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"A Margin of Appreciation": Appreciating Its Irrelevance in International Law

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The margin of appreciation is an ill-defined legal concept that some international tribunals have referred to when affording a measure of deference to actions taken by national authorities. As most international tribunals have concluded, however, the margin of appreciation is neither a rule of international law nor a justifiable exercise of adjudicative authority in the vast majority of cases. International law and international adjudication are better served by a more analytically rigorous approach that eschews references to a margin of appreciation; tribunals should be guided by the text, object and purposes of the relevant treaty provisions and applicable rules of international law. Consistent with this analysis, international tribunals have either refused to apply a margin of appreciation or only paid lip service to the concept, while proceeding to conduct an objective review of the state's compliance with its international law obligations.

The Article first considers the origins, early applications and subsequent rejection of the margin of appreciation doctrine by international courts and tribunals, including the International Court of Justice and its predecessor, the Permanent Court of International Justice. Early applications of a margin of appreciation were rare and generally limited to exceptional circumstances where a measure of deference to decisions of national authorities, international organizations or tribunals was mandated by treaty language, object and purpose. Part II then goes on to consider the only context in which the margin has been applied with any frequency—before the European Commission on Human Rights and the European Court of Human Rights. While the application of the margin of appreciation in that setting is subject to significant criticism, its application in the European human rights context is arguably justified by the text, object and purposes of the European Convention on Human Rights and the unique historical, legal and cultural setting in which the Strasbourg bodies operate.

Despite the doctrine's rejection elsewhere, a handful of investment tribunals have transposed the margin of appreciation from the European human rights context into international investment law. Part III argues that, in these few instances, the margin has been applied by tribunals without meaningful explanation of the doctrine's relevance and without regard to the historical development—and limitations—of the doctrine. The Article concludes by arguing, in Parts IV and V, that there is no generally applicable margin of appreciation in international investment law or international law more generally. The Article argues instead for an approach that takes into account the text, object and purposes of investment treaties and gives effect to the rules of international investment law and international law more generally.

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Introduction

It is often observed that, "if all you have is a hammer, then every problem looks like a nail." That adage applies to international investment arbitration, where a few investment tribunals have recently referred to a so-called "margin of appreciation" when determining whether particular governmental measures have violated a host state's international obligations.[1] These references have ignored the historical treatment of the margin of appreciation in other contexts, and have not considered the characteristics—and limitations—of the concept in those contexts. Instead, some tribunals and commentators have mechanically transposed formulations of the margin of appreciation from the European human rights context, producing results that are both erratic and contrary to the texts, objects and purposes of most contemporary investment treaties. These decisions are textbook examples of an obsession with hammers: they allow a fixation on doctrinal artefact to obscure the terms and purposes of applicable treaty provisions, and to divert analysis from the factual specificities of particular governmental measures.

A margin of appreciation was historically applied only rarely, in a limited number of areas of international law, generally with no explanation. These occasional references provide no basis for concluding that the margin of appreciation is a rule of international law or a general principle of law. Moreover, the concept's most recent application outside the human rights and investment contexts was by the International Court of Justice ("ICJ"), in very unusual circumstances, in its *Admissions* Advisory Opinion in 1948.[2] Since then, a margin of appreciation has been almost uniformly rejected by international courts and tribunals, including the ICJ, when determining the legality of state measures under international law. In light of that history, and considerations of sound treaty interpretation and public policy, this Article challenges the legitimacy of the margin of appreciation concept both in the context of international investment law and in international law more generally. It argues that application of the concept has produced inconsistent results which are contrary to the terms of most investment treaties, and that international law instead requires a standard of review that pays closer attention to the text, objects and purposes of individual treaty provisions and applicable rules of international law.

This Article first considers, in Part I, the origins, early applications and subsequent rejections of a margin of appreciation by international courts and

1. The margin of appreciation concept has largely eluded definition. The concept, also referred to as a "liberté d'appréciation" or "margin of discretion," has been described as both "difficult to define" and "not capable of precise formulation." Clovis C. Morrisson, Jr., *Margin of Appreciation in European Human Rights Law*, 6 Revue Des Droits De L'homme 263, 284 (1973). *See also* Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights,* 4 Hum. Rts. Q. 475, 475 (1982).

2. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57 (May 28) [hereinafter *Admission in the U.N.*].

tribunals, including the ICJ and its predecessor, the Permanent Court of International Justice ("PCIJ"). Part I examines the historical settings in which a margin of appreciation was cited, which were rare and limited to exceptional circumstances where a measure of deference to decisions of national authorities, or to international organizations or tribunals, was granted by the applicable treaty provision or rule of international law. In Part II, this Article examines the only context in which the so-called margin of appreciation continues to be applied with any frequency—namely, by the European Court of Human Rights ("ECtHR") in interpreting the European Convention on Human Rights ("ECHR"). Part II of the Article also examines the unique context in which the margin of appreciation has been developed under the ECHR, as well as the controversial and inconsistent application of the concept even within that setting.

Part III of the Article turns to the attempted transposition of the margin of appreciation from the ECHR context into investment law by a few arbitral tribunals and commentators. As with the ICJ and other international courts and tribunals, most investment tribunals have rejected the margin of appreciation as an appropriate standard of review in the investment context. Despite this, in recent years, several tribunals have referred to, or applied, the concept when considering claims under investment treaties or international law. A few commentators have also urged broader application of the concept outside the context of the ECHR.[3] As detailed in Part III, however, the tribunals that have applied a margin of appreciation have done so without cogent explanation of the concept's relevance, articulating inconsistent standards and producing erratic results. Finally, this Article argues, in Parts IV and V, that these decisions are ill-considered and that the concept has no place in either international investment law or in international law more generally. The margin of appreciation is not a rule of general international law, has no basis in the language or objects and purposes of most contemporary investment treaties and cannot sensibly be exported from the European human rights setting where it has been developed.

Instead, this Article proposes an alternative approach to the issues addressed by the margin of appreciation. This alternative approach relies on application of long-standing rules of treaty interpretation in international law, reflected in customary international law codified in the Vienna Convention on the Law of Treaties ("VCLT"). This approach requires application of these rules to the language of individual investment treaties and consideration of the objects and purposes of those treaties, producing results that are tailored to specific provisions of particular treaties or specific rules of international law. The Article concludes by arguing that this approach leaves no

3. *See, e.g.*, Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 34 (2005); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. J. INT'L L. 357, 404 (1998).

room for the transposition of a controversial European human rights concept into either the investment context or international law more generally.

I. Historical Applications of a Margin of Appreciation

The concept of a margin of appreciation has a chequered and unimpressive pedigree. It was first invoked by an *ad hoc* international arbitral tribunal in 1925, with no citation of precedent and no explanation.[4] Subsequently, in the early part of the twentieth century, a few (relatively unusual) decisions of international courts and tribunals applied what was termed a "margin of appreciation," or "freedom of appreciation." In the majority of these cases, a margin of appreciation was mentioned only in passing, without justification, and often with no reasoning. Even when invoked in these early decisions, the margin of appreciation often did not appear to have a material impact on the tribunal's decision. Instead, in most of these cases, the conclusions of the tribunals were explicable by other considerations, such as the scope of discretionary procedural powers of international tribunals and derogations from international obligations for emergency measures.

More recently, international courts and tribunals have consistently rejected a margin of appreciation in favor of a more rigorous standard of review. Beginning with the Nuremberg Tribunal, international tribunals have repeatedly held that a margin of appreciation was unjustified by, and undermined the efficacy of, applicable treaty provisions or rules of international law. As one commentator has observed, the margin of appreciation has been almost entirely "discarded" in international law.[5]

A. Origins: 1925–1950

The first reported reference to a margin of appreciation by an international tribunal was an arbitral award in *Spanish Zone of Morocco Claims* by Max Huber, sitting as a sole arbitrator.[6] Huber's treatment of what later became known as the margin of appreciation illustrates a number of characteristics of the concept's historical development, as well as several of its shortcomings.

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4. British Claims in the Spanish Zone of Morocco (Gr. Brit. v. Spain), 2 R.I.A.A. 617, 629 (1925) [hereinafter *Morocco Claims*]. It has also been suggested that the margin of appreciation originated in French or German administrative law. *See, e.g.*, Howard C. Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence 14–15 (1996); Sean D. Murphy, *Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms that Protect or Benefit Persons?*, *in* The Role of Domestic Courts in Treaty Enforcement: A Comparative Study 61, 76 (David Sloss ed., 2009); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?,* 16 Eur. J. Int'l L. 907, 909 (2006) [hereinafter Shany, *General Margin*]. Although domestic law concepts can inform international law, there is no evidence that these domestic law concepts provided the basis for international applications of a margin of appreciation.

5. *See* Eirik Bjorge, *Been There, Done That: The Margin of Appreciation and International Law*, 4 Cambridge J. Int'l & Comp. L. 181, 181 (2015).

6. *Morocco Claims*, 2 R.I.A.A. at 629.

One issue in *Spanish Zone of Morocco Claims* was whether military measures taken by Spanish authorities in Morocco during a period of civil unrest, which had caused injury to British nationals, gave rise to Spanish liability under the Agreement of 29 May 1923 between Spain and Great Britain. Spain asserted that Article 2 of the Agreement excluded damages caused by Spanish military operations from the arbitrator's jurisdiction. In particular, Article 2 provided that Spain may "argue that such claims are not of their nature arbitrable, and . . . require a decision on this point before each actual claim is examined and any award delivered with respect to the indemnity, if any, to be paid on the account of such claim."[7] Article 2 also provided that, if the arbitrator determined "that these claims are not arbitrable, [Great Britain] will not further press for their submission to arbitration."[8] Citing this language, Spain contended that Article 2 should be interpreted to afford a measure of "appreciation" to decisions made by Spanish authorities regarding the necessity for military measures, arguing that such measures amounted to an "internal affair" falling outside the arbitral tribunal's international jurisdiction.[9] In response, Great Britain argued that both arbitral jurisdiction and international responsibility existed where Spain had been negligent in its conduct.[10]

The reasoning behind Huber's Award is not entirely clear, but he appears to have agreed with Spain, at least in part, that the question of whether its military operations were necessary should be left largely to the appreciation of Spanish authorities. At the same time, Huber also appeared to require a heightened degree of vigilance by national authorities in their exercise of military authority:

> The appreciation of necessity must be left to a large extent to the very people who are called upon to act in difficult situations, as well as to their military leaders. A non-military court, and above all an international court, can only intervene in this area in the event of manifest abuse of that margin of appreciation [*liberté d'appréciation*]. That being said, one must also recognise that the State must exercise higher vigilance for the purposes of preventing offences committed in breach of military discipline and law by persons belonging to the army.[11]

As the text of his Award suggests, Huber attached importance to his view that domestic military authorities possessed greater expertise than an international tribunal regarding the need for military operations in particular circumstances. Huber also suggested that the terms of the 1923 Agreement

7. *Id.* at 620–21.
8. The Agreement of 29 May 1923 is annexed to the award. *Id.*
9. *Id.* at 629, 639, 645.
10. *Id.* at 639.
11. *Id.* at 645.

contemplated that a "subjective element of appreciation" be granted to the Spanish authorities when reviewing the legality of their military operations.[12]

Huber cited no authority to justify these references to a "*liberté d'appréciation*" or "element of appreciation." Moreover, despite apparently accepting the principal aspects of Spain's argument, by holding that he was according Spain a "considerable margin" of "subjective" appreciation, Huber proceeded to review each of the claims submitted by Great Britain, requiring the "higher vigilance" standard referred to in his Award, when deciding whether there had been a wrongful expropriation by Spain, and, if so, the amount of compensation due.[13]

Huber's understanding of the "element of appreciation" that he cited is ultimately unclear. On the one hand, Huber concluded that Spain's military measures were subject to the tribunal's jurisdiction and to the limitations of the 1923 Agreement and cited "precedents found in international jurisprudence." On the other hand, Huber also interpreted the 1923 Agreement to provide for a substantial measure of deference to Spain's judgments regarding the necessity for military measures when determining substantive liability, while simultaneously demanding "higher vigilance" by Spain in its exercise of military authority. Even with a century's hindsight, the intended meaning and consequences of Huber's margin of appreciation remain unclear—a characteristic of the margin of appreciation that subsequent decisions have done little to alter.[14]

A margin of appreciation was invoked later the same year as Huber's Award (1925), in *Affaire de la dette publique ottomane*, where another sole arbitrator granted what his award termed a "*liberté d'appréciation*" to a decision of the Council of the Ottoman Public Debt in a dispute under the Treaty of Lausanne.[15] The Treaty's provisions required the Council to calculate the Ottoman public debt, and set out a number of principles that the Council was obliged to follow when determining the share of each state party to the Treaty in the annual charges of that debt. In particular, Article 51 of the Treaty provided for this share to be calculated based on the average total revenue of the Ottoman Empire. Without reference to Huber or other authority, the sole arbitrator held that Article 51 should be interpreted to afford the Council a measure of discretion in determining the Empire's average total revenue and making its accounting assessments under the Treaty.[16]

12. *Id.* at 640.

13. *Id.* at 645.

14. Huber also provided little explanation for why he applied a margin of appreciation. As noted above, his Award only alluded in passing to the assertedly superior expertise of Spanish military authorities (compared with an international tribunal) and to the intentions of the drafters of the 1923 Agreement. *Id.*

15. Affaire de la dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grece, Italie et Turquie), 1 R.I.A.A. 529, 567 (1925) [hereinafter *La dette publique ottoman*].

16. *Id.*

The decision appears to reason that the Council's accounting calculations under the Treaty inevitably called for the exercise of judgment by the Council, which the arbitrator should not second-guess. Like Huber's Award in *Spanish Zone of Morocco Claims*, the arbitrator's analysis provided no explanation of the basis or scope of this *"liberté d'appréciation*, and nowhere suggested the existence of any general margin of appreciation doctrine, applicable outside the context of accounting judgments of the Council under the Treaty.

An express reference to a margin of appreciation did not appear in international law until a decade later in the decision of the PCIJ in the *Lighthouses Case between France and Greece.*[17] One of the issues that arose in the *Lighthouses Case* was at least superficially similar to that in *Spanish Zone of Morocco Claims*—whether measures taken by the respondent state were an "urgent necessity" in the circumstances. (The issues in the *Lighthouses Case* differed from those in *Spanish Zone of Morocco Claims* because they did not involve the defense of necessity under international law, but instead concerned the necessity of the challenged measures under municipal Ottoman law.[18]) In resolving this issue, the PCIJ in the *Lighthouses Case* invoked a margin of appreciation in holding that it was precluded from examining the validity of the Ottoman Government's exercise of its domestic constitutional powers. More generally, the PCIJ justified this deference by reasoning that the respondent state was better "qualified" to "appreciat[e] political considerations and conditions of fact" in determining what measures were necessary in particular circumstances under the Ottoman Constitution:

> [A]ny grant of legislative powers generally implies the grant of a discretionary right to judge how far their exercise may be necessary or urgent . . . . It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the . . . situation, is alone qualified to undertake.[19]

Like Huber's first reference to a margin of appreciation, the PCIJ did not suggest any broader application of the concept beyond the circumstances in the *Lighthouses Case*.

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17. Lighthouses Case between France and Greece (Fr. v. Greece), Judgment, 1934 P.C.I.J. (ser. A/B) No. 62, ¶ 22 (Mar. 17) [hereinafter *Lighthouses Case*]. In an earlier decision, the PCIJ considered there to be a measure of "discretion in the appreciation of circumstances" for nationals in Upper Silesia when exercising their right to under the German-Polish Convention of 15 May 1922 to decide the language of a pupil or child for whom they are legally responsible. Nonetheless, the PCIJ considered there to be limitations on this discretionary right. *See* Rights of Minorities in Upper Silesia (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15, ¶ 130 (Apr. 26).

18. The *Lighthouses Case* required the PCIJ to consider the validity of a contract renewing a concession for the maintenance of lighthouses in the Ottoman territory under Ottoman law, particularly with respect to the power of the Ottoman Government to make laws in times of "urgent necessity" under Article 36 of the Ottoman Constitution. *Lighthouses Case*, 1934 P.C.I.J. (ser. A/B) No. 62, ¶ 70.

19. *Id.* ¶ 73.

In 1948, the ICJ's *Admissions* Advisory Opinion adopted language, and an analysis, that was, on its face, similar to that of Huber and the PCIJ. In considering the standards for admission of a state to United Nations ("U.N.") membership, the ICJ interpreted Article 4 of the U.N. Charter to grant U.N. Members "a wide liberty of appreciation" in the exercise of their voting rights on admission to U.N. membership.[20] The ICJ declared: "[t]o ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution. In this case, the limits of this freedom are fixed by Article 4 and allow for a wide liberty of appreciation [*une large liberté d'appréciation*]."[21]

The ICJ did not explain the content of this "*large liberté d'appréciation*" and provided no discussion of the source or basis for the concept. Moreover, as with Huber's Award in *Spanish Zone of Morocco Claims* and the PCIJ's decisions in the *Lighthouses Case* and *Acquisition of Polish Nationality*, the ICJ's reference to a margin of appreciation was limited to a specific context involving the exercise of political discretion by states under one provision of the U.N. Charter.

A margin of appreciation was also applied in a few instances in the early twentieth century by international courts and tribunals when considering their procedural powers. In its Advisory Opinion on the *Acquisition of Polish Nationality*, the PCIJ held that it had a "*liberté d'appréciation*" in exercising its procedural power to permit third party states to participate in the Court's proceedings.[22] In the PCIJ's words: "[t]he Roumanian Government . . . informed the Court . . . that it desired to be allowed to furnish information during the hearings . . .. The Court, using the discretionary powers [*liberté d'appréciation*] which it possesses in the case of Advisory Opinions, at once deferred to the desire thus expressed . . .."[23] Likewise, the Franco-Mexican Commission concluded in the *Georges Pinson* arbitration that it had a complete "*liberté d'appréciation*" in assessing the admissibility and weight of evidence.[24]

A margin of appreciation was also invoked twenty-five years later in relation to challenges to the jurisdiction of the Anglo-Italian Conciliation Commission in *Différend S.A.I.M.I. (Società per Azioni Industriale Marmi d'Italia)*. The Commission reasoned that the relevant treaty afforded it a "freedom of appreciation" in deciding challenges to its own jurisdiction and applying

20. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 64 (May 28).

21. *Id.*

22. Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, ¶ 9 (Sept. 15).

23. *Id.* ¶ 8.

24. Georges Pinson v. United Mexican States (Fr. v. United Mexican States), 5 R.I.A.A. 327, 412–13 (1928).

the terms of the relevant treaty (including determining the ownership of property).[25] In the Commission's words:

> [I]n the case of a dispute submitted to the Commission, the latter is the only one qualified to say who is the owner pursuant to the Treaty . . . [O]therwise the Conciliation Commission would be obliged for each case to refer to the prior decisions of the domestic law courts of each state, thus alienating the freedom of appreciation [*liberté d'appréciation*] accorded to [the Commission] by the treaty and subordinating [its] decisions to those same courts.[26]

The Commission's conclusion, while termed a "freedom of appreciation," is more conventionally (and accurately) characterized as a straightforward exercise of competence-competence, where a tribunal or court has the authority to consider and decide on its own jurisdiction.[27]

In sum, the margin of appreciation is of comparatively recent vintage in international law, apparently first being invoked, without citation of authority, by a sole arbitrator in 1925. Thereafter, the concept was used sparingly by international courts and tribunals in the first half of the twentieth century, appearing in only a handful of reported international decisions. As detailed above, a margin of appreciation was applied in widely disparate contexts, for equally varied purposes, including to restrict the examination of the legality of measures under international law in the context of the defense of necessity; to limit review of the validity of governmental measures under a state's domestic constitutional law; to confirm the scope of international tribunals' procedural, evidentiary and jurisdictional authority; and to underscore the discretionary powers of international organizations.

In the majority of these early references, the margin of appreciation was only mentioned in passing, often without elaboration and with no (or unclear) reasoning. The justification for the concept was almost always unexplained and, in any event, it typically did not appear to have a material impact on the outcome of the decision. Instead, in most of these decisions, the conclusions of the tribunal were independently justified by other considerations (such as treaty language, an international tribunal's inherent procedural discretion or competence-competence, an international organization's discretionary powers, or a state's freedom to interpret its own domestic law). There is little, if anything, in this historical record to suggest that the mar-

25. Différend S.A.I.M.I. (Società per Azioni Industriale Marmi d'Italia) – Décisions Nos 4, 11, 19, 38 et 70, 8 R.I.A.A. 43, 45 (1948–1950) (quote translated by author).

26. *Id.* at 45.

27. *See generally* Gary Born, International Commercial Arbitration (Kluwer Law Int'l, 2d ed. 2014); Antonias Dimolitsa, *Separability and Kompetenz-Kompetenz*, *in* Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 217 (Albert Jan van den Berg ed., 1999); John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 Vand. J. Transnat'l L. 1115 (2003); Francisco González de Cossío, *The Compétence-Compétence Principle, Revisited*, 24 J. Int'l Arb. 231 (2007).

gin of appreciation enjoyed the status of a general principle or rule of international law. Rather, the concept was rarely invoked and, when it was, the language and purposes of the relevant treaty or rule of international law provided a satisfactory, independent explanation for the tribunal's decision.

B. Reassessment: 1950–2019

Despite the foregoing decisions, the overwhelming majority of more recent decisions by international courts and tribunals have refused to apply a margin of appreciation.[28] The turning point was the Nuremberg trials, where the International Military Tribunal refused to defer to the judgment of German authorities as to whether measures taken by Germany in alleged self-defense during World War II were "necessary." The Tribunal rejected the defendants' argument that the determinations of German authorities as to what constituted a necessary measure of self-defense were entitled to deference.[29] Instead, it held that "whether the action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[30] This was a significant departure from the stated terms of Huber's approach in *Spanish Zone of Morocco Claims* and other formulations of the margin of appreciation, according to which "[t]he appreciation of necessity must be left to a large extent to the very people who are called upon to act in difficult situations, as well as to their military leaders."[31]

Similarly, sixty years later, the ICJ in *Oil Platforms* refused to apply a margin of appreciation in the context of claims of unlawful use of force under international law.[32] In *Oil Platforms*, the United States argued that the Court should afford states a "very wide margin of appreciation" or "measure of discretion," akin to that afforded by the ECtHR under the ECHR, when determining whether circumstances pose a threat to essential security interests and what means are necessary to protect those interests.[33] The United

28. Outside the investment and human rights contexts discussed below, there have been only a handful of instances in which a "margin of appreciation," or "appreciation," was referred to, or granted by, international courts and tribunals after the Nuremberg trials. As with earlier decisions by the PCIJ and other international tribunals, these were limited to specific circumstances where the relevant treaty provisions arguably prescribed a measure of discretion. U.N. Secretary-General, Observations of the Eritrea-Ethiopia Boundary Commission, U.N. Doc. S/2003/257/Add.1, ¶ 8 (March 21, 2003); Delimitation of Abyei Area (Sudan v. Sudan People's Liberation Movement/Army), Award, 30 R.I.A.A. 145, ¶¶ 401–11, 661 (Perm. Ct. Arb. 2009); Heathrow Airport User Charges (U.S. v. U.K.), Award, 24 R.I.A.A. 1, ¶¶ 2.2.6, 11.1.35, 11.4.10, 11.7.37 (Perm. Ct. Arb. 1993).

29. Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, Judgment, 41 Am. J. Int'l L. 172, 207 (1947) [hereinafter *Nuremberg Judgment*].

30. The Nuremberg Tribunal also noted that the defendants had provided no evidence that their measures were defensive. *Id.*

31. British Claims in the Spanish Zone of Morocco (Gr. Brit. v. Spain), 2 R.I.A.A. 617, 645 (1925).

32. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6) [hereinafter *Oil Platforms*].

33. *Id.* ¶ 73. *See also id.* ¶ 13; Rejoinder Submitted by the United States of America, Oil Platforms (Iran v. U.S.), ¶¶ 4.25–4.27, 4.30 (Mar. 23, 2001), https://perma.cc/PP3B-XSPL [hereinafter *Oil Platforms* Rejoinder].

States also argued that the principle of good faith should allow domestic authorities a "wide area of latitude" or "fair degree of freedom of action in interpreting and applying the terms of the treaty-obligation."[34] The ICJ rejected these arguments, holding that neither the applicable treaty, nor international law provided for the margin of appreciation cited by the United States;[35] the Court instead concluded that "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for a 'measure of discretion.'"[36]

The ICJ went on to apply the "strict and objective test" and determine whether the necessity requirement was satisfied on the facts of the case. In doing so, the Court afforded no deference to the United States' decision to engage in acts of asserted self-defense. Instead, the ICJ objectively examined the circumstances prevailing when the U.S. measures were taken, before concluding that the challenged measures were neither necessary nor proportionate.[37] Judge Simma's separate opinion reiterated this point: "I also strongly subscribe to the view of the Court . . . according to which the requirement of international law that action avowedly taken in self-defence must have been necessary for that purpose, is strict and objective, leaving no room for any 'measure of discretion.'"[38]

Most recently, in *Whaling in the Antarctic*, the ICJ again refused to grant any margin of appreciation, this time when interpreting Article VIII of the International Convention for the Regulation of Whaling ("Whaling Convention"). The Whaling Convention provides a limited exception for scientific research to an otherwise applicable moratorium on commercial whaling. Article VIII of the Convention allows state parties to grant research permits "subject to such restrictions as to number and subject to such other condi-

34. *Oil Platforms* Rejoinder, ¶¶ 4.24, 4.27.

35. *Oil Platforms*, 2003 I.C.J. ¶ 73. Earlier, in Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua Military Activities*], the Court refused to read a security interests exception in the U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation as a "self-judging" provision that permitted states unilaterally to determine the exception's applicability. The ICJ contrasted the Treaty's text (providing an exception for measures which are "necessary to protect . . . essential security interests") with that of the General Agreement on Tariffs and Trade ("GATT") (providing in Article XXI for an exception for measures that a state "considers necessary"), concluding that the former did not leave room for a purely "subjective judgment" by the state concerned while the latter did. *Id.* ¶¶ 222, 282. *See also* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 51 (Sept. 25) (holding that the treaty between Hungary and Slovakia did not provide for deference to the state's judgment regarding "ecological necessity"); Stephen Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 Max Planck Y.B. U.N. L. 61 (2009).

36. *Oil Platforms*, 2003 I.C.J. ¶ 73. *See also* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 225, ¶ 48 (Nov. 6) (separate opinion by Higgins, J.) ("[The] Court should next have examined — without any need to afford a 'margin of appreciation' — the meaning of 'necessary'. . . it could certainly have noticed that, in general international law, 'necessary' is understood as incorporating a need for 'proportionality'.").

37. *Oil Platforms*, 2003 I.C.J. ¶¶ 76–78.

38. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 324, ¶ 11 (separate opinion by Simma, J.).

tions as the Contracting Government thinks fit."[39] When Japan's whaling program was challenged by Australia, Japan invoked a margin of appreciation, claiming that it was "in the best position to evaluate a programme intended for purposes of scientific research," and that it enjoyed "a margin of appreciation" under Article VIII when issuing research permits.[40] The ICJ rejected this argument, refusing to defer to Japan's determination of whether the permits were for scientific research, and instead requiring Japan "to explain the objective basis for its determination"[41]:

> Article VIII gives discretion to a State party to the [Whaling Convention] to reject the request for a special permit or to specify the conditions under which a permit will be granted. However, whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State's perception.[42]

Adopting an approach like that of the Nuremberg Tribunal and its own earlier decision in *Oil Platforms*, the Court applied an objective standard of review under Article VIII. The Court's analysis involved a rigorous two-part examination of, first, whether Japan's whaling program involved scientific research and, second, whether Japan's use of lethal methods was reasonable in achieving the program's stated objectives. The ICJ emphasized that "[t]his standard of review is an objective one."[43]

In considering whether Japan's program involved "scientific research," the Court refused to accept the state's unilateral determination and conducted its own review, concluding that Japan's program did constitute a "scientific research" project.[44] The Court then assessed whether the program's design and implementation were objectively reasonable in relation to achieving its scientific purposes.[45] Applying this standard, the ICJ concluded that Japan had failed properly to consider the feasibility of non-lethal methods as a means of achieving its program's objectives. According to the Court, there was

> no evidence that Japan ha[d] examined whether it would be feasible to combine a smaller take (in particular, of minke whales) and

39. Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Judgment, 2014 I.C.J. 226, 252 (Mar. 31).

40. *Id.* Japan claimed that the margin of appreciation was an "axiom of international law and relations" and that Article VIII of the Whaling Convention afforded Contracting States a "power of appreciation with respect both to the need for research and the conditions attached to permits." Counter-Memorial of Japan, Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), ¶ 9.16, 61 (Mar. 9, 2012); Written Observations of Japan on the written observations submitted by New Zealand, Whaling in the Antarctic (Austl. v. Japan, N.Z. intervening), ¶¶ 54, 66, 70 (May 31, 2013).

41. *Whaling in the Antarctic*, 2014 I.C.J. ¶ 68.

42. *Id.* ¶ 61.

43. *Id.* ¶ 67.

44. *Id.*

45. *Id.*

> an increase in non-lethal sampling as a means to achieve JARPA II's research objectives. This absence of any evidence pointing to consideration of the feasibility of non-lethal methods was not explained.[46]

Based on that assessment, the Court held that Japan had breached the Whaling Convention.[47]

As these and other decisions[48] demonstrate, the clear weight of contemporary international authority not only does not support, but instead affirmatively rejects, the margin of appreciation as a general rule of international law. Even where there has arguably been a basis for invoking the margin of appreciation, such as treaty language conferring a discretionary power on state parties, international courts and tribunals in recent decisions have refused to apply a margin of appreciation.[49] Instead, they have concluded that an objective standard of review of the conformity of state actions with international law is required, which as a general matter affords the judgments of national authorities no margin of appreciation or similar standard of deference. This historical record does nothing to suggest that a state is entitled to a margin of appreciation as a general rule of international law. On the contrary, it argues strongly against that proposition.

II. The Resurrection of the Margin of Appreciation: Decisions Under the European Convention on Human Rights

Notwithstanding its fate elsewhere, the margin of appreciation has received more favorable treatment in a number of decisions[50] by the European

46. *Id.* ¶ 141.

47. *Id.* ¶ 247, 254, 258, 260.

48. No recent decision of the ICJ refers to a margin of appreciation (with the possible exception of decisions dealing with self-judging treaty clauses or consular assistance cases). *See, e.g.*, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 282 (June 27) ("[W]hether a measure is necessary to protect the essential security interests of a party is not . . . purely a question for the subjective judgment of the party; the text [of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua] does not refer to what the party 'considers necessary' for that purpose."); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 73 (Nov. 6); Gabèíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 51 (Sept. 25) ("[T]he state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation . . . [T]he state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met."); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 140 (July 9); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 177 (Apr. 20). *See also* Chiara Ragni, *Standard of Review and the Margin of Appreciation Before the International Court of Justice*, *in* Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation 1 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

49. Ragni, *supra* note 48.

50. Estimates vary, but the margin of appreciation has been referred to in over 700 ECtHR decisions, as well as a large number of Commission decisions. Steven Greer, The Margin of Appreciation:

Commission and its successor, the ECtHR, under the ECHR.[51] Even in this context, however, the development and application of the margin of appreciation concept has been inconsistent and has given rise to vigorous debates as to the concept's legitimacy and usefulness.[52] Moreover, the concept has not been accepted in other human rights contexts, including the Inter-American Convention on Human Rights, African Charter on Human and Peoples' Rights, and International Covenant on Civil and Political Rights ("ICCPR").[53]

INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2000).

51. The margin of appreciation is to be incorporated into the ECHR by Protocol No. 15, opened for signature in June 2013, which amends the preamble of the Convention to include a new recital:

> [T]he 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. . . . [I]n doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

Protocol No. 15 will enter into force as soon as all the state parties to the Convention have signed and ratified it. Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, June 24, 2013, 213 C.E.T.S. 1, art. 1.

52. *See, e.g.*, Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards,* 31 N.Y.U. J. INT'L L. & POL. 843 (1999); Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law,* 11 COLUM. J. EUR. L. 113 (2004); Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights,* 23 HUM. RTS. Q. 625 (2001); Oren Gross, *Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437 (1998); Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1976); Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights,* 48 INT'L & COMP. L. Q. 638 (1999); Susan Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights,* 15 OXFORD J. LEGAL STUD. 69 (1995).

53. The Inter-American Commission and Court on Human Rights have referred to the margin of appreciation on a few occasions, citing ECtHR decisions. *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, ¶ 36 (Jan. 19, 1984) [hereinafter *Costa Rica Advisory Opinion*]. Nonetheless, the concept has generally not been applied by either the Inter-American Commission or Inter-American Court, and has been rejected by a judge of the Inter-American Court. *See* ANTONIO AUGUSTO CANCADO TRINDADE, EL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS EN EL SIGLO XXI 386–87 (2006). Similarly, although the African Commission has occasionally referred to a margin of appreciation, the Commission more recently refused to accept that this should "[oust] the African Commission's mandate to monitor and oversee the implementation of the African Charter" or otherwise justify a "hands off approach by the African Commission." Garreth Anver Prince v. South Africa, Decision, Comm. No. 255/2002, ¶¶ 51-53 (Dec. 7, 2004). The U.N. Human Rights Committee has also referred to a "margin of discretion" for national authorities, but in later decisions held that the Committee would not apply the margin of appreciation (even though there is an express reference to the margin of appreciation in the *travaux préparatoires* of the ICCPR). *See, e.g.*, Länsman v. Finland, Views of U.N. Human Rights Committee, Comm. No. 671/1995, ¶ 10.5, U.N. Doc. CCPR/C/58/D/671/1995 (Aug. 28, 1995); Länsman v. Finland, Views of U.N. Human Rights Committee, Comm. No. 511/1992, ¶ 9.4, U.N. Doc. CCPR/C/52/D/511/1992 (June 11, 1992); Hertzberg v. Finland, Views of U.N. Human Rights Committee, Comm. No. 61/1979, ¶ 103, U.N. Doc. A/37/40 (Apr. 2, 1982); U.N. Human Rights Committee, General Comment No. 34, ¶ 16, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011); Draft International Covenants on Human Rights: Report of the 3rd Committee, ¶ 49, U.N. Doc. A/5655 (Dec. 12, 1963). For discussion, *see also* ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 13 (2012); Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 695 (1999); Yuval Shany, *All*

As applied under the ECHR, the margin of appreciation has sometimes been described as a "form of legal discretion" that allows national authorities a margin of error or latitude in imposing measures that impinge upon protected human rights.[54] It has also been termed a "doctrine of judicial self-restraint,"[55] or a rule of deference applied to ensure that the Strasbourg bodies "will not fully scrutinize decisions made by national authorities."[56] Similarly, the concept has been characterized as providing "elbow room" for State Parties or establishing "the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws."[57] When applied, the ECtHR's margin of appreciation generally allows for a substantial, if ill-defined and varying, presumption in favor of the propriety of measures imposed by a state. As discussed below, the jurisprudence of the Strasbourg bodies also leaves little question that the margin of appreciation has been erratically applied, with its content and rationale varying significantly from case to case.[58] In the words of one sympathetic commentator, "in spite of the mountain of jurisprudence, [the concept's] most striking characteristic remains its casuistic, uneven, and largely unpredictable nature."[59]

Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Humans Rights and the UN Human Rights Committee, 9 J. Int'l Disp. Settlement 180, 181 (2018) [hereinafter Shany, *Strasbourg*].

54. *See* James Crawford, Brownlie's Principles of Public International Law 666 (2012); Legg, *supra* note 53. *See also* Eirik Bjorge, Domestic Application of the ECHR: Courts as Faithful Trustees 178 (2015); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 Oxford J. Legal Stud. 705, 707, 720–27 (2006).

55. *See, e.g.,* Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR 229 (2004); Yourow, *supra* note 4, at 165, 187; Ronald St. J. Macdonald, *The Margin of Appreciation*, *in* The European System for the Protection of Human Rights 78 (Ronald St. J. Macdonald et al. eds., 1993); Clovis Morrisson, *Margin of Appreciation in European Human Rights Law*, 6 Revue Des Droits De L'homme 263, 275 (1973).

56. Yourow, *supra* note 4, at 13; Letsas, *supra* note 54, at 707.

57. Yourow, *supra* note 4, at 13.

58. Commentators describe the margin of appreciation as "difficult to define," "not capable of precise formulation," and "as slippery and elusive as an eel." Lord Lester of Herne Hill, *Universality Versus Subsidiarity: A Reply*, 1 Eur. Hum. Rts. L. Rev. 73, 75–76 (1998); Morrisson, *supra* note 55, at 284; Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights,* 4 Hum. Rts. Q. 475, 475 (1982); *see also* MacDonald, *supra* note 55, at 85. One commentator has attempted to identify different strands of the margin of appreciation, distinguishing instances in which the ECtHR has afforded "deference" to national decision-making from instances in which it has recognized a measure of "discretion" in the underlying obligation. *See generally* Jeanrique H. Fahner, *The Margin of Appreciation in Investor-State Arbitration: The Prevalence and Desirability of Discretion and Deference*, 2013 Hague Y.B. Int'l L. 422. Fahner defines deference as respect for national decision-making on the basis of a division of competence between international judicial authorities and national institutions. *Id.* at 433–34. Discretion, in contrast, is based on a state's freedom, under a particular rule of international law, to choose among legitimate alternative courses of action. *Id.* at 431–33. Using this distinction, Fahner argues that discretion may be appropriate in investment arbitration but deference is not. As discussed below, investment tribunals and other authorities have generally not adopted this distinction in their analysis. *See infra* Part III.

59. Greer, *supra* note 50, at 5 ("[N]o simple formula can describe how it works.").

As discussed below, a variety of justifications have been advanced for the margin of appreciation in the European human rights context. One asserted rationale given by the Court is the primacy of national authorities under the ECHR and the "subsidiary" nature of the ECHR's international courts, holding that "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights."[60] The Court "cannot interfere with the choices of the national and local authorities, which are closer to the realities of their country [otherwise it would] lose sight of the subsidiary nature of the Convention system,"[61] which "leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines."[62] The Court has explained that "[b]y 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 ECHR] requirements" as well as on the "necessity" of state measures.[63] The apparent reasoning behind the application of this European law concept of "subsidiarity" is that national authorities have greater technical expertise or factual knowledge of relevant circumstances, thereby warranting deference to the judgments of these authorities.[64] Other ECtHR decisions also cite the asserted democratic legitimacy of measures taken by European member states, which are in more direct contact with local populations than the Strasbourg bodies: "The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions."[65] These justifications rest on the unique relationship that the Strasbourg organs share with the European member states under the ECHR, in which the ECtHR has a particular de-

60. Handyside v. U.K., 24 Eur. Ct. H.R. (ser. A), ¶ 48 (1976) [hereinafter *Handyside*] ("The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. . .. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines."). *See generally* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 Am. J. Int'l L. 38 (2003); Philip Sales, *Proportionality and the Margin of Appreciation: Strasbourg and London*, *in* General Principles of Law: European and Comparative Perspectives 179 (Stefan Vogenauer & Stephen Weatherhill eds., 2017); Sarah Vasani, *Bowing to the Queen: Rejecting the Margin of Appreciation Doctrine in International Investment Arbitration*, *in* 3 Investment Treaty Arbitration and International Law 137, 166–67 (Ian A. Laird & Todd J. Weiler eds., 2010).

61. Mouvement Raëlien Suisse v. Switzerland, 2012-IV Eur. Ct. H.R. 373, ¶ 64.

62. *Handyside*, 24 Eur. Ct. H.R. (ser. A), ¶ 48.

63. *Id. See also* S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, ¶ 129; Draon v. France, 2006-IX Eur. Ct. H.R. 5, ¶¶ 106–08; Brannigan v. United Kingdom, 258 Eur. Ct. H.R. (ser. A), ¶ 43 (1993); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), ¶ 207 (1978). *See generally* Sales, *supra* note 60.

64. *Handyside*, 24 Eur. Ct. H.R. (ser. A), ¶ 48. *See also Brannigan*, 258 Eur. Ct. H.R. (ser. A), ¶ 43; *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A), ¶ 207; *Draon*, 2006-IX Eur. Ct. H.R., ¶¶ 106–08.

65. Hatton v. United Kingdom, 2003-VIII Eur. Ct. H.R. 189, ¶ 97. *See, e.g.*, *Draon*, 2006-IX Eur. Ct. H.R., ¶¶ 106-08; Buckley v. United Kingdom, 1996-IV Eur. Ct. H.R., ¶ 75; James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A), ¶ 46 (1986) (margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one").

fined function that is subsidiary to the responsibilities of Contracting States under the ECHR.[66]

A. *Origins of the Margin of Appreciation Under the ECHR: Teitgen's Preparatory Notes*

A margin of appreciation was first suggested under the ECHR[67] by one of the Convention's drafters. The ECHR was prepared by the Maxwell-Fyfe and Teitgen Committee, which provided general definitions of guaranteed freedoms, while intending to defer the specifics of protections for those freedoms to the Contracting States.[68] Consistent with this approach, one of the Committee's Rapporteurs, Teitgen, opined that Contracting States would enjoy a "*liberté d'appréciation*" under the ECHR when deciding how to safeguard guaranteed freedoms within their territories: "[e]ach country shall, through its own legislation, determine the conditions in which these guaranteed liberties shall be exercised within its territory, and, in defining the practical conditions for the operation of those guaranteed liberties, each country shall have a very wide freedom of appreciation [*une très large liberté d'appréciation*]."[69] Despite Teitgen's suggestion, no express reference to a margin of appreciation, or "*liberté d'appréciation*," was included in the ECHR's final text.[70] Nevertheless, the later application of a margin of appreciation by the European Commission and the ECtHR reflected the reasoning of Teitgen's preparatory reports.

66. Under the principle of subsidiarity, the ECtHR is only permitted to perform tasks that cannot be performed at a national level. This has been described by one commentator as a "procedural relationship" between national authorities implementing the Convention and the ECtHR reviewing measures in contentious proceedings only once all domestic remedies have been exhausted. *See infra* at pp. 25, 35–37. *See generally* Letsas, *supra* note 54; Mark E. Villiger, *The Principle of Subsidiarity in the European Convention on Human Rights*, *in* Promoting Justice, Human Rights and Conflict Resolution Through International Law 623 (Marcelo Kohen ed., 2006); Oddný Mjöll Arnardóttir, *The Brighton Aftermath and the Changing Role of the European Court of Human Rights*, 9 J. Int'l Disp. Settlement 223, 238 (2018); Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 Heidelberg J. Int'l L. 240 (1996); Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15 Hum. Rts. L. Rev. 313 (2015); Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity,* 14 Hum. Rts. L. Rev. 487 (2014).

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

68. *See* Council of Europe, Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights (1975–85) (1985).

69. *Id.*

70. Gross & Ní Aoláin, *supra* note 52, at 625; Hutchinson, *supra* note 52, at 639 ("[T]he doctrine is not mentioned anywhere in the Convention itself. It is entirely a product of the Strasbourg organs."); Yourow, *supra* note 4, at 196 ("Neither the Convention itself nor any other source of law or interpretation which the Court consults, including the travaux préparatoires and the Vienna Convention on the Law of Treaties, requires the use of the margin doctrine as a technique of interpretation or as a standard of decision."). As noted above, when it comes into force, Protocol No. 15 of the ECHR will introduce an express reference to a "margin of appreciation" into the Convention's preamble. *See supra* note 51.

B. Early Applications of the Margin of Appreciation Under the ECHR: Article 15's Public Emergency Clause

A margin of appreciation was first applied by the European Commission in the limited, and relatively exceptional, context of Article 15 of the ECHR.[71] Article 15 provides a derogation from the Contracting States' human rights obligations for measures taken in times of war or public emergency. The first paragraph of that Article provides:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[72]

In the *Cyprus Case*,[73] the United Kingdom invoked Article 15 of the ECHR in defense of measures that it had taken in response to attacks against British authorities in Cyprus. The United Kingdom contended that the attacks created a public emergency and that its actions were therefore excluded from review by the Commission under Article 15 as measures to secure community safety and restore public order. According to the United Kingdom, the Commission could not adjudicate whether there was a public emergency; this question had to be resolved by domestic authorities. The United Kingdom's rationale, ironically reminiscent of Spain's position against Britain in *Spanish Zone of Morocco Claims*,[74] was that "a decision of this kind is at least *prima facie* one with the sovereign powers of the Government."[75]

In a divided decision, a majority of the Commission agreed, at least in part, with the United Kingdom. The majority held that "[t]he assessment whether or not a public danger existed is a question of appreciation" that is left to the "appreciation" or "discretion" of domestic authorities:

> The assessment whether or not a public danger existed is a question of appreciation. The United Kingdom Government made such an assessment of the situation prevailing at that time and concluded that there existed a public danger threatening the life of the nation. That this appreciation by the British Government was correct was subsequently proved by the great increase of violence which occurred . . ..[76]

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71. *See* Gross & Ní Aoláin, *supra* note 52, at 630–34; Hutchinson, *supra* note 52, at 639–40.
72. ECHR, *supra* note 67, art. 15(1).
73. Greece v. United Kingdom (Cyprus Case), 1958–59 Y.B. Eur. Conv. on H.R. 174, 176 (Eur. Comm'n on H.R.).
74. *See supra* pp. 5–9.
75. *Cyprus Case*, 1958–59 Y.B. Eur. Conv. on H.R. 174, ¶ 116.
76. *Id.* ¶ 132.

