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ARTICLE

The Margin of Appreciation in International Investment Law

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Investment treaties tend to say nothing, or only very little, about the appropriate standard of review for arbitrating disputes between sovereign states and foreign investors. Most treaties do not address whether states should be afforded any deference in their own assessment of their treaty obligations. Neither do they specify the converse, that state action must be strictly reviewed. They are simply silent — and their silence has been interpreted in innumerable ways by different tribunals. This interpretive chaos has generated calls for a unified approach — one that would resolve the uncertain and fragmented status quo, while being sufficiently flexible as to admit the application of different standards of review in different contexts. To some, the venerable doctrine of the margin of appreciation appears to fit just this bill — a solution finding growing favor among tribunals and commentators, not to mention advocates for respondent states.

This Article challenges the suitability of the margin of appreciation in the adjudication of investment disputes. This judge-made doctrine is famously a product of Strasbourg, manufactured by the European Court of Human

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Rights. Its halting import into the global investment regime is only a recent phenomenon. Through comparison to the Strasbourg Court, I suggest that certain key grounds for affording the margin in its original context do not obtain within investment law — calling into question the doctrine's propriety in its new setting.

Beyond questioning the suitability of the margin of appreciation within ad hoc investment disputes, this Article challenges the broader premise that the problem of fragmented approaches to the standard of review among investment tribunals can be best resolved through judicial recourse to a unified a priori *doctrine of deference. As evidenced by the adventures of the margin in several recent arbitral awards, such attempts tend to produce only a pernicious illusion of unity. I argue, instead, that the desired certainty can be achieved only gradually, through judicial practice and dialogue over the medium to long term.*

INTRODUCTION

Investment treaties tend to say nothing, or only very little, about the appropriate standard of review for arbitrating disputes between sovereign states and foreign investors. Most treaties do not address whether or to what extent states should be afforded a degree of deference in their own assessment of their treaty obligations, or their agencies' findings of fact; and neither do they specify the converse, that state action must be strictly reviewed, or state fact-finding subject to de novo scrutiny. They are simply silent, and their silence has been interpreted in innumerable ways by different tribunals. This emergent interpretive chaos has, unsurprisingly, generated calls for a unified approach — one that would resolve the uncertain and fragmented status quo, while being sufficiently flexible as to admit the application of different standards of review in different contexts. To some, the venerable doctrine of the margin of appreciation appears to fit just this bill — a solution finding growing favor among tribunals and commentators, not to mention advocates for respondent states.

This Article questions the propriety of the margin of appreciation in the context of the *ad hoc* resolution of investment disputes. In so doing, it challenges the broader premise that the problem of fragmented approaches to the standard of review can be best resolved through judicial recourse to a unified *a priori* doctrine of deference, no matter how flexible. The problem cannot be solved all at once — at least not through judicial action under current institutional arrangements. And as evidenced by the adventures of the margin in investment awards to date, attempts to do so are more likely than not to produce only a pernicious illusion of unity. I suggest, instead, that the desired certainty can be achieved only gradually, through judicial dialogue over the medium to long term — among investor-state tribunals, and extending no less to other international courts and tribunals grappling with similar problems.

The margin of appreciation is a judge-made doctrine of deference — famously a product of Strasbourg, manufactured by the European Court of Human Rights (ECtHR); in broad strokes, it reflects a particular approach to "assigning weight to the respondent state's reasoning" under certain judicially imposed conditions.[1] Though developed within the European Convention on Human Rights (ECHR),[2] the doctrine has gained purchase in other international judicial settings.[3] Some scholars have suggested that the margin ought to become a general feature of all international adjudication.[4] Still, its halting import into the global investment regime is only a relatively recent phenomenon.[5] Without questioning the

1. ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW 3, 17 (2012). While the margin of appreciation is, for all intents and purposes, a creation of the ECtHR, there is some dispute as to whether its ultimate origins lie in national or even international judicial doctrines of deference. Some scholars suggest that the doctrine stems from doctrines of deference applied in European national courts. *See, e.g.*, *id.* at 3 (calling the doctrine a "judicial creation" of the ECtHR, whose "origins have been traced to analogous concepts of judicial deference in the administrative law of a number of European countries," including in particular France and Germany). More recently, Eirik Bjørge has made a strong case that the doctrine is better understood as grounded in historical *international* doctrines of deference to national authorities, specifically the more state-centric international legal doctrine of the early twentieth century. *See* Eirik Bjørge, The Margin of Appreciation: Where Does it Come From and Where Is It Headed? (Feb. 10, 2014) (unpublished manuscript) (on file with author) (noting further that the doctrine's precursors have long been abandoned in general international law). But for present purposes the doctrine's pedigree is not at issue. Wherever the doctrine's deepest roots lie, the key point is that the margin of appreciation has been shaped and developed by the ECtHR for nearly four decades, and has become inextricably associated with the Strasbourg Court's jurisprudence.

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

3. *See, e.g.*, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶¶ 62–63 (Jan. 19, 1984).

4. *See* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907 (2005); *see also* Jean-Pierre Cot, *The Margin of Appreciation*, *in* 6 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1012, 1013 (Rüdiger Wolfrum ed., 2012). *But see* Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 354 (Feb. 6, 2007) ("[T]he European Convention on Human Rights permits a margin of appreciation not found in customary international law . . . .").

5. *See* Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010); Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008); Cont'l Cas. Co. v. Argentine Republic, ICSID

propriety of the margin in other supranational judicial contexts, I suggest that this form of deference is problematic in the context of *ad hoc* investor-state arbitration. Through comparative analysis of the ECHR and the international investment regime, I hope to show that certain key grounds for affording the margin in its original context do not obtain within investor-state arbitration — calling into question the propriety of the doctrine in its new setting.

In the arbitral context, the margin of appreciation acts as little more than a pseudo-standard. While appearing to connote a coherent doctrine of deference, the invocation of the margin tends to obscure the reasoning behind tribunals' determination of the appropriate degree of deference in particular disputes, and obstruct dialogue among tribunals across cases. Were it to find increased favor, a doctrine of this kind would only hinder the development of a coherent approach to the standard of review in international investment law.

This relatively granular question about the propriety of the margin of appreciation falls into a broader discussion about standards of review in international investment arbitration. It is worth pausing at the outset to reflect on why the larger issue comes up at all. In broad strokes, the question typically arises where tribunals are called upon to review state action for compliance with vague and open-ended standards of treatment — like the requirements to provide foreign investors with "fair and equitable treatment" (FET) or to refrain from engaging in an indirect expropriation of their property.[6] Taking FET as an example, it is uncontroversial that

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Case No. ARB/03/9, Award (Sept. 5, 2008). Among scholars the idea has been championed by William Burke-White and Andreas von Staden. *See* William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); *see also* 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 (2008). Several scholars have further advocated for applying the doctrine in the investment context as expert witnesses in investor-state arbitrations. *See* El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Witness Statement of Anne-Marie Slaughter & William Burke-White (Mar. 4, 2007) (arguing for a margin of appreciation in circumstances of public order or national security). On the other hand, other tribunals have strongly resisted the import of the margin of appreciation into the investor-state dispute settlement. *Siemens*, ICSID Case No. ARB/02/8, Award, ¶ 354 (finding no support for the margin of appreciation doctrine under the Germany—Argentina BIT at issue, or under customary international law); *see also* Quasar de Valores SICAV S.A. v. Russian Federation, Arbitration Inst. of the Stockholm Chamber of Commerce, Award (July 20, 2012); Chemtura Corp. v. Government of Canada, UNCITRAL, Award, ¶ 123 (Aug. 2, 2010).

6. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 141, 148–49 (2d ed. 2013); Stephan W. Schill, *Deference in Investment Treaty Arbitration: Reconceptualizing the Standard of Review*, 3 J. INT'L DISP. SETTLEMENT 577, 579 (2012) (highlighting other kinds of situations in which deferential review may be appropriate in investor-state arbitration, as when faced by the superior scientific expertise of national authorities, or agency fact-finding grounding their regulatory measures); *see also* Rahim Moloo & Justin M. Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2011–2012 539 (Karl P. Sauvant ed. 2013).

state action cannot be considered unfair and inequitable solely because it negatively affects a foreign investor's bottom line. States retain significant authority to regulate in the public interest, even if such authority is curtailed by their treaty obligations, and it will often happen that legitimate regulatory measures will reduce the value of an investment without entailing any violation of the foreign investor's rights.[7] But the question then arises: how should state action be reviewed where a violation of FET is alleged? In the absence of any specific guidance from the underlying investment treaties, tribunals have appealed to a wide variety of standards of review in different contexts, ranging from the very deferential (e.g., good faith review)[8] to the more probing (e.g., proportionality).[9] The question of the appropriate standard of review similarly arises where the tribunal is called upon to review national authorities' interpretation of their own domestic law, or to review the state's factual determinations — ranging from the scientific fact-finding underlying an environmental measure[10] to the determination of the existence (and requirements) of a national emergency.[11]

The margin of appreciation arises in this context as one very particular approach to determining the standard of review in disputes against states. As indicated above, the margin is most famously a doctrine of deference employed by the ECtHR for resolving a state's compliance with its obligations under the ECHR. The basic idea is that the state is entitled to a cer-

7. *See* DOLZER & SCHREUER, *supra* note 6, at 141. Similarly, in the context of indirect expropriation, see Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 1, 6 (2005) (arguing that "cases of regulatory expropriation involve conflicting policies and interests which are not easily, if at all, reconcilable," and that tribunals and international lawyers should "explore in a more systematic way: (i) the policy rationales for providing compensation for expropriation; and (ii) the contextual factors that weigh in favor of and against compensation."); L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or* Caveat Investor, 19 ICSID REV. 293, 297 (2004); *see also, e.g.*, Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶¶ 261–62 (Mar. 17, 2006) ("[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today." Interpreting the relevant BIT's provisions on expropriation in light of customary international law, the Tribunal held that even under the Treaty the results of regulatory actions falling within the state's police powers non-compensable).

