cases in which a state’s essential interests are at stake and in which the result of the litigation will impact the social and economic life of the state. Again in Abram Chayes’s words, this type of litigation will have “important consequences for many persons including absentees.”⁵⁸ In the Argentine cases those policy ramifications are readily apparent. At stake was nothing short of Argentina’s ability to recover after a catastrophic economic collapse, its ability to prevent public unrest and riots, and the fundamental structure of its economy. Similarly, in the hypothetical German investment in Pakistan, the arbitration would impact publicly espoused fundamental national values. In this narrower subset of cases, arbitral awards may even have implications for the formal constitutional rights of a respondent state’s citizens.⁵⁹ In these cases, the need for public law standards of review is even more urgent as arbitral tribunals are transformed into public law, quasi-constitutional adjudicators.

54. See Chayes, *supra* note 7, at 1302.

55. VAN HARTEN, *supra* note 17, at 70.

56. See, e.g., U.S.-Argentina BIT, *supra* note 37, art. II, ¶ 2.

57. See, for example, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC770_En&caseId=C67, which concerned a dispute over the provision of water and sewage services—arguably a basic public good to be provided in the last instance by the state—in Dar es Salaam, Tanzania. For a discussion of the case, see Luke Eric Peterson, *In-Depth: Tanzania’s Handling of City Water Deemed an Expropriation; Tribunal Finds Project Was Worthless by Time of Expropriation*, 1 *Investment Arbitration Reporter* 5 (2008), <http://www.iareporter.com/Archive/IAR-07-28-08.pdf>. See also Kaushal, *supra* note 26, at 530.

58. Chayes, *supra* note 7, at 1302. These interests are often referred to as essential interests in public international law. See U.N. Int’l Law Comm’n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Reprinted in Report of the International Law Commission*, at 201-02, U.N. Doc. A/56/10 (2001) [hereinafter ILC Draft Articles on State Responsibility].

59. Schlink, *supra* note 42, at 1-2; Tribe, *supra* note 42, at 1-3.

In both the broader set of public law adjudications and the narrower group of quasi-constitutional disputes, the subject of the arbitration is firmly part of public law, that is, “[t]he body of law dealing with the relations between private individuals and the government, and with the structure of the government itself; constitutional law, criminal law, and administrative law taken together.”⁶⁰ As demonstrated by the examples above, even though these cases are heard in the context of private arbitrations, the public law nature of the substantive claims and defenses merits the application of public law standards of review.

A second cumulative element for determining that public law standards of review are appropriate is that the text of the treaty being interpreted by the arbitral tribunal must include appropriate trigger language. In many of these cases, the formal rules of treaty interpretation applied to specific textual provisions of the BIT directly raised in the arbitration dictate a shift in the nature of a tribunal’s review. For example, where a state’s defense is based on an NPM clause in a BIT, the “necessary for” term suggests an element of subjectivity that ought to lead, as a matter of formal treaty interpretation, to a more deferential review.⁶¹ In the case of the NPM clause in the U.S.-Argentina BIT, the trigger language that signals the need for a shift in the standard of review is two-fold.⁶² First, the clause sets out three permissible objectives—public order, international peace or security, and essential security—that the state may legitimately pursue. These permissible objectives are, to a degree, self-referential and subjective. Second, the nexus requirement, in this case “necessary for,” signals to arbitrators that a balancing process is required in which the state’s interest must be weighed against that of investors.

Article 31 of the Vienna Convention on the Law of Treaties requires that the treaty terms be interpreted according to the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶³ The most appropriate and, in this sense “ordinary,” meaning of “necessary” requires a balancing between the state’s objectives and the rights of investors.⁶⁴ Public law adjudication, both in domestic courts and international tribunals, has developed a somewhat varied jurisprudence with respect to the interpretation of the word “necessary.”⁶⁵ Yet courts and tribunals more or less uniformly recognize that the interpretation and application of “necessary” requires a balancing of rights,⁶⁶ which, in turn,

60. BLACK’S LAW DICTIONARY 1350-51 (9th ed. 2009).

61. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law*, 16 EUR. J. INT’L L. 907, 913 (2006) (arguing that deference is appropriate where “the application of law is inherently or inevitably uncertain”).

62. U.S.-Argentina BIT, *supra* note 37, art. XI. For other examples of NPM clauses, see Burke-White & von Staden, *supra* note 36, at 318-26.

63. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

64. For discussions of interpretations of “necessary” in this context, see *infra* Part III.

65. See *infra* Part III for a review of these standards.

66. See, e.g., Burke-White & von Staden, *supra* note 36; Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 LAW & LEGAL ETHICS OF HUM. RTS. (forthcoming 2010) (manuscript at 23, on file with authors).

requires a standard of review derived from public law that weighs competing rights and interests.

Beyond the ordinary meaning of “necessary,” Article 31 of the Vienna Convention points to the context of the term,⁶⁷ which, in the case of an NPM clause, is that of a general exception to the treaty based on the nexus between state action and a set of permissible objectives. Such a general exception indicates that the term is intended to provide states with some flexibility in achieving those objectives based on their own public interests. Context thus also justifies the application of a more relaxed, public law standard of review in the application of NPM clauses pursuant to the formal rules of treaty interpretation.⁶⁸

Even if “necessary” is viewed by a tribunal as ambiguous, Article 32 of the Vienna Convention points an interpreter to the *travaux préparatoires* of the treaty.⁶⁹ While the drafting history of each treaty is unique, at least in the case of the U.S. BIT program, evidence strongly suggests that the United States and its treaty partners understood the term to give states considerable flexibility in responding to exceptional situations. According to a Senate report attached to the 1988 U.S. Model BIT, for example, “[u]nder Article X of the treaty, either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security.”⁷⁰ The flexibility that many states have sought to preserve for themselves through NPM clauses can only be realized through the application of more deferential, public law standards of review that recognize the conflict of rights inherent in the public law context of the dispute.

This two-part test for determining when public law standards of review are applicable is restrictive so as to prevent states from seeking more deferential review where it is not appropriate. An overly broad reading of the cases in which such review should be applied could, admittedly, undercut the international investment law regime by tilting arbitral outcomes in favor of states. However, where the subject matter of a dispute or part thereof is within the realm of public law and the text of the treaty being invoked in the arbitration justifies—within the permissible grounds of interpretation under the Vienna Convention—a greater degree of deference to national regulatory authorities, ad hoc arbitral tribunals ought to apply standards of review more appropriate to the public law nature of such disputes. While the number of such disputes is limited, it is also increasing and likely to continue to expand given the new issues being presented in investment arbitrations. Yet ICSID tribunals themselves have not recognized and responded to the changing nature of their caseload.

67. Vienna Convention on the Law of Treaties, *supra* note 63, art. 31.

68. See generally Burke-White & von Staden, *supra* note 36 (offering a detailed analysis of the U.S.-Argentina BIT, including its context).

69. Vienna Convention on the Law of Treaties, *supra* note 63, art. 32.

70. See S. EXEC. REP. NO. 100-32, at 9-11 (1988). For a more detailed analysis, see Burke-White & von Staden, *supra* note 36, at 376-80.

III. THE ICSID APPROACH, A GROWING LEGITIMACY GAP, AND THE NEED FOR NEW STANDARDS OF REVIEW IN INVESTMENT ARBITRATION

Despite the growing number of arbitrations that have clear public law elements, ICSID tribunals have, as yet, failed to develop a coherent jurisprudential approach or consistent standard of review. Instead, ICSID arbitrations have generated a contradictory jurisprudence that lacks theoretical coherence and remains tied to the private law origins of international arbitration. The Argentine cases are illustrative of the problematic jurisprudence to date. Those cases can be understood in two categories: the early jurisprudence, consisting of the first three awards against Argentina under the U.S.-Argentina BIT, and the more recent cases, including two more recent awards under the BIT.

The ICSID tribunals in the first three Argentine cases—*CMS Gas Transmission Company v. Argentine Republic*⁷¹ (*CMS*), *Enron v. Argentine Republic*⁷² (*Enron*), and *Sempra v. Argentine Republic*⁷³ (*Sempra*)—all applied an extraordinarily strict standard when reviewing Argentina’s economic responses to the financial crisis. That standard essentially made Argentina’s invocation of the NPM clause in the U.S.-Argentina BIT a legal impossibility and failed to take into consideration the broader policy context in which the arbitrations arose. Rather than recognize the public law nature of the arbitration and Argentina’s treaty-based defenses, these three tribunals operated as if the only rights at stake were those of investors and as if the tribunals were enforcing narrowly drawn private law contracts divorced from public law context.⁷⁴

In approaching the NPM clause in the U.S.-Argentina BIT, the three tribunals in *CMS*, *Enron*, and *Sempra* imported the customary law requirements of necessity into their analysis and required Argentina to show that the actions it took were the only ones available to the government to respond to the crisis.⁷⁵ Admittedly, this standard derives from a source in international public law—the necessity defense in customary law. Yet the necessity defense is not a standard of review, but rather a narrow carve-out of

71. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4.

72. *Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007), <http://ita.law.uvic.ca/documents/Enron-Award.pdf>.

73. *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8.

74. In contract disputes, the goal of an adjudicator is to give effect to the intent of the parties, which generally results in a narrow interpretation of the text independent from broader policy concerns. See SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 32:1 (1998) (“Consistent with the notion that a contract represents the parties’ own private agreement as to their legal relationship, liabilities, and rights, the primary purpose and function of the court in interpreting a contract is to ascertain the parties’ intention so as to give effect to that intention.”); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1139 (3d Cir. 1995) (“The cardinal rule in contract interpretation is that effect must be given to the intention of the parties . . .”).

75. *Sempra*, ICSID Case No. ARB/02/16, Award, ¶¶ 350-351. This approach fails to give the government any policy flexibility and does not recognize that some policy options may be more or less effective in responding to the crisis.

general customary law rules of state responsibility.⁷⁶ It does not, therefore, lay the groundwork for a standard of review that could be generalized to public law disputes writ large. Moreover, the necessity defense is extraordinarily narrowly defined and by intent almost impossible to satisfy. In applying the NPM clause, these three tribunals looked to Article 25(1)(a) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, according to which the necessity defense is only available if the actions taken by the state were “the only way for the State to safeguard an essential interest against a grave and imminent peril.”⁷⁷ The ILC Commentaries to the Draft Articles provide that “[t]he plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient.”⁷⁸

The reliance on and narrow construction of the customary international law necessity defense essentially preclude the public law elements of the dispute based on the NPM clause from playing any meaningful role in the resolution of the case. The *CMS* tribunal, for example, found that the ILC’s comment “that the plea of necessity is ‘excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,’ is persuasive in assisting this tribunal in concluding that the measures adopted were not the only steps available.”⁷⁹ Similarly, the *Enron* tribunal noted that “[a] rather sad world comparative experience in the handling of economic crises, shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case.”⁸⁰ The three tribunals asserted that if any alternative policy choice is available—regardless of its likely effectiveness—the necessity defense and, by implication, the NPM defense under Article XI of the treaty, is unavailable. Since states always face a range of policy choices in response to any issue, whichever policy a state chooses is, by definition, not the only available response to the crisis. The three tribunals thus gave no deference whatsoever to Argentina’s policy choices and, essentially, vitiated the necessity defense as a matter of law. The tribunals thereby reverted back to what is essentially a private law, contractual dispute model, without recognition of the public law, quasi-constitutional elements that in fact lay at the heart of the cases.

In contrast, two other tribunals that reviewed Argentina’s actions under the U.S.-Argentina BIT—*LG&E v. Argentine Republic*⁸¹ (*LG&E*) and

76. ILC Draft Articles on State Responsibility, *supra* note 58, art. 25, ¶ 1 (defining necessity as a circumstance “precluding wrongfulness”).

77. *Id.* art. 25, ¶ 1.

78. *Id.* art. 25, ¶ 15.

79. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 324 (May 12, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4.

80. *Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 308 (May 22, 2007), <http://ita.law.uvic.ca/documents/Enron-Award.pdf>; *see also Sempra*, ICSID Case No. ARB/02/16, Award, ¶ 350 (providing a word-for-word identical discussion as the *CMS* tribunal).

81. *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseId=C208.

*Continental Casualty v. Argentine Republic*⁸² (*Continental Casualty*)—took a very different approach to the NPM clause, and gave considerable deference to Argentina’s determination that its actions were necessary to protect essential security interests and maintain public order. These tribunals recognized the public law nature of the disputes and the fact that, along with the rights of investors, considerable national and global policy concerns were at stake. While these two tribunals, and particularly the *Continental Casualty* tribunal, began the process of developing appropriate standards of review for such disputes—based both on proportionality analysis and the margin of appreciation—the jurisprudential framework remains thin and the applicable standards of review are far from sufficiently elaborated and clarified.

At best, ICSID tribunals reviewing Argentina’s actions have generated inconsistent and incoherent jurisprudence. At worst, the early cases against Argentina suggest at least a narrow private law approach to public law dispute settlement based on a “no other means available” test that ignores public law context. These contradictory awards and the lack of a coherent or consistent standard of review are especially problematic given that the ICSID Convention lacks meaningful appellate review and makes awards essentially unreviewable by national courts and enforceable as if they were domestic judgments of the contracting state in which enforcement is sought.⁸³ As a result, when ICSID tribunals get it wrong, neither states nor investors have any meaningful recourse and there is no readily available means for an appellate body to reconcile contradictory jurisprudence.

The divergent decisions in these cases, their often strained legal reasoning, and the exceptional sums awarded to claimants against Argentina have called into question, at least in the eyes of some states, the legitimacy of the ICSID system.⁸⁴ Senior officials in the Argentine government have pondered the political viability of paying more than one hundred thirty million dollars on an award that an annulment committee has found to be legally flawed.⁸⁵ Other states have taken even bolder steps.⁸⁶ In May 2007, Bolivian President Evo Morales withdrew Bolivia from the ICSID Convention, noting that “[we] emphatically reject the legal, media and diplomatic pressure of some multinationals that . . . resist the sovereign rulings of countries, making threats and initiating suits in international arbitration.”⁸⁷ On July 9, 2009,

82. Cont’l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), <http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf>.

83. ICSID Convention, *supra* note 2, arts. 53-55.

84. The question of the legitimacy of the ICSID system should not in any way be interpreted as suggesting that already final awards against states should not be paid. Legitimacy refers here to the justification and acceptability of political authority, *see* Bodansky, *supra* note 8, at 310, and is thus separate from formal legal authority. Regardless of whether states question the legitimacy of the system, and except to the extent that they are annulled in conformity with Article 52 of the ICSID Convention, such awards are still legally valid and binding under Article 53 of the latter. *See* ICSID Convention, *supra* note 2, art. 53, ¶ 1. On the relationship of legitimacy and legality, albeit in a different context, *see*, for example, Tanja Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo*, 7 UCLA J. INT’L L. & FOREIGN AFF. 31, 58-63 (2002).

85. Osvaldo Guglielmino, Prosecutor of the Treasury of the Argentine Republic, Address at American University, Washington College of Law (Oct. 24, 2007).

86. *See* Kaushal, *supra* note 26, at 493.

87. Damon Vis-Dunbar, Luke Eric Peterson & Fernando Cabrera Diaz, *Bolivia Notifies World*

Ecuadorian President Rafael Correa denounced the ICSID Convention, removing the country from future ICSID jurisdiction.⁸⁸ Other Latin American states such as Venezuela and Nicaragua have likewise noted their desire to limit ICSID jurisdiction and threatened to withdraw from the ICSID Convention, without, however, following through on these threats so far.⁸⁹ Even if these states are considered outliers, led by left-leaning governments, their expressed skepticism is nonetheless troubling for the future of ICSID.

In addition, the perceived legitimacy of investment treaty arbitration has been questioned from within the ICSID system.⁹⁰ In *CMS*, an annulment committee constituted under Article 52 of the ICSID Convention and comprised of three of the world's leading international lawyers⁹¹ took the unusual step of finding that, while it lacked jurisdiction to overturn the award, the legal reasoning used by the arbitrators was problematic. Specifically, the committee found that the tribunal "gave an erroneous interpretation of Article XI" that "could have had a decisive impact on the operative part of the award."⁹² This bold pronouncement, which reaches well beyond the committee's limited jurisdiction, casts a shadow of doubt over both the quality of ICSID jurisprudence and the legitimacy of investor-state arbitration more generally.⁹³

In response to the growing perception of a legitimacy deficit in the ICSID system and the threat of state withdrawals from the Convention, commentators have suggested a range of reforms.⁹⁴ Perhaps most prominent has been the call for the creation of a standing appellate mechanism with jurisdiction to review errors of law, rather than the far narrower grounds for annulment presently available under Article 52 of the Convention.⁹⁵ Even the

Bank of Withdrawal from ICSID, Pursues BIT Revisions, International Institute for Sustainable Development, INVESTMENT TREATY NEWS, May 7, 2007, http://www.bilaterals.org/article.php3?id_article=8221.

88. See New Release, ICSID, Ecuador Submits Notice Under Article 71 of the ICSID Convention (July 9, 2009), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&pageName=Announcement20>.