Contrary to the United Kingdom's position, however, the majority also concluded that the Commission retained a measure of authority to review a decision by domestic authorities that a public danger existed, reasoning that there were "certain limits" on the "appreciation" of national authorities.[77] Nonetheless, the majority was not persuaded that the British authorities had gone beyond the limits of this "appreciation," and therefore held that there had been no violation of the ECHR.[78]

A majority of the Commission adopted the same position with respect to whether measures taken by the United Kingdom had been necessary in the circumstances:

> In general, the Commission takes the same view as it did with regard to the question of a "public emergency threatening the life of the nation," namely that the Government of Cyprus should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation. The question whether that discretion has or has not been exceeded is a question of substance which will be dealt with as each individual measure is examined.[79]

This first instance of the Commission applying a margin of appreciation was narrowly limited. Rather than citing or formulating a margin of appreciation that would permit broad deference to all (or many) judgments of domestic authorities, the Commission instead did so only in the limited context of Article 15's derogation for emergency security measures. And even there, it subjected the judgments of national authorities to "certain limits," reserving the power to provide "a critical opinion" on the legality of governmental measures.[80] As numerous commentators have observed, application of a margin of appreciation in derogations cases like the *Cyprus Case* may be summarized as a presumption of compliance with the ECHR, subject to subsequent, unspecified review by the Commission.[81]

In later cases under the ECHR, a margin of appreciation was similarly applied in the context of Article 15's derogation for emergency security measures. In the *Lawless* case, the Commission once more considered Article 15, when Ireland invoked the provision with respect to measures imposed in response to Irish Republican Army violence. The case resulted in sharp disagreement in the Commission. A majority of nine members of the Commission referred to "a certain margin of appreciation" enjoyed by national authorities under Article 15 when determining whether there exists a public

77. *Id.* ¶ 136.
78. *Id.*
79. *Id.* ¶ 143.
80. *Id.* ¶ 132.
81. Gross, *supra* note 52; Gross & Ní Aoláin, *supra* note 52; Letsas, *supra* note 54; Marks, *supra* note 52.

emergency that threatens the life of the nation and that must be dealt with by exceptional measures derogating from its normal obligations under the Convention.[82] After reviewing Ireland's justifications, the majority concluded that Ireland had not gone beyond the proper margin of discretion allowed to it under Article 15, and its detention of suspects without a trial was "strictly required by the exigencies of the situation" pursuant to Article 15.[83] In accepting these justifications, the Commission did not further consider the appropriateness of, or need for, the challenged measures.

In contrast, five members of the Commission took an entirely different view, rejecting the margin of appreciation in their dissenting opinions.[84] Instead, the minority considered whether there was an emergency justifying the state's actions on the facts of the case, applying either a proportionality standard or a least restrictive means requirement. Applying these standards, the minority concluded that Ireland had breached its obligations under the Convention. In his dissent, for example, Commissioner Ermacora reasoned that "[Ireland] did not endeavour to find other, less drastic, means of dealing with the situation," and therefore could not rely on the derogation under Article 15.[85]

In subsequent years, the ECtHR followed the approach of its predecessor, the Commission, and applied a margin of appreciation in cases involving the lawfulness of emergency measures under Article 15. The Court first applied a margin of appreciation in *Ireland v. United Kingdom*, where it held that Article 15 granted national authorities what the ECtHR termed a "wide margin of appreciation" in deciding "both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it":

> It falls in the first place to each Contracting State, with responsibility for "the life of the nation", to determine whether that life is threatened by a "public emergency", and, if so, how far it is necessary to go in attempting to overcome the emergency. By reasons of their direct and continuous contact with the pressing need 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 scope of the

82. Lawless v. Ireland, App. No. 322/57, Report of the Commission, 1 Eur. Ct. H.R. (ser. B) 9, ¶ 90 (1959) (opinion of Waldock, Berg, Faber, Crosbie & Erim, Comm'rs).

83. *Id.* ¶¶ 28–30.

84. *See, e.g.*, *id.* ¶¶ 111, 114 (opinions of Susterhenn & Erim, Comm'rs):

> The Government's freedom of choice and margin of appreciation are limited by the obligations of international law which the Irish Government accepted in ratifying the Convention. . .. In public and international law, the violation of a right is determined on objective grounds. . .. [Ireland] should be allowed a certain discretion in appreciating the character of the emergency. It is nevertheless essential to go on to consider more closely whether the measures taken by [Ireland] come within the 'extent strictly required' and whether they conflict with other obligations in international law.

85. *Id.* ¶ 115. *See also id.* ¶ 93 (opinion of Susterhenn, Comm'r).

> derogations necessary to avert it. In this matter, article 15 paragraph 1 leaves the authorities a wide margin of appreciation.[86]

The circumstances in which the Commission and ECtHR applied the margin of appreciation concept under Article 15 in the *Cyprus Case*, *Lawless*, and *Ireland v. United Kingdom* are exceptions under the ECHR, applied where extraordinary security measures, taken to maintain public order during emergency periods, were at issue. As discussed below, however, the Commission and ECtHR subsequently extended the margin of appreciation concept well beyond emergency measures under Article 15, to afford varying degrees of deference (or, alternatively phrased, "appreciation" or "discretion") to governmental measures under a number of other provisions of the ECHR.

C. Extension of the Margin of Appreciation Beyond Article 15

The first case under the ECHR to apply a margin of appreciation outside the context of Article 15 was *Iversen v. Norway*, where the Commission drew an analogy between emergency measures under Article 15 and similar types of governmental measures under Article 4 of the Convention.[87] Much like Article 15, the text of Article 4 provides for an exception to the prohibition on forced labor for "any service exacted in case of an emergency or calamity threatening the life or well-being of the community."[88] The Commission concluded in *Iverson* that some measure of deference—albeit a limited and ill-defined one—should be afforded to domestic authorities' "analogous" determination of the "existence of an emergency" under Article 4:

> [A] certain margin of appreciation should be given to a government in determining the existence of a public emergency within the meaning of Article 15 in its own country . . . [T]he Commission cannot question the judgment of the Norwegian Government . . . as to the existence of an emergency as there is evidence before the Commission showing reasonable grounds for such judgment.[89]

Subsequent ECtHR decisions applied the margin of appreciation concept more broadly, to other settings not involving issues of emergency security measures.[90] The concept has been applied by the ECtHR to other guarantees under the ECHR, including the right to correspondence with legal advisors

86. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), ¶ 207 (1978).

87. Iversen v. Norway, App. No. 1468/62, 1963 Y.B. Eur. Conv. on H.R. 278, 230 (Eur. Comm'n on H.R.).

88. ECHR, *supra* note 67, art. 4.

89. *Iversen*, 1963 Y.B. Eur. Conv. on H.R. at 330.

90. *See* Arai-Takahashi, *supra* note 55, at 6; Yourow, *supra* note 4, at 35; Letsas, *supra* note 54, at 722–29.

under Articles 6 and 8,[91] freedom of expression under Article 10,[92] and the prohibition of discrimination under Article 14.[93] The ECtHR has also applied a margin of appreciation in cases involving the right to property under Article 1 of the First Protocol to the ECHR and the right to education under Article 2 of the Protocol. In the *Belgian Linguistics* case, for example, the Commission interpreted Article 2 to allow national authorities a "certain margin of discretion" when selecting measures to protect the right to education.[94] Like Article 10 and a number of other ECHR provisions, Article 2 expressly permits qualifications by Contracting States to the rights it protects.[95]

In most of these cases, the ECtHR's application of a margin of appreciation can be explained by the text of the Treaty. The language of Article 10(2), for example, provides an exception to the right to freedom of expression under Article 10 in limited circumstances, including where such measures are "necessary in a democratic society," "in the interests of national security," or "for the protection of health or morals."[96] This text provides the basis for application of a margin of appreciation to a state's judgments regarding its security and related interests.[97]

Nonetheless, the ECtHR has not relied exclusively, or even primarily, on the text of the ECHR in applying a margin of appreciation. As noted above, the Court has also cited the Convention's structure and, in particular, principles of subsidiarity and democratic governance in justifying its deference to national authorities.[98] An oft-cited passage from the *Handyside* case recites the ECtHR's rationale for applying the concept of a margin of appreciation outside the context of emergency measures under Article 15:

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91. *See, e.g.*, Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) (1975); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981); Gillow v. United Kingdom, 109 Eur. Ct. H.R. (ser. A) (1986); Leander v. Sweden, 116 Eur. Ct. H.R. (ser. A) (1987).

92. *See, e.g.*, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A), ¶ 48 (1976); Wingrove v. United Kingdom, 5 Eur. Ct. H.R. 60 (1996); Sunday Times v. United Kingdom (No. 1), 30 Eur. Ct. H.R. (ser. A) (1979); Barthold v. Germany, 90 Eur. Ct. H.R. (ser. A) (1985).

93. *See, e.g.,* Rasmussen v. Denmark, 87 Eur. Ct. H.R. (ser. A), ¶ 28 (1984).

94. Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 6 Eur. Ct. H.R. (ser. A), ¶ 4 (1968) [hereinafter *Belgian Linguistics Case*]. *See also* Jahn v. Germany, 6 Eur. Ct. H.R. 444, ¶ 91 (2005).

95. According to Article 1 of the First Protocol, an interference with the right to property is permissible where it is pursuant to, inter alia, the "public interest" or in accordance with the "general interest." Article 1 also provides that "[t]he preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes. . . ." Article 2 of the First Protocol shares a similar structure to Articles 8 to 11 of the ECHR and provides that an interference with the right to education is permissible where it is "in accordance with law" or "prescribed by law," pursues a legitimate aim and is "necessary in a democratic society."

96. *See Handyside*, 24 Eur. Ct. H.R. (ser. A), ¶ 48.

97. *See id.*

98. *See supra* note 64. The concept of subsidiarity relies on the Convention's provisions assigning primary responsibility for safeguarding human rights to national authorities, *see* ECHR, arts. 1, 13, and on the obligation to exhaust local remedies before seeking relief from the ECHR's international mechanisms, *see* ECHR, art. 35. *See* GREER, *supra* note 50, at 19.

> 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 these requirements [under the ECHR] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them . . . [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.[99]

Other ECtHR decisions underscore the subsidiary character of the ECHR's international mechanisms in protecting European human rights and the primary role of national authorities under the ECHR.[100] Similarly, as noted above, the ECtHR has explained its application of a margin of appreciation by reference to notions of democratic governance and local autonomy, reasoning that:

> [N]ational authorities have direct democratic legitimation and are . . . in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.[101]

These various, but related, rationales rest on the basic structure of the ECHR within the broader context of the European Union. Unlike the Commission's early decisions under Article 15, these rationales do not rely on the specific terms of the ECHR's individual human rights guarantees. Instead, they depend principally on the ECtHR's "subsidiary" role and the primacy of democratic institutions and regulatory authorities functioning at a national level under the ECHR.[102] This approach has permitted, and almost inevitably required, the application of the margin of appreciation concept well beyond its origins, in Article 15's public emergency derogation, to many of the ECHR's human rights protections.[103]

The ECtHR has, in at least some cases, refused to apply the margin of appreciation where the domestic law and practice of Contracting States to the ECHR reflect a significant degree of "European" consensus regarding a particular issue. The ECtHR has repeatedly said that the Convention is a "living instrument" that must be interpreted in light of European legal

99. *Handyside*, 24 Eur. Ct. H.R. (ser. A), ¶ 48.

100. *See supra* note 64.

101. Hatton v. United Kingdom, 2003-VIII Eur. Ct. H.R. 189, ¶ 97.

102. *See supra* note 64.

103. Despite the ECtHR's reliance on structural concepts of subsidiarity, democratic governance, and local expertise, it appears unlikely that the Court would apply the margin of appreciation to at least some of the ECHR's human rights protections. These include prohibitions against torture and guarantees of the right to life. *See infra* note 109 and accompanying text.

tradition and, in particular, the domestic law and practice of the Contracting States.[104] Under this approach, where there is no European consensus on a particular issue, the ECtHR will apply a margin of appreciation. As the ECtHR explained the concept of "European supervision" in the *Sunday Times* case, "a more extensive European supervision corresponds to a less discretionary power of appreciation."[105] Further, as discussed below, the ECtHR has applied differing margins of appreciation, with varying degrees of deference for national decisions, depending on the Convention rights allegedly infringed by state measures.

D. Reservations Concerning the ECtHR's Margin of Appreciation

Notwithstanding the ECtHR's frequent (and progressively expanding) application of a margin of appreciation concept, judges of the Court and commentators have expressed significant reservations about the concept. One criticism of the concept is that it is overly deferential to the judgments of domestic authorities and, consequently, insufficiently protective of international human rights, particularly the rights of minorities.[106] In the words of one commentator, "[t]o grant margin of appreciation to majority-dominated national institutions in such situations is to stultify the goals of the international system and abandon the duty to protect the democratically challenged minorities."[107]

Other critics argue that the absence of clear standards defining the margin of appreciation produces inconsistent and unpredictable results that undermine the purposes and efficacy of the ECHR.[108] As one observer reasoned, "uncertainty as to the width of margin the Court will deem appropriate in any given case" gives rise to risks of arbitrary decision-making:

> [T]he very existence of a margin of appreciation seems to leave open the possibility of rather arbitrary decision-making or, at best, decision-making which is inadequately backed up by explicit, clear analysis and application of the Convention. On occasion the Court sums up the various considerations that would have to be addressed in deciding whether a given restriction is needed in the particular circumstances, and then moves on to announcing that in view of the existence of these various considerations, the decision of the national authorities was within the

104. Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A), ¶ 31 (1978); *see also* Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), ¶ 41 (1979).

105. Sunday Times v. United Kingdom (No. 1), 30 Eur. Ct. H.R. (ser. A), ¶ 59 (1979).

106. *See, e.g.*, Benvenisti, *supra* note 52; Brauch, *supra* note 52; Gross, *supra* note 52; Gross & Ní Aoláin, *supra* note 52; Hutchinson, *supra* note 52; Marks, *supra* note 52.

107. Benvenisti, *supra* note 52, at 850.

108. *See generally* O'Donnell, *supra* note 58; Cora Feingold, *Doctrine of Margin of Appreciation and the European Convention on Human Rights*, 53 NOTRE DAME L. REV. 90 (1977); Higgins, *supra* note 52, at 315; Hutchinson, *supra* note 52; Letsas, *supra* note 54, at 706.

> margin of appreciation allowed to the State (according to whatever cocktail of width factors the Court had decided was appropriate).[109]

The ECtHR has also arguably applied differing margins of appreciation, with varying degrees of deference for national decisions, depending on the rights allegedly infringed by state measures. Thus, the Court has apparently applied "wider" margins of appreciation in some cases, such as those involving freedom of religion, and "narrower" margins of appreciation in other cases, such as those involving protections of personal autonomy and sexuality.[110] Commentators have suggested that, in other cases, no margin of appreciation would be applied by the Court at all; for example, in cases involving prohibitions against torture or guarantees of the right to life.[111] Relatedly, the Court has also suggested that the scope of the margin of appreciation may vary depending on the nature and objectives of the state measures in question. Measures aimed at protecting public order receive greater deference than measures aimed at furthering general social policy.[112] As critics have observed, however, the ECtHR has provided no meaningful explanation of the role of these various factors, and its decisions applying them have been erratic and inconsistent.[113] Indeed, commentators have observed that there appears to be little correlation between the ECtHR's stated degree of deference, or the stated width of its margin of appreciation, and the actual level of scrutiny applied by the Court.[114]

Other commentators have criticized the ECtHR for "gloss[ing] over the text of the Convention" and adopting the role of policy-maker:

> [I]t is not the Convention's text that controls the Court's application of the margin of appreciation. The Court has not been engaged in legal analysis, but in policy-making . . . . The Court glosses over the text of the Convention. The Court either balances (without clear and predictable standards) the interest of the state

109. Hutchinson, *supra* note 52, at 641. Similarly, the Court has been criticized for "fail[ing] to link the over-arching principles of margin analysis—even assuming their validity—to each new factual situation in a convincing way." YOUROW, *supra* note 4, at 197.

110. *See, e.g.*, Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A), ¶ 52 (1981) (finding violation of right to respect for private sexual life under Article 8 of ECHR).

111. *See* EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 407–11 (2001); GREER, *supra* note 50, at 6, 27–28 (arguing Articles 2, 3 and 4 are assertedly not subject to margin of appreciation). *See also* Chahal v. United Kingdom, 23 Eur. Ct. H.R. 413, ¶¶ 80–81 (1996).

112. *See* Sunday Times v. United Kingdom (No. 1), 30 Eur. Ct. H.R. (ser. A), ¶ 59 (1979) (suggesting that measures aimed at "protection of morals" are entitled to more deference than measures aimed at "maintaining the authority of the judiciary"); A v. Ireland, 2010-VI Eur. Ct. H.R. 185, ¶ 232 ("Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted [. . .] where the case raises sensitive moral or ethical issues, the margin will be wider.").

113. *See, e.g.*, YOUROW, *supra* note 4, at 197–98; Benvenisti, *supra* note 52, at 242.

114. *See* Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 EURO. L.J. 80, 106 (2011) ("[T]here does not always appear to be a close correspondence between the language of deference and the actual test applied by the court").

> and the individual, and then makes its own value judgment, or it looks for a consensus (or trend) in Europe (or internationally).[115]

The use of the margin of appreciation in the ECHR context has also frequently been criticized by members of the Strasbourg judiciary. In his dissent in *Z. v. Finland*, for example, Judge De Meyer concluded that references to a margin of appreciation were "empty phrases" that should be "abandoned without delay."[116] He also cited the importance of independent adjudication by the Court to ensure principled application of the Convention:

> [I]t is high time for the Court to banish [the margin of appreciation] from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies [. . .] [T]here is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not . . . . It is for the Court, not each State individually, to decide that issue, and the Court's views must apply to everyone within the jurisdiction of each state.[117]

This criticism of the "relativism" of the margin of appreciation is reflected in ECtHR case law. As the foregoing discussion suggests, the concept has been applied inconsistently, with differing standards and limitations being invoked, without explanation, in different cases.[118] In a few cases, the concept has been invoked to provide almost unlimited deference to national authorities, with no suggestion of meaningful review of municipal decisions.[119] In other cases, such as *A, B and C v. Ireland*, the Court has referred expansively to a margin of appreciation, but nonetheless proceeded to carry out a relatively rigorous examination of the facts. In other cases dealing with similar ECHR provisions, the concept has not been applied, or has been qualified by limiting factors, but largely without explanation by the Court.[120] As these decisions indicate, even to sympathetic eyes, the ECtHR has failed to identify an analytically consistent approach to the margin of appreciation, instead applying a variety of different standards of

115. Brauch, *supra* note 52, at 147–49. *See generally* Franz Matscher, *Methods of Interpretation of the Convention*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 68 (Ronald St. J. Macdonald et al. eds., 1993); Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 65 (1990).

116. Z. v. Finland, 1997-I Eur. Ct. H.R. 323, ¶ 3 (De Meyer, J., partly dissenting).

117. *Id.* ¶ 3.

118. *See, e.g., id.* ¶ 126. Relatedly, application of the concept has frequently resulted in split decisions with robust dissenting opinions by significant minorities of both the Commission and the Court. *See, e.g.*, Lawless v. Ireland (No. 3), 1 Eur. Ct. H.R. (ser. A) (1961); Odièvre v. France, 2003-III Eur. Ct. H.R. 86. *See also supra* pp. 27–33.

119. *See, e.g.*, Greece v. United Kingdom (Cyprus Case), 1958–59 Y.B. Eur. Conv. on H.R. 174, 176, ¶¶ 138, 152 (Eur. Comm'n on H.R.); *Lawless*, 1 Eur. Ct. H.R.; Z. v. Finland, 1997-I Eur. Ct. H.R. 323, ¶ 126; Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 6 Eur. Ct. H.R. (ser. A), ¶ 401 (1968).

120. *See, e.g.*, A v. Ireland, 2010-VI Eur. Ct. H.R. 185, ¶ 185; Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), ¶ 41 (1979). *See also supra* pp. 35, 37–39, 40–41.

review, subject to shifting limitations and restrictions, without adequate explanation. This lack of an analytically consistent approach raises the risk that the outcome in a given case ultimately rests on the Court's subjective discretion.

Some authorities have suggested that the inherent "flexibility" of the margin of appreciation is a strength, rather than a weakness.[121] These commentators have reasoned that the margin of appreciation performs "particular functions that are specific to the ECHR and its Court as a constitutional project," namely that "[i]ts malleability manages the distinct roles and competencies of the [Court] vis-à-vis distinct parts of democracies, namely national judges, administrative agencies and legislatures."[122] That conclusion is very difficult to accept, given the erratic and largely unreasoned application of the concept in ECHR proceedings, and the resulting inconsistencies in ECHR case law. Even in the limited ECHR context, such an approach almost inevitably produces arbitrary, inconsistent results and makes the outcome of human rights claims uncertain and unpredictable; it also lacks any apparent basis in the text, objects, or purposes of the Convention.[123]

In sum, even under the ECHR, many commentators and the dissenting judges of the ECtHR have urged the Court to discard the margin of appreciation and instead conduct an objective analysis of state responsibility under particular provisions of the ECHR. They argue that this approach would be appropriately grounded in the text of the Convention, would facilitate transparent and predictable decision-making, and would bolster the European human rights system's legitimacy.[124] More fundamentally, regardless of how this debate is resolved under the ECHR, it is very difficult to conclude that anything experienced under the Convention suggests that the margin of appreciation should be given wider application as a rule of international law outside its specific European human rights context.

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121. *See* LEGG, *supra* note 53; Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 316–17 (1997); Geir Ulfstein, *The European Court of Human Rights as a Constitutional Court?* PluriCourts Research Paper 14-08 (2014), https://perma.cc/UFP6-DMZ4. *But see* Benvenisti, *supra* note 52, at 844.

122. José E. Alvarez, *The Use (and Misuse) of European Human Rights Law in Investment Dispute Settlement*, *in* THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 519, 598 (Franco Ferrari ed., 2017).

123. *See generally* GREER, *supra* note 50, at 5; ARAI-TAKAHASHI, *supra* note 55; Letsas, *supra* note 54; Brauch, *supra* note 52; Benvenisti, *supra* note 52; O'Donnell, *supra* note 58; Feingold, *supra* note 108; Hutchinson, *supra* note 52; Jan Kratochvil, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETH. Q. HUM. RTS. 324, 340–43 (2011).

124. GREER, *supra* note 50, at 32 ("[I]t is questionable if [the ECtHR's margin of appreciation] is really a 'doctrine' at all since it could be said to lack the minimum theoretical specificity and coherence which a viable legal doctrine has. It is, rather, a pseudo-technical way of referring to the discretion which the Strasbourg institutions have decided the Convention permits national authorities to exercise in certain circumstances.").