8. *See Micula*, ICSID Case No. ARB/05/20, ¶ 94.

9. *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 312–13 (July 14, 2006); Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003).

10. *See, e.g.*, Methanex Corp. v. United States of America, UNCITRAL, Final Award on Jurisdiction and Merits, ¶ 41 (Aug. 3, 2005) (assessing, *inter alia*, the claimant's submission that U.S. regulatory measures "constitute a 'sham environmental protection in order to cater to local political interests or in order to protect a domestic industry.'"); *see also* Julianne J. Marley, Note, *The Environmental Endangerment Finding in International Investment Disputes*, 46 N.Y.U. J. INT'L L. & POL. 1003 (2014).

11. *See, e.g.*, CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 339 (May 12, 2005).

tain "space for maneuver," within which its conduct is exempt from full-fledged review.[12] In other words, so long as the state's action does not violate a certain minimum threshold of protection, the Court will respect the state's determination that its action complies with the Convention — even if the Court might have come to a different conclusion itself, faced with the issue de novo.[13] Crucially, however, the relevant minimum threshold varies from right to right in the ECtHR's case law, and is subject to change over time under certain conditions — conditions defined by the Court.[14]

Parallels between the global investment regime and the ECHR make judicial borrowing tempting: both régimes, after all, empower individuals to bring suit against states directly, before a supranational judicial forum, over alleged violations of their treaty rights.[15] Given this core structural similarity, it may seem natural to import processual doctrines worked out through the ECtHR's robust case law to flesh out the relatively young system of investor-state arbitration.[16] But despite the similarities between the regimes, certain key differences account for both the margin's success in the ECHR and its counter-productivity in international investment law.

Above all, the coherence of the margin in its original setting must be understood in light of the fact that the ECHR entails a standing court, charged with the adjudication of claims against a consistent set of parties to a single overarching treaty. The ECtHR is effectively the steward of the human rights system in Europe. By contrast, the investor-state system is fragmented in all the ways the ECHR is not. Arbitral tribunals are constituted on a *one-off* basis — for the resolution of particular disputes arising out of myriad bilateral and multilateral treaties, covering an infinitely complex constellation of states parties. The legal regime depends, for its consistency and development, upon a rich dialogue among investor-state tribunals, litigants, and scholars. The ideas get worked out through the inter-

12. Schill, *supra* note 6, at 582; *see also* Eirik Bjørge, A Theory of National Application of The European Convention on Human Rights 164 (2013) (unpublished manuscript) (on file with author) (calling the doctrine "a form of legal discretion which recognizes that the respondent state can be presumed to be best qualified to appreciate the necessities of a particular situation affecting its jurisdiction").

13. LEGG, *supra* note 1, at 3; *see also* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 666 (8th ed. 2012); GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 80 (2007); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843–44 (1999).

14. *See* Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 289, 332 (2013) (examining how the ECtHR augments the breadth of the margin over time, in view of the subsequent practice of the parties evidencing what it takes to be a new or emerging European Consensus about the scope of a particular Convention right, or in view of certain kinds of changes in international factual or legal circumstances).

15. It should be stressed that this feature, the grant to individuals and private corporations of the right to bring direct suit against sovereign states, is extremely rare in general international law. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 257 (6th ed. 2008).

16. Burke-White & von Staden, *supra* note 5, at 333.

play of theory and practice over time. As I hope to show, the basic problem with forcing the margin of appreciation into this setting is that it undermines this critical process of dialogue and risks throwing this relatively fragile legal ecosystem into disarray.

The problem can be illustrated by appeal to the five investor-state awards to date in which the tribunal invoked the margin of appreciation: in particular the Award in *Continental Casualty v. Argentina* (2008); the Award in *Frontier Petroleum v. Czech Republic* (2010); and most recently the Decision on Liability in *Electrabel v. Hungary* (2012); as well as the Partial Award in *Saluka v. Czech Republic* (2006) and the Decision on Jurisdiction in *Micula v. Romania* (2008).[17] At a glance, each case seems to have done the same thing, albeit in different contexts. In each instance, the tribunal found that the respondent state was entitled to a margin of appreciation, requiring the arbitrators to treat certain decisions by the national authorities with a degree of deference.[18] However, upon closer scrutiny (and as examined in greater depth below), it appears that despite the consistent invocation of the margin as a rubric, each of the tribunals ultimately subjected the respondent states' actions to very different standards of review.[19] In order of greatest to least scrutiny: *Continental Casualty* engaged in a relatively searching least restrictive means analysis;[20] *Frontier Petroleum* adopted a more lenient review for reasonableness and good faith;[21] and *Electrabel* subjected the state's action to review for mere rational basis and good faith.[22] *Saluka* and *Micula*, the most deferential and also the most similar, looked for only "clear and compelling evidence" of error or other improper regulatory

17. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012); *see also* Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 272 (Mar. 17, 2006) (invoking the respondent's "margin of discretion"); and Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008) (invoking the margin of appreciation in reviewing the validity of a non-disputing party's conferral of nationality on the claimant).

18. *Electrabel*, ICSID Case No. ARB/07/19, ¶¶ 6.92, 8.35; *Frontier Petroleum*, UNCITRAL, ¶ 527; *Micula*, ICSID Case No. ARB/05/20, ¶ 94; *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 181; *Saluka*, UNCITRAL, ¶ 272.

19. *See* discussion *infra* Part I.B.

20. *Cont'l Cas.*, ICSID Case No. ARB/03/9.

21. *Frontier Petroleum*, UNCITRAL.

22. *Electrabel*, ICSID Case No. ARB/07/19. As discussed further below, *Electrabel* is unique among the five investor-state cases in (at least seemingly) suggesting that the margin might apply differently in different instances. The Tribunal there applied the margin at two separate points in its analysis, qualifying it as a "modest" margin of appreciation in one instance, *id.* ¶ 6.92, and a merely "reasonable" margin in the other, *id.* ¶ 8.35. The Tribunal explained that a reasonable margin of appreciation would entail review for rational basis and good faith, but spent no words on what standard of review a modest margin might entail — or to what extent it might differ from the former. *See id.* ¶¶ 6.92, 8.35; *infra* Part I.B.

action and convincing evidence of fraud or material error (respectively).[23] I do not want to suggest that any of these tribunals misapplied the doctrine. The problem is rather that the concept of the margin does no work in any of these awards. It creates only an illusion of consistency, at the heavy cost of masking serious differences in approach. In other words, the doctrine acts as an empty proxy for any real analysis of how to approach the truly sensitive issue: how to determine the appropriate level of deference due to a sovereign, if any, in a particular case.

To be clear at the outset, I do not want to argue against judicial borrowing in all contexts. Especially within investment law, borrowing and analogy represent critical tools for refining and developing the law.[24] Nor do I want to collaterally attack the margin of appreciation as such — indeed the doctrine has played a very important role in the ECtHR, and to a lesser extent within the Inter-American Court of Human Rights.[25] Most importantly, I do not want to argue against any and all judicial deference in the adjudication of investor-state disputes. What I do very much doubt is the propriety of this particular doctrine in the particular context of the *ad hoc* settlement of disputes through investor-state arbitration. Here, this capacious doctrine merely papers over the problem of fragmented approaches to the standard of review, with the effect of producing more uncertainty — not less.

The following Part will first situate the debate on the propriety of the margin of appreciation within the broader issue of deference and standards of review in investor-state arbitration. Part II will then turn to the case law to demonstrate the principal problem missed by the debate thus far — that the margin produces only an illusion of coherence, while obscuring important divergences in these tribunals' approaches to working out the appropriate standard of review in particular cases. Part III will examine the margin of appreciation in its original context, in order to illuminate the source of its poor fit within the international investment regime. Within the ECtHR, I suggest, the margin of appreciation is contentless by design — allowing the Court to adopt a flexible and evolutionary approach to the adjudication of human rights disputes over time in the face of widespread cultural diversity. As I hope to show, the doctrine is only given meaning through this standing court's rich jurisprudence. Returning to the global investment regime in Part IV, I argue that the purposefully vague and variable facets of the doctrine make it uniquely unsuitable in the con-

23. *Saluka*, UNCITRAL, ¶ 272, 273; *Micula*, ICSID Case No. ARB/05/20, ¶ 95.

24. *See* discussion *infra* Part III; Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 50 (2013).

25. *See generally* LEGG, *supra* note 1, at 3. *But see* Benvenisti, *supra* note 13, at 843 (suggesting that the doctrine has had perhaps an overly important role, overly prioritizing moral relativism at the expense of universal principles in the adjudication of human rights disputes).

text of *ad hoc* dispute resolution arising out of a fragmented multitude of diverse investment treaties. The margin's inherent open texture helps explain why it has thus far produced dramatically inconsistent results in every such case in which it has been applied. Perhaps counter-intuitively, I suggest that the broader problem of legal certainty arising out of fragmented approaches to the standard of review in international investment arbitration will not likely be resolved by appeal to a unified *a priori* standard of review, as a one-size-fits-all solution.[26] The right answers will take time to work out and will only coalesce gradually, through well-reasoned arbitral practice, knitted together over time through rich judicial dialogue.

I. THE MARGIN IN INVESTMENT LAW

Over the last few years, the margin of appreciation has found growing favor within investor-state arbitration. Respondent states, in particular, are increasingly invoking the margin in defending claims impugning the accordance of their conduct with applicable bilateral investment treaties (BITs), often by direct reference to the case law of the ECtHR.[27] Similar claims have arisen under more nuanced multilateral investment treaties, including the North American Free Trade Agreement (NAFTA)[28] and the Energy Charter Treaty (ECT).[29] The margin appeals to respondent states because it assumes *a priori* that the state is entitled to a degree of deference — a "space of maneuver" — in complying with its treaty obligations.[30] Because respondents can rarely find explicit authority for deferential review in their treaties, they have increasingly turned to the ECtHR's

26. This argument assumes current institutional arrangements as a given. The picture may of course look very different under a more centralized judicial regime for the resolution of international investment disputes — as, for example, an appellate mechanism within the ICSID system, or an entirely new standing international investment court. *See, e.g.*, UNCTAD, *IIA Issues Note No. 2: Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, at 8–9, UNCTAD/WEB/DIAE/PCB/2013/4 (June 2013), http://unctad.org/en/PublicationsLibrary/web diaepcb2013d4_en.pdf (exploring both institutional mechanisms as possible avenues of reform). The problem, for present purposes, is to grapple with the contemporary absence of any formal institutional centrality in the global investment regime; the possibility of future centralization lies beyond this Article's scope.