89. See *Treaty Developments Related to Bolivia, Ecuador, and Venezuela*, WHITE & CASE INT'L DISPUTES Q. (White & Case, New York, N.Y.), Fall 2007, at 5, available at http://www.whitecase.com/idq/fall_2007/ia1; see also Memorandum, Skadden, Arps, Slate, Meagher & Flom, Nicaragua Threatens Withdrawal from ICSID: Implications for Investors (Apr. 24, 2008), http://www.skadden.com/content%5CPublications%5CPublications1391_0.pdf.

90. Again, such statements questioning the legitimacy of the system do not provide legal grounds for challenging properly rendered awards. See *supra* note 84.

91. Gilbert Guillaume was the President of the International Court of Justice, Nabil Elaraby was a member of that court, and James Crawford is the Whewell Professor of International Law at Cambridge University and the Rapporteur of the International Law Commission for the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/08, Decision on Annulment, ¶¶ 95, 96-97, 125, 136, 146, 158 (Sept. 25, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4.

92. *Id.* ¶ 135.

93. For a more detailed discussion of this problematic jurisprudence, see William Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199 (2008).

94. See, e.g., Choudhury, *supra* note 13, at 807-30 (offering suggestions ranging from greater public access to ICSID arbitrations to the involvement of amicus curie).

95. See ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 112 (1991) (suggesting that arbitration could be enhanced via the use of an appellate system); Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, in INTERNATIONAL COMMERCIAL

CMS annulment committee seemed to suggest the possibility of establishing such appellate review, noting that “if the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground.”⁹⁶ Yet an appellate mechanism is not without its own problems. However constructed, an appellate process would be expensive and time consuming, undermining laudable advances of international arbitration, such as finality, efficiency, and speed.

While ICSID’s critics are correct that the Argentine cases reveal an emerging perception of a legitimacy gap and that the current trajectory of ICSID jurisprudence is likely unsustainable, we suggest that the development of new standards of review grounded in comparative public law, rather than in private contract law, can imbue ICSID with enhanced legitimacy and result in procedures and outcomes broadly acceptable to all stakeholders without sacrificing the considerable benefits offered by international arbitration. Specifically, while ICSID tribunals have demonstrated a preference for strict substantive review of state behavior rooted in private contract law, those standards are not compatible with the new public law and, occasionally, even quasi-constitutional role ICSID arbitrations have come to play.⁹⁷ In contrast with private contract law standards of review, a public law approach provides far more space for balancing treaty obligations with public policy interests.⁹⁸ ICSID tribunals need to rethink the standards of review applied in such circumstances from a comparative public law perspective.⁹⁹

ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 355, 364 (Albert Jan van den Berg ed., 2002) (voicing a concern for the lack of appellate review in the investor-state arbitration context); David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.—FOREIGN INV. L.J. 21, 48-49 (1992) (narrating the concerns of a general counsel of a major corporation upon an adverse ruling in arbitration where there was no recourse to appeal); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1606-10 (2005) (detailing the current legitimacy crisis within the ICSID system and outlining suggestions as to how to best remedy this crisis); ICSID, POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION 3-4 (Oct. 22, 2004), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=22_1.pdf (discussing potential improvements to the ICSID system by adding an appellate review mechanism).

96. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 136 (May 12, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4.

97. Abram Chayes defines such private law disputes in part by the fact that they are “self-contained” and that the “impact of the judgment is confined to the parties.” Chayes, *supra* note 7, at 1283.

98. For an indication of the extremely narrow construction of public policy in contract disputes, see, for example, *Westvaco Corp. v. United Paperworkers International Union*, 171 F.3d 971, 978 (4th Cir. 1999), which said that “we emphasize, as a simple matter of judicial restraint, our reluctance to invoke broad nostrums of public policy to void private bargains”; and *Allied Erecting & Dismantling Co. v. USX Corp.*, 249 F.3d 191, 197 (3d Cir. 2001), which said that “[w]hen ruling on the grounds of public policy, a court must speak for a virtual unanimity that can be found in definite indications in the law.”

99. As early as 1976, Abram Chayes called for a similar change in the approach of U.S. judges as they were forced to adjudicate new kinds of public law disputes. See Chayes, *supra* note 7.

IV. A COMPARATIVE ANALYSIS OF STANDARDS OF REVIEW IN PUBLIC LAW ADJUDICATION

Courts and tribunals have developed a wide range of standards of review in public law adjudication that could serve as models for the development of a coherent jurisprudential approach in the ICSID context. A review of these existing standards used by both international and domestic courts helps situate the approach of ICSID tribunals to date and the range of possible standards ICSID tribunals could adopt. Likewise, it demonstrates that both domestic and international tribunals have developed mechanisms to calibrate the standard of review they apply to the subject matter of the dispute and the nature of the tribunal. This comparative analysis provides a strong foundation for our broader argument that a more deferential standard of review is fully appropriate in the circumstances of investor-state arbitral tribunals engaging in public law adjudication.

This Part begins by considering existing standards used by other international tribunals in broadly similar contexts, including the least restrictive alternative standard used by the WTO and some more recent ICSID tribunals, the margin of appreciation as developed by the European Court of Human Rights and, specifically, as applied in property disputes under Additional Protocol I to that Convention, and good faith review. This Part then turns to an examination of domestic law standards of review in both the United States and Germany, two jurisdictions with well-developed yet distinct jurisprudential approaches.

A. *Standards of Review in International Adjudication*

Viewing investor-state arbitrations that contain public law issues in the context of comparative public law informs and shifts the range of available standards that a tribunal might apply when reviewing state actions and, particularly, the application of defenses such as NPM clauses that raise quasi-constitutional concerns. This Section examines the range of possible standards that ICSID tribunals could adopt based on the jurisprudence of other international courts, including the WTO and the ECtHR. The Section first considers the least restrictive alternative standard, and then examines both the margin of appreciation and good faith review.

1. *The WTO and Later ICSID Jurisprudence: The Least Restrictive Alternative*

A first approach to reviewing state behavior in public law disputes derives from the jurisprudence of GATT and WTO panels.¹⁰⁰ Articles XX and XXI of the GATT provide states with defenses very similar to those found in the NPM clauses of various BITs. Specifically, GATT Article XX allows states to take measures consistent with the *chapeau* that are, for example,

100. See Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437, 462-68 (2008) (discussing five GATT disputes that “have begun to establish a framework for [Article XXI’s] interpretation”).

“necessary to protect public morals” or “necessary to protect human, animal or plant life or health.”¹⁰¹ Similarly, Article XXI provides that nothing in the GATT agreement “shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”¹⁰² In addressing these exceptions, GATT and WTO panels have developed a relatively consistent jurisprudence that asks whether the state has taken the least restrictive measure reasonably available that meets its permissible objective under GATT Articles XX or XXI.¹⁰³ In contrast to the only means available test used by the first set of ICSID tribunals to render awards against Argentina, this least restrictive alternative test is a public law approach that attempts to balance the otherwise irreconcilable rights of the parties.¹⁰⁴

The roots of this approach are evident in the 1990 *Thailand Cigarettes* GATT dispute. In that case, Thailand banned foreign-produced cigarettes but allowed the sale of domestically produced cigarettes, justifying the measure based on Article XX(d) of GATT on the grounds that such restrictions were “necessary to protect human health.”¹⁰⁵ The GATT panel disagreed, finding that the import restrictions imposed by Thailand could be considered “necessary” in terms of Article XX(b) only if there were “no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”¹⁰⁶ In other words, Thailand’s actions could only be justified if they were the least restrictive means of achieving the legitimate policy objective. In this case, a ban on all foreign cigarettes was not the least restrictive means available to protect public health and was deemed a breach of GATT obligations.

Seven years later a GATT panel in *United States—Section 337 of the Tariff Act of 1930* expounded on the interpretation of “necessary” in the context of Article XX. In so doing, the Panel reaffirmed the least restrictive alternative test:

101. GATT, *supra* note 47, art. XX (a)-(b).

102. *Id.* art. XXI(b). For discussion, see Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT’L L. 365, 390-91 (2003), suggesting an interpretation of Article XXI that incorporates the principle of *abus de droit*, a concept that refers to a state exercising a right either in a way which impedes the enjoyment by other states of their own rights or for an end different from that for which the right was created, to the injury of another state.

103. For a general discussion of the least restrictive means test, see Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 416 (2003), noting that “if the regulatory objective relates to some highly valued interest such as the protection of human life, then the challenged regulation will be upheld if there is any doubt as to the ability of the proposed alternative to achieve the same level of efficacy.”

104. For discussion of the WTO’s approach to balancing and, particularly, its use of proportionality analysis, see Mads Andenas & Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective*, 20 CAMBRIDGE REV. INT’L AFF. 71 (2007); Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, 17 EUR. J. INT’L L. 985 (2006); and Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARV. INT’L L.J. 337 (2007).

105. Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 12, DS10/R (Oct. 5, 1990), GATT B.I.S.D. (37th Supp.) at 200, 203 (1990).

106. *Id.* ¶ 75, GATT B.I.S.D. (37th Supp.) at 223.

[A] contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.¹⁰⁷

Notably, the panel stressed that the alternative measures against which the states’ actions are judged must truly be “reasonably available” and that states are not expected under Article XX to undertake fundamental transformations of their economic policy.¹⁰⁸

In practice, the least restrictive alternative approach developed by GATT and WTO panels operates as a three-part test. First, the panel must determine if the measures taken by the state are in fact designed to protect or further a permissible objective under the relevant treaty.¹⁰⁹ Second, the panel must assess whether those measures are necessary.¹¹⁰ That determination, in turn, requires a balancing of three factors: the interests asserted by the state taking the actions, the “contribution of the measure to the realization of the ends pursued by it,” and the “restrictive impact of the measure on international commerce”¹¹¹ (the interests of the state challenging the action). Third, the panel must undertake a “comparison between the challenged measure and possible alternatives.”¹¹² In this third step, if the state invoking the exception makes a prima facie case that its measures were necessary, the burden shifts to the complaining state to show that another measure was reasonably available that would have been both less restrictive on international commerce and have been equally effective in achieving the state’s permissible objective.¹¹³

2. *The Margin of Appreciation*

The margin of appreciation originated at the international level in the context of regional human rights protection, but is now widely used in other contexts as well.

a. *Origins and Justification*

The margin of appreciation doctrine in transnational adjudication has been shaped by the jurisprudence of the ECtHR, the judicial organ set up

107. *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439 (Jan. 16, 1989), GATT, B.I.S.D. (36th Supp.) at 345, 389-91 (1989) [hereinafter *US—Section 337*]. See also Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 J. INT’L ECON. L. 153 (2009), which assessed the recent decisions of the WTO in Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 12, 2007); and in Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 198, WT/DS332/AB/R (Dec. 17, 2007) [hereinafter *Brazil—Retreaded Tyres*], especially as they pertain to necessity tests.

108. *US—Section 337*, *supra* note 107.

109. *US—Gambling*, *supra* note 51, ¶ 294.

110. *Id.*

111. *Id.* ¶ 306.

112. *Id.* ¶ 307.

113. *Id.* ¶¶ 308-310.

under the European Convention on Human Rights (ECHR).¹¹⁴ Making its first appearance in early reports of the now-abolished European Commission of Human Rights with respect to the interpretation and application of the Convention's derogation provision, Article 15,¹¹⁵ it has over time assumed a prevalent role in the interpretation and application of a number of other Convention provisions as well.¹¹⁶

The margin of appreciation can be defined as the "breadth of deference"¹¹⁷ that the Court is willing to grant to the decisions of national legislative, executive, and judicial decisionmakers. The margin is based on a recognition that the normative requirements articulated in the Convention text can often be legitimately met by a range of distinct measures that may strike different, but still normatively acceptable, balances between individual rights and governmental interests. Likewise, the margin recognizes that some national determinations restricting Convention rights may be necessary for the protection of other values and permissible objectives, such as national security, public order, health, or morals. Noting the subsidiary position of the ECHR system with respect to national systems for the protection of human rights, and that domestic decisionmakers are often better positioned to make such determinations due to "their direct and continuous contact with the vital forces of their countries," the Court has invoked the margin of appreciation. In so doing, the Court emphasizes that it is first and foremost "for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in [such] context[s]."¹¹⁸ The Court then reviews such assessments by the national authorities with an eye to both their aims and necessity, in order to determine "whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient."¹¹⁹ As one of the Court's judges has noted,

The margin of appreciation . . . permits the Court to show the proper degree of respect for the objectives that a Contracting Party may wish to pursue, and the trade-offs that it wants to make . . . while at the same time preventing unnecessary restrictions on the fullness of the protection which the Convention can provide.¹²⁰

In the Court's usage, the "width," or scope, of the margin of appreciation is not uniform across cases and "will vary according to the context"

114. Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

115. See *Lawless v. Ireland*, App. No. 332/57, Report of the Commission, 1 Eur. Ct. H.R. (ser. B) 9, 88-90 (1959) (opinion of Waldock, Berg, Faber, Crosbie & Erim, Comm'rs); *id.* at 97-98 (opinion of Süsterhenn, Comm'r); *id.* at 114, 130 (opinion of Waldock, Comm'r); *id.* at 130, 133 (opinion of Sörensen, Comm'r); *Greece v. United Kingdom*, App. No. 176/56, Report of the Commission, vol. 1, ¶¶ 132, 143 (1958), <http://www.echr.coe.int>; *id.* vol. 2, ¶ 318.

116. See, e.g., Ronald St. John Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 83, 83 (R. St. J. Macdonald, F. Matscher & H. Petzold eds., 1993).

117. Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 *CONN. J. INT'L L.* 111, 118 (1987).

118. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), ¶ 48 (1976).

119. *Id.* ¶ 50.

120. Ronald St. John Macdonald, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights*, in 1 *COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW* 95, 160 (Andrew Clapham & Frank Emmert eds., 1992).

Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.”¹²¹ Another factor impacting the breadth of the margin is “the existence or non-existence of common ground between the laws of the Contracting States.”¹²² Moreover, the margin may vary not only with respect to different Convention provisions, but also with respect to different permissible objectives listed in the limitation clauses of Articles 8(2) through 10(2) of the ECHR. For example, the Court has granted national legislatures a wide margin in regulating the freedom of expression with regard to issues touching upon questions of public morality under Article 10(2) due to the lack of interpretive agreement among the contracting states. Yet by contrast, where a greater degree of agreement was demonstrable, a lesser margin would result. For example, while public morality might be subject to strongly divergent understandings,

[p]recisely the same cannot be said of the far more objective notion of the “authority” of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including Article 6 (art. 6), which have no equivalent as far as “morals” are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.¹²³

As a result, the regulation of the maintenance of “the authority and impartiality of the judiciary,”¹²⁴ also mentioned in Article 10(2) as a permissible objective to restrict freedom of expression, is more strictly scrutinized by the Court than is the regulation of expression in the name of public morality.

The application of the margin doctrine in the Court’s judicial practice has become increasingly intertwined with the consideration of proportionality.¹²⁵ Although the Court often invokes both the margin and

121. Buckley v. United Kingdom, 1996-IV Eur. Ct. H.R. 1272, ¶ 74; *see also* Zehentner v. Austria, App. No. 20082/02, ¶ 57 (Eur. Ct. H.R. July 16, 2009), <http://www.echr.coe.int> (noting that the “margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions”); Johansen v. Norway, 1996-III Eur. Ct. H.R. 1029, ¶ 64. On the factors affecting the varying scope of the margin, see, for example, ANNETTE RUPP-SWIENY, *DIE DOKTRIN VON DER MARGIN OF APPRECIATION IN DER RECHTSPRECHUNG DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE* [THE DOCTRINE OF THE MARGIN OF APPRECIATION IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS] 196 (1999); Paul Mahoney, *Marvelous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L.J. 1, 5-6 (1998); Jeroen Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 19 HUM. RTS. L.J. 30, 34-35 (1998).

122. Rasmussen v. Denmark, 87 Eur. Ct. H.R. (ser. A), ¶ 40 (1984); *see also* Stambuk v. Germany, App. No. 37928/97, ¶ 40 (Eur. Ct. H.R. Oct. 17, 2002), <http://www.echr.coe.int> (“[I]n the field under consideration [the regulation of the medical profession], there are no particular circumstances—such as a clear lack of common ground among Member States regarding the principles at issue or a need to make allowance for the diversity of moral conceptions . . . which would justify granting the national authorities a comparable wide margin of appreciation.” (emphasis added)).

123. Sunday Times (no. 1) v. United Kingdom, 30 Eur. Ct. H.R. (ser. A), ¶ 59 (1979); *see also* Otto-Preminger-Institute v. Austria, 295-A Eur. Ct. H.R. (ser. A) ¶ 50 (1994).