III. The Margin of Appreciation in International Investment Law

In recent years, a few states have invoked a margin of appreciation in efforts to limit the scrutiny of governmental measures or the jurisdiction of investment tribunals.[125] ECHR case law has sometimes been cited in support of such efforts.[126] In almost all such cases, however, the margin of appreciation concept—as a broadly applicable form of deference to governmental decision-making or presumption of the propriety of state measures, regardless of justification in the text of the applicable investment treaty or other rules of international law—has been rejected by investment tribunals. Bearing in mind the ECHR-specific context in which the concept has been developed, and the consistent rejection of a margin of appreciation by the ICJ and other international tribunals, these results are unsurprising and confirm the approach adopted in other settings. Moreover, in the few investment awards that applied a margin of appreciation, tribunals have failed to explain why the concept may be transposed from the ECHR context to investment arbitration. On closer review, most of these tribunals appear to have used the margin of appreciation as a shorthand for a measure of deference that is justified by the text of a particular treaty provision or by an applicable rule of international law. Considered as a whole, these awards provide no support for a general application of the margin of appreciation concept in the investment context or more broadly and, on the contrary, support the opposite conclusion.

A. Application of the Margin of Appreciation in Investment Arbitration

Over the past decade, a handful of investment tribunals have referred to, or applied, some variation of the margin of appreciation. These tribunals have done so in a diverse set of circumstances, addressing a variety of different issues arising in investment arbitrations,[127] and providing little or no

125. *See, e.g.*, Guaracachi Am., Inc. v. Bolivia, PCA Case No. 2011-17, Claimants' Reply Memorial, ¶ 103 (Perm. Ct. Arb. 2013) (referring to Bolivia's argument for the application of the margin of appreciation); Teco Guatemala Holdings LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits, ¶¶ 468, 479, 480, 586 (Jan. 24, 2012).

126. *See, e.g.*, Bernhard von Pezold v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, ¶ 453 (July 28, 2015); Deutsche Telekom AG v. India, PCA Case No. 2014-10, Interim Award, ¶¶ 235–36 (Perm. Ct. Arb. 2017). *See also* Alvarez, *supra* note 122; Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID Rev. 88 (2013); Vasani, *supra* note 60.

127. This Article does not consider in detail those investment tribunals and ICSID ad hoc annulment committees which have referred to a "margin of appreciation" when selecting a valuation methodology and assessing damages. These awards are in line with international and national authorities recognizing a tribunal's broad remedial discretion, particularly in assessing damages. *See, e.g.*, Koch Minerals Sàrl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award, ¶¶ 9.4–9.8 (Oct. 30, 2017); Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 335 (Feb. 7, 2017); *von Pezold*, ICSID Case No. ARB/10/15, ¶¶ 808–10, 868; Gold

reasoned explanation for their reliance on the concept. Most of these decisions are better explained by reference to the applicable treaty provision or other rule of international law.

One of the first investment awards to consider application of a margin of appreciation was *Micula v. Romania*. There, Romania challenged a decision by Sweden to confer Swedish nationality on the claimant investor.[128] In addressing this issue, the *Micula* tribunal held 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."[129] In support of this conclusion, the tribunal cited commentary to Article 4 of the Draft Articles on Diplomatic Protection and the advisory opinion of the Inter-American Court of Human Rights in *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*.[130] The tribunal in *Micula* posed the following question:

> [U]nder which conditions is it appropriate for the Tribunal to overcome the sovereign decision taken by Sweden . . . that Viorel Micula had satisfied the Swedish requirements for naturalisation? The Tribunal underlines at this juncture that there are no reasons of real importance to doubt the accuracy and thoroughness of the inquiry that was made by the Swedish authorities at the time . . . . In these conditions, the Tribunal would only be inclined to disregard the decision of the Swedish authorities if there was convincing and decisive evidence that Viorel Micula's acquisition of Swedish nationality was fraudulent or at least resulted from a material error.[131]

As this discussion made clear, the *Micula* tribunal did not apply the margin of appreciation concept as applied in the ECHR context or as a rule of international law, but instead referred to the freedom generally afforded to states

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Reserve v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶ 686 (Sept. 22, 2014); Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Republic of Argentina, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, ¶ 255 (Aug. 10, 2010); Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, Award, ¶¶ 154–55 (Sept. 9, 2009); ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, ¶ 521 (Oct. 2, 2006); Murphy Expl. & Prod. Co. v. Republic of Ecuador, PCA Case No. 2012-16, Partial Final Award, ¶¶ 425, 481 (Perm. Ct. Arb. 2016). Tribunals have also referred to a margin of appreciation with respect to the issuance of a recommendation of provisional measures. This Article also does not consider these awards, which again involve arbitral tribunals' broad remedial authority. *See, e.g.*, Abaclat v. Republic, ICSID Case No. ARB/07/5, Procedural Order No. 10 on Security for Costs (June 18, 2012); Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Procedural Order No. 11 (June 27, 2012).

128. Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶¶ 91, 94 (Sept. 24, 2008).

129. *Id.* ¶ 94.

130. *Id.* (citing Draft Articles on Diplomatic Protection, commentary under art. 4, ¶ (7), citing *Costa Rica Advisory Opinion*, *supra* note 53, ¶¶ 62–63).

131. *Id.* ¶¶ 94–95.

under international law[132] when exercising their sovereign power to confer nationality.[133] In particular, the tribunal relied on the text of the Draft Articles on Diplomatic Protection and the advisory opinion of the Inter-American Court of Human Rights cited above, both of which concerned only a state's conferral of nationality.[134]

Notably, Romania did not ask the *Micula* tribunal to apply a margin of appreciation as a standard of review for the investor's underlying claims that the host state had breached the substantive investment protections under the applicable treaty or customary international law. Nor did the *Micula* tribunal do so. Rather, the tribunal only referred to a "margin of appreciation" in the context of the challenge to Sweden's decision to confer nationality on a person.

In *Continental Casualty v. Argentina*, a margin of appreciation was applied more broadly, like some early applications of the concept in the ECHR context under Article 15 of the ECHR. Argentina contended that measures it had imposed fell within the scope of the emergency clause, commonly referred to as a security interests provision, in Article XI of the United States-Argentina BIT.[135] Article XI provides: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or the restoration of international peace or security, or the protection of its own essential security interests." Argentina argued for a broad interpretation of the terms "maintenance of public order" and "essential security

132. *See, e.g.*, 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE 855–56 (Robert Jennings & Arthur Watts eds., 9th ed. 2008). *See also* John R. Dugard (Special Rapporteur on Diplomatic Protection), *First Report on Diplomatic Protection*, U.N. Doc. A/CN.4/506, ¶ 96 (Mar. 7/Apr. 20, 2000) ("[I]t is difficult to resist the conclusion that [the principle that it is for each state to determine under its own laws who are its nationals] has acquired the status of customary law.").

133. Other investment tribunals have interpreted this aspect of the *Micula* award in a similar manner. The tribunal in *Arif v. Moldova*, for example, cited to *Micula* for the proposition that an investment tribunal should only question the grant of nationality by a state if there is "convincing and decisive" evidence that the investor's acquisition of nationality "was fraudulent or at least resulted from a material error," but made no reference to any margin of appreciation. Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, ¶ 357 (Apr. 8, 2013).

134. *Costa Rica Advisory Opinion*, *supra* note 53, ¶¶ 62–63 (The Inter-American Court was "fully mindful of the margin of appreciation which is reserved to states when it comes to the establishment of requirements for the acquisition of nationality and the determination of whether they have been complied with," but went on to review the requirements imposed by Costa Rica and conclude that they were discriminatory.).

135. There is a debate as to whether Article XI of the United States-Argentina BIT and similarly worded treaty provisions are reflective of the defense of necessity available in customary international law, or whether it prescribes an autonomous standard. *See, e.g.*, El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15 Award, ¶¶ 552–55 (Oct. 31, 2011); Cont'l Cas. v. Argentine Republic, ICSID Case No. ARB/03/9, Decision on Annulment, ¶ 133 (Sept. 16, 2011); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, ¶¶ 186–219 (June 29, 2010).

interests" in Article XI, invoking a margin of appreciation as applied in the ECHR context, and citing the ECtHR's authority.[136]

The *Continental Casualty* tribunal agreed that Argentina was entitled to what the tribunal termed a "significant margin of appreciation" under Article XI: "[an] 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."[137] The tribunal reasoned that Article XI's expression "its own security interests" implied that "a margin of appreciation must be afforded to the Party that claims 'in good faith' that the interests addressed by the measure are essential security interests or that its public order is at stake."[138] Applying this analysis, the tribunal held that an economic crisis could qualify as a circumstance implicating a state's security interests under Article XI.[139]

Notwithstanding this conclusion, and the broad language of Article XI, the tribunal also held that there was no indication that the states party to the United States-Argentina BIT had intended to preclude tribunals from reviewing the propriety of a state's conduct under Article XI. Applying the VCLT, and citing the *Oil Platforms* case discussed above, the *Continental Casualty* tribunal cautioned against applying a margin of appreciation to allow a state to evade its treaty obligations:

> Although a provision such as Art. XI . . . involves naturally a margin of appreciation by a party invoking it, caution must be exercised in allowing a party unilaterally to escape from its treaty obligations in absence of clear textual or contextual indications. This is especially so if the party invoking the allegedly self-judging nature of the exemption can thereby remove the issue, and hence the claim of a treaty breach by the investor against the host state, from arbitral review. This would conflict in principle with the agreement of the parties to have disputes under the BIT settled compulsorily by arbitration . . ..[140]

136. Argentina also relied on commentary for the proposition that "[a] certain deference to such a discretion when the application of general standards in a specific factual situation is at issue, such as reasonable, necessary, fair and equitable, may well be by now a general feature of international law." Cont'l Cas. Co., v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 181, n. 270 (Sept. 5, 2008) (citing James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A), ¶ 46 (1986)); Shany, *General Margin*, *supra* note 4. *See also infra* Part III.C.

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

138. *Id.* ¶ 181, n.266.

139. *Id.* ¶¶ 178–81.

140. *Id.* ¶ 187.

The tribunal then went on to consider whether Argentina's measures were in fact necessary, holding that Article XI required tribunals to engage in "a process of weighing and balancing of factors."[141]

It is unclear from the tribunal's analysis in *Continental Casualty* whether, and if so how, the margin of appreciation affected the outcome of its decision. Despite referring to a margin of appreciation, and stating that it had no mandate to "censure Argentina's sovereign choices as an independent state," the tribunal went on to apply various objective standards of review, including a less-restrictive means analysis, to determine whether Argentina's plea of necessity under Article XI was well founded.[142] Even if the tribunal did afford Argentina a measure of deference under Article XI, that conclusion may be explained by the text of Article XI, which refers to a state's "own" security interests, and the subjectivity that language implies, as reflected in previous interpretations of comparable security interest provisions, including Huber's in the context of the defense of necessity under international law.[143] Thus, the *Continental Casualty* decision does not provide support for broader application of the margin of appreciation comparable to that of the ECtHR. Indeed, the tribunal specifically rejected the conception of the margin of appreciation put forward by Argentina.[144] Instead, it restricted the concept to limited circumstances justified by the text and purposes of Article XI and carried out its own objective assessment of Argentina's measures.

The tribunal in *Frontier v. Czech Republic* also referred to a margin of appreciation, but again in the limited factual circumstances of the case.[145] The tribunal rejected the investor's claim that the Czech courts' refusal to recognize an arbitral award violated the Czech Republic's obligation to afford investors fair and equitable treatment ("FET") under the Canada-Czech Republic BIT.[146] The claimants objected to a Czech judicial decision that recognition and enforcement of a foreign arbitral award in their favor would be contrary to Czech public policy and was therefore not required under Article V(2)(b) of the New York Convention. The *Frontier* tribunal held that "[s]tates enjoy a certain margin of appreciation in determining what their

141. This included assessment of whether the measures were "material or decisive in order to react positively to the crisis," whether less restrictive means were "reasonably available," and "whether Argentina could have adopted at some earlier time different policies, that would have avoided or prevented the situation that brought about the adoption of the measures challenged." *Id.* ¶¶ 194–99 (citing Panel Report, *Brazil – Measures Affecting Import of Retreaded Tyres*, ¶ 7.104, WTO Doc. WT/DS332/R (adopted Dec. 6, 2007)).

142. *Id.* ¶¶ 194–99.

143. British Claims in the Spanish Zone of Morocco (Great Britain v. Spain), 2 R.I.A.A. 615, 629 (1925). *See also supra* pp. 5–9.

144. Cont'l Cas. v. Argentine Republic, ICSID Case No. ARB/03/9, Decision on Annulment, ¶ 187 (Sept. 16, 2011).

145. Frontier Petroleum Servs. Ltd. v. Czech Republic, PCA Case No. 2008-09, Final Award (Perm. Ct. Arb. 2010).

146. *Id.* ¶ 529.

own conception of international public policy is."[147] Nonetheless, the tribunal went on to examine whether the Czech courts' conclusion was "a plausible interpretation of the public policy ground in Article V(2)(b) of the New York Convention."[148] The tribunal held that the margin of appreciation limited the state's liability to situations where national courts had acted "arbitrarily, discriminatorily, or in bad faith."[149]

The *Frontier* tribunal's deference to the Czech Republic's determination of its public policy was not only limited in scope and content, but was also grounded firmly in the language of Article V(2)(b) of the New York Convention. Importantly, Article V(2)(b) is an express "escape valve,"[150] which permits Contracting States to the Convention broad latitude to deny recognition of foreign awards on the basis of local law in the recognition forum. Article V(2)(b) permits a state to deny recognition of arbitral awards that conflict "with the public policy of *that* country," referring expressly to the public policy of the state where recognition is sought.[151] In these circumstances, as the tribunal held, the relevant treaty provision entitled Contracting States to decline to recognize an award; the application of a state's public policy in these circumstances did not amount to unfair or inequitable treatment.

A margin of appreciation was also referred to in *Invesmart v. Czech Republic*.[152] There, in the context of an expropriation claim, the tribunal accepted the Czech Republic's argument that a "margin of appreciation" should be afforded to "discretionary" ministerial decisions to deny state aid.[153] The *Invesmart* tribunal also referred more generally to a "margin of discretion" for the regulator and a "high level of deference to the right of domestic authorities to regulate matters within their own borders."[154] The tribunal declared that "the regulator's right and duty to regulate must not be subjected to undue second-guessing by international tribunals."[155]

It is unclear from these various formulations what the *Invesmart* tribunal meant by the "margin of appreciation." In any event, the tribunal emphasized that the domestic authorities' decisions were not "beyond review."[156] It went on to examine the evidentiary record and upheld the state's measures

147. *Id.* ¶ 527.
148. *Id.*
149. *Id.* ¶ 529.
150. Born, *supra* note 27, at 614. *See generally* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Emmanuel Gaillard & Domenico Di Pietro eds., 2008); Dirk Otto & Omaia Elwan, *Article V(2)*, *in* Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention 345 (Herbert Kronke et al. eds., 2010).
151. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), art. V(2), June 10, 1958, 21 U.S.T. 2517.
152. Invesmart v. Czech Republic, UNCITRAL, Award, ¶¶ 484–86 (June 26, 2009).
153. *Id.* ¶ 247.
154. *Id.* ¶¶ 501–02.
155. *Id.* ¶ 501.
156. *Id.* ¶¶ 486–95.

only after objectively determining that they were reasonable.[157] Again, this left the meaning and importance of the tribunal's references to a "margin of appreciation" unclear.

A margin of appreciation also made multiple—and varied—appearances in *Electrabel v. Hungary*.[158] In contrast to other investment arbitrations where only the respondent state invoked a margin of appreciation, the claimant in *Electrabel* accepted that Hungary possessed a margin of appreciation for certain purposes under European Union ("EU") law. The core of the claimant's complaint, as summarized by the tribunal, was that Hungary had not "correctly enforc[ed]" a European Commission decision regarding state aid "within its permitted margin of appreciation under EU law."[159] Given the claimant's position, the "key issue" in the arbitration was therefore "whether Hungary breached the ECT [Energy Charter Treaty] when exercising the discretion afforded to it by EU law."[160]

In resolving this issue, and rejecting the claimant's argument that Hungary should have challenged the European Commission's decision, the tribunal referred in passing, and without further explanation, to a margin of appreciation: "The Tribunal considers, on the facts of this case, 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."[161] The tribunal did not explain this conclusion, leaving it unclear whether, among other things, the tribunal's "modest margin of appreciation" was derived from EU state aid law, from the FET standard under the ECT, or from elsewhere.[162] It is also unclear whether the "margin of appreciation" affected the tribunal's review of the state's "discretionary decision," which the claimant had conceded was contemplated by EU law.[163]

The *Electrabel* tribunal also referred to a margin of appreciation when determining whether Electrabel had legitimate expectations regarding elec-

157. *Id.* ¶¶ 487–95.

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

159. *Id.* ¶ 4.168.

160. *Id.*

161. *Id.* ¶ 6.92.

162. The tribunal did not refer to any margin of appreciation in discussing the applicable standards under the ECT. Instead, as discussed in text, the tribunal referred to a margin of appreciation provided by EU law in the context of state aid decisions. *See id.*

163. The claimant in *Electrabel* also referred to a "margin of appreciation" in the context of the tribunal's authority to decide the legal issues of the case. Reminiscent of the early applications of a margin of appreciation in the context of a tribunal's competence-competence or procedural powers, Electrabel argued that "the Tribunal enjoys a margin of appreciation in deciding whether or not a particular measure in question is unreasonable or discriminatory, impairing the investment's management, maintenance, use, enjoyment or disposal." The claimant did not explain why such a margin of appreciation was applicable or how it should affect the tribunal's analysis. Nor did the tribunal refer to any margin of appreciation in describing the content of the FET and full protection and security standards under the ECT. *See id.* ¶¶ 7.73–84, 7.149–52.

tricity price regulation for purposes of its FET claim. The tribunal first found that Electrabel's claim failed on the facts, including because Electrabel had accepted the same price regulation previously.[164] After having made these dispositive factual determinations, the tribunal went on to say that Hungary enjoyed a "reasonable margin of appreciation" in regulating electricity prices:

> [T]he Tribunal's 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 [the claimant] [. . .] Regulatory pricing [. . .] was and remains an important measure available to State regulators in liberalised markets for electricity. It is, even at best, a difficult discretionary exercise involving many complex factors. In short, Hungary would enjoy a reasonable margin of appreciation in taking such measures before being held to account under the ECT's standards of protection. In the present case, however, the Tribunal considers that Hungary requires no such margin in its defence to Electrabel's claim.[165]

It is again unclear what role, if any, the reference to a "reasonable margin of appreciation" played in the tribunal's analysis, especially given its other rulings.[166] In particular, it is unclear whether the tribunal relied on a margin of appreciation to afford some measure of deference to the underlying decisions of the Hungarian regulators under EU law or whether the tribunal instead used the margin of appreciation when determining whether Hungary had complied with its obligations under the ECT. Moreover, the tribunal did not explain the basis for its application of either a "reasonable" or a "modest" margin of appreciation, or consider whether these were the same or different standards.[167] Likewise, the tribunal simply referred to a "margin of appreciation" without any explanation of its source, including without explaining whether this margin of appreciation was derived from ECtHR decisions under the ECHR or otherwise.[168] The most that can be said is that the *Electrabel* tribunal apparently, but unnecessarily, referred to a margin of appreciation, without explaining the basis, the content or the importance of this concept.

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164. *Id.* ¶ 8.33. The tribunal also held that Hungary's reintroduction of price regulation was "a rational and reasonably appropriate measure in the prevailing circumstances." *Id.* ¶ 8.34.

165. *Id.* ¶¶ 6.92, 8.35.

166. These rulings included the discretionary nature of the underlying decision by the state, the elevated showing of wrongdoing applicable to that decision (requiring irrationality or bad faith), and the tribunal's statement that a margin of appreciation was not necessary to its decision on the facts of the case.

167. Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 6.92 (Nov. 30, 2012).

168. *Id.*

The most extensive discussion of the margin of appreciation concept by an investment tribunal was in *Philip Morris v. Uruguay*, when considering a challenge of Uruguay's tobacco plain packaging legislation.[169] There, a majority of the tribunal agreed with Uruguay that the margin of appreciation concept was not limited to claims under the ECHR, but applied also to FET claims under investment treaties, "at least in contexts such as public health."[170] The majority declared that it would "review each measure [challenged under international law] taking into account all relevant circumstances, including the margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations."[171] Citing *Electrabel*, the majority held that it was obliged to afford respect to the "discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith [. . .] involving many complex factors."[172] In light of what it termed the "substantial deference" to national authorities' decisions regarding "an acknowledged and major public health problem," the majority concluded that "the sole inquiry for the [t]ribunal [. . .] is whether or not there was a manifest lack of reasons for the legislation."[173]

The *Philip Morris* majority did not explain the basis for its application of a margin of appreciation, nor did the majority address the numerous investment awards and other decisions rejecting the concept.[174] Instead, the tribunal relied solely on *Electrabel* as support for its transposition of the ECtHR's margin of appreciation as a standard of review—despite the fact that, as noted above, the *Electrabel* tribunal did not cite or appear to rely on ECtHR authority in applying a margin of appreciation.[175] Nor did the *Philip Morris* majority take into account the fact that the *Electrabel* tribunal's award did not rest on the concept of the margin of appreciation, but rather on the tribunal's objective analysis of EU law and factual evidence of Hungary's actions.

Although the *Philip Morris* majority suggested that tribunals should pay what it variously called "substantial deference" or "great deference" to "governmental judgments of national needs in matters such as the protection of public health,"[176] it did not explain the rationale for the distinction it drew between public health and other areas of governmental regulation to which investment treaty claims might relate (*e.g.*, national security, energy regulation, or environmental protection) or why "public health" measures were insulated from review. Likewise, the majority's decision did not address

169. *See generally* Philip Morris Brands v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).

170. *Id.* ¶¶ 388, 399.

171. *Id.* ¶ 388.

172. *Id.* ¶ 399 (citing *Electrabel*, ICSID Case No. ARB/07/19, ¶ 8.35).

173. *Id.* ¶¶ 399, 418.

174. *See infra* Part III.B.

175. *See supra* pp. 46–48. *See also* Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion, ¶ 189 (July 8, 2016).