27. *See, e.g.*, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶¶ 434–36 (July 24, 2008) (recounting the respondent's argument that, as a sovereign state, Tanzania was acting well within its margin of appreciation under international law). The respondent relied exclusively on ECtHR cases in supporting this position. *Id.* ¶ 434 (citing Ireland v. United Kingdom, 18 Jan. 1978, §§ 214, 229, Ser. A no. 25; Rasmussen v. Denmark, 28 Nov. 1984, § 40, Ser. A no. 87; Lithgow & Others v. United Kingdom, 8 July 1986, Ser. A no. 102; and Smith & Grady v. United Kingdom, nos. 33985/96, 33986/96, § 77, ECHR 1999-VI).

28. *See* Chemtura Corp. v. Government of Canada, UNCITRAL, Award, ¶ 123 (Aug. 2, 2010).

29. *See* Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012).

30. *See* Schill, *supra* note 6, at 584.

well-established jurisprudence for support in the hopes of establishing that they are at least entitled to some degree of deference *in principle*.

Invocations of the margin have thus far yielded only a mixed track record for respondents. Some tribunals have expressly rejected the doctrine. For example, the Tribunal in *Siemens v. Argentina* held that as regards the right to property, "the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the [Germany-Argentina BIT]."[31] And other tribunals have simply ignored the respondent's invocation of the doctrine.[32] But a handful of arbitral tribunals have expressly employed the margin in reviewing states' conduct under investment treaties — both at the respondent's urging, as in *Continental Casualty v. Argentina*, and apparently *sua sponte* as in *Frontier Petroleum v. Czech Republic* and *Electrabel v. Hungary*.[33] Suffice it to say that from a high-altitude review of the cases, the long-term acceptance of the doctrine in the context of investor-state arbitration remains to be seen.

Still, the mere notion that the margin of appreciation has a role to play within investor-state arbitration has sparked a polarized scholarly debate. As I hope to show, recourse to the doctrine thus far has also already produced significant jurisprudential problems. By way of background, this Part will first situate the debate about the margin in the broader discussion of the appropriate role and contours of judicial deference in investor-state arbitration. I will then turn to the cases where the doctrine has found favor, in hopes of illustrating its poor fit within the investment regime.

A. Deference and the Standard of Review

The problem of standards of review in investment law starts with silence. As noted above, investment treaties tend to say nothing about the standards of review applicable to disputes between sovereign states and foreign investors over the meaning or application of their provisions. However the fact of their silence on this issue should not be surprising,

31. Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 354 (Feb. 6, 2007); *see also Chemtura*, UNCITRAL, ¶ 123 (holding that "the assessment of the facts is an integral part of its review under Article 1105 of NAFTA. In assessing whether the treatment afforded to the Claimant's investment was in accordance with the international minimum standard, the Tribunal must take into account all the circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations. This is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be conducted *in concreto*. The Tribunal will proceed to such assessment *in concreto* when reviewing the specific measures challenged by the Claimant.").

32. *See, e.g.*, *Biwater Gauff*, ICSID Case No. ARB/05/22, ¶¶ 434–36 (recounting Tanzania's invocation of the margin of appreciation at length in summarizing the respondent's position, but completely ignoring the argument in its own analysis of the case).

33. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 181 & n.270 (Sept. 5, 2008); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 527 (Nov. 12, 2010); *Electrabel*, ICSID Case No. ARB/07/19, ¶ 6.92.

and would not be necessarily problematic by itself. It is indeed *unusual* to find express guidance on appropriate standards of review in the constituent instruments of international courts and tribunals, or even in national constitutions.[34] The silence of investment treaties becomes problematic only in view of the fragmented nature of the investment regime.

As a preliminary matter, it should be understood that the very idea that *any* deference should be afforded to host states is controversial, though increasingly less so. Investment arbitration was, for a long time, considered merely a sub-species of international commercial arbitration or, in other words, a purely private dispute between the investor and the State-*qua*-private party. As Stephan Schill explains, any notion of deference in that setting was considered "anathema" as a violation of a fundamental principle of international arbitration: the parties' equality of arms.[35] However, as Burke-White and von Staden have amply shown, it is increasingly clear that the investment arbitration regime has moved from its purely private origins into a form of thoroughgoing public law litigation, in which foreign investors regularly challenge host states' fundamental regulatory policy.[36]

Tribunals have increasingly come to appreciate this evolution, and have turned to the idea of deferential standards of review as a tool for balanc-

34. In the United States, the idea of differentiating among various standards of review appropriate to different cases (i.e., strict scrutiny, intermediate scrutiny, and rational basis review) is completely judge-made. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Similarly, the famous German doctrine of proportionality review is found nowhere in the Basic Law; it too is judge-made. *See, e.g.*, Apotheken-Urteil [Pharmacy Case], Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 377, 1958 (Ger.); *see also* Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT'L L. 291 (2012). Similarly, in the ECtHR, the margin of appreciation is a wholly judge-made doctrine, and has remained un-codified for sixty years, although it will likely be incorporated into the preamble to the ECHR soon. *See* Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* June 24, 2013, art. 1, C.E.T.S. No. 213, https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2012)166&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 (appending the following recital to the end of the preamble: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention[.]"). Article 1 of Protocol 15 will only come into force upon ratification by all the parties; although universal ratification appears likely, at the time of writing, Protocol 15 has been signed by only twenty-one out of forty-seven, and ratified by just one (Ireland). Up-to-date figures on signatures and ratifications are available at *Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR. TREATY OFFICE (June 27, 2013), http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=8&DF=27/06/2013&CL=ENG.

35. Schill, *supra* note 6, at 587.

36. *See* Burke-White & von Staden, *supra* note 5, at 287; *see also* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 316 (2008); Roberts, *supra* note 24, at 46–49; Schill, *supra* note 6, at 579.

ing the regulatory authority of the state against foreign investors' rights and legitimate expectations under investment treaties.[37] Different arbitral panels have identified and relied on a dizzying set of standards of review in different cases, drawn from international and national orders, and both civil and common law jurisdictions. These standards generally involve some particular linguistic formulation connoting a test. They range from the simple to the nuanced, and from the extremely deferential to the relatively strict.

Some standards entail only minimal review, limited, for example, to the assessment of good faith, rational basis, or reasonableness (in order of greatest to least deference). Other standards involve more sophisticated tests, and will tend to involve a more searching (i.e., less deferential) analysis of impugned governmental action. For example, in applying the least restrictive means (LRM) analysis favored in WTO jurisprudence, a court will uphold a measure so long as it was (1) necessary to a legitimate state aim, and (2) the least restrictive means reasonably available toward achieving that end.[38] Proportionality review is even more strict (if more subjective), adding to the LRM analysis a third prong whereby even if a measure satisfies LRM the court will balance the value of achieving that legitimate aim against its interference with the claimant's right.[39] Finally, U.S.-style "strict scrutiny" represents a maximally searching (or minimally deferential) standard of review, requiring that to survive scrutiny a measure must be both "narrowly tailored to serve a compelling state interest" and also the least restrictive means toward achieving its aim.[40]

Arbitral tribunals have turned to each of these widely varied approaches in grappling with the silence of their underlying treaties. The effect is a state of general uncertainty as to what the standard of review might be from one case to the next — whether the state will be entitled to significant deference in comporting with its treaty obligations, or whether it will be subject to more exacting review. The tribunal's choice of standard thus has serious consequences, and can easily prove decisive in a particular arbi-

37. *See, e.g.*, Methanex Corp. v. United States, UNCITRAL, Final Award on Jurisdiction and Merits (Aug. 3, 2005); *see also* DOLZER & SCHREUER, *supra* note 6, at 141.

38. *See, e.g.*, Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 308, WT/DS285/AB/R (Apr. 7, 2005). Within investment law, see *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 196; Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L.J. 371, 378 (2007).

39. HCJ 2056/04 Beit Sourik Vill. Council v. Government of Israel [2004] (Isr.); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012). In the context of investor-state arbitration, see Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003). Among scholars, Alec Stone Sweet has been a forceful advocate for reliance on proportionality review in the context of investor-state arbitration. *See* Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 76 (2010).

40. *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990).

tration. As the significance of these choices becomes increasingly apparent, the problem of uncertainty is moving rapidly to the forefront.[41] Faced with this state of confusion, a growing number of scholars have sought out a more unified approach to the standard of review, applicable across a wide variety of cases.[42]

The debate about the margin of appreciation in international investment law arises out of this broader problem of identifying an appropriate standard of review in the context of *ad hoc* arbitrations based on thousands of disparate legal instruments.[43] On the one side, advocates have been spurred by a perceived need to expand judicial deference in investor-state arbitration where tribunals are faced with disputes that implicate public law, including, for example, disputes over the effects of fundamental state regulatory policy in areas like the environment, health, or public morals, as well as state action in the context of emergencies.[44] Supporters of the margin in the investor-state context question whether non-national arbitrators ought to pass judgment on the state's domestic regulatory policy. At least in the context of some such "public law" disputes, they argue that a degree of deference is necessary, and that the margin of appreciation represents an appropriate mechanism for achieving the correct balance.[45] Most importantly, they emphasize that the margin approach is suitable *across all kinds of cases*.[46] Burke-White and von Staden stress that the doctrine envisions different degrees of deference in different contexts.[47] According to them, where an investment dispute has a public character, the margin of appreciation allows the arbitrator the flexibility to determine whether a wide or limited degree of deference would be appropriate; and where an arbitration between a state and a foreign investor entails a purely private dispute, no margin should be afforded to the respondent state at all (i.e., the latter is entitled to no deference).[48] On this view, the margin fits better than other standards within investment law because of its characteristic elasticity.