124. ECHR, *supra* note 114, art. 10(2).

125. *See* Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, *supra* note 116, at 125, 127-31.

proportionality in justifying its decisions, it has so far failed to elaborate the precise doctrinal relationship between the two.¹²⁶ Proportionality is generally the last factor assessed in evaluating state measures under the margin of appreciation doctrine.¹²⁷ Proportionality takes into account the context of, and the rationale for, a given interference, the consequences for the right at issue, and its impact on the applicant.¹²⁸ In the context of restrictions on the freedom of the press, for example, the Court recognizes that states enjoy a certain margin of appreciation in regulating press activities, where considered necessary. Yet that margin is, in turn, “circumscribed by the interest of democratic society in ensuring and maintaining a free press.”¹²⁹ That same “interest will [also] weigh heavily in the balance in determining . . . whether the restriction was proportionate to the legitimate aim pursued.”¹³⁰

Admittedly, the Court’s jurisprudence on the relationship between the margin and proportionality and, consequentially, our explanation of the Court’s description of that relationship may still offer insufficient clarity. One way in which the relationship between the margin of appreciation and proportionality has been conceptualized sees the margin as relating primarily “to the legitimacy of the aim of the interference in meeting a pressing social need, whereas the doctrine of proportionality concerns the means used to achieve that aim.”¹³¹ That approach, while recognizing that the margin and proportionality are in practice intertwined, does not, however, explain how precisely they influence each other.¹³² Another useful perspective views proportionality analysis itself as being subject to the margin of appreciation, with the effect that “in assessing the proportionality of [a] state’s acts, a certain degree of deference is given to the judgment of national authorities when they weigh competing public and individual interests.”¹³³

In contrast to either of these approaches as described by the Court, looking to its actual practice suggests a relationship between the margin of appreciation and proportionality that we find both compelling and

126. See YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 193 (2002).

127. See D.J. HARRIS ET AL., *HARRIS, O’BOYLE & WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 358 (2d ed. 2009).

128. See STEVEN GREER, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, in *HUMAN RIGHTS FILES NO. 17*, at 20 (2000).

129. *Fressoz v. France*, 1999-I Eur. Ct. H.R. 3, ¶ 45.

130. *Id.*; see also *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 483, ¶ 40.

131. CLARE OVEY & ROBIN C.A. WHITE, *JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 240 (4th ed. 2006).

132. *Id.* For another example where the existence of both the margin and proportionality is merely mentioned but their relationship not further explained, see MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* 243 (3d ed. 2008), which notes that the proportionality requirement is “related to the margin of appreciation,” without further explication as to the modalities of that relationship.

133. HARRIS ET AL., *supra* note 127, at 12; see also David Feldman, *Proportionality and the Human Rights Act 1998*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* 117, 124 (Evelyn Ellis ed., 1999) (finding that the margin “diminishes . . . the practical significance of the proportionality principle”); Jeremy McBride, *Proportionality and the European Convention on Human Rights*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE*, *supra*, at 23, 29 (noting that the applicability of a certain margin of appreciation to a given restriction weakens any subsequent proportionality analysis “since the Court has effectively tipped the scales in favour of the measure imposing” the restriction); *id.* at 30-33 (discussing further the relationship between the margin and proportionality analysis).

jurisprudentially useful. In practice, the Court uses the margin of appreciation to inform its proportionality analysis. In other words, when the Court grants a wide margin of appreciation to states in a given issue area, it then transforms that wide margin into a greater degree of deference to the national government in the proportionality balancing process which follows. A wide margin results in a less stringent proportionality test. A narrow margin leads to stricter review in the proportionality test. Where a wide margin leads to a deferential balancing test, a state action that interferes with individual rights would need to be only roughly proportional to the objective pursued. By contrast, where a narrow margin leads to a stricter proportionality balancing test, the relationship between the state's action and the objective pursued would need to be strictly proportional. A broader margin provides states with greater freedom to choose from the range of possible "balances" between competing interests, whereas a narrower margin results in a narrowing of the range of available choices that are still permissible.

b. *The Margin of Appreciation in the ECtHR's Jurisprudence on the Protection of Property Under Article 1 of Protocol 1*

The cases most analogous to investment arbitration in the ECtHR's jurisprudence on the margin of appreciation involve the protection of property under Article 1 of Protocol 1 to the ECHR. Article 1 provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.¹³⁴

The Court has interpreted this provision as comprising three separate rules: first, the general rule protecting the peaceful enjoyment of property; second, the rule regarding modalities of lawful expropriation; and third, the rule that permits the regulation of the use of property in the general interest.¹³⁵ The latter two rules address "particular instances of interference with the right to peaceful enjoyment of property . . . [and] should . . . be construed in the light of the general principle enunciated in the first rule."¹³⁶

The margin of appreciation accorded to states by the Court in the regulation of property issues is generally a wide one. The recognition of such a wide margin hinges on the concept of the "public interest,"¹³⁷ the

134. ECHR, *supra* note 114, Protocol 1, art. 1.

135. See *Immobiliare Saffi v. Italy*, 1999-V Eur. Ct. H.R. 73, ¶ 44; *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A), ¶ 37 (1986); *Sporrong & Lönnroth v. Sweden*, 52 Eur. Ct. H.R. (ser. A), ¶ 61 (1982).

136. *Iatridis v. Greece*, 1999-II Eur. Ct. H.R. 75, ¶ 55.

137. The reference to the "general interest" in paragraph 2 of Article 1 of the Protocol has been interpreted by the Court as being essentially identical with the concept of "public interest" and thus does not provide a different standard. See *James*, 98 Eur. Ct. H.R. (ser. A), ¶ 43; HARRIS ET AL., *supra* note

furtherance of which must motivate property-regulating measures. As to questions of public interest, the Court acknowledged that national authorities, because of their closer proximity to the social realities of the community that they are entrusted to govern, are better placed to determine what is in the public interest and what is not.¹³⁸ As the Court reaffirmed in *Broniowski*:

Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property, including deprivation and restitution of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.

Furthermore, the notion of “public interest” is necessarily extensive. In particular, the decision to enact laws expropriating property or affording publicly funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. The Court has declared that, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, it will respect the legislature’s judgment as to what is “in the public interest” unless that judgment is manifestly without reasonable foundation This logic applies to such fundamental changes of a country’s system as the transition from a totalitarian regime to a democratic form of government and the reform of the State’s political, legal and economic structure, phenomena which inevitably involve the enactment of large-scale economic and social legislation.¹³⁹

In practice, a state’s identification of a legitimate aim in pursuit of social and economic policies is rarely reviewed, and the burden of proof to show that an initiative does not further a legitimate aim falls squarely upon the applicant.¹⁴⁰

This wide margin in the pursuit of social and economic policies notwithstanding, any measure adopted by a state must also meet the requirements of lawfulness¹⁴¹ and proportionality.¹⁴² Since its first judgment on Article 1 of Protocol 1, the Court has addressed this latter proportionality requirement by applying a “fair balance” test.¹⁴³ The core of the fair balance test looks to the presence of “a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures depriving a person of his or her possessions.”¹⁴⁴ The assessment of such a relationship is not measured against any abstract and fixed scale constructed in advance, but instead

127, at 668.

138. *James*, 98 Eur. Ct. H.R. (ser. A), ¶ 46.

139. *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, ¶ 149 (citations omitted).

140. See HARRIS ET AL., *supra* note 127, at 667-68.

141. The criterion of a measure’s “lawfulness” requires compliance with domestic law as well as that the “applicable provisions of domestic law [are] sufficiently accessible, precise and foreseeable.” *Beyeler v. Italy*, 2000-I Eur. Ct. H.R. 1, ¶¶ 108-109.

142. See *Bubić v. Croatia*, App. 23677/07, ¶ 50 (Eur. Ct. H.R. July 9, 2009), <http://www.echr.coe.int> (noting that “[d]espite the margin of appreciation given to the State the Court must nevertheless, in the exercise of its power of review, determine whether the requisite balance was maintained in a manner consonant with the applicant’s right to property” and that such balance would be upset if the measures adopted in pursuit of the general interest imposed a “disproportionate burden” on the applicant).

143. See *Sporrong & Lönnroth v. Sweden*, 52 Eur. Ct. H.R. (ser. A), ¶ 69 (1982).

144. *Kozacioğlu v. Turkey*, App. 2334/03, ¶ 63 (Eur. Ct. H.R. Feb. 19, 2009), <http://www.echr.coe.int>.

involves “an overall examination of the various interests in issue”¹⁴⁵ in the concrete case.

In determining whether a fair balance has been struck in cases where property is taken by the state, the Court frequently looks to the availability and amount of compensation provided to the aggrieved individual. The basic requirement for a fair balance to exist is that any compensation paid must be reasonably related to the value of the property at issue.¹⁴⁶ The Court has recognized certain exceptions, noting that “legitimate objectives in the ‘public interest,’ such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value,”¹⁴⁷ including the absence of any compensation at all.¹⁴⁸ For example, the Court has accepted lower compensation standards with regard to regulatory takings that further the “protection of [a country’s] historical and cultural heritage,”¹⁴⁹ nationalization of key industries,¹⁵⁰ compensation after relocations following border adjustments,¹⁵¹ the consequences of a country’s regime change,¹⁵² or the implications of German reunification.¹⁵³

c. *Use of the Margin of Appreciation by Other International Judicial Bodies*

Several other international dispute settlement bodies, including the European Court of Justice (ECJ), the WTO Dispute Settlement Body, the Inter-American Court of Human Rights, and North American Free Trade Agreement (NAFTA) arbitral tribunals, have, if less frequently and prominently, applied standards of review similar to the margin of appreciation,¹⁵⁴ often using the term explicitly. For example, several arbitral panels convened under Article 22(6) of the WTO Dispute Settlement Understanding (DSU), in disputes concerning the appropriateness of retaliatory countermeasures in response to noncompliance with prior panel and Appellate Body decisions,¹⁵⁵ have concluded that retaliating states possess

145. *Beyeler*, 2000-I Eur. Ct. H.R. 57, ¶ 114.

146. *Former King of Greece v. Greece*, 2000-XII Eur. Ct. H.R. 119, ¶ 89 (citing *Pressos Compania Naviera N.A. v. Belgium*, 332 Eur. Ct. H.R. (ser. A), ¶ 38 (1995)).

147. *Scordino v. Italy* (no. 1), 2006-V Eur. Ct. H.R. 91, ¶ 97 (citing *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A), ¶ 54 (1986)).

148. *Holy Monasteries v. Greece*, 301 Eur. Ct. H.R. (ser. A), ¶ 71 (1994).

149. *Kozacioğlu*, App. 2334/03, ¶ 64.

150. *Lithgow v. United Kingdom*, 102 Eur. Ct. H.R. (ser. A), ¶ 121 (1986).

151. *See Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, ¶ 182 (2004).

152. *See Zvolský v. Czech Republic*, 2002-IX Eur. Ct. H.R. 163, ¶ 72 (describing the challenges of reallocating property after a communist regime); *Former King of Greece v. Greece*, 2000-XII Eur. Ct. H.R. 119, ¶ 87.

153. *Jahn v. Germany*, 2005-VI Eur. Ct. H.R. 55, ¶ 117 (2005); *Von Maltzan v. Germany*, 2005-V Eur. Ct. H.R. 395, ¶ 77.

154. *See Onder Bakircioglu*, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 GERMAN L.J. 711, 713 (2007); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 55-56 (2003); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 519 (2003); Shany, *supra* note 61, at 927-31.

155. On this procedure, see PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* § 3.4.4.4, at 305-06 (2d ed. 2008).

a margin of appreciation in assessing the appropriateness of such countermeasures:

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.¹⁵⁶

Another WTO arbitration panel addressed the margin approach explicitly as a judicial standard of review. That panel affirmed that states enjoy a margin of appreciation in the context of deciding whether it is “practicable or effective,”¹⁵⁷ to retaliate within the same sector at issue in the relevant panel or Appellate Body decision that gave rise to the authorization of countermeasures. Specifically, the panel concluded that because states enjoy a margin of appreciation,

the margin of review by the Arbitrators implies the authority to *broadly* judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could *plausibly* arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough.¹⁵⁸

This approach, also adopted in 2007 by the panel in *US—Gambling*,¹⁵⁹ clearly echoes the ECtHR’s approach to the margin of appreciation. Each adjudicatory body identified a deferential standard of review under which it abstained from strictly scrutinizing the facts of the situation and the initial appraisal of those facts by the competent state authorities. Instead, the tribunal looked only at the extent to which the respondent state could show that it considered such facts in a nonbiased manner and drew reasonable conclusions from them.

3. Good Faith Review

A third potential public law standard of review derives from a general principle of international law—good faith. Because good faith has long been a

156. Decision of the Arbitrator, *US—Tax Treatment of “Foreign Sales Corporation,”* ¶ 5.62, WT/DS108/ARB (Aug. 30, 2002); *see also id.* ¶ 6.55.

157. The relevant parts of Article 22(3) of the DSU provide that [i]n considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures: . . . (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement; (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement

Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22(3), 33 I.L.M. 112 (1994), available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

158. *See* Decision by the Arbitrators, *EC—Regime for the Importation, Sale and Distribution of Bananas III*, ¶ 52, WT/DS27/ARB/ECU (Mar. 24, 2000).

159. *See* Decision by the Arbitrator, *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 4.16-18, WT/DS285/ARB (Dec. 21, 2007).

core principle of international law,¹⁶⁰ it can also serve as a standard for reviewing state behavior.¹⁶¹ Admittedly, good faith is an extremely lenient standard. It allows states to balance conflicting rights and interests and defers to the state's own resolution of that balancing, as long as the state's determination was made in good faith and was reasonable. A good faith standard still requires weighing and balancing irreconcilable interests, but shifts that balancing process to the national government. The review at the international level then does not seek to balance such interests itself, but instead asks whether the respondent state has rationally balanced conflicting rights and interests and acted with honesty and fair dealing. While deferential to a state's own determinations, good faith review is not hollow. It requires states to internalize the balancing process and offer a rational basis for their ultimate determinations.

Unfortunately, the paucity of jurisprudence on the principle of good faith means that the practical standards for undertaking a good faith review are underdeveloped and arbitrators may find the standard lacking specificity. The "good faith" standard in treaty performance is, however, well established and offers a useful starting point for the development of good faith as a standard of review. The 1949 Draft Declaration on the Rights and Duties of States included such a standard in Article 13.¹⁶² As the International Law Commission's commentary on the provision noted, it was seen as "a reinstatement of the fundamental principle *pacta sunt servanda*."¹⁶³

As a standard of review, good faith has two basic elements: first, whether the state has engaged in honest and fair dealing and, second, whether there is a rational basis for the action taken by the government. Perhaps the best articulation of the honesty and fair dealing element of good faith review is contained in the 1935 Harvard Research on the Law of Treaties, according to which:

The obligation to fulfill in good faith a treaty engagement requires that its stipulations be observed in their spirit as well as according to their letter, and that what has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise.¹⁶⁴

The question then is whether the state has acted honestly and to the best of its ability in balancing its own permissible interests with the rights of, for example, foreign investors. Where evidence exists that a state invokes its interests, perhaps through a BIT NPM clause, just as a pretext for ulterior economic motives, or where the connection between the measures taken and national security is so spurious as to clearly breach the good faith

160. See Draft Declaration on Rights and Duties of States, G.A. Res. 375 (IV), Annex art. 13, U.N. GAOR, 4th Sess. (Dec. 6, 1949).

161. See generally JOHN O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991).

162. "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty." Draft Declaration on the Rights and Duties of States, *supra* note 160, art. 13.

163. See *id.*

164. *Codification of International Law*, 29 AM. J. INT'L L. 1, 981 (Supp. 1935).

requirement,¹⁶⁵ a tribunal could find that the state had not satisfied the standard.

The second element of good faith review involves a determination of whether there was a rational basis for the outcome of the state's own internal balancing process. This element of the good faith test may have been best expressed by the International Whaling Commission in its evaluation of the good faith requirements of the U.N. Convention on the Law of the Sea.¹⁶⁶ According to the Commission, good faith requires "fairness, reasonableness, integrity and honesty in international behaviour."¹⁶⁷ The reasonableness requirement stressed by the Commission requires that the state have some rational basis for its actions. The question a tribunal must ask is whether a reasonable person in the state's position could have concluded that its permissible interests—for example, the need to protect essential security through the invocation of an NPM clause—outweighed the protected rights and interests of investors.

Two examples are illustrative of this element of good faith review in practice. If, for example, a landlocked state such as Switzerland were to invoke an NPM clause and claim a security threat from increasingly severe tidal ranges and the attendant threats of flooding, a tribunal would have to conclude that there was no rational basis to believe that the respondent state was indeed threatened by that phenomenon and hence that the clause had not been invoked in good faith. In contrast, should an island state invoke an NPM clause to build sea barriers citing the potential for global warming to raise sea levels, notwithstanding potentially contradictory scientific evidence, the tribunal would have to conclude that the state had a rational basis for its determination and that the reasonableness element of good faith review was satisfied.

In operationalizing good faith as a standard of review, a tribunal would look to see if the state had justified its actions by giving reasons for those actions and undertaking its own internal balancing process. A tribunal might then test both the state's fair dealing and the reasonableness of its actions by looking to efforts by the state to reconcile competing interests through negotiation, the timing of a state's actions, the availability of less restrictive measures, and the duration of measures taken. The result would be meaningful, albeit limited review.