176. *Philip Morris*, ICSID Case No. ARB/10/7, Award, ¶¶ 399, 418.

how a concept developed in the European human rights context could be transposed into the investment context or whether that transposition would require modifications to the concept.[177]

The dissenting arbitrator in *Philip Morris* (and co-author of this article) challenged the majority's application of the margin of appreciation, concluding instead that there was no basis for importing the concept into either investment law or international law more generally.[178] The dissent adopted a textual approach, citing both customary international law rules of treaty interpretation and previous decisions involving similar treaty guarantees, which in his view required "a sensitive and nuanced consideration of the nature of the governmental measure, the character and context of the governmental judgment, the relationship between the measure and its stated purpose, and the measure's impact on protected investments."[179] While the dissent acknowledged that a measure of deference should be afforded to Uruguay's choice of public policy objectives, it concluded that the FET standard requires "some measure of objective consideration of the extent to which the [challenged measure] achieves, or is calculated to achieve, that objective."[180] The dissent went on to review the challenged Uruguayan measure and concluded that it was both unprecedented among international regulatory efforts and "inherently ill-suited to achieving its asserted objective of prohibiting the deceptive or misleading use of trademarks."[181] The dissent concluded that Uruguay's failure to prove that it had undertaken any objective consideration of the extent that the measure achieved its stated objective, coupled with the measure's arbitrary and disproportionate effects, amounted to a breach of the FET standard: "[m]indful of Uruguay's extensive legislative authority and broad regulatory discretion, it is still impossible to see how a hastily-adopted measure that is so ill-suited to its articulated purpose, and that treads so far onto protected rights and interests, can satisfy even the [t]ribunal's stated standard."[182]

Most recently, the tribunal in *Deutsche Telekom AG v. India* considered the appropriate standard of review for the essential security interests provision in the Germany-India BIT. India argued for a standard of review akin to the margin of appreciation under the ECHR, asserting that "international tribu-

177. In any event, it is difficult to determine what role the margin of appreciation played in the majority's ultimate decision in *Philip Morris*. As one commentator observed about the tribunal's award, "[i]t is not clear that the majority in Philip Morris actually paid much attention to how the ECtHR applies the margin of appreciation." Alvarez, *supra* note 122, at 584. Another commentator has questioned whether "a margin of appreciation and deference really play[ed] a part in the decision," and suggested that the majority were "minded to include reference to the margin of appreciation simply because this would help ensure the persuasiveness of its award as a whole." Caroline E. Foster, *Respecting Regulatory Measures: Arbitral Method and Reasoning in the* Philip Morris v Uruguay *Tobacco Plain Packaging Case*, 26(3) Rev. Eur. Comp. & Int'l Envtl. L. 287, 296 (2017).

178. *Philip Morris*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion, ¶¶ 87, 138–97.

179. *Id.* ¶ 142.

180. *Id.* ¶¶ 147–50, 191.

181. *Id.* ¶¶ 146–79.

182. *Id.* ¶ 176.

nals should not second-guess national security determinations made by national authorities, as the latter are uniquely positioned to determine *what* constitutes a State's *essential security interests in any particular circumstance* and *what measures should be adopted* to safeguard those interests."[183] Citing ECtHR caselaw, India argued that the only question for the tribunal should be whether "the decision on its face is *obviously related to* issues of defence and national security."[184]

The tribunal began its analysis with the treaty interpretation rules under the VCLT and concluded that the essential security interests provision was not "self-judging": "whether a measure is necessary to protect the essential security interests of a party is not . . . purely a question for the subjective judgment of the party."[185] Nonetheless, the tribunal accepted that a "degree of deference" should be afforded to states' determinations of the existence of their "essential security interests," but noted that "such deference cannot be unlimited."[186] The tribunal did not say that it was applying a margin of appreciation more widely or that it was applying the ECtHR's margin of appreciation. In fact, the tribunal questioned India's reliance on a decision of the ECtHR for the proposition that national security should be given "broad scope." The tribunal pointed out that, "in reality," the ECtHR had held that the limits of essential security interests "cannot be stretched beyond their natural meaning."[187] For the tribunal, this meant that it was obliged to review India's determination and decide whether India had an interest concerned with "security" (as opposed to a public or societal interest) that was "essential" (*i.e.*, that went to the core, or "essence," of state security).[188]

The tribunal also agreed with India that "a margin of deference" should be applied to determine whether a measure was "necessary" or "imposed to the extent necessary," due to "the state's proximity to the situation, expertise and competence."[189] The tribunal therefore said that it would not "review *de novo* the state's determination nor adopt a standard of necessity requiring the state to prove that the measure was the 'only way' to achieve the stated purpose."[190] Again, the tribunal also noted that this deference "cannot be unlimited"; to allow "unreasonable invocations of Article 12

183. Deutsche Telekom AG v. Republic of India, PCA Case No. 2014-10, Interim Award, ¶ 234 (Perm. Ct. Arb. 2017).

184. *Id.* ¶ 237.

185. *Id.* ¶ 231.

186. *Id.* ¶ 235.

187. *Id.* ¶¶ 235–36 (citing *C.G. v. Bulgaria*, App. No. 1365/07, ¶ 43 (2008), https://perma.cc/Z59G-TS9U).

188. *Id.* ¶ 236.

189. *Id.* ¶ 238.

190. *Id.* However, the tribunal also reiterated that "the deference owed to the state cannot be unlimited, as otherwise unreasonable invocations of Article 12 would render the substantive protections contained in the Treaty wholly nugatory." *Id.*

would render the substantive protections contained in the Treaty wholly nugatory."[191]

Applying these standards, the *Deutsche Telekom* tribunal then considered whether India's measure was "principally targeted to protect its asserted essential security interests at stake" and whether the measure was "objectively required in order to achieve that protection, taking into account whether the state had reasonable alternatives, less in conflict or more compliant with its international obligations."[192] Following that assessment, the tribunal concluded that India had not established that its measure was necessary for the protection of its essential interests.[193]

Apart from one brief reference to an ECtHR decision, the *Deutsche Telekom* award made no mention of a margin of appreciation, instead referring more generally to a "margin of deference" in the limited context of an essential security interest provision on which India relied. Moreover, notwithstanding its reference to this "margin of deference," the tribunal also conducted a fairly rigorous examination of India's challenged measures, ultimately concluding that they violated the applicable BIT. The decision therefore provides at most very tenuous support for any general application of a margin of appreciation in investment law.

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In sum, a review of all available investment awards reveals very limited and equivocal support for application of a margin of appreciation in investment arbitrations. Only three awards (*Electrabel*, *Philip Morris* and *Deutsche Telekom*) even arguably applied a margin of appreciation when considering a substantive claim under an investment treaty. None of these awards discussed the basis for applying the margin of appreciation outside of the ECHR context and all three tribunals applied the concept only in narrow circumstances (such as an essential security interest provision in *Deutsche Telekom* or to "public health" regulations in *Philip Morris*). Moreover, none of these awards provided a coherent explanation of the standard of review that the margin of appreciation entailed, with *Electrabel* citing a "modest" or "reasonable"[194] margin of appreciation, *Philip Morris* referring to a "substantial" or "great" margin of appreciation,[195] and *Deutsche Telekom* citing an

191. *Id.*

192. *Id.* ¶ 239.

193. The *Deutsche Telekom* tribunal concluded that the records showed that a host of other factors played a "determinant role" in the decision-making process. The tribunal also was persuaded, among other things, by the lack of any evidence or witness testimony proving that the Indian authorities had considered alternative measures. *Id.* ¶¶ 241, 245–46, 260–65, 280–91.

194. 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).

195. Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶¶ 399, 418 (July 8, 2016). As in *Electrabel*, it is unclear whether the margin of appreciation played any material role in the tribunal's decision in *Philip Morris*.

undefined "margin of deference," but applying a fairly rigorous standard of review.[196] More fundamentally, none of these awards made any effort either to explain the basis for application of a margin of appreciation, particularly one drawn from ECtHR decisions, in an investment arbitration or any attempt to ground the margin of appreciation concept in treaty text, objects or purposes, or international law more generally. As such, none of these awards provides support for the application of a margin of appreciation in investment arbitrations.

B. Rejection of the Margin of Appreciation by Investment Tribunals

The few investment awards that refer to a margin of appreciation, discussed above, are outliers. In contrast, a clear majority of the investment tribunals to consider the issue have declined to apply a margin of appreciation, many holding instead that the concept should be confined to the ECHR and is not appropriate in the context of claims under investment treaties. These awards instead conclude that there is no justification for a tribunal to import a margin of appreciation concept from the ECHR context into either investment law or international law more generally.

The first published investment award to consider application of a margin of appreciation was *Siemens v. Argentina*,[197] where Argentina argued that the margin of appreciation concept permitted a respondent state to pay less than fair market value for expropriated property under certain circumstances. In Argentina's submission, when a state expropriates property for social or economic reasons, fair market value should not apply because it would restrict the sovereignty of the state and the ability of a state with limited resources to introduce reforms.[198] The *Siemens* tribunal rejected this argument, in part on the basis that Argentina had not established that it had inadequate resources and, in any event, that Argentina had not specified the reforms it asserted an intention to carry out. In addition, the tribunal also rejected a margin of appreciation on the basis that "Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty."[199]

The tribunal in *Biwater Gauff v. Tanzania* (which included a co-author of this article) also refused to apply a margin of appreciation.[200] In response to an expropriation claim, Tanzania argued that it had been "acting well within the Republic's margin of appreciation under international law" when it had introduced measures allegedly to protect water services.[201] The *Bi-*

196. Deutsche Telekom AG v. Republic of India, PCA Case No. 2014-10, Interim Award, ¶¶ 234, 241, 245–46, 260–65, 280–91 (Perm. Ct. Arb. 2017).

197. Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 354 (Feb. 6, 2007).

198. *Id.*

199. *Id.*

200. Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008).

201. *Id.* ¶¶ 434–36.

water Gauff award did not expressly reject application of the margin of appreciation, but it is clear from the award that the tribunal did not accept Tanzania's argument. The tribunal did not refer to the margin of appreciation in its reasoning, nor did it consider it appropriate to afford any deference to the state's justification for its challenged actions. Instead, the tribunal engaged in an objective assessment of the measures in question and whether those measures had an expropriatory effect on the claimant's investment, concluding that they had such effects.[202]

The margin of appreciation was also rejected in *Chemtura v. Canada*, where the tribunal was required to interpret the minimum standard of treatment in Article 1105 of the North American Free Trade Agreement ("NAFTA") and whether that protection was "lessened" by a margin of appreciation.[203] The tribunal observed that "the assessment of the facts is an integral part of its review under Article 1105 of NAFTA," and concluded that the tribunal "must take into account all circumstances, including the fact that certain agencies manage highly specialised domains involving scientific and public policy determinations."[204] The tribunal rejected application of a margin of appreciation on the basis that Article 1105 did not prescribe "an abstract assessment circumscribed by a legal doctrine about the margin of appreciation," but instead required the tribunal to engage in an objective factual assessment *in concreto*.[205] Thus, although the tribunal acknowledged that the determinations of specialized regulatory agencies may be entitled to a measure of deference in particular circumstances, it dismissed the argument that the margin of appreciation concept was applicable, or would provide a useful standard of review, under NAFTA.

Likewise, in *Quasar de Valores v. Russia*, the tribunal refused to apply a margin of appreciation.[206] The tribunal acknowledged that the ECtHR had found the relevant Russian tax and other measures to be expropriatory, notwithstanding the "wide margin of appreciation" granted under Article 1 of the First Protocol to the ECHR. Importantly, however, the tribunal emphasized that, in contrast to the ECtHR, it was not required to apply Article 1's margin of appreciation, "but rather [was bound] by the terms of the applicable BIT."[207] The tribunal then reviewed the measures imposed by Russia, including the timing and scope of the measures and whether Russia had acted in good faith, without applying any margin of appreciation, ultimately concluding that Russia had violated the applicable investment treaty.[208]

202. *Id.* ¶¶ 451–521.

203. Chemtura Corp. v. Canada, PCA Case No. 2008-01, Award, ¶ 123 (Perm. Ct. Arb. 2010).

204. *Id.*

205. *Id.*

206. Quasar de Valores SICAV S.A. v. Russia, SCC Case No. V-024/2007, Award (Arb. Inst. of the Stockholm Chamber of Comm. 2012).

207. *Id.* ¶ 126.

208. *Id.* ¶ 127. In reaching its conclusion, the tribunal also referred to an earlier investment award that had considered the same measures and found them expropriatory. RosInvest Co. U.K. Ltd. v. Russia, SCC Case No. V079/2015, Final Award (Arb. Inst. of the Stockholm Chamber of Comm. 2010). There,

Similarly, in *von Pezold v. Zimbabwe*, an investment tribunal again refused to apply a margin of appreciation.[209] The tribunal did so on the basis that an investment dispute was "a very different situation from that in which the margin of appreciation is usually used" by the ECtHR,[210] and that considerable caution should be exercised before importing the concept from the ECHR to the investment context:

> Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law. . . . This is a very different situation from that in which [the] margin of appreciation is usually used. Here, the Government has agreed to specific international obligations and there is no "margin of appreciation" qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore, the Tribunal declines to apply this doctrine.[211]

This, together with the absence of a textual basis in the applicable bilateral investment treaty, led the tribunal to conclude that a margin of appreciation should not (and could not) be applied.

In sum, investment tribunals have applied a margin of appreciation only on rare occasions. A clear majority of reported awards have refused to apply the margin of appreciation concept in investment arbitration, sometimes expressly rejecting the concept as a general rule of international law. In the few cases where tribunals have referred to a "margin of appreciation," they have always done so in unusual circumstances, usually relying on treaty language that could be construed to import a deferential standard of review (as in *Frontier v. Czech Republic* and *Deutsche Telekom v. India*) or applying accepted rules of international law granting deference to the state (as in *Micula*

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the tribunal similarly held that it was not bound by the "wide margin of appreciation" applied by the ECtHR under the First Protocol to the ECHR, but instead by the terms of the applicable BIT. The tribunal went on to find that the Russian measures "must be seen as a treatment which can hardly be accepted as bona fide," and so violated the treaty. *Id.* ¶ 567.

209. Bernhard von Pezold v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award (July 28, 2015).

210. *Id.* ¶ 466.

211. *Id.* ¶¶ 465–66. The tribunal also held that the margin of appreciation could not be applied as a general principle of customary international law, holding that the principle had "not achieved customary status." *Id.* ¶ 466. Similarly, one commentator has recently observed that "without such textual support ISDS arbitrators should be wary of importing ECHR law into international investment law without careful analysis of the differing institutional contexts of the Strasbourg Court and of ad hoc ISDS tribunals." Alvarez, *supra* note 122, at 519, 542. The *von Pezold* tribunal also held that: "In any case, the Claimants have noted that neither the 'margin of appreciation' nor the proportionality doctrine can be used to justify illegal conduct, such as a breach of an obligation *erga omnes*, by engaging in racial discrimination . . . there is ample evidence that the Claimants were targeted in the present case on the basis of skin colour." *von Pezold*, ICSID Case No. ARB/10/15, ¶¶ 467–68.

v. Romania). Moreover, the very few awards that have even arguably applied a margin of appreciation have provided no rationale for doing so, adopted divergent and contradictory standards of what the concept meant, and applied the concept only in narrow and circumscribed circumstances.

C. The Illegitimacy of the Margin of Appreciation in International Investment Law

It is elementary that treaty provisions must be interpreted pursuant to the rules of treaty interpretation, as set out in the VCLT. A treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[212] These interpretive principles, together with other applicable rules of international law, do not support general application of a margin of appreciation in investment law, or more widely, in the manner urged in some investment arbitrations.[213] In the words of one commentator in the ECHR context, which apply at least equally elsewhere, to apply the margin of appreciation concept would be to "glos[s] over the text" of the applicable investment protection treaty, producing a "relativism" that converts tribunals into policy-makers and undermines international law.[214] These criticisms are correct: putting aside the appropriateness of a margin of appreciation under the ECHR, there are a number of related reasons why application of the ECtHR's margin of appreciation in investment arbitration would not be in accordance with either the VCLT or international law more generally.

First, there is no basis in the text of most investment treaties for application of a margin of appreciation. There is no reference in the language of NAFTA, the Energy Charter Treaty, the ASEAN Comprehensive Investment Agreement, or other major multilateral investment treaties to a "margin of appreciation" or any similar concept. Likewise, a review of the language of representative bilateral investment treaties reveals virtually no treaties that refer to a "margin of appreciation."[215] Nor do any of the pub-

212. Vienna Convention on the Law of Treaties, Article 31(3), May 23, 1969, 1155 U.N.T.S. 331. Although "any relevant rules of international law applicable in the relations between the parties" may also be considered under Article 31(3)(c), as discussed above, the margin of appreciation concept is not a "rule of international law." Moreover, as discussed below, the margin of appreciation is unique to the European human rights context and cannot be considered "applicable" in the treaty relations between parties to investment treaties outside that limited context.

213. *See supra* Part III.B.

214. *See, e.g.*, Z. v. Finland, 1997 Eur. Ct. H.R. at 357; Odièvre v. France, 2003 Eur. Ct. H.R 1, 30 (2003) (concurring opinion by Rozakis, J.). As another commentator concluded, the VCLT has "played very little role" in the case law of the ECHR." George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer,* 21(3) EUR. J. INT'L L. 509 (2010). *See also* YOUROW, *supra* note 4, at 196; Alvarez, *supra* note 122, at 509, 598; Hutchinson, *supra* note 52, at 649–50; MacDonald, *supra* note 55, at 85; Rabinder Singh et al., *Is There a Role for the 'Margin of Appreciation' in National Law After the Human Rights Act?*, 1 EUR. HUM. RTS. L. REV. 4 (1999).

215. *See, e.g.*, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed., 2013); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW

licly available *travaux préparatoires* of investment treaties refer to the concept.[216] As a matter of interpretation, therefore, there is no textual basis in investment treaties for application of the margin of appreciation concept.[217]

Second, the margin of appreciation is also contrary to the objects and purposes of most international agreements and, in particular, most contemporary investment protection treaties. As discussed above, the margin of appreciation generally allows for a substantial presumption in favor of the propriety of measures imposed by a state, justified in part on the basis that state authorities are in principle in a better position than international decision-makers to determine the content of the state's obligations. Yet the fundamental purpose of most treaties entered into between states is to prescribe binding rules of international law, which are generally subject to enforcement by means of international adjudication.[218] A fundamental purpose of investment treaties in particular is to guarantee, through arbitral mechanisms,[219] the objective and independent application of basic protections under international law for foreign investors, thereby avoiding the politicized diplomatic espousal of claims or the potential bias of national courts.[220]

A margin of appreciation would generally undermine these basic purposes, substituting expansive and ill-defined deference to the views of national authorities for the objective and independent application of international standards prescribed by treaty provisions.[221] It would also open

(2d ed. 2012); RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995); KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION (2010); KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009).

216. Under the VCLT, in the event that Article 31 fails to provide an ordinary meaning, recourse may be had to supplementary means of interpretation, such as the *travaux préparatoires,* to determine the meaning of the provision or to confirm the interpretation that has resulted from the general rule in Article 31.

217. As discussed below, there may be cases where, under a particular investment protection guarantee in a particular treaty, some measure of deference to governmental acts or decisions is prescribed; in general, however, most provisions of investment protection treaties contemplate no deference to state decisions. *See infra* Part IV. Some commentators have suggested that the absence of language prescribing a margin of appreciation or other standard of review does not "provide a decisive argument for or against the margin of appreciation," reasoning that the absence of such language leaves it to arbitral tribunals to "interpret the open norms according to their own views." Fahner, *supra* note 58, at 468. That analysis is not convincing. Where states agree to specified treaty protections, without qualifying those protections as self-judging or otherwise, the imposition of a margin of appreciation or similar concept of deference contradicts the text, objects, and purposes of the treaty. Nothing in the language of most investment protection treaties dilutes or qualifies the force of the protections they confer, much less leaves to arbitral tribunals to apply their own views about standards of deference.

218. *See* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L. J. 775 (2012).

219. *See, e.g.*, VANDEVELDE, *supra* note 215; DOLZER & SCHREUER, *supra* note 215.

220. *See, e.g.,* VANDEVELDE, *supra* note 215, at 56–59; DOLZER & SCHREUER, *supra* note 215; ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, ch. 1 (2009).

221. Note again the suggestions that investment tribunals should apply "their own views" regarding standards of deference and review in investment arbitrations. Fahner, *supra* note 58, at 468. That suggestion is impossible to reconcile with the VCLT or the basic objects of most investment protection treaties, which instead aim at predictability and the rule of law.

the door to substantive discretion on the part of arbitrators as to whether or not, and to what extent, to examine challenged governmental measures. Instead, consistent with the reasoning of the Nuremberg Tribunal and the ICJ in *Oil Platforms* and *Whaling in the Antarctic*, a "strict and objective" assessment of a state's compliance with international law is necessary to give effect to the obligations under most treaties. Put simply, compliance with international law "must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[222] Alternatively, as the tribunal in *Continental Casualty* concluded in rejecting a broad conception of the margin of appreciation, "caution must be exercised in allowing a party unilaterally to escape from its treaty obligations in the absence of clear textual or contextual indications."[223]

Investment treaties typically contain a number of related, but discrete, substantive protections for foreign investors.[224] The application of a treaty provision must, of course, take into account the text, character and content of that particular provision—an analysis which proponents of the margin of appreciation have not even attempted to undertake in the investment arbitration context. As discussed in greater detail below,[225] when an analysis of individual investment treaty provisions is undertaken, it provides no basis for importing the margin of appreciation into investment law. On the contrary, the text, object and purpose of most investment treaty provisions argue decisively against the notion of a margin of appreciation. Even where a particular provision in a treaty may permit some deference to state judgments, this is, at most, limited to specific, carefully delineated issues and provides no support for a wholesale importation of the margin of appreciation with its generalized deference to governmental decision-making.

Third, the decisions of the ECtHR and Commission do not provide support for extending the margin of appreciation outside the ECHR context to investment law. As discussed above, application of the concept by the ECtHR has been justified by the text and *travaux préparatoires* of the ECHR, together with the ECHR's institutional setting and structure and the Convention's specific geographic and historical context. The concept is applied by the ECtHR to "protect European democratic values," to ensure balanced

222. *Nuremberg Judgment*, *supra* note 29, at 207. *See also* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161 (Nov. 6); Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31).

223. Cont'l Cas. Co., v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 187 (Sept. 5, 2008).

224. Some commentators cite the familiar description of investment protection treaties as a "grand bargain: a promise of protection of capital in return for the prospect of more capital in the future." Fahner, *supra* note 58, at 476 (citing Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 1, 77 (2005)). That description does not contradict, and instead confirms, the conclusion that the objects and purposes of most BITs exclude application of a margin of appreciation. Insofar as BITs reflect a grand bargain, it is then essential that their terms be given independent and objective application—to ensure that the bargain is honored.

225. *See infra* Part IV.

"European supervision" of national decisions and to protect the ECtHR "from charges that they are violating the wishes of democratic polities, particularly legislatures."[226] As one commentator has observed, the European human rights system is unique because the "key member States share a similar culture, history and political tradition," which calls for "a certain degree of pluralism through application of the margin of appreciation doctrine."[227] Within this unique setting, the margin of appreciation is used, along with the principle of subsidiarity, to fulfill the purposes of the EU and the ECHR, namely "to use supranational human rights protection to establish a European legal order that respects the rule of law"[228] and to contribute to the development of the EU's political and legal structure.[229]

These institutional considerations and intra-European objectives of the ECHR are fundamentally different from the typical objects and purposes of an investment treaty, often involving non-European states, with very different legal cultures and interests, and materially different types of treaty provisions. The object and purpose of most investment treaties are identified in the preambles to such treaties as being to encourage and protect cross-border investment,[230] rather than the ECtHR's role of supervising the development of a European legal order for the protection of human rights within Member States and facilitating the process of European integration and institutional development.[231] This distinction is underscored by the ECtHR's reliance on

226. *See* Alvarez, *supra* note 122, at 597; Caroline Henckels, Proportionality And Deference In Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy 14 (2015).