On the other side, several critics reject the margin as inappropriate in the investor-state context — but they have tended to focus on what they

41. In Anthea Roberts's phrase, the issue of the standard of review is likely to prove the next battleground in the theory and practice of international investment arbitration. Anthea Roberts, *The Next Battleground: Standards of Review in Investment Treaty Arbitration*, 16 INT'L COUNCIL FOR COM. ARB. CONGRESS SERIES 170, 172 (2011).

42. *See, e.g.*, Burke-White & von Staden, *supra* note 5, at 286, 333.

43. These instruments include thousands of bilateral and multilateral treaties, as well as contracts and national investment laws.

44. *See* Burke-White & von Staden, *supra* note 5, at 292; Choudhury, *supra* note 5, at 827.

45. *See* Andreas von Staden, *Deference or No Deference, That is the Question: Legitimacy and Standards of Review in Investor-State Arbitration*, INVESTMENT TREATY NEWS, July 19, 2012, at 3, 3–4.

46. Burke-White & von Staden, *supra* note 5, at 286, 323, 333.

47. *Id.* at 305–06.

48. *Id.* at 288.

take to be problems with the notion of deference *as such*.[49] They reject the margin as affording too much deference to respondent states, emphasizing that the purpose of the investor-state arbitral regime is to protect foreign investors from undue interference by host states. These critics portray the margin as a means of giving respondent states a free pass to accomplish indirectly what they cannot do directly.[50] In other words, it enables states to cheat — to take advantage of deference by dressing up mere interference in the clothes of public law (e.g., by engaging in indirect expropriation through dubious environmental measures).[51] Indeed they tend to go further and reject all deference in the investor-state context, advocating instead U.S.-style "strict scrutiny."[52] The criticisms are generally quantitative; the arguments tend to reduce into either the old contention that *any* deference is inappropriate in the context of investor-state arbitration, or that, at any rate, this particular doctrine affords the state *too much* leeway.

In my view, the debate has missed the conceptual core of the problem with importing a doctrine like the margin of appreciation into the *ad hoc* adjudicatory setting. The problem is not that the doctrine affords deference to respondent states *as such*, or that it necessarily entails too much deference. Advocates for the margin raise compelling arguments about the need for deferential standards of review in investment law, at least in some contexts. The deeper problem with the margin is that it entails no particular standard of review. As regards the scope and degree of deference due to national decision-makers, the margin of appreciation is essentially *contentless*. And indeed, as constructed by the ECtHR, the doctrine is contentless by design.

By contrast to the varied standards of review considered above, the margin of appreciation does not entail any concrete linguistic standard or specific test. Unlike review for good faith, reasonableness, LRM, and proportionality, the margin does not inherently imply any particular level of deference to the decisions of national authorities. While it recognizes in principle that some deference is due to respondent states, the doctrine is contentless as to the scope and degree of that deference in the abstract.[53]

49. *See* Kassi D. Tallent, *The Tractor in the Jungle: Why Investment Arbitration Tribunals Should Reject a Margin of Appreciation Doctrine*, *in* 3 INVESTMENT TREATY ARBITRATION & INTERNATIONAL LAW 111 (Ian A. Laird & Todd J. Weiler eds., 2010); Sarah Vasani, *Bowing to the Queen: Rejecting the Margin of Appreciation Doctrine in International Investment Arbitration*, *in* 3 INVESTMENT TREATY ARBITRATION & INTERNATIONAL LAW 137, 162–63 (Ian A. Laird & Todd J. Weiler eds., 2010).

50. *See* Tallent, *supra* note 49, at 113; Vasani, *supra* note 49, at 149.

51. See, for an oft-cited example, Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000) (wherein Mexican authorities declared the region around the claimant's waste disposal facility a protected area for a rare form of cactus on apparently dubious grounds, thereby precluding Metalclad from operating its facilities).

52. *See* Tallent, *supra* note 49, at 113, 134; *see also* Vasani, *supra* note 49, at 149, 162–65 (acknowledging that at least emergency situations "warrant increased scrutiny").

53. At most the Court has pointed to certain factors that it considers relevant to the scope of the

B. Recourse to the Margin of Appreciation

The best way to draw out the indeterminacy inherent in the margin as applied in the context of *ad hoc* arbitration is by comparing the cases — specifically the five awards where the tribunal relied on the doctrine to date: *Continental Casualty v. Argentina*, *Frontier Petroleum v. Czech Republic*, *Electrabel v. Hungary*, *Saluka v. Czech Republic*, and *Micula v. Romania.*[54]

Continental Casualty was one of several arbitrations arising out of the Argentine financial crisis of 2001.[55] Continental, an American company, claimed that Argentina's emergency fiscal measures had interfered with its investment in Argentina (an insurance company named CNA Aseguradora), thereby substantially diminishing its value in violation of several provisions of the U.S.—Argentina BIT (to the tune of roughly $70 million). Argentina argued that its measures were not wrongful because they constituted lawful derogations from the BIT under the "non-precluded measures" clause at Article XI, exempting, *inter alia*, measures "necessary for the maintenance of public order," or the protection of the state's own "essential security interests" from constituting violations of the treaty. For present purposes, the relevant question of the appropriate standard of review arose out of the question of who gets to decide whether or not Article XI applied in the present circumstance — the Tribunal or the respondent state itself (meaning that the clause would be "self-judging" on the question of applicability)? And if the Tribunal, then how much, if any, deference should be afforded to the respondent state?

The Tribunal held that the clause was not self-judging, and that it thus had to determine whether the financial crisis triggered Article XI. In determining the applicability of this derogation clause, however, the Tribunal held that the respondent state should be entitled to a margin of appreciation, citing to the jurisprudence of the ECtHR.[56] In the words of the Tri-

margin in particular cases. In Buckley v. United Kingdom, 25 Sept. 1996, § 74; *Reports of Judgments and Decisions*, 1996-IV, the Court held that "[t]he scope of this margin of appreciation is not identical in each case but will vary according to the context . . . . Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned." *See also* Schalk & Kopf v. Austria, no. 30141/04, § 98, ECHR 2010 (observing that "[t]he scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background."). However, it provides no doctrinal explanation for how it weighs these factors in particular cases.

54. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012); Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006); Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008).

55. *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 53.

56. *Id.* ¶ 181 (citing Jahn & Others v. Germany, nos. 46720/99, 72203/01, 72552/01, ECHR 2005-VI) (further citing Shany, *supra* note 4). The Tribunal notes, in the footnote, that "A certain

bunal, "this objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight."[57]

Rather than impose a strict review, the Tribunal determined that, given the state's margin of appreciation, it would only be appropriate to engage in a relatively deferential LRM analysis, asking only (1) whether the impugned measures were necessary to a legitimate end, and (2) whether these means were the least restrictive measures reasonably available to achieving that purpose.[58] With respect to all but one relatively minor claim, the Tribunal found that Argentina's measures satisfied the LRM test and thus constituted non-precluded measures under Article XI — thereby immunizing the respondent state from liability under the BIT.[59]

Frontier Petroleum involved a much less dramatic kind of dispute. It belongs to a line of cases interrogating the liability of a respondent state for the actions of its judiciary in refusing to enforce a commercial arbitral award between two private parties.[60] Frontier, a Canadian company, claimed that it had made a significant investment in the Czech Republic through a joint venture to manufacture aircrafts with a private Czech company (Moravan).[61] After disputes arose between the two companies, the claimant commenced and won a private commercial arbitration in Stockholm, and sought to enforce the award in the Czech Republic under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[62] The Czech courts refused

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deference to such a discretion [of the respondent state] when the application of general standards in a specific factual situation is at issue, such as reasonable, necessary, fair and equitable, may well be by now a general feature of international law also in respect of the protection of foreign investors under BITs." *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 181 n.270.

57. *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 181.

58. *Id.* ¶¶ 193–95; *see also* Sweet, *supra* note 39, at 73–74.

59. *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 320 (the one exception entailed a comparatively small sum of U.S. $2.8 million, relative to the U.S. $70 million originally claimed).

60. *See, e.g.*, Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award (June 30, 2009); ATA Constr., Indus. & Trading Co. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2000); White Indus. Austl. Ltd. v. Republic of India, UNCITRAL, Final Award (Nov. 30, 2011). *But see* GEA Grp. Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award (Mar. 31, 2011) (finding that a commercial arbitral award does not constitute an investment, and thus that State authority's refusal to enforce any such award is not, on its own, actionable before an ICSID tribunal). *See generally* D. Brian King & Rahim Moloo, *Enforcement After the Arbitration: From National Courts to Public International Law Fora*, *in* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 393, 412–26 (Franco Ferrari ed., 2013).

61. Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 26 (Nov. 12, 2010).

62. The New York Convention provides only very limited grounds for a State to refuse to enforce an arbitral award, one of which is a relatively narrow category of public policy. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 ("Recognition and enforcement of an arbitral award may also be

enforcement as a matter of public policy (one of the few permissible grounds for refusing enforcement under the New York Convention (Article V(2)(b))), citing Moravan's intervening bankruptcy, the need to maintain the equality of creditors in bankruptcy proceedings, and the equitable and orderly distribution of assets.[63] As a measure of last resort, Frontier brought a direct claim against the Czech Republic as an investor under the Canada—Czech BIT, alleging that the Czech authorities' refusal to enforce its commercial award constituted, *inter alia*, a breach of the BIT obligation to afford foreign investors fair and equitable treatment.