We have outlined the extremely strict "no other means available" standard applied by the early ICSID tribunals and three distinct alternatives that operate in international public law adjudication—the least restrictive means test, the margin of appreciation, and good faith review. With the exception of the strict no other means available test employed by the early

165. An illustrative example of this is provided by Sweden's attempt in 1975 to justify import quotas on footwear for national security reasons under the GATT. See John A. Spanogle, Jr., *Can Helms-Burton Be Challenged Under the WTO?*, 27 *STETSON L. REV.* 1313, 1331 (1998).

166. See United Nations Convention on the Law of the Sea art. 300, Dec. 10, 1982, 1833 U.N.T.S. 397, 137 ("States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.").

167. Int'l Whaling Comm'n, Resolution 2001-1 (2001), available at <http://www.iwcoffice.org/meetings/resolutions/resolution2001.htm>.

ICSID tribunals, the remaining three standards each offer different mechanisms for weighing and balancing competing rights and interests. This Subsection compares and contrasts those standards to offer a clear picture of their differences in practice. As a general matter, the standards have been presented in order of increasing deference to the respondent state's regulatory activity, with the "no other means available" test offering essentially no deference to the respondent state, the least restrictive alternative test offering greater deference, the margin of appreciation offering perhaps more deference, and good faith review giving states the greatest deference.

B. *Judicial Deference in Domestic Public Law*

Having examined standards of review including the least restrictive alternative, the margin of appreciation, and good faith used by some international tribunals, we now turn to a consideration of standards of review used in particular domestic legal systems, with a focus on the United States and Germany. One critical problem with the current state of international public law arbitration is the lack of clarity and sound theoretical underpinnings for the choice of applicable standards of review. Different courts and tribunals apply different standards to similarly situated cases. At best, those choices are guided by the specific precedents of the forum; at worst, by the whims of a particular arbitral tribunal. Yet ICSID tribunals are far from the first courts to confront the question of what standard of review to apply in public law disputes. Domestic legal systems have created well-developed standards of review and clear criteria for determining the appropriate standard to apply in different types of public law adjudication.

An examination of the public law standards of review used in the United States and Germany shows similarities with international approaches and highlights the importance of theoretical consistency in the standard of review applied in different types of public law adjudication. We focus our analysis here on the United States and Germany for two reasons. First, the legal systems of the United States and Germany are very different—one is based on common law, the other on civil law—and the similarities in the standards of review in both systems are, therefore, noteworthy. Second, the United States and Germany are two of the most significant players in the international investment system and have two of the longest standing BIT programs.

1. *Judicial Deference and Standards of Review in the United States*

In the United States, the choice of a standard of review arises in a number of distinct contexts, two of which merit detailed consideration: constitutional adjudication and administrative law review of agency regulation. In both of these contexts, U.S. courts have developed standards of public law review that calibrate appropriate levels of judicial scrutiny and deference to other decisionmakers in ways that are both consistent and justifiable. The result is a well-honed system for allocation of deference that, while using language distinct from the international context, results in

standards similar to good faith, the least restrictive means, and the margin of appreciation.¹⁶⁸ Unlike the international system, which lacks clear principles to guide the choice of standard of review, the U.S. system highlights the potential for a coherent set of principles based on both the nature of the rights at stake and the comparative expertise of courts and other actors to guide the determination of the appropriate standard of review.

In U.S. constitutional review, domestic courts examine governmental actions that infringe on constitutionally protected individual rights. Three different standards of scrutiny are used in U.S. constitutional law and have been described by one leading scholar as “instructions for balancing” between competing individual rights and governmental objectives.¹⁶⁹ These standards for constitutional review find their origins in the *Carolene Products* decision of 1937, in which the U.S. Supreme Court observed, in a famous footnote, that “more searching judicial inquiry” is appropriate when the law in question “interferes with individual rights, . . . restricts the ability of the political process to repeal undesirable legislation, or . . . discriminates against a ‘discrete or insular minority.’”¹⁷⁰

The first of these standards, rational basis review, upholds the constitutionality of a law if the legislation is rationally related to a legitimate government purpose.¹⁷¹ In most such cases, courts defer to Congress based upon the presumption that legislatures are better positioned than courts to set economic and social policy, to the degree those policies do not conflict with fundamental rights or target a protected class of persons.¹⁷²

Under the second of these standards, intermediate scrutiny, U.S. courts engage in a stricter review and give less deference to the legislature with respect to laws that draw distinctions based on gender,¹⁷³ illegitimacy classifications,¹⁷⁴ or that regulate commercial speech.¹⁷⁵ When applying

168. A further “standard” resulting in judicial deference to other decisionmakers that merits mentioning here is the political question doctrine, which U.S. courts can invoke to decline deciding a case at all. The principal reasons courts have declared an issue to be a political question are the clear constitutional allocation of decision-making powers to another branch of government, the absence of judicially manageable standards, and various forms of prudential abstention. *See, e.g., Baker v. Carr*, 369 U.S. 186, 217 (1962).

169. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 539 (3d ed. 2006).

170. *Id.* at 540.

171. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631 (1996); *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (finding that health concerns provided rational basis for law preferring optometrists over opticians); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (noting that concerns over traffic safety and right of government to combat one evil at a time provided a rational basis for a law prohibiting vehicles devoted purely to advertising but allowing advertising on delivery vehicles).

172. *See Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (“[If a] classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because, in practice, it results in some inequality.” (internal quotations and citations omitted)).

173. *See United States v. Virginia*, 518 U.S. 515 (1996) (invalidating a policy restricting women from attending a state military school); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (invalidating an Oklahoma statute that prohibited sale of “near-beer” to males under the age of twenty-one and to females under eighteen).

174. *See Clark v. Jeter*, 486 U.S. 456 (1988) (declaring unconstitutional a law that required a nonmarital child to establish paternity within six years of birth in order to seek support from his or her father); *Lehr v. Robertson*, 463 U.S. 248 (1983) (upholding New York statute permitting adoption of nonmarital child without notice to the biological father).

intermediate scrutiny, courts will ask whether the legislation furthers an important governmental purpose and is substantially related to that purpose.¹⁷⁶

The least deferential standard, strict scrutiny, applies where legislation draws distinctions based on suspect classifications, such as race, national origin,¹⁷⁷ or alienage,¹⁷⁸ where it burdens a fundamental right,¹⁷⁹ or where it imposes a content-based restriction on the freedom of speech.¹⁸⁰ Under strict scrutiny, courts examine legislation to determine if it is narrowly tailored to achieve a compelling governmental purpose.¹⁸¹ Specifically, the law must be the least restrictive or least discriminatory alternative to achieve the government's important goal.¹⁸²

The standards of review in U.S. constitutional law offer important parallels to those applied in international public law adjudication. Specifically, the rational basis test in U.S. constitutional law is remarkably similar to the good faith standard in international law. Rational basis review requires only that the legislation be rationally related to a legitimate government purpose. International good faith review similarly requires honesty and fair dealing by the state and a rational basis for its actions. Both standards are extremely deferential to the government. Lawrence Tribe's observations with respect to the leniency of rational basis review domestically are also applicable with respect to the international law good faith standard:

This remarkable deference to state objectives has operated in the sphere of economic regulation quite apart from whether the conceivable [purpose] (1) actually exists, (2) would convincingly justify the classification if it did exist, or (3) was ever urged in the classification's defense either by those who promulgated it or by those who argued in its support.¹⁸³

The strict scrutiny approach of U.S. courts finds its international parallel in the least restrictive alternative test employed by the WTO. In both contexts, the reviewing court or tribunal inquires whether the enacting government has chosen the least restrictive or least discriminatory means to achieve a

175. See *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (holding that a complete ban on advertising to promote the use of electricity by a utility violates the First and Fourteenth Amendments).

176. See, e.g., *Craig*, 429 U.S. at 197 (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

177. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that all racial classifications imposed by federal, state, or local government actors are to be analyzed under strict scrutiny); *Loving v. Virginia*, 388 U.S. 1 (1967) (rejecting Virginia's ban on miscegenation under strict scrutiny).

178. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634 (1973) (requiring the application of strict scrutiny for alienage classifications).

179. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (applying strict scrutiny to a regulation restricting the free exercise of religion).

180. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (applying strict scrutiny to regulation of sexually oriented cable networks); *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115 (1989) (applying the same to sexually oriented prerecorded telephone messages).

181. See *Adarand*, 515 U.S. at 227 (holding that all classifications on the basis of race are subject to strict scrutiny).

182. See, e.g., *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”).

183. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1443 (2d ed. 1988).

permissible objective. Both domestic strict scrutiny and the WTO's least restrictive means test are more deferential than the only means available test used by early ICSID tribunals. In contrast with the early ICSID approach, the WTO least restrictive means test and the U.S. strict scrutiny approach, while difficult to satisfy, are not impossible to overcome and leave room for some residual deference to other branches of government or national authorities.¹⁸⁴

One of the most striking differences between standards of review in U.S. constitutional law and those found internationally is the justification for the choice of an applicable standard of review. The U.S. domestic system offers a far more coherent approach to determining the applicable standard in any given case than do most international tribunals. In U.S. constitutional practice, the determination of the applicable standard is particularly critical, as it is often outcome-determinative. Rational basis scrutiny is usually sufficiently deferential that legislation will survive judicial review. In contrast, strict scrutiny is an extremely difficult burden for the government to meet and is often referred to as "strict in theory and fatal in fact."¹⁸⁵

In Equal Protection Clause jurisprudence, for example, a U.S. court selects a particular standard of review based on the nature of the divisions the legislation in question draws between classes of individuals. The more suspect the classification in question, the stricter the scrutiny employed by the tribunal. Legislation of a general nature is subject only to rational basis review; more suspect classifications, such as gender, are subject to intermediate scrutiny; the most suspect classes, such as race, are subject to strict scrutiny. While the nature of the rights at stake in international public law adjudication are different and the classification approach used by U.S. courts might not be appropriate in international adjudication, the U.S. system offers at least a coherent, justifiable, and predictable set of principles on which to determine the appropriate standard of scrutiny, and hence deference to the legislature—something urgently needed at the international level.

In administrative law, U.S. courts again apply distinct standards of review based on separate theoretical assumptions about the respective roles of the judicial and executive branches. These administrative law standards likewise have important parallels with and possible lessons for international public law adjudication. In challenges to formal administrative agency action based on an agency's interpretation of the congressional statute giving it authority to act, U.S. courts have developed doctrinal standards that allow them to defer to the agency's interpretation and administrative action due to the agency's comparative expertise in that field, even if the application of such standards in practice, at least at the level of the U.S. Supreme Court, is less than consistent.¹⁸⁶ Specifically, under *Chevron* deference¹⁸⁷ courts will

184. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795-96 (2006) (finding, through empirical study, that thirty percent of all applications of strict scrutiny result in the validation of the challenged law).

185. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *But see* Grutter v. Bollinger, 539 U.S. 306, 326-28 (2003) (upholding a racial classification under strict scrutiny).

186. *See generally* William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (analyzing different standards of judicial deference to agency statutory interpretation and

first ask whether the congressional legislation on which the agency relies expressly grants the agency authority to act, is ambiguous, or leaves a gap that Congress intended the agency to fill. If any of those three possibilities are met, the court will proceed to a second step and ask if the agency interpretation of the statute is reasonable. If so, the court will defer to the agency. In contrast, if the agency interpretation runs contrary to an unambiguous statute or if the agency interpretation is unreasonable, then the court will invalidate the agency action. As a general matter, the *Chevron* approach is deferential to agency action and expertise.¹⁸⁸

Like U.S. constitutional review, these administrative standards of deference have significant parallels in international public law adjudication. In essence, *Chevron* deference operates similarly to the margin of appreciation used by the ECtHR. Within a limited margin of appreciation, namely the sphere of authority delegated to the agency by statute or within a gray zone of ambiguous delegation of authority, U.S. courts will generally defer to any reasonable agency interpretation. Similarly, at the international level, the ECtHR accords national governments a margin of appreciation and grants their determinations deference unless those determinations are “manifestly without reasonable foundation” and fail a residual balancing test.¹⁸⁹ Though *Chevron* deference and the margin of appreciation use different language and rely on distinct legal foundations, the two tests have striking similarities in practice.

Significantly, *Chevron* deference and the margin of appreciation rely on similar theoretical justifications, again highlighting the importance of consistency in determining an appropriate standard of review. Both *Chevron* and the margin recognize that administrative agencies or national governments are often better placed and have greater expertise to make policy determinations than are courts or international tribunals, respectively. Writing for the Court in *Chevron*, Justice Stevens observed that perhaps Congress, “thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position” to make difficult policy calls, empowered administrative agencies. Further, he observed: “Judges are not experts in the field In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”¹⁹⁰ Similarly, the ECtHR has justified its application of the margin on the basis of the comparatively greater expertise and political understanding of national governments, noting that “because of

tracking their application in Supreme Court practice).

187. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

188. See generally Thomas W. Merrill & Kristen E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001) (discussing the range of deference under *Chevron*). Even if the *Chevron* test does not apply in a given case, administrative agencies may still receive some degree of deference under the “power to persuade” standard articulated in *Skidmore v. Swift & Co.*, based on the agencies’ “specialized experience and broader investigations and information.” 323 U.S. 134, 139 (1944); see also *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (holding that *Chevron* did not eliminate the applicability of *Skidmore* deference).

189. *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, ¶ 149.

190. *Chevron*, 467 U.S. at 865.

their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’” and that “[u]nder the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting”¹⁹¹ a relevant and specific response. U.S. courts and the ECtHR may express this justification differently. For U.S. courts, deference may be a matter of institutional capacity, whereas for the ECtHR it may be a matter of subsidiarity,¹⁹² but at their core the justifications are nearly identical.

2. *Judicial Deference and Standards of Review in Germany*

The German legal system has also developed a theoretically grounded and consistent set of standards of review applicable in different types of public law adjudication. German domestic law recognizes both a margin of appreciation standard as well as a proportionality test. The margin approach is principally employed in administrative law adjudication in two distinct contexts and proportionality analysis is used by the Federal Constitutional Court (FCC) in constitutional law review.

German administrative law distinguishes two types of administrative action that are subject to limited review by the courts.¹⁹³ First, where administrative agencies have been explicitly granted statutory authority to choose among alternative courses of action that may follow from an applicable norm (the so-called *Rechtsfolgenseite*), courts will refrain from reviewing the substance of their decision. In statutory language, such administrative discretion (*Ermessen*) is usually indicated by trigger terms in the applicable statute such as “may,” “can,” or “is authorized to,” rather than obligatory terms such as “must” or “has to.” These terms signal the final and thus nonreviewable substantive decision-making authority of the relevant agency, either with respect to whether it wants to regulate at all (*Entschließungsermessen*) or with regard to the choice of specific regulatory options (*Auswahlermessen*). Any agency decision must still comply with procedural requirements and courts can still review such decisions to ensure that they are within the confines and purpose of the statutorily granted discretion.¹⁹⁴ If the agency is acting within the confines of the statutorily

191. *Bubić v. Croatia*, App. No. 23677/07, ¶ 40 (Eur. Ct. H.R. July 9, 2009), <http://www.echr.coe.int>.

192. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), ¶ 48 (1976); *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 6 Eur. Ct. H.R. (ser. A), ¶¶ 9-10 (1968).

193. See generally FERDINAND KOPP, VERWALTUNGSVERFAHRENSGESETZ [ADMINISTRATIVE PROCEDURE LAW] 830 (6th ed. 1996); HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT [GENERAL ADMINISTRATIVE LAW] 133-64 (17th ed. 2009); Matthias Jestaedt, *Maßstäbe des Verwaltungshandelns [Measures of Administrative Action]*, in ALLGEMEINES VERWALTUNGSRECHT [GENERAL ADMINISTRATIVE LAW] 285, 285-329 (Hans-Uwe Erichsen & Dirk Ehlers eds., 13th ed. 2006).

194. See *Verwaltungsgerichtsordnung [VwGO]* [Code of Administrative Procedure] Jan. 21, 1960, Bundesgesetzblatt [BGBl] I, at 17, as amended, § 114, available at <http://dejure.org/gesetze/VwGO/114.html> (providing that the administrative courts will examine the lawfulness of discretionary acts in terms of the limits of the statutorily granted discretion and with respect to its proper exercise in light of the purpose of that grant).

granted discretion, then the agency's decision will stand and not be further reviewed by the courts. In particular, courts will not consider arguments that there were better or more appropriate choices available to the administrative agency than the regulation undertaken.¹⁹⁵

Although this area of nonreviewable administrative decisionmaking in German administrative law is phrased as one of (a margin of) discretion and does not explicitly invoke the margin of appreciation, the freedom to choose among alternative measures provided for in the authorizing statute harmonizes in principle with the ECtHR's concept of the margin of appreciation.

Judicial deference in this context is justified by the fact that the legislature has specifically delegated decision-making authority to administrative bodies, which the courts must respect. Because parliament will often delegate such decision-making authority when it believes that the relevant administrative actor is in a better position to make decisions in a given context based on its expertise and proximity to the facts of a case, judicial deference in these circumstances is based on similar foundations to the deference shown to administrative agencies in the United States and to national authorities in the European human rights context.