227. Shany, *Strasbourg*, *supra* note 53, at 189.

228. Alvarez, *supra* note 122, at 597.

229. *Id.* at 597; Henckels, *supra* note 226, at 14.

230. *See, e.g.*, Netherlands Model Bilateral Investment Treaty (2004), https://perma.cc/3V8P-3S2V, the preamble of which states that the parties "[d]esir[e] to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party" and "[r]ecognis[e] that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties." *See also* Saluka Invs. B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶ 300 (Mar. 17, 2006); Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8, Award, ¶ 81 (Feb. 6, 2007); Quasar de Valores SICAV S.A. v. Russia, SCC Case No. V-024/2007, Award, ¶ 22 (Arb. Inst. of the Stockholm Chamber of Comm. 2012) ("[H]uman rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of 'margins of appreciation' that apply to the former.").

231. The ECHR's preamble is representative of the Convention's object and purpose: "the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms" and "have a common heritage of political traditions, ideals, freedom and the rule of law." *See* ECHR, *supra* note 67, Preamble. *See also* Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A), ¶ 34 (Applying Article 31(2) of the VCLT, the Commission cited the passage in the ECHR preamble which provides Member States share "a common heritage of political traditions, ideals, freedom and the rule of law."); Macdonald, *supra* note 55, at 123. Even within the ECHR context, as others have pointed out, the ECtHR's margin of appreciation concept is problematic, particularly in settings involving minority rights and interests. Benvenisti, *supra* note 52, at 847–53; Gross & Ní Aoláin, *supra* note 52, at 642.

concepts of "subsidiarity" under the ECHR and respect for democratic governance of European states in justifying application of a margin of appreciation in European human rights cases[232]—concepts that have no parallel under most investment protection treaties. Instead of seeking to further legal and political integration, with the aim of ensuring a common European system, investment treaties have a much more specific objective—of facilitating cross-border investment—and can operate between states that share no common political, legal, or cultural background. There is no reason to apply the standard of review that is appropriate in one setting, for a wide range of human rights protections, in other, fundamentally different settings, for very specific investment protections.

Equally importantly, the ECHR's provisions are directed in significant part towards the protection of the human rights of European nationals against the actions of their own home states.[233] In that regard, it may be understandable that concepts of subsidiarity and deference to democratic governance and local customs should be given decisive importance—as reflected in the ECtHR's justifications for the margin of appreciation[234] and in the Convention's exhaustion of remedies requirement.[235] The position of foreign investors under investment protection treaties is fundamentally different. By definition, foreign investors are not local nationals of the host state, with both the right to participate in its democratic or other political processes and obligation to exhaust local remedies; instead, they are foreigners who are excluded from such political participation, and naturally and not infrequently the target of precisely the governments resulting from those democratic processes. As one tribunal explained, "the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled to exercise political rights reserved to the national of the State."[236] Whatever its value under the

232. *See supra* pp. 21–25. In general, it is impossible to see how respect for democratic decision-making would apply generally to justify a margin of appreciation under investment treaties. Numerous states that cannot readily be categorized as democratic are parties to such treaties and it would be both anomalous and pernicious for tribunals to calibrate their standards of review based upon this consideration. *See also* Fahner, *supra* note 58, at 481–87; Anthea Roberts, *The Next Battleground: Standards of Review in Investment Treaty Arbitration*, *in* International Council for Commercial Arbitration Congress Series No. 16, 178 (Albert Jan van den Berg ed., 2011); Shany, *Strasbourg*, *supra* note 53, at 189–90; Vasani, *supra* note 60, at 149–50; Joshua Paine, *Standard of Review (Investment Arbitration)*, Max Planck Institute Luxembourg, Department of International Law and Dispute Resolution (January 2018), https://perma.cc/7LAC-6UVL.

233. *See supra* pp. 21–25.

234. *See id*.

235. ECHR, *supra* note 67, art. 35(1) ("The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.").

236. Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003). *See also* Fahner, *supra* note 58, at 486–87; Vasani, *supra* note 60, at 149–50.

ECHR,[237] the ECtHR's deference to local democratic decision-making has no application in the context of investment protection treaties, whose basic purpose is to protect foreigners from local abuses and mistreatment, whether democratically inspired or otherwise.

These differences between the ECHR and investment protection treaties render the margin of appreciation as developed in the European human rights context of little or no relevance in the field of investment law or international law more generally. Indeed, transposition of the concept from the ECHR context to investment arbitration necessarily results in application of an ill-suited standard, controversially constructed for one context with one set of objectives, to a very different context with very different objectives—using a hammer to turn a screw or make an omelet. Relatedly, the transposition of the margin of appreciation from the ECHR context also discourages independent analysis of the particular text, object and purposes of relevant investment treaties, contrary to basic precepts of treaty interpretation.

Equally importantly, as discussed above, the margin of appreciation has been applied by the Commission and the ECtHR in a variety of materially different ways in a variety of different contexts,[238] and has frequently been the subject of significant dissent and criticism in these contexts.[239] The inconsistent standards applied in the ECHR context, justified by differing and often disputed rationales, provide no meaningful guidance for investment arbitration. Moreover, in recent decisions of the ECtHR, the concept has been narrowed in scope, including by consideration of the degree of European consensus (termed "commonly accepted standards . . . in the Member States of the Council of Europe") regarding the individual rights protected under the ECHR.[240] The various conditions and limitations imposed on the margin of appreciation by the process of "European supervision" in the ECHR context have no analogue with investment disputes, where the concept would have particularly substantial consequences for treaty protections. Again, these aspects of the ECtHR's application of the margin of appreciation do nothing to justify an extension of the concept into investment law and instead argue for the opposite result.

Fourth, the historical use of the margin of appreciation outside the ECHR context also provides no grounds for acceptance of the concept as a general

237. Even within the ECHR context, as others have pointed out, the ECtHR's margin of appreciation doctrine is inappropriate, particularly in settings involving minority rights and interests. Benvenisti, *supra* note 52, at 847–53; Gross & Ní Aoláin, *supra* note 52, at 642.

238. *See* in addition to the cases discussed in Part II above, *e.g.*, Union of Belgian Police v. Belgium, 19 Eur. Ct. H.R. (ser. A), ¶ 39 (1975) (the freedom of peaceful assembly and association under Article 11 of the ECHR); Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A), ¶ 45 (the right to correspondence with a solicitor under Article 8).

239. *See, e.g.,* Benvenisti, *supra* note 52, at 850; Brauch, *supra* note 52, at 147, 149; Feingold, *supra* note 108; Gross, *supra* note 52; Gross & Ní Aoláin, *supra* note 52; Marks, *supra* note 52; O'Donnell, *supra* note 1.

240. *See supra* Part II.

principle of international law. Rather, as discussed above, the decisions of international courts and tribunals show that the margin of appreciation has been applied infrequently, almost always being rejected in contemporary international decisions absent clear textual basis. Even when a margin of appreciation has been accepted, it has not been applied as a single, coherent standard, but instead as a label attached to numerous different concepts for very different reasons in very different settings.[241] In most of the decisions where a margin of appreciation has been applied, it has been in narrow circumstances that do not provide support for a broader application of the concept.[242]

Unsurprisingly, in light of this historical record, a substantial majority of the tribunals to consider the issue have held that the margin of appreciation is not a general principle of international law, and is therefore not applicable as a matter of investment law.[243] The only contrary authorities are the majority award in *Philip Morris* and, less clearly, the tribunals' awards in *Electrabel* and *Deutsche Telekom*, none of which provides meaningful support for application of the concept.[244] The *Philip Morris* majority mechanically imported standards from the ECHR context into one investment law setting, without either doctrinal or policy analysis, while citing contradictory standards.[245] The *Electrabel* and *Deutsche Telekom* tribunals likewise applied inconsistent standards, while also failing to explain either their source or basis, including whether any of these standards was derived from ECtHR decisions or the ECHR.[246] It is therefore impossible to conclude that the *Philip Morris* award or any other investment award that has referred to the margin of appreciation provides persuasive support for application of the margin of appreciation in investment law or in international law more generally.

Fifth, considerations of sound policy similarly provide no grounds for application of a margin of appreciation in investment arbitration. Those com-

241. *See supra* Part I. *See also* LEGG, *supra* note 53; Arai-Takahashi, *supra* note 55; Letsas, *supra* note 54.

242. *See supra* Part I.

243. Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007); Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008); Chemtura Corp. v. Canada, PCA Case No. 2008-01, Award (Perm. Ct. Arb. 2010); Quasar de Valores SICAV S.A. v. Russia, SCC Case No. V-024/2007, Award (Arb. Inst. of the Stockholm Chamber of Comm. 2012); Bernhard von Pezold v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award (July 28, 2015). *See also* Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion, ¶ 142 (July 8, 2016).

244. *See supra* pp. 59–65. *See also* Letsas, *supra* note 54; Arai-Takahashi, *supra* note 55; LEGG, *supra* note 53.

245. The majority also failed to address either the textual basis in the ECHR for a margin of appreciation or the significant limitations on, and criticisms of, the concept in the ECHR context. The references to the concept were "casual and unspecified" with "no references to ECHR case law." Alvarez, *supra* note 122, at 602.

246. As discussed above, the *Electrabel* award cited a margin of appreciation without addressing the source or legal basis for doing so. *See supra* pp. 46–48. Similarly, like *Philip Morris*, the *Electrabel* tribunal referred to differing and inconsistent margins of appreciation (which it variously termed "modest" and "reasonable"). 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).

mentators who have urged broader application of the margin of appreciation outside the context of the ECHR and other human rights treaties[247] have made conclusory references to the desirability of a "flexible reading of international law."[248] Those policy arguments that are advanced in support of the concept are, on examination, unpersuasive and contrary to the rules of treaty interpretation under the VCLT and international law more generally.

One commentator has suggested that the margin of appreciation is justified because domestic regulatory agencies are asserted to have "superior law-application capabilities" to those of international tribunals.[249] Likewise, proponents of a margin of appreciation cite a supposed "resource gap" between international tribunals and domestic regulatory agencies, which purportedly exacerbates the lack of expertise of international tribunals in understanding a regulatory area or the background conditions of investment disputes.[250] This argument is reminiscent of Huber's earlier view, in the *Spanish Zone of Morocco Claims* case, that local authorities had greater competence to make judgments about the need for military action than an international tribunal,[251] and comparable suggestions by the ECtHR.[252]

Putting aside the text, object and purpose of investment treaties, all of which reject transposition of the margin of appreciation concept into investment law, there are compelling additional grounds for rejecting these policy arguments. Investment arbitrations often do not involve carefully calibrated regulatory decisions, made by domestic agencies possessing specialized expertise and arguably enjoying a "resource gap" vis-à-vis international tribunals. Instead, in many cases, state actors are motivated by political, economic, social or other rationales that do not entail the exercise of any technical or specialized analysis.

In *Biwater Gauff*, for example, Tanzania engaged in no meaningful regulatory analysis and applied no specialized expertise when deciding to expropriate the claimant investor's property.[253] Instead, after detailed review of the historical record, the *Biwater Gauff* tribunal concluded that Tanzania's forcible occupation of the claimant investor's plant was "motivated by political considerations."[254] Similarly, in *BP Exploration Co. v Libya,* the ad hoc arbitrator held that the taking of a foreign oil company constituted an expropriation "as it was made for purely extraneous political reasons and was

247. *See, e.g.*, Helfer, *supra* note 3, at 404; Glashausser, *supra* note 3, at 34 (arguing that the margin of appreciation concept "makes sense for other treaties as well").

248. Shany, *General Margin*, *supra* note 4, at 912.

249. *Id.* at 918.

250. *Id.* at 918–19.

251. British Claims in the Spanish Zone of Morocco (Gr. Brit. v. Spain), 2 R.I.A.A. 617, 640–45 (1925).

252. *See, e.g.*, James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A), ¶ 46 (1986).

253. *See generally* Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008). As noted above, Mr. Born, a co-author of this article, sat on the *Biwater Gauff* tribunal.

254. *Id.* ¶ 500.

arbitrary and discriminatory in character."[255] Numerous other investment tribunal decisions, involving governmental measures taken without any technical or other regulatory analysis, and instead motivated by obvious local prejudice or partisan interest, confirm this point.[256]

Even where specialized domestic agencies have in fact conducted technical analyses that the host state relied upon in implementing the challenged measures, this does not justify application of a margin of appreciation to the question of whether the host state complied with its international law obligations. At most, it would justify some amount of deference to national authorities in assessing the technical conclusions and judgments.[257] It would also be important to consider whether the host state had engaged in a transparent and non-arbitrary decision-making process, in pursuit of a legitimate policy objective. For example, in *Methanex*, the tribunal found that the scientific studies that the United States relied on provided a "serious, objective and scientific approach to a complex problem," which was subject to "public hearings, testimony and peer-review" and motivated by an "honest belief, held in good faith and on reasonable grounds."[258] Importantly, the existence of a scientific analysis did not preclude review by the tribunal, which went on to examine whether the government had also considered alternative less-restrictive measures. Similarly, in *Chemtura*, the tribunal upheld a measure banning the planting of canola seeds treated with lindane due in part to the fact that the Canadian government had conducted a scientific review.[259] Also relevant to the tribunal's determination was the fact that the claimant had the opportunity to participate in the review process and that the review itself was further corroborated by an expert witness. Again, Canada's commission of a scientific review did not prevent the tribunal from examining the lawfulness of the state's action, but it provided an important

255. BP Expl. Co. v. Libya, Award, 53 I.L.R. 297, 329 (1979).

256. In *Crystallex v. Venezuela*, for example, Venezuela claimed that its decision to withdraw the claimant investor's mining rights was based on a technical study that the Ministry of Environment had commissioned, but did not provide any evidence to demonstrate that such a study existed. The *Crystallex* tribunal concluded that "[w]ithout more detailed specifications or explanations, these indeterminate references [to technical reports] are . . . entirely incapable of providing any possibly sound justification for a decision." *See* Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶¶ 324–26, 593–98 (Apr. 4, 2016); *see also* Quasar de Valores SICAV S.A. v. Russian Federation, SCC Case No. V-024/2007, Award, ¶ 214 (Arb. Inst. of the Stockholm Chamber of Comm. 2012); RosInvest Co. U.K. Ltd. v. Russia, SCC Case No. V079/2015, Final Award (Arb. Inst. of the Stockholm Chamber of Comm. 2010); S.D. Myers Inc. v. Canada, UNCITRAL, Partial Award (Nov. 13, 2000); Vivendi Universal S.A. v. Republic of Argentina, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007); Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

257. *See, e.g.*, Mercer Int'l Inc. v. Canada, ICSID Case No. ARB(AF)/12/3, Award, ¶ 7.33 (Mar. 6, 2018); Saluka Invs. B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶ 273 (Mar. 17, 2006); *Crystallex*, ICSID Case No. ARB(AF)/11/2, Award, ¶¶ 583–86; Les Laboratoires Servier S.A.S. v. Poland, UNCITRAL, Award, ¶ 568 (Feb. 14, 2012). *See also* HENCKELS, *supra* note 226, at 95–103.

258. Methanex v. U.S., UNCITRAL, Partial Award, ¶¶ 103–05 (Aug. 7, 2002).

259. Chemtura Corp. v. Canada, PCA Case No. 2008-01, Award, ¶¶ 133–63 (Perm. Ct. Arb. 2010).

indicium of both the good faith and reasonableness of the measure under international law.

Moreover, in conducting their review, investment tribunals often have access to procedural tools that national authorities do not possess or did not utilize during the decision-making process.[260] These tools include document disclosure,[261] written and oral witness testimony,[262] *amicus curiae* submissions,[263] the constitution of tribunals including technical experts,[264] site inspections,[265] and expert witness conferencing.[266] For example, the *Philip Morris* tribunal heard extensive technical expert evidence regarding the justifications and consequences of the challenged measures, from experts who submitted five detailed expert reports and gave extensive technical evidence about the justifications and consequences of the challenged measures, as well as *amicus curiae* submissions from international health organizations, on the purpose and efficacy of the challenged measure.[267] In addition, international

260. The evidentiary record in many investment arbitrations is extensive, typically involving tens of thousands (or more) of pages of documentary evidence, numerous fact and expert witness statements, and a lengthy evidentiary hearing. Examples of cases involving typical evidentiary records include Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016); LG&E Energy Corp. v. Republic of Argentina, ICSID Case No. ARB/02/1, Decision on Liability, (Oct. 3, 2006); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (May 16, 2018); Pac Rim Cayman LLC v. El Salvador, ICSID Case No. ARB/09/12, Award (Oct. 14, 2016).

261. *See* BORN, *supra* note 27, at 2347–50; NATHAN D. O'MALLEY, RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE (1st ed., Informa Law 2013).

262. *See* BORN, *supra* note 27, at 2257–60, 2280–84; IBA RULES OF EVIDENCE: COMMENTARY ON THE IBA RULES OF THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (Tobias Zuberbuhler et al. eds., 2012); Robert Pietrowski, *Evidence in International Arbitration*, 22 ARB. INT'L 373 (2006).

263. *See* Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1(3) CAMBRIDGE J. INT'L & COMP. L. 208 (2012); Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration,* 34 ICSID REV. (forthcoming); Fernando Dias Simões, *Myopic Amici: The Participation of Non-Disputing Parties in ICSID Arbitration*, 42 N.C. J. INT'L L. 791, 798–99 (2017); Sophie Lamb et al., *Recent Developments in the Law and Practice of Amicus Briefs in Investor-State Arbitration*, 5 INDIAN J. ARB. L. 72, 92 (2017); Kirsten Mikadze, *Uninvited Guests: NGOs, Amicus Curiae Briefs and the Environment in Investor-State Dispute Settlement*, 12 J. INT'L L. & INT'L REL. 35, 63–65 (2016). For example, in *Philip Morris v. Uruguay*, the arbitral tribunal received and relied upon extensive *amicus curiae* submissions from the World Health Organization, the WHO Framework Convention on Tobacco Control Secretariat and the Pan American Health Organization. In *Eureko v. Slovak Republic*, the tribunal invited written *amicus curiae* submissions from the EU Commission and the Netherlands. *See Philip Morris*, ICSID Case No. ARB/10/7, Award, ¶¶ 35–55; Eureko B.V. v. Slovak Republic, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶¶ 154–211 (Perm. Ct. Arb. 2010).

264. For example, the tribunal in the *Indus Waters Kishenganga Arbitration* included Professor Howard S. Wheater Freng, a leading hydrologist. *See* In re Indus Waters Kishenganga Arbitration (Pak. v. India), PCA Case No. 2011-01, Final Award (Perm. Ct. Arb. 2013).

265. *See, e.g.*, Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012), which visited the Ecuadorian Amazon during the proceedings. *See also* BORN, *supra* note 27, at 2352–54.

266. *See, e.g.*, UNCITRAL Rules, art. 27.2. For commentary, *see* Michael Hwang, *Witness Conferencing and Party Autonomy*, *in* SELECTED ESSAYS ON INTERNATIONAL ARBITRATION 403–88 (Michael Hwang ed., 2013); Wolfgang Peter, *Witness Conferencing*, 18 ARB. INT'L 47 (2002).

267. By the conclusion of the arbitral proceedings, the tribunal considered substantially more technical analysis and evidence than had allegedly been considered by the Uruguayan regulatory authorities. *See Philip Morris*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion Co-Arbitrator Gary Born, ¶ 167 ("[T]he evidentiary record makes it clear that the [respondent's measure] was adopted with no

tribunals have the luxury of considering evidentiary issues after the fact in a deliberative process, and are not ordinarily subject to the same local, partisan pressures that may affect domestic political bodies[268]—in both instances, promoting a more objective assessment of technical and other evidence. Investment tribunals thus arguably enjoy significant evidentiary advantages compared to national authorities; at the very least, there is no basis for suggesting that investment tribunals lack adequate means of assessing scientific or other complex technical issues, or that any "resource gap" justifies deferring to a host state's views as to its compliance with its international law obligations.

Finally, the margin of appreciation concept is often affirmatively unhelpful to a proper analysis of alleged breaches of investment protections and other international obligations. In the words of one commentator, addressing the concept in the ECHR context, "the margin of appreciation is a conclusory label which only serves to obscure the true basis on which a reviewing court decides whether or not intervention in a particular case is justifiable."[269] This criticism applies with at least equal force outside the ECHR context.

As discussed above, references to a margin of appreciation have appeared in numerous different settings, ranging from an international tribunal's jurisdictional competence and procedural powers,[270] to political determinations of the U.N. Security Council and General Assembly;[271] the authority of a state to confer nationality;[272] and a state's compliance with various international obligations such as prohibitions against aggressive wars, guarantees of freedom of commerce, and denials of FET.[273] Likewise, the margins of appreciation applied in these varying circumstances have ranged from a

meaningful prior study, internal debate, or external consultation. Rather, so far as the evidence shows, the requirement was formulated, drafted and adopted in the space of only a few days, without any meaningful study or discussion of the measure. The absence of internal checks and balances, or external consultation, both helps explain, and underscores the arbitrary and disproportionate character of the [measure].") (footnote omitted). *See also id.* ¶¶ 111–12.

268. *See* Chemtura Corp. v. Canada, PCA Case No. 2008-01, Award, ¶¶ 133–63 (Perm. Ct. Arb. 2010); *Philip Morris*, ICSID Case No. ARB/10/7, Award; LG&E Energy Corp. v. Republic of Argentina, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (May 16, 2018); Pac Rim Cayman LLC v. El Salvador, ICSID Case No. ARB/09/12, Award (Oct. 14, 2016).

269. *See* Singh, *supra* note 214.

270. *See supra* Part I.

271. *See supra* Part I.

272. *See* Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 94 (Sept. 24, 2008).

273. *See, e.g.,* British Claims in the Spanish Zone of Morocco (Gr. Brit. v. Spain), 2 R.I.A.A. 617, 640 (1925) (necessity and military actions); Affaire de la dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grece, Italie et Turquie), 1 R.I.A.A. 529, 567 (1925) (compliance with accounting obligations under Treaty of Lausanne); Cont'l Cas. Co., v. Republic of Argentina, ICSID Case No. ARB/03/9, Award, ¶ 181 (Sept. 5, 2008) (necessity, expropriation, and FET); Frontier Petroleum Servs. Ltd. v. Czech Republic, PCA Case No. 2008-09, Final Award, ¶ 529 (Perm. Ct. Arb. 2010).