The crucial issue implicating the standard of review was how to determine whether the respondent state had actually breached its obligation under the New York Convention, given that it claimed to have refused enforcement pursuant to the valid public policy exception under Article V(2)(b). In the Tribunal's view, this task amounted to determining whether the Czech courts' interpretation of the public policy exception in Article V(2)(b) was "made in an arbitrary or discriminatory manner," or otherwise amounted to a breach of FET.[64] According to the Tribunal in *Frontier Petroleum*, it would not be necessary to determine for itself whether the findings of the Czech courts met the standard of public policy under Article V(2)(b), nor would it be appropriate for it to determine the precise contents of that standard.[65] Instead, it held that "States enjoy a certain margin of appreciation in determining what their own conception of international public policy is."[66] The Tribunal thus limited itself to a highly deferential form of review, asking only whether the Czech courts' interpretation of public policy under the New York Convention was "*reasonably tenable* and made in *good faith*."[67] The Tribunal found no reason to doubt the Czech courts' good faith, and was satisfied with the reasonableness of the courts' interpretation of public policy by evidence that this view was corroborated in French and German national jurisprudence, as well as in academic commentary.[68] The Tribunal thus found no violation of the BIT.

The third case, *Electrabel v. Hungary*, concerned a dispute arising out of Hungary's accession to the European Union (EU), and its subsequent efforts to harmonize its laws with binding EU regulations.[69] In 1995, Hun-

refused if the competent authority in the country where recognition and enforcement is sought finds that: . . . (b) The recognition or enforcement of the award would be contrary to the public policy of that country.").

63. *Frontier Petroleum*, UNCITRAL, ¶ 29.

64. *Id.* ¶ 525.

65. *Id.* ¶ 527.

66. *Id.*

67. *Id.* (emphasis in original).

68. *Id.* ¶¶ 528–30.

69. Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012).

gary caused a then-state-owned power plant operator (Dunamenti) to enter into a power-purchase agreement (PPA) with a separate state-owned energy supply company, guaranteeing the latter's purchase of a large, fixed quantity of electricity from the former. The goal was to make Dunamenti attractive to private, and especially foreign, investment; the PPA would act, in effect, as a lucrative government subsidy. Between 1995 and 2001, the claimant, a Belgian corporation, invested heavily into Dunamenti, presumably to take advantage of the attractive PPA. The most significant dispute arose in connection with Hungary's accession to the EU, in 2004, due to a perceived inconsistency between Dunamenti's preferential PPA and EU regulations prohibiting such subsidies. Hungary ultimately terminated the PPA in 2008 in compliance with a binding order to do so by the European Commission in the form of a "Final Decision."[70] Notably, Hungary declined to challenge the Commission's decision before the EU courts.[71] Electrabel thus brought an ICSID claim against Hungary under the Energy Charter Treaty, contending that the state's termination of the PPA constituted an indirect expropriation and a violation of FET. Though less significant to the overall arbitration, Electrabel further complained of Hungary's reintroduction of regulated electricity pricing in 2006, which the claimant contended violated its legitimate expectations and forced Dunamenti to lower its prices by 40 percent.[72]

The *Electrabel* Tribunal invoked the margin of appreciation at two different points in its analysis. It resolved the bulk of the dispute by determining that Hungary was under an obligation to comply with EU regulations and could not bear international responsibility for complying with any binding orders by the Union under the terms of the ECT.[73] However, the issue of deference arose in relation to two remaining issues: whether Hungary should have challenged the European Commission's Final Decision before the EU courts; and, separately, whether Hungary's reintroduction of regulated pricing in 2006 violated Electrabel's legitimate expectations (and thus FET). First, in resolving whether Hungary should have challenged the European Commission's Final Decision, the Tribunal held that "Hungary was entitled to a *modest* margin of appreciation in arriving at its own discretionary decision in regard to such proceedings, without thereby committing a breach of the ECT's FET standard."[74] The Tribunal went no further in explaining what level of review any such "modest" margin would entail, simply finding Hungary not liable for failing to challenge the Commission's decision.

70. *Id.* ¶ 2.24.
71. *Id.* ¶ 6.92.
72. *Id.* ¶ 2.12.
73. *Id.* ¶ 4.40 (finding that ECT itself envisions compliance with EU regulations).
74. *Id.* ¶ 6.92 (emphasis added).

The Tribunal was somewhat more specific in invoking the margin a second time, later in the case. In assessing Hungary's regulation of electricity prices, the Tribunal held that, at least as regards that particular sector of the economy, "[r]egulatory pricing (by operation of law) was and remains an important measure available to State regulators."[75] As a result, the Tribunal determined that the state enjoyed a "*reasonable* margin of appreciation in taking such measures before being held to account under the ECT's standards of protection."[76] The Tribunal added that its "task is not here to sit retrospectively in judgment upon Hungary's discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith towards Dunamenti at the relevant time."[77] Notably, the Tribunal's language gives pause as to whether it applied the doctrine in the same way in each instance — whether, in other words, a "reasonable" margin of appreciation is the same as a "modest" one. At least in the former case, it seems as though the Tribunal considered the doctrine to call for a review for rational basis and good faith; as for the "modest" version of the doctrine, the reader is simply left wondering.

Two further cases merit brief mention. The first is *Saluka v. Czech Republic*, wherein the Tribunal afforded the respondent state a "margin of discretion" in assessing the compliance of its regulatory action with the Czech—Netherlands BIT provision on expropriation.[78] In relevant part, the claimant complained that the respondent had expropriated its investment in a Czech bank by placing the ailing institution under state administration. Despite the slightly different linguistic formulation, the Tribunal engaged in a similar kind of analysis to the above cases. The Tribunal held that, in view of the bank's financial state, the Czech State "had the responsibility to take a decision," and that it "enjoyed a margin of discretion in the exercise of that responsibility."[79] Given that margin, the Tribunal reviewed only for "clear and compelling evidence that the [Czech banking regulator] erred or acted otherwise improperly in reaching its decision" to put the bank under forced administration.[80] In the absence of any such evidence, the Tribunal considered itself bound to accept the justification given by the Czech authorities.[81]

Finally, in *Micula v. Romania*, the Tribunal invoked the margin of appreciation in assessing the validity of the claimant's acquisition of Swedish nationality. Though born a Romanian national, Micula claimed the right to

75. *Id.* ¶ 8.35.

76. *Id.* (emphasis added).

77. *Id.*

78. Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 272 (Mar. 17, 2006).

79. *Id.*

80. *Id.* ¶ 273.

81. *Id.*

sue Romania under the Sweden—Romania BIT on the grounds that he had both renounced his Romanian nationality and acquired Swedish nationality. Romania challenged his claim to foreign nationality, alleging that the claimant had acquired Swedish nationality through fraud or material mistake of fact.[82] Noting that Sweden was not a party to the dispute, the Tribunal invoked the margin to ground an extremely deferential standard of review. It considered that the "State conferring nationality must be given a 'margin of appreciation' in deciding upon the factors that it considers necessary for the granting of nationality,"[83] and determined under that rubric that it could only disregard the Swedish authorities' decision if there was "convincing and decisive evidence" that the "acquisition of Swedish nationality was fraudulent or at least resulted from a material error."[84]

Taking stock, none of these cases, on their own, seem glaringly problematic. In each instance the Tribunal determined that the state was due a margin of appreciation in a particular context, and accordingly scrutinized its impugned measures under a more or less lenient standard. But viewing the awards side by side, it appears that each of these tribunals adopted very different standards of review under the seemingly consistent rubric of the margin: a somewhat deferential LRM analysis in *Continental Casualty*;[85] a more deferential review for reasonableness and good faith in *Frontier Petroleum*;[86] still lighter review for a mere rational basis and good faith in *Electrabel*;[87] and even more deferential approaches in *Saluka* and *Micula*, with the former reviewing for clear and compelling evidence of regulatory error or other impropriety,[88] and the latter reviewing only for clear and convincing evidence of fraud or material error.[89] The problem is not that any of these tribunals *misapplied* the margin — but rather that the doctrine

82. Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 94 (Sept. 24, 2008). (Sweden was not a party to the dispute).

83. *Id.*, *citing* Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶¶ 62–63 (Jan. 19, 1984).

84. *Micula*, ICSID Case No. ARB/05/20, ¶ 95.

85. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 181 (Sept. 5, 2008).

86. Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 527 (Nov. 12, 2010).

87. *See* Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 8.35 (Nov. 30, 2012) (finding the State entitled to a "reasonable" margin of appreciation, which seemed to require only that the state's determination was "not made irrationally and not exercised in bad faith" — i.e., rational basis review). The *Electrabel* Tribunal indicated in a separate instance that the State was entitled to a differently qualified "modest" margin of appreciation, but left unsaid whether this entailed a weaker standard of review, and if so, what kind of analysis it might have entailed. *Id.* ¶ 6.92.

88. Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 272 (Mar. 17, 2006).

89. *Micula*, ICSID Case No. ARB/05/20, ¶ 94.

itself provides no guidance one way or another as to the appropriate standard of review. While indicating merely that *some* deference is appropriate, these invocations of the margin obscure the deeper issue of *how much*.

Of course these cases did not necessarily all call for the same standard of review. Cases like *Electrabel* and *Saluka* seem to call for the same kind of standard insofar as each tribunal weighed the respondent's justification of its regulatory action as coming under its police power — and it stands out that the one engaged in rational basis review, while the other reviewed only for clear and compelling evidence of error or impropriety. But on the other hand, it seems fairly reasonable that the determination of an absent third state as to nationality would be entitled to substantially more deference than the assessment of a respondent state's invocation of a public policy exception to its treaty obligation to enforce foreign arbitral awards. To be sure, different standards of review may be appropriate in different circumstances. The point is rather that the doctrine of the margin does no work in actually determining what the right standard should be. At least in the context of *ad hoc* investment arbitration, the problem is that the doctrine *appears* to be doing work, but in reality amounts to a mere pseudo-standard — a substitute for real reasoning. In other words, the invocation of the margin of appreciation as a rubric creates a false impression of consistency across cases like *Continental Casualty*, *Frontier Petroleum*, *Electrabel*, *Saluka*, and *Micula*, while obscuring significant differences in the type and degree of deference afforded therein.

The problem comes down to institutions. As indicated above, the margin of appreciation is by no means a useless doctrine in all judicial contexts, even in light of its apparent hollowness. Indeed, in the practice of the ECtHR the doctrine appears to be contentless *by design*; its flexibility is a feature there, not a flaw. The following Part will thus turn to an examination of the margin in Strasbourg, in hopes that a comparison to the operation of the doctrine in its original setting will be instructive as to its poor fit in the context of international investment law.