The second area in which German courts grant administrative agencies some nonreviewable freedom of choice involves agency interpretations of indeterminate legal terms such as "public security and order," the "public interest," or "necessary protection." Academic commentators and judicial practice have both recognized that the scope of this form of nonreviewable agency discretion (*Beurteilungsspielraum*), which literally translates as "margin of appreciation" or "margin of appraisal," is not of a general nature and is only exceptionally granted in certain types of cases. The indeterminate nature of a legal term is thus necessary, but not sufficient, to trigger a nonreviewable administrative margin of appreciation.¹⁹⁶ Courts recognize such a margin with respect to, for example, agency decisions taken as part of various types of admission tests and examinations; career evaluations of public servants; and agency planning, forecasting, and risk assessment.¹⁹⁷

Such planning, forecasting and risk assessment determinations are notably similar to the types of governmental regulation often at stake in public law ICSID arbitrations. While German courts have not developed a standard catalogue of criteria for determining whether a nonreviewable margin should be granted in a particular case,¹⁹⁸ academic writing has distilled a number of indicators. Those indicators include (1) the absence of judicially manageable normative standards that could determine whether an interpretation and the decision based on it are to be considered right or wrong, (2) the inadequacy of judicial proceedings to generate general interpretations that could appropriately cover multiple cases, and (3) the presence of basic

195. See MAURER, *supra* note 193, at 140.

196. Jestaedt, *supra* note 193, at 303, 316.

197. See MAURER, *supra* note 193, at 150-54; Jestaedt, *supra* note 193, at 316-19.

198. See Yutaka Arai-Takahashi, *Discretion in German Administrative Law: Doctrinal Discourse Revisited*, 6 EUR. PUB. L. 69, 76 (2000).

epistemological problems that require, by their very nature, an iterative process of repeated adjustments based on new facts and insights.¹⁹⁹

In contrast with many other European states, Germany has relatively strong judicial review of administrative action. In fact, in Germany there is a constitutional right to review of administrative acts.²⁰⁰ Yet it is noteworthy that Germany nonetheless recognizes areas of discretionary decisionmaking which the courts, for normative or functional reasons, will not review. In any event, where it exists, the notion of an administrative *Beurteilungsspielraum* is essentially coextensive with the margin of appreciation as employed in the ECtHR's jurisprudence: both grant to other public decisionmakers a certain degree of freedom in interpreting and applying indeterminate legal terms.

Public law standards of review are also used in German constitutional law, in which the FCC applies both a graduated system of standards of review as well as the principle of proportionality. Graduated standards of review are generally used by the FCC in the evaluation of factual assessments and of forecasts undertaken by the legislature. The FCC has recognized standards of review including: (1) strict scrutiny (*intensivierte inhaltliche Kontrolle*), under which the FCC will undertake its own evaluation of a given situation, over a "tenability" test; (2) *Vertretbarkeitskontrolle*, which requires primarily that procedural requirements have been observed; and (3) manifest unconstitutionality (*Evidenzkontrolle*), under which the Court will strike down legislation only if it evidently clashes with constitutional values.²⁰¹ While the criteria for determining what standard will be applied in which circumstances are not always straightforward, where an issue area is sufficiently complex and forecasts are necessarily subject to some uncertainty, one of the two lesser standards of review will generally be applied.²⁰²

Proportionality analysis features prominently in the FCC's civil rights adjudication. In assessing whether an act of a public authority satisfies proportionality analysis, the FCC conducts a tripartite test.²⁰³ First, the FCC asks whether the chosen measure can effectively contribute to the achievement of the given objective (*Geeignetheit*, suitability). To meet this requirement, the measure need not be the most effective one available, but must contribute to the stated goal. Second, the FCC asks whether the stated objective could have been achieved as effectively by using an alternative measure that would have less adversely affected other legal interests at issue without imposing too excessive a burden on the state (*Erforderlichkeit*, necessity). Third, even if the first two requirements have been met, the FCC

199. See Jestaedt, *supra* note 193, at 319-20.

200. The German Constitution provides that "[s]hould any person's rights be violated by public authority, he may have recourse to the courts." GRUNDGESETZ [GG] [Constitution] art. 19(4) (F.R.G.), translation available at http://www.bundestag.de/interakt/informationmaterial_alt/fremdsprachiges_material/downloads/ggEn_download.pdf.

201. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 1, 1979, 50 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 290 (333), available at <http://www.servat.unibe.ch/dfr/bv050290.html> (in German); see also KURT VOGEL, DAS BUNDESVERFASSUNGSGERICHT UND DIE ÜBRIGEN VERFASSUNGSORGANE [THE FEDERAL CONSTITUTIONAL COURT AND THE OTHER CONSTITUTIONAL ORGANS] 198-209 (1988).

202. 50 BVerfGE 290 (333-34).

203. See, e.g., HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR [COMMENTARY ON THE BASIC LAW] 436-37 (3d ed. 1995).

asks in a final step whether the infringement of the claimant's legal position can still be considered reasonable in light of the public good pursued (*Angemessenheit*, proportionality or balancing *sensu stricto*). This part of the analysis thus involves a balancing of conflicting legal interests (*Güterabwägung*). The more fundamental the public good to be pursued or protected in this balancing, the more an individual claimant may have to suffer an interference with his or her legal position.

The justifications for judicial deference in the German legal system are similar to those advanced in U.S. administrative law and the European human rights context, linking deference either explicitly or implicitly with the superior expertise and comparatively better positioning of administrative agencies, or with the absence of judicially manageable and sufficiently grounded normative standards by which executive and legislative conduct could be properly evaluated. The FCC's use of proportionality is generally taken as a self-evident element of rule-of-law and human rights, needing no deeper justification.²⁰⁴

3. Conclusion

A comparison of the standards of review used by other tribunals in international public law adjudication demonstrated that there already exists a range of potential standards on which ICSID tribunals could draw in reviewing state regulatory behavior. That comparison also showed that, by applying such standards, international tribunals are able to calibrate an appropriate degree of deference to national authorities, while still protecting the rights of other parties. The subsequent examination of standards of review in U.S. and German law showed the considerable parallels between international standards and their domestic counterparts. Likewise, both the U.S. and German legal systems highlight the importance of consistent and coherent rules for determining the appropriate standards of review in any given case. In international courts, as well as both the U.S. and German domestic systems, the level of deference often turns on, among other things, the nature of the substantive rights at stake and the relative expertise of courts and other actors in the system. What emerges from the consideration of both the international and domestic systems is that international public law arbitrations urgently need a coherent set of standards of review and appropriate rules for selecting among them based on the substantive rights at stake and the relative expertise of the government and arbitral tribunal.

V. TOWARD A CONSISTENT AND THEORETICALLY GROUNDED INTERNATIONAL APPROACH TO STANDARDS OF REVIEW IN PUBLIC LAW ADJUDICATION

Having demonstrated the public law nature of many ICSID arbitrations today and the failure of early ICSID tribunals to recognize this new context of investor-state arbitration, we engaged in a comparative public law analysis of

204. See Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 386 (2007).

available standards of review in international and domestic law on which ICSID tribunals could draw. We now draw on that comparative analysis of the standards of review used by international and domestic tribunals to develop a more focused argument as to the most appropriate standard for ICSID tribunals to adopt in reviewing state public law regulatory activities. Specifically, we contend that, for reasons of institutional capacity, ICSID tribunals ought to use the margin of appreciation as the basis for a consistent and coherent approach to reviewing state public regulation. The institutional capacity of ICSID tribunals—both in terms of their expertise and relative embeddedness in the political communities whose disputes they adjudicate—sets them apart considerably from the domestic tribunals discussed in Section IV.B, above, and even from most other international tribunals, discussed in Section IV.A, above. Those differences militate against strict standards of review, such as strict scrutiny applied in appropriate cases by U.S. courts, and auger in favor of more deferential standards, such as the margin of appreciation developed by the European Court of Human Rights.

This Part begins by showing how even more recent ICSID tribunals have confused the available standards discussed in Part IV. Thereafter, we consider the institutional capacity of ICSID tribunals—in terms of both expertise and embeddedness—to suggest that ICSID tribunals are poorly equipped to engage in direct rights balancing and ought to grant greater deference to national authorities. Finally, we argue that, while other approaches that require tribunals to engage primarily in direct rights balancing, such as proportionality analysis, are better than the jurisprudential status quo, adopting the margin of appreciation as the applicable standard in such cases best suits the peculiar circumstances of investor-state arbitration and the limited capacities of ad hoc ICSID tribunals.

A. *Melding (or Confusing?) the Standards: Recent ICSID Jurisprudence*

As noted above, while early ICSID jurisprudence more or less uniformly followed the strict “no other means available” standard in reviewing state behavior, more recently ICSID tribunals have, appropriately, adopted somewhat more deferential standards of review. Even the jurisprudence of these more recent tribunals that have sought to grant national authorities a degree of deference has been problematic for two reasons. First, each tribunal borrows different elements of the standards we discussed in Part IV, resulting in a review of state behavior that may not adequately balance the conflicting interests at stake. Second, these tribunals’ approaches are far from uniform, resulting in continued ambiguity in and conflict over the applicable standard of review in similar public law settings.

Three cases frame the problematic jurisprudence of the more recent ICSID cases: *LG&E v. Argentine Republic*,²⁰⁵ *Continental Casualty v.*

205. *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseId=C208.

Argentine Republic,²⁰⁶ and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*.²⁰⁷ Rather than coherently justify and consistently deploy a single standard in reviewing a state's public law regulatory activity, each of these tribunals invoked two or more of the standards of review discussed above in potentially contradictory ways. In particular, the more recent ICSID tribunals have made explicit reference to the least restrictive alternative test, the margin of appreciation, and good faith review. The result has been a melding or, perhaps, a confusing of approaches, rather than the emergence of a clear standard of review for public law arbitration. The least restrictive alternative, the margin of appreciation, and good faith review are distinct and independent standards with separate jurisprudential approaches to balance competing rights and interests. Attempts to meld two or more of these approaches into a single standard of review are dangerous because of the distinct balancing mechanisms each standard employs.

The first ICSID award to move away from the strict only means available test was *LG&E*, decided in October 2006. The tribunal never clearly articulated the applicable standard for reviewing Argentina's behavior, but suggested that elements of the least restrictive alternative test, the margin of appreciation, and good faith review were relevant. In granting Argentina greater deference than had tribunals in the earlier cases, the *LG&E* tribunal broadened the interpretation of "necessary" through a balancing process similar to that developed by the WTO Appellate Body in *US—Gambling and Korea—Beef*. The *LG&E* tribunal observed:

In this circumstanc[e], an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed.²⁰⁸

The *LG&E* tribunal did not ask if a slightly different recovery package could have been employed, but merely determined that some across-the-board recovery package was needed. The tribunal, at least implicitly, weighed the grave nature of Argentina's interests at stake in the economic crisis against the infringement on investor rights caused by Argentina's recovery plan, finding that as a result of that balancing in these circumstances, "necessary" ought to be interpreted somewhat more broadly.²⁰⁹ The tribunal noted:

Certainly, the conditions in Argentina in December 2001 called for immediate, decisive action to restore civil order and stop the economic decline. . . . Article XI refers to situations in which a State has no choice but to act. A State may have several responses at its disposal to maintain public order or protect its essential security interests.²¹⁰

206. *Cont'l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), <http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf>.

207. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC770_En&caseId=C67.

208. *LG&E*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 257.

209. *Id.* ¶ 239.

210. *Id.* ¶¶ 238-239.

While clearly drawing on elements of the least restrictive alternative standard, this portion of the *LG&E* tribunal's analysis is also fully consistent with a margin of appreciation standard. Accepting that the economic crisis faced by Argentina required the swift adoption of an "across-the-board response,"²¹¹ the tribunal effectively granted Argentina some freedom of choice in selecting the specific policy elements of that response without examining whether the means chosen by Argentina was in fact the least restrictive available in those circumstances.

Other elements of the *LG&E* decision seem to reflect good faith review. The tribunal expressly noted that its substantive analysis did "not significantly differ from" the good faith review advocated by Argentina.²¹² In particular, the tribunal recognized that the measures adopted as part of the emergency legislation package were "necessary and legitimate" at the time, especially in light of the time pressures under which the government worked, and excused Argentina from liability for the period between December 1, 2001, and April 26, 2003.²¹³ The tribunal did not, however, further develop the good faith standard. The *LG&E* tribunal thus did not develop a clear standard of review, but employed elements of a number of standards seemingly pulled together without clear justification or consistency.

The tribunal in *Continental Casualty* likewise moved away from the "no other means available" standard but, unlike *LG&E*, it more explicitly adopted the WTO's least restrictive alternative approach. Yet once again, the *Continental Casualty* tribunal simultaneously drew on other standards without justification or jurisprudential coherence. The *Continental Casualty* tribunal, chaired by Giorgio Sacerdoti, an experienced WTO law expert, found Argentina's actions fully justifiable under Article XI of the U.S.-Argentina BIT, citing WTO jurisprudence, including *Korea—Beef*, *Brazil—Retreaded Tyres*, and *US—Gambling*. Consistent with the WTO's least restrictive alternative approach, the *Continental Casualty* tribunal found that the determination of "necessary" requires a two-step analysis. First, there must be a showing that the measures taken by a state contributed to a legitimate aim and, second, the tribunal must determine whether there were "reasonably available alternatives" more compliant with the states international obligations "while providing an equivalent contribution to the achievement of the objective pursued."²¹⁴ With respect to the first part of the test, the tribunal directly adopted the language from *Brazil—Retreaded Tyres*, observing:

[W]ithin the economic and financial situation of Argentina towards the end of 2001, the Measures at issue . . . were in part inevitable, or unavoidable, in part indispensable and in any case material or decisive in order to react positively to the crisis, to prevent the complete break-down of the financial system, the implosion of the economy and the growing threat to the fabric of Argentinean society and generally to assist in overcoming

211. *Id.* ¶ 257.

212. *Id.* ¶ 214.

213. *Id.* ¶¶ 226, 240.

214. *Cont'l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 198 (Sept. 5, 2008), <http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf> (citing *Brazil—Retreaded Tyres*, *supra* note 107, ¶ 156).

the crisis. In the Tribunal's view, there was undoubtedly "a genuine relationship of end and means in this respect."²¹⁵

With respect to the second prong of the test, the *Continental Casualty* tribunal determined after lengthy analysis that for each measure taken by Argentina there was not a reasonably available alternative that would have been less in conflict with Argentina's international obligations.²¹⁶ It concluded: "The measures were sufficient in their design to address the crisis and were applied in a reasonable and proportionate way at the end of 2001-2002."²¹⁷

The most significant distinction between the least restrictive alternative test developed by the WTO and applied by the *Continental Casualty* tribunal and that used by some earlier ICSID tribunals relates to the nature of alternative measures that might have been available to Argentina. While some earlier tribunals found Argentina's actions to fail the necessary test if there were any alternatives whatsoever, the *Continental Casualty* tribunal asked instead if there were reasonably available alternatives that would have met Argentina's policy goals and been less incompatible with its international obligations.²¹⁸ At the very least, such an inquiry requires a comparison of the course of action chosen by the state with other proffered ways of protecting its essential security interests. The *Continental Casualty* tribunal undertook just such an inquiry through a detailed consideration of each measure taken by Argentina and the range of possible alternatives before concluding that "such alternatives would not have been reasonably available or would have been impracticable or speculative as to their effects" and that, therefore "the measures [taken by Argentina] were necessary under Art. XI of the BIT."²¹⁹

Despite the explicit references to WTO jurisprudence, the *Continental Casualty* tribunal appeared to draw simultaneously on the margin of appreciation in its analysis. The tribunal expressly recognized a "significant margin of appreciation for the State applying" measures under Article XI of the BIT.²²⁰ In reaching this conclusion, the tribunal approvingly cited to Argentina's reference to the ECtHR's justification for such a margin on the basis of national authorities' "direct knowledge of their society and its needs"²²¹ and noted that "[a] certain deference to such a discretion when the application of general standards in a specific factual situation is at issue, such as reasonable, necessary, fair and equitable, may well be by now a general feature of international law also in respect of the protection of foreign

215. *Id.* ¶ 197 (citing *Brazil—Retreaded Tyres*, *supra* note 107, ¶ 145).

216. *Id.* ¶¶ 198-231.

217. *Id.* ¶¶ 198-232.

218. This reasonably available alternatives standard again derives from the WTO. *See US—Gambling*, *supra* note 51, ¶ 308 ("An alternative measure may be found not to be 'reasonably available', however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.").

219. *Cont'l Cas.*, ICSID Case No. ARB/03/9, Award, ¶ 198.

220. *Id.* ¶ 181; *see also id.* ¶ 187 ("[A] provision such as Art. XI . . . involves *naturally* a margin of appreciation by a party invoking it" (emphasis added)).

221. *Id.* ¶ 181 n.270 (citing *Jahn v. Germany*, 2005-VI Eur. Ct. H.R. 55, ¶¶ 87-91).

investors under BIT.”²²² Notably, the tribunal furthermore acknowledged the relationship between the application of the margin doctrine and elements of good faith review. Although rejecting the self-judging nature of Article XI of the U.S.-Argentina BIT, which would have strengthened the claim for a residual good-faith-only standard of review, the tribunal concluded that the expression “its own security interests” contained in that provision “implies that a margin of appreciation must be afforded to the Party that claims *in good faith* that the interests addressed by the measure are essential security interests or that its public order is at stake,”²²³ suggesting that a tribunal called upon to assess the invocation of Article XI should honor such determinations as long as they had been made in good faith.