"modest" margin to a "reasonable" one, from "certain" to "substantial," to "wide," to "subjective," to either undefined or essentially unfettered.[274]

Characterizing these widely divergent standards applied in equally diverse settings as a generally applicable margin of appreciation is not merely unjustified but affirmatively unhelpful. Reference to a single margin of appreciation suggests that the same standard of deference and thus the same margin of appreciation applies in each of the various settings in which it is invoked. That is not historically accurate, under the ECHR or otherwise,[275] nor is it sensible. Very different considerations apply to the review of an arbitral tribunal's procedural and evidentiary discretion[276] and the tribunal's jurisdictional determinations.[277] Equally diverse considerations apply to the U.N. General Assembly's decisions on admissions;[278] a state's discretionary conferral of nationality;[279] and a state's compliance with prohibitions on the use of force.[280] Treating all of these different decisions as applications of "the" margin of appreciation incorrectly attributes a single standard of deference to fundamentally different actions, subject to fundamentally different international standards. It is again reminiscent of using a hammer to fix every problem.

Relatedly, application of the margin of appreciation also inhibits objective application of particular treaty provisions and rules of international law, and independent assessment of evidentiary records. Instead of addressing these matters, the margin of appreciation concept results in the mechanical application of labels and standards from inapposite contexts. In the words of one commentator, criticizing application of the margin of appreciation under the ECHR, the concept "has freed the Court from having to do the real and challenging work of interpreting the meaning and contours of the rights that are protected in the Convention."[281] Or, as Baroness Higgins concluded, application of the margin of appreciation is "increasingly difficult to control and objectionable as a viable legal concept."[282] Precisely the same conclusions apply, with even greater force, to the application of a margin of appreciation in investment law.

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274. 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); Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶¶ 399, 418 (July 8, 2016); *Morocco Claims*, 2 R.I.A.A at 640; Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57 (May 28).

275. *See supra* Parts I, II.

276. *See, e.g.*, Pinson v. United Mexican States (Fr. v. Mex.), 5 R.I.A.A 327, 412–13 (Oct. 19, 1928).

277. *See, e.g.*, Società per Azioni Industriale Marmi d'Italia (Fr. v. It.), 8 RIAA 43, 45 (1964).

278. *See supra* notes 50–52; s*ee also S.A.I.M.I.*, 8 R.I.A.A. 43; *Admission in the U.N.*, 1948 I.C.J. 57.

279. Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 94 (Sept. 24, 2008).

280. Quasar de Valores SICAV S.A. v. Russia, SCC Case No. V-024/2007, Award, ¶ 214 (Arb. Inst. of the Stockholm Chamber of Comm. 2012).

281. Brauch, *supra* note 52, at 147–49.

282. Higgins, *supra* note 52, at 315.

IV. If Not a Margin of Appreciation, Then What?

Since the margin of appreciation is rejected in investment law, and international law more generally, what standard of review should be applied instead? The answer is provided by orthodox rules of treaty interpretation, prescribed by the VCLT, and by other principles of international law. The scope of any deference to decisions by national authorities under international law, including investment law, should be based on an analysis of the text of the applicable treaty provisions or other rules of international law; the task is to identify the ordinary meaning of the text of the treaty provision in light of the objects and purposes of the treaty and the content of applicable rules of international law.[283] That approach ensures that the standard of review applied, and accordingly any deference afforded decisions of national authorities, is justified by and tailored to the applicable treaty provision or rule of international law.[284] This approach is also, unsurprisingly, that adopted by the ICJ, in its decisions in *Oil Platforms*, *Whaling in the Antarctic*, and *Nicaragua Military Activities*, which looked to the text of relevant treaty provisions in considering whether to afford deference to the judgments of state authorities.[285]

The starting point for this analysis, as discussed above, is that there is no basis for a generalized margin of appreciation or a similar concept of deference in either investment law or international law more broadly.[286] Presumptively, states are obliged to comply with the international obligations

283. Most treaties do not expressly provide the appropriate standard of review and that standard therefore must be determined by implication from the text, object, and purposes of the treaty. *See* Henckels, *supra* note 226, at 189; Wouter Werner & Lukasz Gruszczynski, Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation 1, 1–15 (Lukasz Gruszczynski & Wouter Werner eds., Oxford Univ. Press 2014); 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, 293 (2010); Campbell McLachlan, *Investment Treaties and General International Law,* 57(2) Int'l & Comp. Q. 361 (2008).

284. One example of a treaty provision that expressly provides for a restrictive standard of review is Article 17.2.1 of Chapter 17 of the U.S.-Oman FTA, which affords discretion to states implementing environmental measures, providing that

> The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance . . . where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

Agreement on the Establishment of a Free Trade Area, U.S.-Oman, Jan. 1, 2009; *see also* Adel a Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, ¶¶ 389–90 (Nov. 3, 2015).

285. *See* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27); Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Judgment, 2014 I.C.J. 226 (Mar. 31); Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 25).

286. *See* Bernhard von Pezold v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, ¶¶ 465–68 (July 28, 2015); *see also* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. 45, 77 (2013).

that they undertake in treaties or otherwise; again presumptively, claims of violations of international law are to be adjudicated objectively and independently, particularly where, as in investment treaties, a treaty establishes a mechanism for independent international adjudication of those treaty commitments.[287] Deference may be afforded to state actions only where the text, objects, and purposes of a particular treaty provision, or an established rule of international law, displace this presumption and affirmatively provide that deference should be given to the decisions of national authorities. In those cases, the scope and limitations of any deference are prescribed by the text, objects, and purposes of the relevant treaty provisions. This was affirmed by the Nuremburg Tribunal and by the ICJ in *Oil Platforms* and *Whaling in the Antarctic*, and applies in the context of international investment law and more generally.[288]

This conclusion is confirmed by the text, objects, and purposes of contemporary investment treaties. Such treaties virtually never contain express provisions providing a margin of appreciation, or referring to any comparable measure of deference, applicable generally to the protections under such treaties. On the contrary, the most fundamental trend in contemporary investment law and treaty practice over the past century has been away from diplomatic espousal of claims (with the subjectivity and politicization that this inevitably entails) and towards specific treaty guarantees and international adjudication (with the objectivity and independence that it requires).[289] As discussed below, the language of individual investment protection provisions of such treaties, as these provisions are typically drafted,[290] reflects this approach, with no express provision for deference to host state decisions and actions; likewise, there is generally no basis for implying any margin of appreciation or standard of deference into such provisions when assessing a state's compliance with its treaty obligations. Finally, as also discussed below, when provisions of investment treaties or contemporary rules of international law have been interpreted as permitting some measure of deference to host state actions, this has applied only in limited circumstances, subject to narrow limitations and other conditions.

None of this supports a general margin of appreciation in investment law or otherwise. Rather, it supports a presumption that the protections of investment treaties will be applied objectively, without deference to host state actions, except where an individual treaty provision or rule of international law requires a different result; in those cases, the scope and limitations of any deference are prescribed by the text, objects, and purposes of the relevant treaty provisions. This approach gives effect to both the text and objects and purposes of individual treaties and rules of international law, while

287. *See supra* Part III.C.
288. *Oil Platforms*, 2003 I.C.J. Rep., ¶¶ 76–78; *Whaling in the Antarctic*, 2014 I.C.J., 251–71.
289. *See supra* Part III.C.
290. *See infra* Part IV.

also allowing, in appropriate and limited circumstances, for a measure of deference to state actions and judgments.

Prime examples of investment protection standards in contemporary investment treaties are obligations of national treatment[291] and most-favored-nation treatment.[292] Neither of these types of protection, as typically drafted, authorizes or contemplates application of a margin of appreciation. Rather, both provisions require a straightforward and objective inquiry into the treatment afforded by a state to different classes of investors—protected foreign investors as compared with domestic investors (under national treatment protections), and protected foreign investors as compared with third-state investors (under most-favored-nation treatment protections). The key issue under these provisions is whether the host state treated protected foreign investors less favorably than other investors in like circumstances.[293] In most respects, this requires a straightforward inquiry into the types of treatment that a state has provided to different classes of investors and the circumstances surrounding such treatment;[294] these inquiries neither contemplate nor allow for a margin of appreciation or similar deference to state actions.

There is one possible, but limited, exception to this conclusion. Under typical national treatment and most-favored-nation treatment provisions, not every difference in treatment of investors or their investments constitutes wrongful discrimination. Rather, differential treatment will generally not be wrongful when different classes of investors are not in "like" circumstances. In addressing this question, some tribunals have considered whether the host state had a legitimate policy basis for differentiating between different classes of investors or their investments, inquiring whether there is a "reasonable nexus" between allegedly discriminatory measures and "rational governmental policies not motivated by preference of domestic over foreign-owned investment," or whether such measures were "plausibly connected with a legitimate goal of policy" or conversely "lacking proportionality" in respect to the stated objective.[295] In contrast, other authorities have under-

291. *See, e.g.*, North American Free Trade Agreement art. 1102, Dec. 17, 1992, 32 ILM 289 [hereinafter NAFTA]; Energy Charter Treaty art. 10(7), Dec. 17, 1994, 2080 U.N.T.S. 95 [hereinafter ECT]; United Kingdom Model Bilateral Investment Treaty art. 3 (2008), https://perma.cc/JZW7-2L5U; Netherlands Model BIT, *supra* note 230, art. 3(2).

292. *See, e.g.*, NAFTA, *supra* note 291, art. 1103; ECT, *supra* note 291, art. 10(7); U.K. Model BIT, *supra* note 291, art. 3; Netherlands Model BIT, *supra* note 230, art. 3(2). *See generally* Dolzer & Schreuer, *supra* note 215, at ch. 7; Newcombe & Paradell, *supra* note 220, at ch. 6; Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails*, 2 J. Int'l Disp. Settlement 97 (2011).

293. *See* Newcombe & Paradell, *supra* note 220, at chs. 4–5; Campbell McLachlan et al., International Investment Arbitration: Substantive Principles 336–53 (2d ed. 2017).

294. *See* McLachlan et al., *supra* note 293, at 336–53.

295. GAMI Invs. Inc. v. United Mexican States, UNCITRAL, Final Award, ¶ 114 (Nov. 15, 2004), 13 ICSID Rep 147 (2008); S.D. Myers Inc. v. Canada, UNCITRAL, Partial Award, ¶¶ 245–50 (Nov. 13, 2000); Pope & Talbot v. Canada, UNCITRAL, Award on the Merits of Phase 2, ¶¶ 76–79 (Apr. 10, 2001), 7 ICSID Rep 102 (2005); Merrill & Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1,

taken a more rigorous inquiry into the question whether host states have discriminated between different classes of investors or their investments, without any apparent deference to state actions, whether in the form of a "reasonable nexus," "plausibl[e] connection" or otherwise.[296]

Neither of these approaches to most favored nation or national treatment protections supports application of a general margin of appreciation or similar deferential standard of review. Those tribunals that have accorded a measure of deference to governmental measures when determining whether a national treatment or most-favored-nation treatment standard has been breached have only done so for specific and limited purposes, as part of their analysis of whether differential treatment of investors or their investments constitutes wrongful discrimination. This approach is controversial, but even if it is accepted, these decisions provide no support for a generalized margin of appreciation. On the contrary, these decisions have allowed only circumscribed deference to governmental actions for limited purposes, based on their interpretations of the relevant treaty standards and their content (specifically, what constitutes "like" circumstances and discriminatory treatment).

The same analysis applies to guarantees of free transferability of investments and investment proceeds, which are commonly included in investment treaties.[297] Again, the language of such provisions typically does not

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Award, ¶¶ 79–94 (Mar. 31, 2010); Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶¶ 368, 371, 374–75, 396–97, 429–30 (Sept. 11, 2007); Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 170 (Dec. 16, 2002); Clayton v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 720–24 (Perm. Ct. Arb. 2015); United Parcel Service v. Canada, ICSID Case No. UNCT/02/1, Award on Merits, ¶ 165 (May 24, 2007); *United Parcel Service*, ICSID Case No. UNCT/02/1, Separate Statement Dean Ronald A. Cass, ¶ 117. Other tribunals have required that the discriminatory measure must not only pursue a legitimate policy goal, but that there must also be no other less restrictive measures available. *S.D. Myers*, UNCITRAL, ¶¶ 243–57 (where the Tribunal recognized that the evaluation of like circumstances should take into account the state's policy objectives for the challenged measure, but concluded that the existence of less-restrictive means for achieving that objective indicated that the measures "were intended primarily to protect the Canadian PCB disposal industry from U.S. competition"). *See also* Cargill, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, ¶¶ 193–210 (Sept. 18, 2009); HENCKELS, *supra* note 226, at 79–81; ANDREW D. MITCHELL ET AL., NON-DISCRIMINATION AND THE ROLE OF REGULATORY PURPOSE IN INTERNATIONAL TRADE AND INVESTMENT LAW 5–10, 31–35, 142–50 (2016).

296. *See, e.g.*, Occidental Expl. & Prod. Co. v. Ecuador, LCIA Case No. UN3467, Final Award, ¶¶ 173–77 (July 1, 2004); Corn Prods. Int'l Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶¶ 137, 142 (Jan. 15, 2008).

297. *See, e.g.*, German Model Bilateral Investment Treaty art. 5 (2008), https://perma.cc/K4QG-445S; Agreement Concerning the Reciprocal Promotion and Protection of Investments art. 5, Afg.-Turk., July 10, 2004, https://perma.cc/K7A7-DLBX; Agreement on the Promotion and Protection of Investments art. 7, Alb.-Fin., June 24, 1997, 2055 U.N.T.S. 311; Agreement Concerning the Encouragement and Reciprocal Protection of Investment art. 6, China-Brunei, Nov. 11, 2000, https://perma.cc/52VG-Y69R; Agreement for the Promotion and Protection of Investments art. IX, Can.-Croat., Feb. 3, 1997, No. 53234; Agreement on the Promotion and Reciprocal Protection of Investments art. 4, Rom.-Leb., Oct. 19, 1994, https://perma.cc/25HQ-GY3P. *See also* Rudolf Dolzer, *Transfer of Funds: Investment Rules and Their Relationship to Other International Agreements*, *in* INTERNATIONAL MONETARY & FINANCIAL LAW: THE GLOBAL CRISIS 537–538 (Mario Giovanoli & Diego Devos eds., 2010); UNCTAD, TRANSFER OF FUNDS, U.N. Doc. UNCTAD/ITE/IIT/20 (Dec. 1, 2000).

suggest any scope for a general margin of appreciation or similar concept of deference, instead typically providing unqualified assurances of free transferability.[298] Likewise, the inquiry under such provisions is typically straightforward: has a state prevented or impeded the transfer of property or funds? There is no reason, and no basis, for application of a margin of appreciation in these settings, whether in the language, objects or purposes of such provisions; likewise, no reported investment tribunal decision has applied a margin of appreciation in these contexts.

There is again a possible, but limited, exception to this conclusion. Some treaty provisions allow states to restrict transfer of funds abroad in periods of limited foreign exchange availability or for "prudential reasons,"[299] including "maintenance of the safety, soundness, integrity or financial responsibility of financial institutions."[300] Where a state invokes one of these exceptions, the state's measures might be afforded what could be termed "deference" (for example, in making judgments about the existence and magnitude of threats to the soundness or integrity of financial institutions). Nonetheless, any such deference is prescribed by the treaty's text and is narrowly cabined by that text, both temporally and by subject matter. This limited deference, based on an express exception provided in the treaty, also provides no support for a margin of appreciation or similar concept of deference; instead, it reflects interpretation of the treaty's text, which, exceptionally, provides for a measure of governmental discretion in specified circumstances and for defined purposes. Indeed, these provisions do not provide for a standard of review that prescribes deference to governmental decisions, but rather exclude specified types of state action from liability under the treaty's substantive terms.

Similarly, as observed by the *Siemens* tribunal, as well as others, prohibitions against unlawful expropriation in contemporary investment treaties generally neither require nor allow application of a margin of appreciation.[301] The language of most investment treaties dealing with expropriation

298. *See, e.g.*, United States Model Bilateral Investment Treaty art. 20 (2012), https://perma.cc/9NNH-3VTH; France Model Bilateral Investment Treaty art. 7 (2006), https://perma.cc/TKZ4-EJLQ. *See* UNCTAD, Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking 62–63, U.N. Doc. UNCTAD/ITE/IIT/2006/5 (Jan. 2, 2007) [hereinafter UNCTAD, BITs 1995–2006].

299. Some BIT provisions permit states to restrict the transfer of funds in periods of limited foreign exchange availability or other crisis situations, which might be interpreted to permit a measure of deference to the state in determining whether such a period existed. *See, e.g.*, Agreement on the Reciprocal Protection and Promotion of Investments art. 8, Turk.-Azer., Oct. 25, 2011, https://perma.cc/A8QT-2ENF; Agreement for the Promotion and Protection of Investments art. IX, Can.-Costa Rica, Oct. 25, 2011, No. 53287; Agreement on the Promotion and Reciprocal Protection of Investments art. 9, Mex.-Slovk., Oct. 26, 2007, 2625 U.N.T.S. 46762. On the other hand, where a treaty prescribes criteria for such periods, an objective, independent assessment is presumptively contemplated.

300. *See, e.g.*, U.S. Model BIT, *supra* note 298, BIT art. 20; French Model BIT *supra* note 298, art. 7. *See* Lucy Reed et al., Guide to ICSID Arbitration 87–88 (2011); UNCTAD, BITs 1995–2006, *supra* note 298, at 62–63.

301. *See, e.g.*, NAFTA, *supra* note 291, art. 1110(1); ECT, *supra* note 291, art. 13(1); Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Egypt, art. III(1), Mar. 11, 1985,

makes no provision for a margin of appreciation or similar generalized concept of deference.[302] Nor is a margin of appreciation useful in determining whether an investment has been nationalized or seized, or whether an investor has had its rights otherwise annulled: in each of these cases, the question is largely a factual inquiry whether an investor has been deprived of its property rights, which leaves no scope for deference to state actions.[303] Similarly, the valuation of expropriated property neither requires nor permits deference to governmental judgments; the primary question is what constitutes sufficient compensation under international law.[304] As with other investment protections, there is no room in the text, objects or purposes of such provisions for either a generalized margin of appreciation or similar concept of deference.

The only setting in which some investment tribunals have afforded states deference in the context of expropriation involves distinguishing between lawful and unlawful expropriations[305] and, more specifically, when determining whether an expropriation was "for a public purpose."[306] In this context, most tribunals have refrained from questioning a public purpose identified by the host state, effectively according states deference in determining what constitutes their own "public purposes."[307] This deference

21 I.L.M. 927; Agreement for the Promotion and Protection of Investments art. 5, U.K.-Sierra Leone, Jan. 13, 2000, https://perma.cc/T7F9-X6B2.

302. UNCTAD, Expropriation 6–9, U.N. Doc. UNCTAD/DIAE/IA/2011/7 (Nov. 30, 2012) [hereinafter UNCTAD, Expropriation]; OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law (Sept. 1, 2004) [hereinafter OECD, Indirect Expropriation].

303. McLachlan et al., *supra* note 293, at chs. 7–8; Johanne Cox, Expropriation in Investment Treaty Arbitration, ch. 5 (2018); Dolzer & Schreuer, *supra* note 215, at ch. 6.

304. *See, e.g.*, CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award, § V (Sept. 13, 2001), 9 ICSID Rep. 121 (2006); ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, ¶¶ 423–24, 444, 476, 479–500 (Oct. 2, 2006). *See also* Newcombe & Paradell, *supra* note 220, at ch. 7.

305. Some investment treaties have articulated standards for distinguishing between lawful and unlawful expropriations. *See, e.g.*, ECT, *supra* note 291, art. 13(1); Agreement on the Reciprocal Promotion and Protection of Investments art. 6, Switz.-Venez., Nov. 18, 1993, 1984 U.N.T.S. 110; Agreement for the Promotion and Protection of Investments art. 6, U.K.-Venez., Mar 15, 1995; Acuerdo entre la República de Bolivia y la República de Chile para la Promoción y Protección Recíproca de Inversiones art. IV(1), Bol.-Chile, Sept. 22, 1994, https://perma.cc/2AX2-QBMF; Agreement on the Promotion and Protection of Investments art. 6, U.A.E.-Ukr., Jan. 21, 2003, https://perma.cc/FT78-2UD2.

306. It is well-settled that, although states may lawfully expropriate property, they may do so only in accordance with prescribed conditions, including the requirement that the expropriation be "for a public purpose." *See, e.g.*, Dolzer & Stevens, *supra* note 215, at 98–99; OECD, Indirect Expropriation, *supra* note 302; UNCTAD, Expropriation, *supra* note 302; Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Rev. 1 (2005); McLachlan et al., *supra* note 293, at 359–412.

307. *See, e.g.*, Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8, Award, ¶ 273 (Feb. 6, 2007); Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, ¶ 391 (Feb. 28, 2010); Koch Minerals Sàrl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award, ¶¶ 7.17–7.23 (Oct. 30, 2017); Vestey Group Ltd. v. Venezuela, ICSID Case No. ARB/06/4, Award, ¶¶ 294–95 (Apr. 15, 2016); Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Award, ¶¶ 243–245 (Sept. 16, 2015). As discussed above, a measure of state discretion is implicit in the context of public policy. *See supra* Section III(A).

does not, however, entirely insulate governmental measures from review under the public purpose requirement of expropriation protections. When a state cites a public interest as justifying a measure, tribunals will, at a minimum, examine whether the asserted purpose actually existed, whether the purpose was "public," whether the state was in fact motivated by that purpose, and whether there was a sufficient nexus between the measure and the stated objective.[308]

Even where tribunals adopt a more deferential analysis of the "public purpose" of a measure, this does not support a margin of appreciation or more general standard of deference like that under the ECHR. Instead, tribunals have recognized that the underlying substantive protection against expropriation grants host states a measure of deference in adopting particular public policies: put differently, individual states have the sovereign right to establish their own national public policies, with only limited international constraints on what policies states choose to adopt. Deference to the state's right to regulate is relevant only to identifying when an expropriation satisfies the "public policy" requirement of expropriation provisions, while leaving the state's expropriatory conduct subject to the other requirements of such provisions (including the obligation to pay compensation). This limited deference, confined to one aspect of expropriation and implicit in the concept of "public policy," does not support, and instead contradicts, a more general rule of deference or margin of appreciation.

Similarly, where an investor has alleged an indirect expropriation, some tribunals appear to have afforded host state conduct a measure of deference. As tribunals and commentators have noted, distinguishing between permissible regulation, on the one hand, and expropriation triggering compensation, on the other, requires nuanced analysis; the text of most investment protection treaties does not resolve this issue, instead leaving tribunals to determine when an indirect or regulatory expropriation has occurred.