II. STRASBOURGEOIS DEFERENCE

In comparison to the fragmented international investment regime, the ECHR represents the exemplar of a systematized supranational judicial order. At its pinnacle sits the ECtHR, a standing court charged with the adjudication of human rights disputes between individuals and the 47 parties to the Convention. The ECHR permits individuals to bring direct claims against the states parties — and they do so frequently. Today the

Court's backlog is well over 100,000 cases, and ever growing.[90] All this means that the Strasbourg Court enjoys ample opportunities to interpret (and reinterpret) the rights of the Convention — and it has developed a formidable case law over its sixty-plus years in operation.[91]

While the margin of appreciation is, today, a fixture of the ECtHR's jurisprudence, the Court developed the doctrine only gradually, over the last forty years.[92] The ECtHR first deployed the concept in the 1976 case *Handyside v. United Kingdom* — a case implicating the freedom of expression at Article 10 of the Convention, which expressly admits limitations by the state for purposes of regulating public morals.[93] The question, then, was how much weight to give to the state's own determination that it was acting within the scope of that exception. The case involved the state's seizure, on grounds of obscenity, of several thousand copies of *The Little Red School Book* — a book which encouraged young people to experiment with sex and drugs and otherwise challenge the authority of adult "paper tigers."[94] The Court famously refused to scrutinize the United Kingdom's decision to confiscate the books, declaring the state entitled to a "margin of appreciation" in determining the appropriate contours of the public morals exception in Article 10(2).[95] The Court pointed out that:

> [T]he machinery of protection established by the Convention is *subsidiary* to the national systems safeguarding human rights . . . . The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines . . . . By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle *in a better position* than the international judge to give an opinion on the exact content of [the]

90. As a snapshot, in 2009 alone the Court received 57,200 applications, and the Court's backlog reached 119,300. Council of Europe Press Division, Fact Sheet: Protocol 14, The Reform of the European Court of Human Rights (May 25, 2010), *available at* https://wcd.coe.int/com.instranet.IstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1566940&SecMode=1&DocId=1583116&Usage=2.

91. *See* Arato, *supra* note 14, at 333.

92. Only in the last few years have the parties begun the process of formally codifying the judge-made doctrine, culminated in Protocol 15, opened for signature on April 29, 2013, which provides, *inter alia*, for incorporating a reference to the margin of appreciation in the preamble to the Convention. *See* Protocol No. 15, *supra* note 34.

93. Handyside v. United Kingdom, 7 Dec. 1976, Ser. A no. 24. The exception clause at art. 10(2) states that: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society," including, *inter alia*, "for the prevention of disorder or crime, for the protection of health or morals." ECHR, *supra* note 2, art. 10(2).

94. *Handyside*, §§ 20, 32.

95. *Id.* § 48.

> requirements [of public morals] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.[96]

The key justification for affording deference to the state was thus, at this stage, based on the doctrine of subsidiarity. The idea was that, in those cases where the state was in a better position to determine the line between a qualified right and its exception in light of the "vital forces" of its own country, the Court would defer to the state's interpretation of its obligations under the Convention.

Shortly after *Handyside*, the Court extended the doctrine to states' derogations in the context of national emergencies in the case of *Ireland v. United Kingdom*.[97] The issue here was to assess the state's judgment that it was acting within the meaning of the Convention's general provisions on derogation, permitting states to derogate from the ECHR "in time of war or other public emergency threatening the life of the nation."[98] And here too the Court grounded its answer in the principle of subsidiarity, holding that:

> [b]y reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and the scope of derogations necessary to avert it.[99]

Such deference would not be limitless, but the Court would afford the state a wide berth.[100]

Over the years the Court has dramatically extended and fleshed out the doctrine to encompass its review of state compliance with a wide array of substantive rights of the Convention — not only as a matter of subsidiarity, but increasingly as a means of fostering the rich cultural, political, and legal diversity across the parties to the Convention. In other words, as Benvenisti notes, the doctrine is today largely "based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions."[101] As the modern doctrine stands, the Court will afford states a margin of appreciation as regards their compliance with (most) of

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96. *Id.* §§ 48–49 (emphasis added).

97. Ireland v. United Kingdom, 18 January 1978, § 48, Ser. A no. 25.

98. ECHR, *supra* note 2, art. 15. It is worth bearing in mind the parallel between this situation and Argentina's invocation of the non-precluded measure clause in the Argentina—United States BIT in Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008).

99. *Ireland v. United Kingdom*, § 207.

100. *Id.* ("Article 15 § 1 leaves [national] authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect.").

101. Benvenisti, *supra* note 13, at 843–44. No supporter of the doctrine, Benvenisti goes on to state that the "Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights" and that its use should be curtailed within the ECtHR. *Id.* at 844.

the Convention rights,[102] reviewing their laws, regulations, and measures for conformity to a certain minimum threshold, beyond which the Court will respect the decisions of each state to determine how best to effectuate the right within its borders.

As noted above, the core idea is that the Court will respect the state's determination of its obligations under the Convention — based on subsidiarity or cultural diversity — even if the Court would have itself come to a different decision if presented with the matter de novo. However, it is easier to frame the margin as an abstract principle than to pin down its full doctrinal contours. In practice, the margin represents something of a moving target: unlike typical standards of review, within the ECHR the margin affords national authorities a *variable* level of deference, shifting from right to right, and over time.

In the first place, the Court gives states a wider or narrower space of deference depending on the Convention provision in question — taking into consideration the context and importance of the interests at issue. Speaking in general terms, in *Buckley v. United Kingdom* the Court offered the vague explanation that "[r]elevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned."[103] While such a broad factor-based test tells us relatively little, a closer look at the cases reveals some clear trends. For example, in the context of assessing state measures regarding public emergencies,[104] national security,[105] the protection of public morals,[106] and interference with private property,[107] the Court tends to afford states a

102. The exception being a handful of "absolute rights," for example the prohibition of torture and inhuman and degrading treatment at Article 3 or the prohibition of slavery at Article 4, which entails no qualification and affords no derogation under Article 15. *See* ECHR, *supra* note 2, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"), art. 15(2) ("No derogation . . . from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.").

103. Buckley v. United Kingdom, 25 Sept. 1996, § 74, *Reports of Judgments and Decisions*, 1996-IV; *see also* Schalk & Kopf v. Austria, no. 30141/04, § 98, ECHR 2010 (observing that "[t]he scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background."). However, it provides no doctrinal explanation for how it weighs these factors in particular cases.

104. *Ireland v. United Kingdom*, § 48; Brannigan & McBride v. United Kingdom, 26 May 1993, § 40, §§ 41–43, Ser. A no. 258-B (both cases affording a wide margin to the State's decision to derogate from the Convention "[i]n time of war or other public emergency threatening the life of the nation.").

105. Klass & Others v. Germany, 6 Sept. 1978, Ser. A no. 28 (1978) (concerning a secret surveillance system aimed at combating terrorism).

106. Handyside v. United Kingdom, §§ 48–49, 7 Dec. 1976, Ser. A no. 24.

107. Perhaps of greatest relevance to international investment law, the Court takes a highly deferential approach to the right to property, affording a "wide" margin in cases alleging either a deprivation of, or interference with, private property by the State in violation of ECHR Article 1, Protocol 1 (A1-P1). *See* James & Others v. United Kingdom, 21 Feb. 1986, § 46, Ser. A no. 98 (holding that States enjoy a "wide margin of appreciation" in determining the "public interest" in relation to ex-

"wide" (more deferential) margin. By contrast, the Court has afforded only a "narrow" margin in cases implicating an intimate aspect of an individual's private life.[108]

Moreover, the margin varies over time. The Court augments the size of the member states' margin of appreciation under certain conditions. Most famously, the Court will readjust the breadth of the margin as regards a particular right in view of a new consensus among the member states as to the meaning or scope of the right in question.[109] The Court takes a very broad view of the term "consensus" — meaning really "almost-consensus," or even "emerging consensus," which need not actually include the respondent state in the case at hand.[110]

Similarly, the Court has proven willing to revisit the scope of the margin in view of the convalescence of external rules of international law relating to the particular issue — a respect the Court has extended not only to other rules of international law binding on the parties to the Convention, but also to norms binding on only some of them, unratified treaties, treaties signed by only some of the parties, and even intrinsically nonbinding "soft law" instruments like declarations issued by the International Labor Or-

propriation under A1-P1).

108. Dudgeon v. United Kingdom, 22 Oct. 1981, § 52, Ser. A no. 45 (noting in the context of Northern Ireland's criminalization of forms of sexual conduct between consenting adult males, the State is indeed entitled to some margin of appreciation as regards public morals, but that "[t]he present case concerns a most intimate aspect of private life" and that "[a]ccordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate . . . .").

109. *See* Rasmussen v. Denmark, 28 Nov. 1984, § 40, Ser. A no. 87 ("The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States . . . .").

110. In *Christine Goodwin*, for example, the Court recognized that Article 8 (respect for a private life) may generally entail a wide margin of appreciation, but found that margin defeated in this case on the basis of changing international trends, despite the manifest lack of any clear consensus within Europe. Christine Goodwin v. United Kingdom [GC], no. 28957/95, § 85, ECHR 2002-VI ("The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."); *see* Arato, *supra* note 14, at 336–37 (examining the Court's expansive approach to the doctrine of European consensus); *see also* Georg Nolte, *Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice: Second Report for the ILC Study Group on Treaties over Time*, *in* TREATIES AND SUBSEQUENT PRACTICE 210, 255–59 (Georg Nolte ed., 2013). *But see* A, B, & C v. Ireland [GC], no. 25579/05, §§ 233–37, ECHR 2010 (affording Ireland a wide margin of appreciation in its decision to prohibit abortion in the vast majority of cases despite acknowledging the existence of a clear European consensus to the effect that the right to a private life (Article 8) requires less interference with the right to terminate a pregnancy. The Court emphasized, in particular, "the acute sensitivity of the moral and ethical issues raised by the question of abortion," and the lack of consensus as to the specific question of when life begins). Evidently, the application of the margin is not just variable but largely discretionary, and entails, as Benvenisti notes, no small measure of "judicial politics." *See* Benvenisti, *supra* note 13, at 846.

ganization.[111] As with identifying consensus, the Court leaves itself significant leeway.