Other ICSID tribunals have also been confronted with a choice of applicable standards of review, but have sought to avoid explicitly deciding what standards ought to apply. In these cases, respondent states have argued that their regulatory actions should be accorded a margin of appreciation, but the tribunals provided little, if any, discussion of the question. For example, in *Biwater Gauff*,²²⁴ U.K. investors undertook significant upgrades to the water and sewage system of Dar es Salaam, Tanzania. Through a series of regulatory measures, Tanzania imposed restrictions on Biwater Gauff and its operating companies that claimants deemed to constitute expropriations and violations of fair and equitable treatment in contravention of the 1994 BIT between the United Kingdom and Tanzania.²²⁵ Citing to several ECtHR judgments, Tanzania argued that it “was entitled to a measure of appreciation,” and that “[w]ater and sanitation services are vitally important, and that the Republic has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so.”²²⁶ Ultimately, in Tanzania’s view, its actions to protect the water supply were “well within the Republic’s margin of appreciation under international law.”²²⁷ The tribunal rejected this argument on factual grounds with little consideration of the developing lines of jurisprudence on applicable standards of review.²²⁸ Without further reference to the margin of appreciation, the tribunal found only that “there was no necessity or impending public purpose to justify the Government’s intervention in the way that took place.”²²⁹ As a result, the *Biwater Gauff* tribunal largely reverted back to the strict scrutiny

222. *Id.*; see also *id.* ¶ 233 n.351 (“[A] margin of discretion and appreciation is generally recognized to national authorities in this respect whenever their conduct is tested under international standards.”).

223. *Id.* ¶ 181 n.266 (emphasis added).

224. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC770_En&caseId=C67.

225. See *id.* ¶¶ 15-18, 354.

226. *Id.* ¶ 434.

227. *Id.* ¶ 436.

228. Note, however, that unlike in the Argentine cases, the BIT between the U.K. and Tanzania does not contain an explicit nonprecluded measure provision. See Agreement for the Promotion and Protection of Investments, U.K.-Tanz., Jan. 7, 1994, available at http://www.unctad.org/sections/dite/ia/docs/bits/UK_tanzania.pdf.

229. See *Biwater Gauff*, ICSID Case No. ARB/05/22, Award, ¶ 515.

test of the early ICSID cases, though without detailed consideration of alternative standards of review.

Two other arbitrations warrant brief mention for their failure to address the standard of review applicable to public regulation by national authorities. In *Siemens AG v. Argentine Republic*, Argentina cited to the jurisprudence of the ECtHR, arguing that that court's jurisprudence allowed lesser compensation in cases in which property deprivations were motivated by compelling social reasons. While Argentina invoked the margin of appreciation in its arguments, the ICSID tribunal merely stated without elaboration that the ECtHR affords a margin of appreciation not found in customary international law or in the Germany-Argentina BIT.²³⁰ Likewise, in *National Grid p.l.c. v. Argentine Republic (National Grid)*, an UNCITRAL tribunal rejected Argentina's invocation of the margin of appreciation, finding instead that the ICJ's strict definition of "necessity" articulated in *Gabčíkovo-Nagymaros Project* case was applicable.²³¹ The reasoning of the *National Grid* tribunal is particularly problematic as it seeks to generalize a public law standard of review from the narrowly formulated necessity defense in customary international law.²³² The tribunal did not even get to a substantive discussion of an appropriate standard of review.²³³

The approach taken by ICSID tribunals in determining an appropriate standard of review in these public law international arbitrations has been deeply problematic. Some tribunals have failed to address the question at all, even when respondent state has expressly raised the issue. Other tribunals have borrowed somewhat haphazardly from a range of available standards in ways that are neither coherent nor consistent. Yet other tribunals have adopted extremely strict standards without regard to the public law context of the arbitration. No ICSID tribunal has engaged in a serious and considered treatment of the appropriate standard of review to apply in cases that raise public law issues.

ICSID jurisprudence urgently needs a well-considered analysis of the available standards of review in public law arbitrations and the reasons why a particular standard are appropriate to the public law subject matter of these arbitrations and the text of the treaty being interpreted. We argue that such an analysis would point ICSID adjudicating public law disputes toward a far more deferential standard than they have applied to date, likely developed from the margin of appreciation standard.

230. *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 354 (Feb. 6, 2007), <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>; see also *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 308-313 (July 14, 2006), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C5> (discussing the jurisprudence of the ECtHR relating to proportionality, expropriation, and a state's decision as to what constitutes "public use").

231. *National Grid p.l.c. v. Argentine Republic*, Award, ¶¶ 205-262 (UNCITRAL Nov. 3, 2008), <http://ita.law.uvic.ca/documents/NGvArgentina.pdf>.

232. For further discussion of this problematic approach, see Burke-White, *supra* note 93.

233. See *National Grid*, Award, ¶ 262.

B. *Standards of Review and the Institutional Context of Judicial Decisionmaking*

The appropriateness of the margin of appreciation as a standard of review in public law arbitrations is further reinforced by the institutional context of judicial decisionmaking by ad hoc international arbitral tribunals. At a basic level, the primary function of all courts and tribunals, whether located at the domestic, transnational, or international level, is to resolve conflicts between at least two disputants by authoritatively determining their respective rights and obligations, interpreting and clarifying the meaning of the law, and evaluating the facts of the case against the applicable normative framework.²³⁴ Viewed in isolation, this “technical” aspect of the resolution of the legal conflict at issue is, in principle, compatible with all of the standards of review discussed above and does not privilege any one of them. Even a deferential good faith approach formally resolves the legal dispute by tending to leave the factual or normative situation unchanged (provided the requirements of the good faith standard are being met). But courts do not operate in a vacuum. Instead, they are embedded within broader political, legal and institutional environments that also empower other actors to generate generally binding decisions.²³⁵ Once courts are placed in the context of broader institutional structures for the governance of private and public affairs, questions arise as to the boundaries of each institutions’ jurisdiction and decision-making authority vis-à-vis other decision-making bodies.

The very idea of “standards of review” recognizes this contextual placement of courts, serving to define the scope of judicial decisionmaking authority with respect to decisions made by other legitimate and duly constituted governance institutions within a given politico-legal environment. The standards of review discussed above cover a broad spectrum of relative institutional authorities, ranging from an expansive understanding of judicial decisionmaking authority (strict scrutiny review) to a limited, “backstop” function of judicial review (good faith review). What standard to choose, absent any plain constitutional, statutory or conventional stipulation, becomes, in our view, a question of the appropriateness of any particular standard of review to the specific institutional context in which the court or tribunal operates. That choice is important, as it may, in turn, affect the perceived legitimacy of the judicial institution as a whole. When a chosen standard is considered inappropriate by principal actors subject to the court’s or tribunal’s jurisdiction, the institution’s legitimacy as a whole is weakened and backlash may arise in the forms of decreased compliance, calls for institutional reform, or even, where possible, withdrawal from its jurisdiction.

We argue that in determining whether a stricter or more lenient standard of review is appropriate,²³⁶ attention must be paid to courts’ and tribunals’ relative institutional capacity vis-à-vis other actors in a given institutional context. Within the category of institutional capacity, the element of expertise

234. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (1981).

235. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

236. See, e.g., Shany, *supra* note 61, at 918-22.

should have pride of place. In other words, courts and tribunals should exercise strict scrutiny review of the acts of other governmental actors when they genuinely possess superior expertise in assessing and resolving the issues at stake. Where this is not the case, they should adopt a more deferential standard of review with more respect to the assessments and decisions made by those actors that have a more compelling claim to possessing such expertise.

The expertise of a tribunal contains two interrelated, but analytically distinct aspects. The first is legal and technical expertise. A court should engage in substantive review notably when it can claim superior legal and technical expertise in the relevant area of law as well as the underlying subject area, as compared to the original decision-making body. Only then is there a high probability that the resulting decision will be legally sound and substantively superior to those of other decisionmakers, a key quality in eliciting legitimacy and compliance.²³⁷ In cases involving public law or quasi-constitutional disputes, such sound legal reasoning requires both recognition that a dispute is situated within a public law context in the first place and expertise in decision rules or standards of review derived from, and appropriate to, that context.

Domestic tribunals, such as those discussed in Section IV.B, above, tend to have both the legal and technical expertise to engage in deep substantive review and are often, therefore, well equipped and properly situated to employ, in appropriate circumstances, strict standards of review. In contrast, however, ICSID arbitrators rarely have public or constitutional law backgrounds. ICSID does not require arbitrators to have public law expertise.²³⁸ Most ICSID arbitrators come from the world of private practice or from government positions such as finance ministries, which do not generally lead to legal expertise,²³⁹ at least not in the broad sense required for the adjudication of a diverse range of public law issues.²⁴⁰ As a result, more often than not, a tribunal will have few if any arbitrators with public law expertise or mindset. Without such expertise on an ICSID panel, it is perhaps not surprising that tribunals rarely turn to public law approaches or standards of review in their analysis.

237. See, e.g., Anne-Marie Slaughter & Laurence Helfer, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 318 (1997) (“Judges on supranational tribunals tend to attribute their relative success or failure, according to their own measures, to the quality of their legal reasoning.”).

238. ICSID Convention, *supra* note 2, art. 14 (“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”).

239. See INT’L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, MEMBERS OF THE PANELS OF CONCILIATORS AND ARBITRATORS (2010), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&reqFrom=ICSIDPanels> (showing that the majority of ICSID arbitrators share an academic or governmental background); LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 80, 80 (2004) (stating that the majority of ICSID arbitrators are practicing international lawyers).

240. That government officials may have acquired bits and pieces of public law experience within their relevant issue domains is not disputed, but in most cases this will be quite specific knowledge that does not generally compare to that required, for example, of most candidates for high court positions, be they constitutional or administrative.

The second aspect of expertise is somewhat harder to grasp, but, we believe, equally relevant. This aspect concerns the extent to which third-party dispute settlers are embedded within the social, political and legal environment within which they operate. Most tribunals—both domestic and international—that engage in public law adjudication, especially if they have jurisdiction to decide issues of a public law nature and, perhaps, of constitutional significance, are situated within the normative, political, and legal community whose policies they adjudicate.²⁴¹ Take, for example, the U.S. Supreme Court. While its Justices are insulated from day to day politics, they are selected from and remain rooted in the U.S. political community.²⁴² That embeddedness, we contend, appropriately situates domestic courts to calibrate the standards of review outlined in Section IV.B to the nature of the dispute and, where appropriate, to engage in, for example, strict scrutiny review in the case of suspect classifications in the U.S. system.

Like domestic tribunals, most international tribunals called upon to engage in public law adjudication have ties that ground the tribunal in the norms and values of the state whose policies are being considered. For example, the International Court of Justice allows each party who does not have a national on the court to choose a judge to sit for that particular case.²⁴³ Similarly, the European Court of Justice includes one judge from each of the EU member states.²⁴⁴ Moreover, the judges who serve on these courts are, at least in part, selected for their experience with or expertise in public law disputes.²⁴⁵ Their self-identity and understanding of their own role in adjudication is likely to be grounded in public law sensibilities.

It is in part these linkages between adjudicators and the states whose policies they are reviewing—whether achieved through the selection of judges and arbitrators or political review of decisions—as well as the public law mindset of adjudicators, that imbue these institutions with the legitimacy to make decisions with broad public policy ramifications. Such judges, even if sitting at an international tribunal, have the background and experience to understand both the law they are applying and the context in which it is being applied. States are likely to respect and obey them because of their understandings of social and political context and their ability to convey that understanding in their opinions. Similarly, where decisions must be accepted by national governments and their polities, those judges must understand and

241. See Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 W. EUR. POL. 77, 912 (2002) (describing the relationship between constitutional adjudication and parliamentary governance); Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMP. POL. STUD. 147, 161 (1999) (discussing the relationship between the judiciary and the legislature).

242. See BICKEL, *supra* note 235.

243. Statute of the International Court of Justice art. 31, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

244. Treaty Establishing the European Economic Community art. 223, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958).

245. While the criteria for serving on national high courts vary considerably by country, at least in constitutional democracies selection processes generally result in judges who have served in government and/or have public law experience. For discussion of the selection of U.S. Supreme Court Justices, see CHRISTINE L. NEMACHECK, *STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER TO GEORGE W. BUSH* (2007); and DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999).

demonstrate through sound reasoning their understanding of the political and social contexts of their decisions.²⁴⁶

One might expect ICSID arbitrators to be more closely linked to, and informed of, the context of their cases than judges in other international fora. After all, parties to ICSID disputes select their own arbitrators.²⁴⁷ Yet ICSID tribunals often lack these legitimating connections for two reasons. First, an ICSID arbitrator on the standard three-member panel cannot have the same nationality as a party to a dispute unless the opposing party agrees, something that occurs only rarely.²⁴⁸ Second, because each side is able to appoint one arbitrator who is likely to disagree with the arbitrator appointed by the opposing party, the president of the tribunal who, by definition, cannot be a national of the state party, wields extraordinary influence on the outcome and the drafting of the award.²⁴⁹ As the president must be mutually agreeable to both parties or selected by the Chairman of ICSID,²⁵⁰ the decisive voice of the president is likely to have little or no connection with the state party to the dispute nor any meaningful familiarity with the political and social context thereof.

The lack of familiarity with national context and the lack of public law experience of ICSID tribunals can undermine those tribunals' perceived legitimacy and, hence, the willingness of states to comply with their awards. As Shany explains:

[T]he physical detachment of international courts from their national societies whose compliance with the law they assess exacerbates their lack of expertise. While national courts are generally familiar with local conditions, which influence the manner of application of international norms, this is hardly the case with international courts As a result, national actors (including national courts) seem to be better situated than international courts to establish the facts underlying law-application processes.²⁵¹

Generally, the greater embeddedness of a tribunal in a state's socio-political context justifies and supports the application of more strict scrutiny by the tribunal. In contrast, lack of embeddedness suggests the need for

246. This is not to say that judges or arbitrators should be explicitly political or biased. Rather, their neutrality and autonomy is critical. See Slaughter & Helfer, *supra* note 237, at 312-14.

247. See ICSID Convention, *supra* note 2, arts. 37-39; INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES 103-04 (2003), http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf [hereinafter ICSID Arbitration Rules] (setting forth Rules 1 and 2 of ICSID's Rules of Procedure for Arbitration Proceedings).

248. ICSID Arbitration Rules, *supra* note 247, at 103; see also CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 504-06 (2001) (illustrating the mechanisms through which parties to an arbitration may allow for a co-national of either party to form part of the arbitral tribunal); Omar E. García-Bolívar, *Comparing Arbitrator Standards of Conduct in International Commercial Trade Investment Disputes*, 60 DISP. RESOL. J. 76, 79 (2006) (establishing that, in general, arbitrators do not share the same nationality of the parties despite the possibility of waiver).

249. See ICSID Convention, *supra* note 2, art. 37(2)(b) (establishing that where the parties do not previously agree to a specific composition of the arbitral tribunal, the arbitral tribunal will consist of three arbitrators, one chosen by each party and the third chosen by agreement of the parties); *id.* art. 48(1) (establishing that an award is determined by the agreement of the majority of the arbitrators); see also Andreas F. Lowenfeld, *The Party-Appointed Arbitrator: Further Reflections*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 41, 47 (Lawrence W. Newman & Richard D. Hill eds., 2004) (suggesting that the chairman of an arbitral tribunal heavily influences the drafting of the arbitral award).

250. ICSID Arbitration Rules, *supra* note 247, at 104.

251. Shany, *supra* note 61, at 919.

greater deference to decisions made by institutions that are more culturally, legally, and politically embedded. Such embeddedness and proximity to the issues at stake serves certain functions that cannot be easily replicated. Not only are those closer to the issues better positioned to make factual assessments of the situation²⁵²—a standard ECtHR argument in support of the margin of appreciation—but widely shared cultural, political, and legal assumptions and understandings also tend to inform judicial as well as political decisionmaking. A common set of assumptions and understandings between the state and the tribunal may thus generate greater perceived legitimacy because decisions resonate better with the culture and values of the relevant environment than decisions that show disregard for such common assumptions and understandings.²⁵³

Unlike many international tribunals discussed in Section IV.A and the domestic tribunals considered in Section IV.B, international investment tribunals should, on grounds of institutional capacity and relative embeddedness, generally refrain from applying searching standards of review to public law disputes and, instead, adopt more deferential postures toward respondent states. The application of strict scrutiny in effect authorizes a tribunal to fully evaluate all aspects of a case up to the point of substituting any assessments made by the governmental actors in the case with its own. At the international level, especially in the case of temporary, free-floating ad hoc tribunals, such an approach is generally inappropriate and will likely result in a reduction of perceived legitimacy, at least from the perspective of respondent states. The least restrictive alternative test, while also enabling a tribunal to conduct a full review, provides at least some deference to national decisionmaking, as it shifts the burden of proof to the claimant if the respondent state can make a reasonable prima facie case that the means chosen was, at the time, the least restrictive means available. While the good faith standard provides the broadest deference, such drastic judicial self-restraint allocates only a residual supervisory role to courts and tribunals and is warranted only where the relevant treaty text specifically calls for it. In the next Section we will argue that, overall, the margin of appreciation provides the most suitable standard of review for public-law-related investor-state arbitrations.