Tribunals have taken varying approaches to this issue. Some tribunals have refused to afford any deference to the host state's regulatory goals, instead applying a "sole effect" doctrine that looks only to the impact of regulatory measures on the claimant's investment. Where that investment was rendered worthless or otherwise gravely affected, these tribunals have required compensation even if the measure was adopted in the exercise of a state's police or regulatory powers.[309] Other tribunals appear to have afforded some deference to the host state's regulatory policy, albeit with important limitations. Thus, some tribunals have applied a "police powers"

308. *See, e.g.*, *Kardassopoulos*, ICSID Case Nos. ARB/05/18 & ARB/07/15, ¶¶ 391–92; *Koch Minerals*, ICSID Case No. ARB/11/19, ¶ 7.22; *Vestey*, ICSID Case No. ARB/06/4, ¶¶ 296–300; *Siemens*, ICSID Case No. ARB/02/8, ¶ 273.

309. *See, e.g.*, Pope & Talbot Inc v. Canada, UNCITRAL, Interim Award, ¶¶ 96, 99 (June 26, 2000), 7 ICSID Rep 43 (2005); Compañia del Desarrollo de Santa Elena S.A. v. Costa Rica, ICSID Case No. ARB/96/1, Final Award, ¶ 72 (Feb. 17, 2000); Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 85, 89, 103, 106–07, 111 (Aug. 30, 2000).

doctrine, under which a regulatory action will not constitute an expropriation, and, accordingly, will not give rise to an obligation to pay compensation, if that action is an exercise of the state's legitimate police powers.[310] In applying the police powers doctrine, some tribunals have relied on express references in the text of the applicable treaty to the police powers doctrine,[311] while others have found support for the police powers doctrine in customary international law.[312] In these cases, some tribunals have afforded host states deference in identifying and pursuing public policy objectives without triggering an obligation to pay compensation.[313]

Even when applying the police powers doctrine, however, tribunals afford only limited deference to governmental actions, and go on to independently assess whether the state was actually motivated by the asserted public policy in adopting the challenged regulatory measure and whether the measure was reasonable and proportionate to the objective pursued.[314] As a result, this deference to a state's policy objectives under the police powers doctrine is limited in scope and effect, and subject to significant conditions. Moreover, this treatment of deference reflects an orthodox process of treaty interpretation under the VCLT or customary international law, which, in each case, is part of the task of defining when an expropriation, triggering investment protections, has occurred.

A similar analysis also applies to claims that an investor has been denied FET. Again, as observed by the *Chemtura* tribunal and others, the language of virtually all FET provisions in investment treaties makes no reference to

310. *See, e.g.*, Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶¶ 287–90 (July 8, 2016); Saluka Invs. B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶¶ 255, 260, 262 (Mar. 17, 2006); Chemtura Corp. v. Canada, PCA Case No. 2008-01, Award, ¶¶ 262–66 (Perm. Ct. Arb. 2010); Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003); Methanex v. U.S., UNCITRAL, Partial Award, ¶ 7 (Aug. 7, 2002); CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶ 603 (Sept. 13, 2001); *Quiborax*, ICSID Case No. ARB/06/2, ¶¶ 201–207; Shum v. Peru, ICSID Case No. ARB/07/6, Award, ¶¶ 117–217 (July 7, 2011); Fireman's Fund Ins. Co. v. Mexico, ICSID Case No. ARB(AF)/02/1, Award, ¶¶ 176–77 (July 17, 2006); SEDCO, Inc. v. Nat'l Iranian Oil Co., 9 Iran-U.S. Cl. Trib. Rep. 248 (1985). *See also* Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens: II. Draft Convention on the International Responsibility of States for Injuries to Aliens*, 55 AM. J. INT'L L. 548, 562 (1961); OECD, INDIRECT EXPROPRIATION, *supra* note 302, at 5.

311. Some investment treaties adopt the police powers doctrine by way of an express exception to the expropriation standard. *See, e.g.*, Comprehensive Economic and Trade Agreement Annex 8-A, Oct. 30, 2016, O.J. (L 11) 23 [hereinafter CETA]; COMESA Common Investment Area Agreement art. 20(8), May 23, 2007, https://perma.cc/L9GF-KRTK; Ghana Model Bilateral Investment Treaty art. 7(6) (2008), https://perma.cc/TW2W-QBJX; U.S. Model BIT, *supra* note 298. *See also Philip Morris*, ICSID Case No. ARB/10/7, ¶¶ 300–01.

312. *Philip Morris*, ICSID Case No. ARB/10/7, ¶ 287–307. *See also Saluka*, UNCITRAL, ¶¶ 254–62; OECD, INDIRECT EXPROPRIATION, *supra* note 302, at 5, n.10.

313. *See, e.g.*, *Tecmed,* ICSID Case No. ARB (AF)/00/2, ¶ 122; LG&E Energy Corp. v. Republic of Argentina, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 195 (Oct. 3, 2006); Belokon v. Kyrgyzstan, PCA Case No. AA518, Award, ¶ 198 (Oct. 24, 2014).

314. *See, e.g.*, *Philip Morris*, ICSID Case No. ARB/10/7, ¶ 305; *Saluka*, UNCITRAL, ¶ 255; *Tecmed,* ICSID Case No. ARB (AF)/00/2, ¶ 122.

either a margin of appreciation or any similar formula.[315] That is also true of recent bilateral treaties, like the 2012 U.S. Model BIT, that contain a number of carefully formulated limitations or exceptions to treaty standards for FET,[316] but no language prescribing a general margin of appreciation or similar concept of deference. Nor would it generally be appropriate, given the substantive content and purposes of the FET standard, to apply a general margin of appreciation, either akin to that applied in the ECHR context or otherwise. As discussed above, the codification in investment protection treaties of basic international standards of fairness, to be applied by independent tribunals, is in tension with generalized grants of deference to national authorities. The determination whether a particular governmental measure is "fair and equitable," or a denial of justice, is an objective one, to be made independently by the arbitral tribunal.

As part of this objective analysis, many tribunals have, however, afforded a limited measure of deference to decisions by national regulatory authorities.[317] A number of investment awards addressing FET claims have reasoned that the arbitral tribunal should not "second-guess" the decisions or policy-making of national authorities or act as "superior regulators."[318] For example, one tribunal concluded:

> When interpreting and applying the "minimum standard [of treatment, applicable under the NAFTA's FET provision]," a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decisionmaking. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or

315. *See, e.g.*, NAFTA, *supra* note 291, art. 1105(1); ECT, *supra* note 291, art. 10(1); ASEAN Comprehensive Investment Agreement art. 6, Feb. 26, 2009, ASEAN Legal Instruments No. 30; Trans-Pacific Partnership art. 9.6, Feb. 4, 2016. *See generally* UNCTAD, IV International Investment Instruments: A Compendium 148 (2001); Dolzer & Schreuer, *supra* note 215, at ch. 7; Newcombe & Paradell, *supra* note 220, at ch. 6.

316. *See, e.g.*, U.S. Model BIT *supra* note 298, art. 5; CETA, *supra* note 311, arts. 8.9, 8.10; *see also* Transatlantic Trade and Investment Partnership Annex I, ¶ 3, Sept. 2015, on the expropriation standard.

317. A few tribunals have addressed this issue as a matter of "deference" to governmental actions. *See, e.g.*, Teco Guatemala Holdings LLC v. Guatemala, ICSID Case No. ARB/10/23, Award, ¶¶ 474, 483, 490–93, 629–38 (Dec. 19, 2013); S.D. Myers Inc. v. Canada, UNCITRAL, Partial Award, ¶ 263 (Nov. 13, 2000). Other tribunals have termed the issue as one of the host state's "discretion" or "discretionary right." *See, e.g.*, *Philip Morris*, ICSID Case No. ARB/10/7, ¶ 399; Adel a Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, ¶ 389 (Nov. 3, 2015).

318. A few critics have suggested that investment tribunals applying FET standards have exercised "far-reaching authority to oversee states intensively in relation to legislative and executive decision-making." Gus van Harten, Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration 17 (2013); Burke-White & von Staden, *supra* note 283. As the discussion below shows, that conclusion has no basis in the text of most investment treaties. *See infra* Part IV.

> counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[319]

Other tribunals have expressed similar views, both in the context of the NAFTA and otherwise.[320]

In each case, however, the text, objects and purposes of the relevant provisions of the applicable investment treaty, along with the applicable principles of international law, explain these references to deference. Investment tribunals have afforded state measures a degree of deference on the basis that the applicable substantive standard under particular FET provisions is a relatively demanding one, which itself incorporates concepts of deference, whether prescribed by the evolving content of the minimum standard of treatment,[321] or by the related, but autonomous, concept of "fair and equitable treatment" under contemporary investment treaties.[322] This demanding substantive standard both explains and justifies the deference afforded to host state actions in some FET cases. This deference typically takes the form of acknowledging that the content of the FET standard itself requires tribunals to afford the host state a measure of discretion in deciding among various policy choices or courses of regulatory action, but without allowing any additional layer of deference in the form of, or akin to, a margin of appreciation as applied by the ECtHR. This is precisely the reasoning of the better-reasoned arbitral awards on the subject.[323] As the *Glamis Gold* tribunal explained:

> The Tribunal disagrees that domestic deference in national court systems is necessarily applicable to international tribunals. In the present case, the Tribunal finds the standard of deference to al-

319. *S.D. Myers Inc.,* UNCITRAL, ¶ 261.

320. *See, e.g.*, Total S.A. v. Republic of Argentina, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 115 (Dec. 27, 2010); Gemplus S.A. v. Mexico, ICSID Case No. ARB(AF)/04/3, Award, ¶ 6–26 (June 16, 2010); Talsud S.A. v. Mexico, ICSID Case No. ARB(AF)/04/4, Award, ¶ 6–26 (June 16, 2010); Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 283 (Jan. 14, 2010); Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003).

321. *See, e.g.*, *S.D. Myers,* UNCITRAL, ¶ 263; Archer Daniels Midland Co. v. Mexico, ICSID Case No. ARB (AF)/04/5, Award, ¶¶ 142, 149–50 (Nov. 21, 2007); Methanex v. U.S., UNCITRAL, Partial Award, ¶ 158 (Aug. 7, 2002); Corn Prods. Int'l Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶ 137 (Jan. 15, 2008).

322. *See, e.g.*, Saluka Invs. B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶ 309 (Mar. 17, 2006); Waste Mgmt. Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004). *See also* McLachlan et al., *supra* note 293, at 296–329; Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment 111–53 (2013); OECD, *Fair and Equitable Treatment Standard in International Investment Law* (OECD Working Papers on International Investment 2004/03, 2004), https://perma.cc/3U8H-YRGR; UNCTAD, *Fair and Equitable Treatment* (UNCTAD Series on Issues in International Investment Agreements II, 2012), https://perma.cc/4UUW-PMBR.

323. Glamis Gold Ltd. v. United States, UNCITRAL, Award, ¶ 607 (June 8, 2009); Chemtura Corp. v. Canada, PCA Case No. 2008-01, Award, ¶ 123 (Perm. Ct. Arb. 2010); *Waste Mgmt.,* ICSID Case No. ARB(AF)/00/3, ¶ 98.

> ready be present in the standard as stated [under Article 1105's FET guarantee], rather than being additive to that standard. The idea of deference is found in the modifiers 'manifest' and 'gross' that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning.[324]

The tribunal went on to hold that the fair and equitable treatment standard in the relevant treaty imposed a demanding burden on claimants that left national authorities a measure of discretion in formulating domestic policies and choosing among courses of regulatory action, but that no further deference for host state decisions was appropriate. Other tribunals have taken a similar approach.[325]

These decisions do not support application of a general margin of appreciation or comparable concept of deference. Rather, they show only that the FET standard is generally a demanding one, violated only by gravely unfair or arbitrary governmental actions. These decisions appear to have been based on an interpretation of the relevant provision of the applicable treaty, or influenced by the historic content of the minimum standard of treatment in customary international law, and not on either the ECHR's margin of appreciation or any cognate concept of general application.[326] Although some tribunals and commentators have referred expressly to "deference" when reviewing host state actions in these cases, the better analysis is that the relevant FET provisions, objectively applied, will be violated by governmental actions that constitute gross instances of unfairness or manifest arbitrariness; in the absence of treaty language excepting such measures, the existence of certain policy objectives or justifications will not automatically excuse such measures from liability under the applicable treaty.

For similar reasons, there may also be room for a measure of deference to governmental decisions under essential security provisions or emergency

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324. *Glamis Gold,* UNCITRAL, ¶ 617; *see also Tecmed*, ICSID Case No. ARB (AF)/00/2, ¶¶ 617, 623.

325. Eastern Sugar B.V. v. Czech Republic, SCC Case No. 088/2004, Partial Award, ¶ 272 (Mar. 27, 2007); Inversión y Gestión de Bienes v. Spain, ICSID Case No. ARB/12/17, Award (Extracts), ¶ 205(d) (Aug. 14, 2015); Hochtief AG v. Republic of Argentina, ICSID Case No. ARB/07/31, Decision on Liability, ¶ 219 (Dec. 29, 2014); Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 315 (Sept. 11, 2007); AES Corp. v. Kazakhstan, ICSID Case No. ARB/10/16, Award, ¶ 314 (Nov. 1, 2013).

326. This analysis is confirmed by application of the FET standard where a state has provided stabilization (or comparable) commitments to an investor. In these cases, determining whether those commitments exist and have been breached does not require or permit application of a margin of appreciation. Instead, it only requires interpretation of the relevant investment contract or statutory (or other) stabilization commitment and then determination whether the state's actions violated that commitment. *See, e.g.*, Gold Reserve v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶ 576 (Sept. 22, 2014). Again, there is nothing in the provisions of most investment treaties guaranteeing FET that either requires or permits application of a margin of appreciation concept in these circumstances, and no reported investment award has applied the concept in the context of a stabilization commitment.

clauses[327] and when interpreting other treaty exceptions (for example, clauses excluding liability for measures taken for public health, public morals, or conservation of natural resources).[328] Where these types of provisions are at issue, it may be appropriate to afford the state a measure of deference, as mandated by the applicable treaty or rule of international law. Importantly, however, recognition of a degree of deference in these circumstances is, as in other contexts, limited in scope, is carefully-delineated and is based on the text, objects and purposes of particular treaty provisions, not on a generally applicable margin of appreciation or concept of deference.[329]

Finally, there is nothing in the character or structure of international investment law that argues for a different approach. It is well-settled that the VCLT and other principles of international law (concerning state responsibility, attribution, remedies and the like) apply fully in investment arbitration. There is no reason that the intentions of states, expressed in the treaty language they adopt, should not be given full effect in investment arbitrations, just as in other international settings. Nor are there persuasive reasons for affording states a margin of appreciation with respect to national regulations affecting private parties that does not apply in other settings (particularly state-to-state relations). The Nuremberg Tribunal rejected any such concept in applying international law to individual defendants,[330] while most international human rights tribunals (other than the ECtHR) have similarly rejected a margin of appreciation in matters involving individual claimants.[331] Indeed, if anything, international protections for individuals, who are necessarily more dependent on those protections, call for less, rather

327. For example, one ICSID ad hoc Annulment Committee concluded there had been a manifest excess of powers when the tribunal had failed to interpret Article XI of the U.S.-Argentina BIT as "self-judging" and had not prescribed a measure of deference to the respondent state's decision to take emergency measures. Sempra Energy Int'l v. Republic of Argentina, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, ¶ 127 (June 29, 2010). *See also* CC/Devas Ltd. v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, ¶¶ 244–45 (July 25, 2016); CC/Devas Ltd. v. India, PCA Case No. 2013-09, Dissenting Opinion Arbitrator David R. Haigh, ¶ 3.

328. Treaty exceptions setting out permissible policy objectives must be interpreted on their own terms, and may or may not provide for a measure of deference to respondent states. *See, e.g.*, Agreement on the Promotion and Reciprocal Protection of Investments art. 11(3), Mauritius-Switz., Nov. 26, 1998, https://perma.cc/M72M-3HUL; Agreement for the Promotion and Protection of Investments Annex I, art. III, Can.-Uru., Oct. 29, 1997, No. 5327; Colombia Model Bilateral Investment Treaty art. 8 (2011), https://perma.cc/8WKF-QES9; Canada Model Foreign Investment Protection Agreement art. 10(4) (2004), https://perma.cc/U7MY-V7K8; Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China, ch. 17, N.Z.-China, Apr. 7, 2008, 2590 U.N.T.S. 101. *See also* Adel a Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, ¶ 389 (Nov. 3, 2015).

329. *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments art. 12(2), India-Swed., July 4, 2000, https://perma.cc/V4TP-U5RZ (Indian Ministry of Foreign Affairs website); Treaty Concerning the Encouragement and Reciprocal Protection of Investment art. XIV, Alb.-U.S., Nov. 1, 1995, S. Treaty Doc. No. 104-19 (1995). *See also* CETA, *supra* note 311, arts. 28.3, 28.6.

330. *See supra* Part I.A.

331. *See supra* notes 51, 53.

than greater, deference than interstate undertakings applicable only to states.[332]

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In sum, nothing in the text or objects and purposes of most investment protection treaties supports application of either the margin of appreciation concept or any similar general rule of deference akin to what has been applied in the ECHR context. Instead, what is required is an objective application of treaty protections, without any general deference to a state's determinations of the content of its own international obligations. That is evident from both the language of such treaties (including recently-concluded investment treaties which, while sometimes introducing new limitations or exceptions to treaty protections, do not prescribe either a margin of appreciation or comparable standard of general deference) and the objects and purposes of such treaties (which continue to encourage and protect reciprocal investment and provide for independent adjudication of investment disputes). The proper approach towards investment protection treaties, like other international agreements, is to apply the rules of interpretation prescribed by the VCLT and customary international law, not to transpose a margin of appreciation from the ECHR to other settings. This is true even if the outcome in a particular case may be the same under the investment treaty provision at issue and under the margin of appreciation—it is essential to locate a foundation for any deference granted in the treaty text and applicable rules of international law.

That conclusion is confirmed by the specific provisions of investment protection treaties and decisions of investment tribunals applying these provisions. With only limited exceptions, none of these provisions provide for or contemplate a margin of appreciation or comparable concept of generalized deference to governmental actions. Similarly, most arbitral awards objectively apply the terms of investment treaties, without referring to or applying any margin of appreciation; indeed, in most cases where the issue has arisen, tribunals have rejected host states' attempts to rely on the ECtHR's margin of appreciation or similar concepts of deference. In those limited circumstances where tribunals have afforded state actions or decisions a measure of deference, they have done so only for narrow, carefully-delineated purposes, based on the language of particular treaty provisions or the content of the treaty standards in question, and not on the basis of any general margin of appreciation. Transposing a margin of appreciation from the ECHR context to investment treaties would be entirely inconsistent with

332. *Cf.* Ragni, *supra* note 48, at 334–35 (suggesting that margin of appreciation is applicable to international obligations affecting "domestic" regulatory measures).

application of orthodox rules of treaty interpretation under the VCLT and customary international law.

Notably, even where tribunals have referred to the concept of deference in the context of individual investment protections, those references are often unhelpful. Where the content of the treaty standard imposes a demanding standard of proof (for example, with the minimum standard of treatment's requirement for egregious or shocking governmental action), it is unhelpful and misleading to refer to deference to state actions. Instead, the tribunal's analysis is based on the level of scrutiny required by the particular treaty standard, which demands an elevated showing, objectively evaluated, of arbitrariness or unfairness in order to establish a treaty violation (as with requirements for violation of FET protections). That is not application of either a margin of appreciation or similar concept of deference; instead, it is only application of a substantive treaty standard or existing rule of international law that proscribes a wrongful governmental action. This simply requires application of a specified substantive standard, prescribed by the applicable treaty and understood in the context of general rules of international law, in an independent and objective manner; abstract concepts of deference are misleading and irrelevant to this inquiry.[333] Where a measure of deference is afforded to a state decision, it must be justified by reference to the substantive terms of certain provisions of investment treaties or rules of international law. There is no need, and no justification, for adding a further margin of appreciation, whether drawn from the ECHR or elsewhere.

Moreover, even in the relatively few circumstances where deference to a state's actions may be appropriate under the terms of a particular treaty provision or rule of international law, it is important to appreciate the limited character and effect of that concept. Thus, tribunals that appear to have applied concepts of deference in the context of most-favored-nation and national treatment provisions, or when considering the public purpose of expropriatory conduct, have done so for clearly identified reasons, in narrow circumstances and subject to significant limitations. This limited role of deference to governmental policy choices, under some investment protections, does not support either a margin of appreciation or any similar, generalized principle of deference. On the contrary, it reflects the application of orthodox rules of treaty interpretation, based on the VCLT and applicable rules of international law, to individual treaty protections.

Finally, the deference that states have been accorded under particular investment treaty provisions has differed in critical respects from the margin of appreciation adopted under the ECHR. As discussed above, the ECtHR's margin of appreciation is supported by the *travaux préparatoires* of the ECHR

333. Similarly, as tribunals have made clear, there is no basis for applying an additional margin of appreciation or concept of deference, beyond the elevated standards of wrongdoing proscribed by such treaties. *See* Glamis Gold Ltd. v. United States, UNCITRAL, Award, ¶¶ 23, 617 (June 8, 2009).

and the treaty's textual qualifications to the protections it grants, by the ECHR's status as a regional treaty designed to develop the European legal order among European states and their own citizens and by the substantive character of the ECHR's human rights guarantees. Given this, it makes no sense to transpose the margin of appreciation applied under the ECHR—however it is formulated—to the significantly different setting of investment arbitration. Instead, the standard of review that is appropriate in an investment arbitration is mandated by the very different language, objects and purposes of specific investment treaty provisions of particular treaties, and the applicable rules of international law.

Conclusion

There is no basis for importing the concept of a margin of appreciation from the ECHR into investment law or international law more generally. The concept has been consistently rejected by international courts and tribunals outside the limited and unrepresentative ECHR context. Even under the ECHR, the margin of appreciation has been subject to significant criticisms, in part because of the uncertain and arbitrary results it has typically produced. The consistent refusal of international courts and tribunals to export the margin of appreciation beyond the ECHR context is well considered: there is no reason to adopt the concept as a rule of either investment law or international law more generally.

Nothing in the text of most investment treaties, or in the objects and purposes of such treaties, justifies application of the margin of appreciation concept in either investment arbitrations or more widely. On the contrary, as the weight of authority has concluded, the text, objects and purposes of virtually all provisions of investment treaties preclude application of the ECHR's margin of appreciation concept and instead support the objective assessment of whether the respondent state has complied with its international obligations. The same is true in most other international contexts, particularly where states have consented to independent international adjudication of their disputes.

The proper approach is that formulated by the ICJ—being a "strict and objective" application of international law.[334] As the Nuremberg Tribunal concluded, the application of rules of international law "must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[335] Whatever its merits in the European context, the margin of appreciation undermines these objectives, both in investment arbitration and international law more broadly. The concept is the legal equivalent of a hammer, converting all issues into nails, subject to the same treatment and

334. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 73 (Nov. 6).
335. *Nuremberg Judgment*, *supra* note 29, at 207.

standards, rather than considering their specific context, including the text, objects and purposes of applicable treaty provisions and principles of international law. This is not justified by, and is instead contrary to, the rules of international investment law and international law more generally.