Thus the margin of appreciation cannot be properly understood in the abstract. It is not a static doctrine, but an inherently dynamic device that twists and turns through the case law over time. It allows the Court to ensure that the Convention remains responsive to material changes in the legal, political, and social circumstances of greater Europe and beyond. The margin of appreciation must thus be understood in light of the central fact that the ECtHR views itself as the steward of human rights in Europe — charged with overseeing 47 countries, widely diverse in social, economic, legal, and political character.

In sum, as a doctrine of deference, the margin reflects a commitment to subsidiarity. That is, an understanding that the states are the primary guarantors of human rights in Europe, and that the Court should defer to national authorities in areas where they will be more competent (e.g., as regards societal mores or the determination of appropriate responses to a public emergency). The doctrine further reflects a respect for cultural diversity, acknowledging that such different societies as comprise the ECHR membership may legitimately structure and balance their rights protection in different ways;[112] it represents an acknowledgement that there are not always right answers, though of course some answers will always be wrong. But at the same time, the doctrine is dynamic and responsive — reflecting the idea that things change over time, and the minimum threshold of rights protection (or, conversely, the appropriate width of the margin) may adapt and evolve in response.

Viewed on a case-by-case basis, the margin may seem just as arbitrary in the ECtHR as it does in the investment regime.[113] But the doctrine's success lies precisely in the fact that the Court is charged with the adjudication of complaints under the Convention on a *standing* basis. Although the

111. Demir & Baykara v. Turkey, no. 34503/97, ECHR 2008 (narrowing the margin with respect to labor rights under Article 11 on the basis of changing external norms of international law under the auspices of the ILO); *see* Julian Arato, *Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law*, 37 BROOK. J. INT'L L. 349, 371 (2012) (examining the Court's willingness to expand rights protection in light of a broad array of external norms, ranging from international law norms binding on the parties to the ECHR to explicitly non-binding soft law).

112. As Benvenisti notes, this doctrine thus entails a principled moral relativism that is difficult to square with the universalism inherent in the very idea of human rights. *See* Benvenisti, *supra* note 13, at 844. Benvenisti rightly suggests that it is difficult to explain the Court's recourse to the margin without at least in part recognizing the driving force of "judicial politics." *Id.* at 846. This Article takes no position as to whether the margin is ultimately desirable in the context of international human rights adjudication. The point here is only to demonstrate why it *works* in the context of the ECHR — i.e., why it produces (relatively) coherent and sensible jurisprudence, whatever we may think of the outcomes, by contrast to the present (and likely future) arising out of its import into international investment arbitration.

113. *See* Tallent, *supra* note 49; Vasani, *supra* note 49.

margin contains no particular degree of deference in the abstract, the degree of deference entailed gets fleshed out over the long term, through the case law of the Court. And while the degree can change, it tends to shift through coordinated and relatively well-known ways. Even at home, the margin of appreciation certainly has its critics;[114] but at least there these three words reflect a coherent doctrine.

III. DEFERENCE AND DIALOGUE

Variable deference may be appropriate in the context of the ECtHR, where the rationales of subsidiarity, inter-cultural sensitivity, and inter-temporal flexibility make sense and can actually be vindicated. But all this works because the regime entails a single court, charged with the adjudication of disputes against a stable set of parties under a single treaty. Certainty and coherence arise out of case law, and the case law is explicitly responsive to changes of view among the parties. This kind of doctrine works less well in the context of *ad hoc* dispute resolution.

International investment law lacks any centralized system for ensuring jurisprudential consistency, any notion of formal precedent, or even consistent adjudicators. The system — such as it is — is even fragmented at its roots, arising out of myriad discrete treaties, with an infinite diversity of parties. Interpretation of these treaties occurs *ad hoc*, each time on a one-off basis. In this setting, the idea of a flexible margin of appreciation connotes little more than a pseudo-standard. It does no analytical work beyond merely acknowledging that some degree of deference is due. The structure of the regime makes it difficult, if not impossible, for a purposefully variable standard to develop a rich and dynamic structure through case law.

The comparison between these regimes helps to illuminate the deep structural problem with importing the margin of appreciation into investment arbitration. A review of the investment cases already gives rise to an intuition that something is wrong. It seems strange and potentially misleading that applications of the supposedly same doctrine can give rise to such varied standards of review in different, but not altogether dissimilar cases: requiring an LRM analysis here, a reasonableness review there, or a mere rational basis test in a third case.[115] But the problem is not just the fact of

114. *See, e.g.*, Benvenisti, *supra* note 13.

115. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008) (engaging in LRM review); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010) (reviewing for reasonableness and good faith); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012) (reviewing the relevant measure for a rational basis (and good faith)); *see also* Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008) (reviewing only for convincing evidence of fraud or material error); Saluka Investments BV (The

difference. As we have seen, even within the ECtHR, the margin leads to the application of widely varied standards of review in different cases. Indeed such flexibility is a central feature of the doctrine, and the characteristic most strongly emphasized by those advocating its import into the investment regime. The real problem is that the fragmented investment regime lacks the institutional capacity to coordinate the application of this elastic doctrine over time; here the margin of appreciation tends to produce difference *without reason*.

The problem of interpretive cacophony on the question of the standard of review is significant. There is no doubt that the growing uncertainty in this important area, and the increased awareness of such uncertainty, undermines the credibility of the system. But the invocation of the margin by scholars and tribunals reflects the wrong approach to resolving this perennial problem in the diffuse investment regime. The attempt to solve the problem *a priori*, through judicial recourse to an open-textured doctrine sufficiently flexible as to accommodate all kinds of different situations, is set up to fail in a system lacking any unified judicial body capable of streamlining its meaning and contours over time. Absent such *institutional* unity, the margin of appreciation and other doctrines like it will create more uncertainty than they resolve.

In this decentralized regime, the better path to interpretive coherence is the slow road of judicial dialogue across tribunals over the long term. Dialogue among *ad hoc* tribunals is central to the coherence, certainty, and development of international investment law over time — and this centrality is due precisely to the structural fragmentation of the regime belabored above. Absent a unified, hierarchical judicial system, and absent any generally accepted notion of formal precedent (in the sense of *stare decisis*), the vague and varied standards of treatment in investment treaties get worked out only gradually, as tribunals rely on or distinguish one another's interpretations. This path is equally open to attaining greater coherence in approaches to the standard of review, even if the process promises only gradual results.

Most standards are indeterminate in international investment law. Investment treaties contain myriad formulations of broad standards of treatment like FET, or the obligation to refrain from indirect expropriation. Despite marked differences in their phrasings, and even in view of widely varied interpretations by different tribunals, few believe that these standards are today impossibly uncertain.[116] At least at their cores, these

Netherlands) v. Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006).

116. *See* DOLZER & SCHREUER, *supra* note 6, at 134–39 (recounting the long debate among tribunals as to the scope of FET provisions, broadly over whether they merely incorporate the supposedly restrictive international minimum standard of treatment under customary international law, or whether FET clauses entailed a more robust standard autonomous from customary international

standards are relatively stable. But they were not built in a day; rather, these standards have convalesced over time through arbitral practice informed by prior case law. To be sure, there are conflicting lines of jurisprudence, often — but not always — relating to the outer boundaries of these concepts.[117] But conflict and disagreement are essential motors in the process, so long as they are well reasoned rather than papered over. Distinguishing past cases is as valuable a mechanism of judicial dialogue as relying on them. And where the law appears truly in flux, as with standards of review, the best answer is often to wait and see — to wait for tribunals to come to conclusions, test approaches, and compare their views with whatever disparate authorities are available.[118]

Thus the fact that tribunals employ different standards of review in different cases is not necessarily a problem at all. There may have been perfectly good reasons to apply a more searching LRM test in reviewing the state's emergency measures in *Continental Casualty* and a mere rational basis test in determining whether the state was within its rights to reintroduce administrative pricing in *Electrabel*. But even in more similar cases the fact of differences in result is not necessarily a bad thing. It is not necessarily problematic that the tribunals in *Electrabel* and *Saluka* resorted to different standards of review in assessing whether their respective respondents' regulatory actions were non-compensable exercises of the states' police powers; if adequately explained, the fact that one engaged in rational basis review while the other considered a more deferential approach appropriate could help illuminate methodological possibilities as well as the relevant stakes for future disputes, and thereby prompt greater critical reflection going forward. But everything turns on reasoning. Difference can only be

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law). Dolzer and Schreuer note that over time extreme divergence among tribunals on this issue has given way to "growing doubts about the relevance of the whole debate." *Id.* at 138. Most scholars now tend to acknowledge that FET provisions must at least be interpreted in light of customary international law, but at the same time, that the law on the protection of aliens under customary international law has evolved into something more robust than the international minimum standard of the early twentieth century. *See* MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT (2013).

117. For example, tribunals have come to opposite conclusions in interpreting whether the most favored nation clause of the same treaty, the Germany—Argentina BIT, applies only to substantive protections or also allows importation of more favorable procedural protections found in other BITs. *Compare* Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶¶ 102–03, 120–21 (Aug. 3, 2004) (allowing importation of the more favorable procedural structure of the Argentina—Chile BIT, to avoid having to comply with a requirement under the Germany—Argentina BIT to litigate in domestic court for eighteen months before going to arbitration) *with* Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (Aug. 22, 2012) (holding, on exactly the same issue, that the most favored nation provision of the treaty does not allow recourse to more favorable procedural provisions in external treaties, and thus disclaiming jurisdiction).