C. *Paths Forward: The Margin of Appreciation and Proportionality Analysis*

Given the unique characteristics of public law adjudication in international arbitration and the problematic ICSID jurisprudence to date, a new approach to reviewing state regulatory behavior is urgently needed. Ultimately, any standard of review that grants an appropriate degree of deference to national authorities undertaking public regulation, while still protecting investor rights, is preferable to the problematic status quo. ICSID tribunals must seriously analyze the standards of review appropriate to the

252. *See id.*

253. *See Slaughter & Helfer, supra note 237, at 318.*

unique circumstances of public law arbitration and move toward a more coherent and consistent jurisprudence.

1. *The Margin of Appreciation and Proportionality Analysis in Theory*

One approach to developing an alternative standard of review based on existing models is to recognize that many of the potential standards on which international arbitral tribunals could draw are forms of proportionality analysis, similar to those employed by the German Federal Constitutional Court. As Alec Stone Sweet and Jud Mathews argue, proportionality analysis has become “the preferred procedure for managing . . . an alleged conflict between two rights claims, or between a rights provision and a legitimate state . . . interest.”²⁵⁴ They describe proportionality analysis in its various forms as a four-step process. First is a “legitimacy” step in which the “judge confirms that the government is constitutionally-authorized to take such a measure.”²⁵⁵ Second is a “suitability” step in which a judge ensures that “the means adopted by the government are rationally related to the stated policy objectives.”²⁵⁶ Third is a “necessity” step, which, in their view, is equivalent to a least restrictive means test.²⁵⁷ Finally, a court applying proportionality analysis will engage in “balancing *stricto sensu* [sic],” in which the judge weighs the “benefits of the act . . . against the costs incurred by infringement of the right.”²⁵⁸ Stone Sweet and Mathews describe this approach as a “new constitutionalism.”²⁵⁹ Throughout the Subsections that follow, we use Stone Sweet and Mathews’ approach to proportionality to inform our articulation of the margin of appreciation as both a standard of review and as a counterpoint to highlight the distinct nature of margin analysis.

Many of the alternate standards of review that we have discussed and on which international arbitral tribunals could draw are variants of proportionality analysis. The least restrictive alternative standard as used by the WTO is perhaps the clearest example.²⁶⁰ Similarly, the German FCC (discussed in Section IV.B) has relied heavily on proportionality analysis, which in fact developed out of early German jurisprudence.²⁶¹ In contrast, the early ICSID awards rejected proportionality analysis by refusing to recognize that a balancing of rights was necessary at all.

Elsewhere, Stone Sweet argues that the more recent ICSID tribunals in the Argentine cases are engaged in a “flirtation with proportionality balancing” and notes that in *Continental Casualty*, the tribunal “adopted a

254. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSN'T'L L. 72, 73 (2008).

255. *Id.* at 75.

256. *Id.*

257. *Id.*

258. *Id.* at 75-76.

259. *Id.* at 73.

260. See sources cited *supra* note 104.

261. See Grimm, *supra* note 204, at 385; Stone Sweet & Mathews, *supra* note 254, at 97-111; see also Eberhardt Grabitz, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Bundesverfassungsgericht [The Principle of Proportionality in the Jurisprudence of the Federal Constitutional Court]*, 98 ARCHIV DES ÖFFENTLICHEN RECHTS 568, 569 (1973).

mature form of proportionality analysis.”²⁶² Stone Sweet goes on to argue that proportionality analysis ought to be the preferred means of resolving rights conflicts in international public law adjudication²⁶³ and that “it would be wise for ICSID tribunals to embrace the proportionality framework.”²⁶⁴

We wholeheartedly agree with Stone Sweet that if ICSID tribunals were to consistently embrace proportionality analysis it would be a significant advance over the jurisprudential status quo. Embracing proportionality analysis would address many of our concerns with the approach of ICSID tribunals to date, particularly the private law mindset and the lack of balancing among competing rights so evident in the early “no other means available” standard. Similarly, we agree with Stone Sweet that “adopting proportionality would give ICSID tribunals important advantages in coping with the increasing politicization of investor-State arbitration” and would likely enhance the overall legitimacy of the investor-state arbitration system.²⁶⁵

We disagree, however, with two basic propositions of Stone Sweet’s analysis. First, while it is true that the *Continental Casualty* tribunal flirted with proportionality, it is far from clear that, as he claims, “the positions taken by ICSID tribunals in *CMS*, *Enron*, and *Sempra* [the tribunals that maintained a strict, no other means available standard] have now been destroyed.”²⁶⁶ Admittedly, the annulment committee in *CMS* scathingly critiqued the award rendered by the *CMS* tribunal. That annulment committee report, however, is not binding on other tribunals and the weight of jurisprudence to date still tips in favor of the strict “no other means available” standard used by the first three tribunals in the Argentina cases. Hence, we find that the trajectory of ICSID jurisprudence is far less clear and far more troubling than does Stone Sweet. While ICSID tribunals may move further in the direction of proportionality analysis, they also may remain stuck in the “no other means available” approach or move toward a different standard entirely.

Second, we disagree with Stone Sweet’s conclusion that proportionality analysis necessarily “offers to arbitrators the best available doctrinal framework with which to meet the present challenges to the BIT-ICSID system.”²⁶⁷ While we recognize that proportionality is a viable approach and preferable to the status quo, the peculiarities of public law investor-state arbitration may argue in favor of a different approach. Specifically, the effectiveness and legitimacy of standards of review based on proportionality analysis turn on the ability of judges or arbitrators to balance among competing rights or interests and to convince both states and investors that they have struck the appropriate balance. As Stone Sweet and Mathews observe:

262. Stone Sweet, *supra* note 66, at 22.

263. See generally Stone Sweet & Mathews, *supra* note 254 (noting the benefits of proportionality analysis and tracing its diffusion). But see Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT’L J. CONST. L. 468, 487 (2009) (“The balancing approach, in the form of the principle of proportionality, appears to pervert rather than elucidate human rights adjudication.”).

264. Stone Sweet, *supra* note 66, at 24.

265. *Id.* at 3.

266. *Id.* at 24.

267. *Id.* at 25.

Judges have embraced proportionality for similar reasons. Given the constitutional texts they have been asked to interpret and enforce, [proportionality analysis] made it easy for them to prioritize the values that the polity itself has chosen to prioritize, even in the difficult situations in which these values would come into tension or conflict.²⁶⁸

Yet prioritization of the values chosen by the polity requires both familiarity with those values and a degree of embeddedness within that polity. It is our contention that ad hoc ICSID tribunals lack the institutional capacity to base their determinations primarily on such direct balancing and to convince skeptical audiences of the legitimacy of their balancing outcomes.

Stone Sweet and Mathews make, if inadvertently, perhaps the best case against the expertise and capacity of ICSID tribunals to engage in direct balancing. They note first that “balancing can never be dissociated from lawmaking: it requires judges to behave as legislators do, or to sit in judgment on a prior act of balancing performed by elected officials.”²⁶⁹ It is, in their words, a “difficult judicial task involving complex policy considerations.”²⁷⁰ Moreover, “in balancing situations, it is context that varies, and it is the judge’s reading of context—the circumstances, fact patterns, and policy considerations at play in any case—that determines outcomes.”²⁷¹

The inherent problem with ICSID tribunals engaging in the direct balancing at the heart of proportionality analysis is that they are not well positioned or equipped to engage in lawmaking, to internalize the context, and to weigh the policy considerations at play in a particular case. As we have argued above, ICSID arbitrators are far removed from the polities over whom they exercise control.²⁷² They often lack expertise in the particular circumstances and fact patterns of the case.²⁷³ They are not embedded in the polities or policies at stake. As a result, ICSID tribunals are in a uniquely poor position to engage in the direct balancing necessary for effective and legitimate proportionality analysis.

Moreover, proportionality analysis alone is unlikely to overcome the legitimacy gap in investor-state arbitration. Ad hoc arbitral tribunals’ lack of expertise in public law and lack of connection with domestic polities is obvious to those impacted by the tribunals’ awards—the national government and the polity of the state whose policies are being reviewed. In such circumstances, proportionality balancing by ad hoc arbitral tribunals is unlikely to enhance perceptions of legitimacy, precisely because the ad hoc tribunal lacks the requisite capacities and is not seen as possessing the necessary expertise and understanding to engage in direct balancing, much less legislating.

Within a constitutional framework, proportionality analysis may be an ideal mechanism for judicial balancing. Yet outside such a constitutional context, and particularly in the case of ad hoc ICSID arbitration, an alternative approach that moves away from the “no other means available” standard

268. Stone Sweet & Mathews, *supra* note 254, at 160.

269. *Id.* at 88.

270. *Id.* at 89.

271. *Id.*

272. *See supra* Section V.B.

273. *See supra* Section V.B.

applied by the early Argentine tribunals but that does not become an exercise in direct balancing by disconnected ad hoc arbitrators is preferable. We find that the margin of appreciation is the best solution, precisely because it provides a means to resolve conflicts between rights and interests without putting an ad hoc ICSID tribunal in the position of undertaking direct balancing without a frame of reference.

As we showed in detail in Subsection IV.A.2, the margin of appreciation allows a tribunal to set an appropriate space within which national authorities are able to take regulatory action without a tribunal second-guessing those decisions or acting in a legislative capacity. Again, national authorities are generally better positioned, both in terms of expertise and embeddedness within the domestic polity to engage in an explicit balancing between rights and interests at stake than is an international arbitral tribunal.²⁷⁴ By adopting the margin of appreciation as the relevant standard of review, the international arbitral tribunal would sit in a supervisory capacity akin to that of the ECtHR, reviewing whether the measures adopted by a respondent state remain within the government's recognized margin of appreciation and whether any resulting interference is sufficiently justified, but without substituting its own assessments as to the most appropriate policy in a given case.²⁷⁵

Admittedly, adopting the margin of appreciation does not fully do away with the difficulties presented by ad hoc tribunals engaging in rights balancing. The margin of appreciation itself includes a residual balancing test. Yet adopting the margin of appreciation shifts the nature and location of that balancing from a direct comparison of a national regulation and a state's interests on one side, with investor rights on the other, to a determination of the appropriate width of the margin for a particular type of rights or interests, and a residual consideration of the justification for interference with individual rights.²⁷⁶

As a matter of institutional capacity, ad hoc international tribunals are far better positioned to set the appropriate contours of a margin of discretion for national authorities than they are to directly balance rights and interests for two basic reasons. First, determining the breadth of a margin of appreciation requires an order of magnitude calculation that captures the weight of the state interests and investor rights at stake, rather than an explicit balancing of those rights and interests.²⁷⁷ Second, reliance on the margin of appreciation allows

274. See Shany, *supra* note 61, at 939 (noting that the margin is appropriate due to “the comparative decision-making facilities of international courts and domestic institutions relating to the specific matter at hand”).

275. See *Fressoz v. France*, 1999-I Eur. Ct. H.R. 3, ¶ 45 (“The Court’s task in exercising its supervisory function is not to take the place of the national authorities but rather to review . . . the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the ‘interference’ complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’”); *TV Vest AS v. Norway*, App. No. 21132/05, ¶ 62 (Eur. Ct. H.R. Dec. 11, 2008), <http://www.echr.coe.int>.

276. See Shany, *supra* note 61, at 939 (“[T]he degree of judicial deference in the context of application of the doctrine is not fixed. It should vary in the light of a variety of considerations.”).

277. Compare, e.g., *Andrejeva v. Latvia*, App. No. 55707/00, ¶ 83 (Eur. Ct. H.R. Feb. 18, 2009), <http://www.echr.coe.int> (“[A] wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. . . . [T]he Court will generally respect the legislature’s policy choice unless it is ‘manifestly without reasonable foundation’”), with *TV Vest AS v. Norway*, App. No. 21132/05, ¶ 59 (Eur. Ct. H.R. Dec. 11, 2008),

for the development of broad categories of rights—such as the right to property addressed under Protocol 1 to the European Convention. Tribunals can then apply a corresponding margin of appreciation of uniform breadth to that whole category of rights, thereby avoiding the need for deeply context-dependent decisions by nonembedded judges. The result is both greater consistency and predictability of outcomes.²⁷⁸

Admittedly, the margin of appreciation involves a second analytic step—a residual consideration of whether, even for regulatory activities that fall within the margin of appreciation, any resulting interference with individual rights is sufficiently justified. That analysis may require a degree of balancing between the interests of the state and the interference with individual rights. However, this balancing is residual, not direct. It only comes after the primary determinations of the width of the margin and whether the state's regulatory activities fall within that margin. Moreover, in margin of appreciation analysis, the residual balancing can be informed and guided by the analytically prior step—the determination of the breadth of the margin.²⁷⁹ Where the margin of appreciation is broad, and the state's activity clearly within it, the residual proportionality test can be less searching. In contrast, if the margin is narrow or the state's activity falls closer to the edge of that margin, proportionality balancing can be stricter. Ad hoc tribunals will be better positioned to undertake balancing in such circumstances if they can ground the residual proportionality analysis in the preliminary determination of the breadth of the margin. Residual proportionality analysis is thus a far easier and more appropriate task for ad hoc tribunals than free-standing proportionality analysis, since the preliminary determination of the width of the margin provides guideposts, context, and a framework for the residual proportionality analysis.

For similar reasons, the margin of appreciation is preferable not just to proportionality analysis itself, but also to the various standards for reviewing state behavior that we considered in Part IV. Ad hoc arbitral tribunals are poorly equipped to engage in least restrictive means analysis as developed by the WTO. Specifically, such least restrictive means analysis requires the tribunal to consider other available alternatives and second-guess government regulatory behavior. Just as ICSID tribunals lack the legislative-type capacities to engage in direct balancing, so too do they lack the knowledge, expertise and resources to engage in the kind of second-guessing of policy choices required by a least restrictive means analysis. In addition, as a second step, the WTO least restrictive means approach includes an explicit proportionality balancing test, for which we have already established that ad hoc tribunals are poorly positioned.

<http://www.echr.coe.int> (“[T]here is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest . . .”), and *VgT Verein gegen Tierfabriken v. Switzerland*, 2001-VI Eur. Ct. H.R. 243, ¶ 71 (2001) (“[I]n the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual's purely ‘commercial’ interests, but his participation in a debate affecting the general interest.”).

278. See *supra* note 277.

279. See *supra* p. 308.

The margin of appreciation is also preferable in most circumstances to more lenient standards such as good faith review. While our argument that ad hoc ICSID tribunals lack the capacity for legitimate direct balancing taken to a logical extreme might point toward good faith review that requires only a rationality analysis, good faith review may not always offer sufficient protection of investor rights.²⁸⁰ Given that the object and purpose of most BITs and the clear goal of the whole investor-state arbitration regime is to provide at least some protection for investors, a standard that merely imposes reasonableness, honesty, and fair dealing requirements may be inadequate to protect investor rights. The margin of appreciation, in contrast, more narrowly limits the realm of deference to national authorities and includes a residual consideration of whether interference with individual rights is justified. Acting in its supervisory capacity, a tribunal employing the margin of appreciation can still intervene when national authorities exceed the appropriate margin or engage in unjustified interference with individual rights, thereby providing far greater protections to investors than would a good faith standard.

Compared to other available standards of review, the margin of appreciation also promotes legitimacy, and perhaps even accountability, by returning national authorities to the center of decisionmaking and placing the ad hoc arbitral tribunal, with fewer connections to the domestic polity and potentially far less expertise, in the more limited supervisory position.²⁸¹ As Yuval Shany contends, the margin of appreciation “improves the quality and perceived legitimacy of legal pronouncements,”²⁸² because it no longer has to convince potentially skeptical audiences of the accuracy of a direct balancing process.

2. *The Margin of Appreciation and Proportionality Analysis in Practice*

The distinctions between proportionality analysis and the margin of appreciation, as well as the greater appropriateness of the margin of appreciation to public law disputes before ad hoc investment tribunals, are most clearly demonstrated through a concrete example. This Subsection takes the basic dispute raised in cases such as *CMS*, *LG&E* and *Continental Casualty* over the applicability of Article XI of the U.S.-Argentina BIT and traces the different processes of analysis based first on proportionality review

280. Good faith review may nonetheless be appropriate where the underlying treaty obligation is self-judging. There, good faith offers a means of imposing at least some constraint on and review of a state's behavior. Take, for example, a BIT that contains an expressly self-judging NPM clause, such as “nothing in this treaty shall preclude the application of measures by a state party *which it considers* necessary for the protection of its essential security.” In these circumstances, applying a good faith standard of review reflects the nature of the bargain inherent in a self-judging NPM clause, namely, that a state will be able to determine for itself—consistent with the background norm of good faith in international law—whether the provision applies. Yet the good faith standard still forces states to internalize and justify its own balancing of rights and interests, thereby imposing some constraint on state behavior, even where states only have a self-judging obligation. *See generally* Burke-White & von Staden, *supra* note 36.