118. Admittedly this answer may not satisfy litigants in particular cases, but it will likely not surprise anyone either — at least not those with experience within the investor-state arbitral system.

productive where reasons are given. As things stand, the tribunals in *Electrabel* and *Saluka* grounded their choices about the standard of review in only abstract invocations of the margin of appreciation in lieu of any real reasoning — as a consequence, their differences in result appear more or less random.

This concept of dialogue should thus not be equated with the separate idea of de facto precedent in international investment law. Some have emphasized the fact that tribunals do (and should) rely on one another's opinions, not just as a matter of practical reasoning but on the further theory that such opinions should be entitled to some presumptive weight. This view is especially associated with the prolific arbitrator and publicist Gabrielle Kaufmann-Kohler; as arbitrator, she has ensured the inclusion of a paragraph formalizing the idea in several awards. As framed in *Saipem v. Bangladesh*:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[119]

By contrast, I do not mean to suggest that prior awards need necessarily be afforded any precedential *weight*. The point is rather that tribunals ought to draw from previous awards in working out their answers where doing so is helpful. Whether or not tribunals grant authoritative weight to past decisions *because* they are past decisions is distinct from, and arguably less important than, the idea that they should rely on prior awards on the basis of strength of reasoning.

My negative claim is thus that we should avoid turning to broad all-encompassing approaches in seeking to attain greater coherence as regards

119. Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, ¶ 90 (June 30, 2009). This paragraph has become a hallmark of Gabrielle Kaufmann-Kohler and appears often among the many disputes chaired or decided by this prolific arbitrator. *See, e.g.*, Quiborax S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 46 (Sept. 27, 2012) (repeating practically verbatim the above paragraph from *Saipem S.p.A.*); *see also* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT'L 357, 378 (2007); J. P. Commission, *Precedent in Investment Treaty Arbitration: The Empirical Backing*, TRANSNAT'L DISP. MGMT., Sept. 2007, at 6, http://www.transnational-dispute-management.com/article.asp?key=1064. *But see* Brigitte Stern's separate statement in *Quiborax*, indicating that she "does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend." *Quiborax*, ICSID Case No. ARB/06/2, ¶ 46.

the standard of review. Recourse to malleable *a priori* doctrines not found in the treaties runs the risk of undermining dialogue over time, by substituting abstract recitations for real reasoning, and thereby obscuring difference and disagreement. My positive claim is that we can and should count on the process of dialogue to work out the answers in the long term. This means that tribunals ought to simply do their best to determine the right standards in particular cases, in light of (but not necessarily in reliance on) other cases. Of course they need not shy away from deviating from past cases or case lines, even on similar issues, where there appears good reason to do so. But they should above all be very clear in explaining their choices. The system privileges, and indeed necessitates, clarity. In international investment law, an award should be only as persuasive as its reasoning.

A final point bears noting. None of this is to say that the jurisprudence of other international courts and tribunals like the ECtHR bears no relevance to judicial reasoning in international investment arbitration. Dialogue need not be confined among investor-state tribunals. As Schill forcefully argues, the judgments of other international courts and tribunals provide a valuable repertoire of practice from which arbitrators can draw insight and inspiration — including the rich case law of the ECtHR.[120] The same arguably applies to drawing from the reasoning of national courts as they grapple with similar questions in various contexts.[121] Although, as I have argued above, it may be imprudent to try to resolve the problem of standards of review in investment law by lifting a complex, overarching doctrine from a very different standing court, there may be good reason to rely on more precise elements of such a court's reasoning in particular cases.[122]

Even as regards the specific issue of determining the appropriate standard of review, several investor-state tribunals have drawn important insights from the jurisprudence of the ECtHR without having recourse to

120. Stephan W. Schill, *International Investment Law and Comparative Public Law — An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3 (Stephan W. Schill ed., 2010).

121. *Id.*; *see also* Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 392 (2012). *But see* PAPARINSKIS, *supra* note 116, at 19–20, 172–74, 255–56 (voicing healthy skepticism of analogies to domestic public law in the interpretation of standards of treatment in international investment treaties).

122. As Jeremy Waldron forcefully notes, arguing *mutatis mutandis* for the invocation of foreign law by U.S. courts, there is a deep value in examining how others have worked out similar problems in similar contexts — as a matter of practical reasoning, falling short of any kind of doctrine of *stare decisis*. JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 76 (2012) (pursuing two main lines of arguments: first "that we can learn from what other courts are doing when they address questions which are the same or similar to those we are addressing"; and second "the more challenging idea that there may be some virtue in sheer consistency across the decisions of different courts, even for courts belonging to different jurisdictions.").

the doctrine of the margin of appreciation *per se*. For example, in determining how much deference to afford the respondent in *Tecmed v. Mexico*, the Tribunal famously determined that the appropriate standard would be review for proportionality.[123] However, the Tribunal drew important inspiration from the ECtHR in tailoring its proportionality test. The Tribunal noted with approval the European Court's finding in *James v. United Kingdom* that a state should be entitled to a less lenient version of proportionality review where, as in *Tecmed* (and all investor-state arbitration), the state interferes with the property rights of a *non-national*.[124] The Tribunal emphasized the ECtHR's reasoning that:

> [N]on-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.[125]

Whether or not we approve of the ECtHR's argument in *James*, the *Tecmed* Tribunal's use of that argument reflects the right kind of approach to judicial borrowing — based on reasoning rather than abstract doctrines. The *Tecmed* Tribunal drew from *James* because it provided guidance on the specific question of what kind of deference should be afforded a sovereign state in its treatment of foreigners — not because it embodied a convenient and generalizable abstract principle of deference. And indeed, these ideas have since found favor with subsequent investor-state tribunals.[126]

Thus the case law of the ECtHR may have an important role to play as tribunals work out how state action ought to be reviewed in different kinds of investment cases. Advocates of the margin of appreciation approach

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123. Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003).

124. *Id.*

125. James & Others v. United Kingdom, 21 Feb. 1986, § 63, Ser. A no 98, *quoted in Tecmed*, ICSID Case No. ARB(AF)/00/2, ¶ 122.

126. *See, e.g.*, Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 312–13 (July 14, 2006) (citing *Tecmed* and *James* and finding that "these additional elements provide useful guidance for purposes of determining whether regulatory actions would be expropriatory"). Indeed we see this kind of borrowing from the ECtHR frequently, as for example in *Saipem S.p.A.*, where the Tribunal relied on ECtHR jurisprudence in establishing the principle, discussed above, that the setting-aside of or refusal to enforce a commercial arbitral award by a host state's national courts can qualify as a judicial expropriation in violation of an investor's BIT rights. Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, ¶ 130 (June 30, 2009) (relying heavily on the Court's reasoning that a commercial award can count as a "possession" within the meaning of the right to property under the ECHR, so long as the award is final and binding) (quoting and discussing Stran Greek Refineries & Stratis Andreadis v. Greece, 9 Dec. 1994, Ser. A no. 301-B).

are absolutely right, at least, in highlighting the value of that court's extensive jurisprudence toward working out the answers across a wide variety of different circumstances. While adopting the margin of appreciation doctrine wholesale is the wrong way to go, there is still much to be gained from looking at how the ECtHR applies the margin in specific cases.

CONCLUSION

In the absence of a system of appeal or formal precedent, the holdings of an arbitral award are only as persuasive as their underlying reasoning. But as I hope to have shown, this is just where the margin of appreciation falls short as a doctrine. In investment arbitration, the margin tends to be invoked to justify determinations of the standard of review without any substantive explanation of why a particular standard reflects the appropriate degree of deference in a particular context. In each of the cases analyzed, the margin has appeared to yield completely different standards of review; yet we, and future tribunals, are left with little impression as to why. From a reading of *Continental Casualty v. Argentina* and *Frontier Petroleum v. Czech Republic*, it seems as if LRM or reasonableness review simply follow inexorably from the notion of the margin.[127] The same can be said of *Saluka v. Czech Republic* and its review for clear and compelling evidence of error or improper conduct or the review for convincing evidence of fraud or material error in *Micula v. Romania*; and *Electrabel v. Hungary* is even more opaque.[128] Nothing about the margin of appreciation as a doctrine illuminates these variations, nor is any other reasoning presented. The doctrine is, in other words, employed more or less as a cheap substitute for any analysis of the deepest questions: in the face of treaty silence, what standard or standards of review are appropriate in investor-state arbitration? Under what conditions? And for what reasons?

At the same time, the false impression of consistency across cases like *Continental Casualty*, *Frontier Petroleum*, *Electrabel*, *Saluka*, and *Micula*, runs the risk of compounding itself in the future. If such cases are viewed as unproblematic instantiations of tribunals' application of a single doctrine,

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127. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008) (applying a searching LRM analysis); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010) (reviewing for reasonableness and good faith).

128. Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 273 (Mar. 17, 2006); Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008). *Electrabel* applies the margin of appreciation in two instances and in seemingly different ways. Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 6.92, 8.35 (Nov. 30, 2012). The Tribunal afforded Hungary a "reasonable margin of appreciation," again without articulating any particular test under such rubric, or differentiating between a "reasonable" and "modest" margin. *Id.* ¶ 8.35. And it also granted the State a "modest margin of appreciation," without explaining whether and how that might differ from a "reasonable" margin. *Id.* ¶ 6.92.

they risk muddying the analysis in future disputes. The cases we have thus far have come out differently on the key questions, with no explanation as to why. If we pretend that these are all simply applications of a single doctrine, the capacity for confusion and uncertainty will prove staggering.

Thus the import of the margin of appreciation into international investment law does active harm. Absent institutional centralization, the invocation of this open-ended doctrine tends to obstruct that process of dialogue essential to working out a more consistent approach to the standard of review over time. This is not necessarily a problem unique to the margin, but one that the margin produces in an especially severe way. As I hope to have shown, the problem of interpretive fragmentation concerning the standard of review in international investment law will not be readily resolved through an abstract, *a priori* doctrine, no matter how flexible. The better road is, here, the harder road — unity through well-reasoned arbitral practice and judicial dialogue. If this approach abstains from trying to resolve the problem of fragmented approaches to the standard of review in the short run, the reward will be a more coherent, certain, and legitimate approach in the medium to long term.