281. Choudhury notes that the margin of appreciation “allows for the inclusion of public interest issues into investment treaties.” Choudhury, *supra* note 13, at 827.

282. Shany, *supra* note 61, at 939.

and then on the margin of appreciation. Though both standards would likely lead to the same conclusion—the applicability of Article XI and a finding that Argentina was not liable for a breach of the BIT—the analytic processes at work are notably different. Specifically, the margin of appreciation offers a far more tractable approach, more appropriate to the institutional context of an ad hoc investment tribunal.

As a preliminary matter, it is necessary to determine whether the dispute itself falls within the public law sphere to which our argument for alternative standards of review applies. In this case, the dispute is undoubtedly of a public law nature, both in terms of its subject matter and the text of the treaty being interpreted. In terms of substance, Argentina faced a massive economic collapse and had to devise a policy to prevent further economic turmoil, move toward economic recovery, and avoid the complete breakdown of governmental authority.²⁸³ To that end, Argentina implemented measures that were damaging to investor interests, including freezes on tariff rate adjustments, currency restrictions, and devaluations.²⁸⁴ Claims by investors challenging these policies meet Abram Chayes’s test for matters of public law in that investors had a “grievance about the operation of public policy” and were not merely private individuals seeking to enforce private rights.²⁸⁵ Second, the dispute meets the textual requirements we set forth for the application of alternative standards of review. Specifically, Article XI of the U.S.-Argentina BIT, asserted as a defense by Argentina, states: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order . . . or the Protection of its own essential security interests.”²⁸⁶ The term “necessary” implies a subjective balancing test and the references to both “public order” and “essential security” are indicative of public law choices. As a result, this is just the type of public law dispute to which an ad hoc international investment tribunal should apply an alternative standard of review.

Take first the application of proportionality analysis to the dispute. Stone Sweet and Mathews suggest that proportionality analysis involves a four-step test: legitimacy, suitability, necessity, and balancing.²⁸⁷ The first three steps of the test are relatively straightforward. First, the arbitral tribunal must confirm the legitimacy of Argentina’s actions by asking if the government was constitutionally empowered to act as it did. In this case, the answer would be in the affirmative.²⁸⁸ Second, the tribunal should consider the suitability of Argentina’s acts by determining whether “the means adopted by the government are rationally related to the stated policy objectives.”²⁸⁹ Whether or not one agrees with Argentina’s particular policy choices, tariff adjustment

283. See, e.g., *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseId=C208.

284. See *id.*

285. See Chayes, *supra* note 7, at 1302.

286. U.S.-Argentina BIT, *supra* note 37, art. XI.

287. Stone Sweet & Mathews, *supra* note 254, at 74.

288. The constitutionality of Argentina’s actions has not been challenged in any of the ICSID cases against it to date.

289. Stone Sweet & Mathews, *supra* note 254, at 74.

freezes, currency restrictions, and currency revaluations are rationally related to preventing further economic crises and managing an economic recovery. Third, the tribunal would engage in a necessity analysis. While the cases against Argentina clearly indicate the range of interpretations of necessity,²⁹⁰ Stone Sweet and Mathews suggest that, under proportionality analysis, necessity should be equivalent to a least restrictive means test. At least according to the findings of the *Continental Casualty* tribunal, Argentina's actions would satisfy such a least restrictive means test in that there were no reasonably available alternative measures that would have caused less infringement on investor rights.²⁹¹

While the first three steps of proportionality analysis are relatively straightforward and tractable, it is the fourth step suggested by Stone Sweet and Mathews that demonstrates the difficulty of proportionality analysis for ad hoc tribunals. Specifically, a tribunal engaging in balancing must “weigh the benefits of the act . . . against the costs incurred by the infringement of the right.”²⁹² In so doing, the tribunal will acknowledge “that each side has some significant constitutional right on its side” but will then have to “make a decision” between those competing rights.²⁹³ How should the tribunal balance the state's right to regulate so as to avoid further crises and investor rights under the BIT and various contracts? Do investors' property rights trump the state's right to its continued existence or individual citizens' rights to safety and security? How should the rights dispute even be framed?²⁹⁴ While our view is that the tribunal should accord preference to the continued existence of the state and the safety of individuals from public riots over investor property, that outcome is not necessarily a given and depends in large part on the preferences and predilections of arbitrators, many of whom in the ICSID context are themselves private litigators.

The problem for an ad hoc investment tribunal is that it lacks the contextual knowledge, the expertise in the particular issues at stake, and the embeddedness in the social fabric of the dispute necessary to engage in this balancing process. Most other tribunals that undertake balancing *sensu stricto* are, in contrast, deeply familiar with the context of the dispute and embedded in the socio-political system in which the dispute arises.²⁹⁵ In fact, the very sources on which Stone Sweet and Mathews rely for their proposition that proportionality balancing has been constitutionalized are domestic tribunals

290. Compare *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4, with *Cont'l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), <http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf>.

291. See *Cont'l Cas.*, ICSID Case No. ARB/03/9, Award.

292. Stone Sweet & Mathews, *supra* note 254, at 78.

293. *Id.* at 89.

294. See generally Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002).

295. On the case of the Federal Constitutional Court in Germany, see, for example, TIM KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS* 63-69 (2003). On the manner in which the cultural background of judges may affect judicial reasoning, see, for example, Thomas M. Franck & Peter Prows, *On the Role of Presumption in International Tribunals*, 4 LAW & PRAC. INT'L CTS. & TRIBUNALS 197, 200 (2005), which notes that the “cultural aspect” of “our ways of seeing, and reasoning about, the external world . . . is of importance to judges, lawyers, and, indeed, everyone.” *Id.*

that are, not surprisingly, deeply embedded within their social and political systems.²⁹⁶ In order to engage in the balancing necessary to complete proportionality analysis, arbitrators must “behave as legislators do, or . . . sit in judgment of a prior act of balancing performed by elected officials.”²⁹⁷ Yet they must do so without context, expertise, or any cues to help them weigh competing constitutional values. Their judgments are, therefore, at best arbitrary or, at worst, personal predispositions.

Contrast this approach with the application of the margin of appreciation. The margin of appreciation analysis starts with a determination of the appropriate width of the margin or “breadth of deference”²⁹⁸ in the particular case. The ECtHR has a well-developed jurisprudence for determining the appropriate breadth of the margin of appreciation based on the nature of the rights in conflict.²⁹⁹ Here we have a case that involves the state’s fundamental social and economic policies on one side and investors’ property rights on the other. In the jurisprudence of the ECtHR, property rights are less fundamental than, say, the right to life, and hence are indicative of a comparatively wider margin within which states can choose how to regulate.³⁰⁰ Similarly, regulation of socioeconomic policies in the public interest is generally accorded a wide margin. As the ECtHR observed in *Broniowski*, since “the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, [the Court] will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation.”³⁰¹

296. See Stone Sweet & Mathews, *supra* note 254, at 104-11.

297. *Id.* at 87.

298. Yourow, *supra* note 117, at 118.

299. See *Oršuš v. Croatia*, App. No. 15766/03, ¶ 66 (Eur. Ct. H.R. July 17, 2008), <http://www.echr.coe.int> (“[W]hile in its *D.H. and Others* judgment the Court found that the difference in treatment was based on race, which required the strictest scrutiny, in the present case the difference in treatment was based on adequacy of language skills. This ground, however, allows for a wider margin of appreciation.”); *Ceylan v. Turkey*, 1999-IV Eur. Ct. H.R. 25, ¶ 34 (“[W]here . . . remarks incite to violence against an individual, a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.”); *Lehideux v. France*, 1998-VII Eur. Ct. H.R. 2864, ¶ 4 (Foighel, Loizou & Freeland, JJ., dissenting) (“[I]t is in the first place for the national authorities to determine whether the interference in issue corresponds to such a need, for which they enjoy a greater or lesser margin of appreciation . . . In cases involving the right to freedom of expression the Court has generally been particularly restrictive in its approach to the margin of appreciation, although it has been prepared to accept a wider margin in relation to issues likely to offend personal convictions in the religious or moral domain.”); *Wingrove v. United Kingdom*, 1996-V Eur. Ct. H.R. 1937, ¶ 58 (“Whereas there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest . . . , a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.”).

300. See *Budayeva v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, ¶ 175 (Eur. Ct. H.R. Mar. 20, 2008), <http://www.echr.coe.int> (“While the fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities’ power in the sphere of disaster relief for the protection of that right, the obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances. Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals’ possessions from weather hazards than in deciding on the measures needed to protect lives.”).

301. *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 55, ¶ 149 (citations omitted).

As a result, the rights on both sides of the dispute are indicative of a wide margin such that the state's regulatory choices would only be overturned by the international tribunal acting in a supervisory capacity if those choices were without reasonable foundation. Argentina's actions clearly have reasonable foundation—they were intended to mitigate the economic crisis and promote economic recovery. Argentina's actions would, therefore, fall within the allowable margin of appreciation afforded by Article XI of the U.S.-Argentina BIT.

The margin of appreciation analysis then proceeds to a second step, a residual proportionality test,³⁰² identical in form to that advanced by Stone Sweet and Mathews. As we discussed in Part IV and Subsection V.C.1, the residual proportionality test in margin analysis should be informed by the prior determination of the width of the margin of appreciation afforded in the particular case. The first three steps of the proportionality analysis approach would proceed just as they did under the proportionality analysis in isolation, as described above. However, with respect to the fourth step—balancing *sensu stricto*—proportionality balancing under the margin of appreciation differs from proportionality balancing in isolation. Specifically, when engaging in residual balancing as part of the margin of appreciation analysis, the tribunal has the benefit of already having determined the breadth of the margin of appreciation and can use the breadth of the margin as a cue to determine the strictness of the balancing test to be imposed. In this case, with a wide margin of appreciation, the balancing test should be relatively light and, likely, tip in favor of the state's own determination of what it sees as an appropriate balance, unless that balance struck by the national government is blatantly unreasonable and out of proportion.

In contrast, if the margin were narrower, for example in a case of freedom of expression, the balancing test would be more searching and likely tip in favor of the aggrieved individual whenever the balance struck by the state failed to pass muster under a stricter version of the proportionality test.³⁰³ In the Argentina case, using the initial determination of the width of the margin to inform the residual balancing test makes a tribunal's analysis of Argentina's regulatory activity far more clear. Given a relatively light balancing test based on the wide margin of appreciation in a case involving property rights and a state's essential security, the alteration of tariff adjustment rates and limitations on currency exchange imposed by Argentina would be proportionate to the ends it sought. The limited infringement on

302. See *Bubić v. Croatia*, App. No. 23677/07, ¶ 40 (Eur. Ct. H.R. July 9, 2009), <http://www.echr.coe.int>; Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*, *supra* note 116, at 125.

303. It is important to note that the initial determination of the width of the margin and the residual balancing test do not collapse into a single analysis. Even though the residual balancing test is informed by the initial determination of the width of the margin, it is easy to imagine cases in which even on a wide margin of appreciation, the state's regulatory activity would still fail the residual balancing test. Take, for example, a case involving property, which would have a relatively wide margin of appreciation. If the state failed to pay any compensation whatsoever for the taking of that property and there were not some external mitigating circumstances, it would be difficult to find the state's regulatory activity as satisfying a proportionality test, notwithstanding the wide margin of appreciation.

investors' rights would, therefore, be justified. As a result, the tribunal would find Argentina's actions fell within Article XI of the U.S.-Argentina BIT.

The principal difference, then, between proportionality analysis and the margin of appreciation, is that the margin of appreciation allows residual balancing to be guided by an initial determination of the breadth of the margin. That initial determination does not, however, require direct balancing, but rather an order-of-magnitude calculation based on the nature of the rights at stake and, possibly, guided by a well developed ECtHR jurisprudence as to the appropriate contours of the margin of appreciation when different rights are at stake. As a result, an ad hoc arbitral tribunal unfamiliar with the context of the dispute and disconnected from the socio-political system in which the dispute arises can avoid the difficulties of balancing in isolation by taking cues from the initial determination of the breadth of the margin in the case. In so doing, the tribunal more accurately employs its relative expertise and acts appropriately given its institutional context.

Ultimately, while we laud the move to greater deference exhibited by the ICSID tribunal in *Continental Casualty*, we are not convinced that the award marks an explicit turn toward proportionality analysis or that ICSID tribunals should wholeheartedly embrace proportionality in isolation. ICSID tribunals urgently need to move toward a consistent and coherent standard of review, whether based on proportionality, the least restrictive alternative or even good faith. Any of these standards would more appropriately reflect the new public law context of much investor-state arbitration. Yet a better standard of review based both on institutional capacity of ad hoc arbitral tribunals and the need for domestic legitimacy of their awards, may well be found in the more explicit and better developed application of the margin of appreciation. Such a standard of review would appropriately place ad hoc tribunals in an international supervisory capacity, minimizing the direct balancing for which they are poorly positioned and allowing them to focus their analysis on the determination of the contours of a margin of appreciation for public regulation by national governments in different categories of cases.

VI. CONCLUSION

As states react to the extraordinary awards against Argentina, consider the troubled jurisprudence of many ICSID tribunals, and watch the growing number of arbitrations that challenge public regulation, the legitimacy of ICSID and the future of investor-state arbitration are being called into question. While this legitimacy gap has been widely recognized, most proposed solutions have called for structural changes in the ICSID system, such as the establishment of an appellate mechanism. Yet these changes would be difficult to implement, as they require revision of the ICSID Convention and might well undermine many of the benefits of arbitration, such as efficiency and finality.

In contrast with these proposed solutions, we have identified an underlying cause of this legitimacy deficit: the fact that, despite the new public law subject matter of many ICSID arbitrations, ICSID tribunals continue to apply standards of review developed from and more appropriate to

the private, contract law origins of international arbitration. Recognition of this new public law context of investment arbitration and the development of appropriate public law standards of review that allow for some deference to national authorities are urgently needed. The application of such public law standards of review would go far to help close the legitimacy gap by demonstrating to states that ICSID tribunals recognize and take account of the competing interests of both states and investors in public law arbitration.

Various standards of review appropriate to public law disputes and routinely used both by other international tribunals and by domestic courts are available to ICSID tribunals. Any such public law standards of review that balance between a state's public interest and investor rights would be far preferable to the confused and contradictory standards presently employed by ICSID tribunals and all too evident in the awards against Argentina. Yet the unique circumstances and limited institutional capacity of ad hoc arbitral tribunals suggest the need for a relatively deferential standard that minimizes the second-guessing of state policies and the direct balancing of state and investor interests by such tribunals. The margin of appreciation does just that, allowing the ad hoc tribunal to focus on the determination of an appropriate margin of appreciation in a particular type of case and then using that preliminary determination of the breadth of the margin to ground the residual review of the degree of interference posed by a state's action.

We recognize that such a shift in standards of review may be criticized as reducing the level of protection accorded to investors and, thereby, weakening the overall investor-state arbitral system. In our view, however, such criticism is misplaced for three key reasons. First, we only advocate the use of an alternative standard of review in that relatively narrow but important subset of cases and subset of issues within those cases in which matters of public law arise before the arbitral tribunal. In the vast majority of cases in which such issues do not arise, our proposal would neither alter standards of review nor the level of protection accorded investors. Second, while giving greater deference to decisions by national governments, the margin of appreciation still protects investor interests, allowing the international tribunal to intervene in favor of investors when a state's regulations exceed the margin of appreciation or otherwise fail the residual proportionality test. Finally, to the degree that our proposal does in fact reduce the protections available for investors,³⁰⁴ those greater risks to investors can be priced into investments themselves. In an efficient market for international investment, the price paid by states for foreign investments (presumably in terms of rates of return on the investment) should reflect the degree of risk assumed by investors. To the degree our proposal increases those risks, investors should receive commensurately higher returns on their investments.³⁰⁵

Movement toward a public law standard of review such as the margin of appreciation is relatively easy to implement. In contrast with the difficult process of amending the ICSID Convention, as others have proposed, ICSID

304. For a discussion of outcomes of investment arbitrations, see Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009); and Susan D. Franck, *An Empirical Analysis of Investment Treaty Awards*, 101 AM. SOC'Y INT'L L. PROC. 459 (2007).

305. For a discussion, see Burke-White & von Staden, *supra* note 36, at 401-03.

tribunals can directly adopt new standards of review through gradual jurisprudential development and harmonization. Without an appellate authority, however, tribunals will have to engage in a dialogue with one another through their awards as they move to a common public law standard of review. That, in turn, may require a shift in the mindset and even identity of arbitrators themselves. Rather than seeing themselves as the first order decisionmakers in a private dispute, ICSID arbitrators should come to understand their role as public law actors and recognize that their awards have impacts well beyond the direct case at hand. Confronted with that new identity, ICSID arbitrators may recognize that they are far better equipped to play a supervisory role, as appropriate to a margin of appreciation, rather than engage in the second-guessing of state policies and the direct balancing of state interests and investor rights in public law arbitration.